

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3703

Appeal MA17-458

City of Hamilton

December 6, 2018

Summary: The City of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for any correspondence regarding a specific residential address during a specified time period. It conducted a search and initially found no responsive records, and issued an access decision accordingly. The requester appealed the decision. During mediation, the city conducted a secondary search and located responsive records. It issued a revised decision, withholding most of the responsive records on the basis of the discretionary exemption at section 12 (solicitor-client privilege) of the *Act* and granting full access to the remaining records. The issue of reasonable search advanced to adjudication. This order upholds the reasonableness of the city's search and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

OVERVIEW:

[1] The City of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any correspondence regarding a specific residence during a specified time period.

[2] The city conducted a search and issued a decision in which it indicated that no records responsive to the request were identified.

[3] The requester, now the appellant, appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] Through mediation, the city conducted a further search and advised the mediator that it located responsive records. The city issued a revised decision granting partial access to the responsive records with severances pursuant to section 12 (solicitor-client privilege) of the *Act*. As a result, the city disclosed some additional records to the appellant.

[5] The appellant advised the mediator that she was of the view that additional records should exist. In particular, the appellant explained that she is seeking access to documents stating that the subject property is compliant with a specific completed Action Request. The city advised the mediator that one of the records disclosed to the appellant addressed the issue of compliance with respect to the subject property.

[6] The appellant advised the mediator that she would like to pursue the appeal at adjudication on the basis that additional responsive records should exist.

[7] At adjudication, I began my inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal to the city. The city provided written representations in response, which I shared with the appellant on consent. The appellant then provided representations in response. Upon my review of her representations, I determined that it was not necessary to seek a reply from the city.

[8] For the reasons that follow, I uphold the reasonableness of the city's search and dismiss this appeal.

DISCUSSION:

Did the city conducted a reasonable search for responsive records?

[9] The appellant claims that additional records exist beyond those identified by the city. The issue in this appeal is therefore whether the city has conducted a reasonable search for records as required by section 17.¹ I note that a significant portion of the appellant's representations are about her late husband, and the alleged effects on his life resulting from dealing with city by-law issues. While I am sympathetic to the appellant's circumstances, the only issue that I have the legal authority to decide is whether the city conducted a reasonable search in response to the request that is the subject of this appeal.

[10] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[11] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.² To

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

be responsive, a record must be "reasonably related" to the request.³

[12] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴

[13] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

The city's evidence

[14] On the basis of the following, I find that the city conducted a reasonable search for responsive records.

[15] The city was required to provide a written summary of all steps taken in response to the request, and to provide this information in affidavit form, to be signed by the person or persons who conducted the actual search.

[16] In addition to providing representations from the Access and Privacy Officer regarding the background information and a summary of the steps taken in response to this appeal, the city provided two affidavits from city employees, summarizing their search efforts.

[17] The city's representations indicate that the appellant had submitted three other separate requests concerning the municipal property address that is the subject of the request being adjudicated in this appeal. All the requests relate in some way to by-law enforcement. This background is important to understand as further details emerge about the city's search efforts, as described below.

[18] When the city received the request at issue in this appeal, it forwarded the request to its Planning and Economic Development department for a record search and response to the city's Access and Privacy office. Staff from the Planning and Economic Development department's Licencing and By-law division and Building division searched for responsive records but did not locate any. These divisions advised the Access and Privacy office of the search results, and the city issued an access decision to the appellant advising her that no responsive records were identified.

[19] After the appeal process began, and with further details provided by the IPC, the city asked its Licencing and By-law division staff to conduct a secondary search. The affidavits provided by the city are from the by-law clerk in the Municipal Law Enforcement (MLE) section of the Licencing and By-law services division who performed the searches in response to this request, and his manager who instructed him to conduct a secondary search. The by-law clerk explained that he frequently responds to

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

freedom of information requests received by the MLE section, and that he reports those search results to the city's Freedom of Information section. I am satisfied that this by-law clerk who personally performed the searches in response to this request was an experienced employee, knowledgeable in the subject matter of the request.

[20] The by-law clerk's affidavit indicates that the first search yielded no responsive records, but that the second search resulted in the identification of several pages of responsive records consisting of email messages and correspondence. The second search was conducted in response to the IPC's request to the city that it review its records to determine if an error had been made in its initial search. The manager investigated the issue. The city's representations include specifics about the second search: 94 pages of responsive records were found, of which 82 pages were exempt from disclosure in their entirety under section 12 (solicitor-client privilege) of the *Act*, and the remaining 12 pages were fully disclosed to the appellant.

[21] This discrepancy between the search results was explained by the MLE manager's affidavit. In her affidavit, the manager attests that through her own investigations, she determined that some records that might be responsive to this request may have inadvertently been included with the city's response to one of the appellant's previous requests (which also pertains to her residential property). She, therefore, asked her staff to review those records and determine if any were responsive to this request, and instructed the by-law clerk who conducted the first search to perform a second electronic search. I find this explanation to be reasonable, given the number of requests made by the same appellant, and the overlapping subject matter.

[22] The Access and Privacy office also asked for clarification from Licencing and By-Law staff about two pages in specified records, and as a result, two additional pages were identified as responsive to the request.

The appellant's evidence

[23] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁶ In my view, the appellant has not done so in this case.

[24] The appellant was asked to comment on the city's search, considering the explanation of the reasonable search issue in the Notice of Inquiry and the city's representations.

[25] Most of the appellant's representations are not relevant to the issue of reasonable search, but concern other matters, such as the MLE's by-law enforcement procedures themselves.

[26] The appellant's representations do include submissions relevant to the issue in

⁶ Order MO-2246.

this appeal (whether the city conducted a reasonable search for responsive records), but I do not find that the appellant establishes that there is a reasonable basis for concluding that additional records exist for two reasons.

[27] First, in contrast to the details provided by the city about its search, the appellant provides an assertion, without persuasive supporting evidence, that city did not conduct a reasonable search. The appellant attached an MLE protocol to her representations and made submissions about that protocol in relation to records that she submits should exist if certain actions are taken relating to a by-law matter. She reproduces language from point number 7 of the protocol regarding the requirement of an MLE officer to document a telephone conversation and telephone number in both their notebook and the database ("AMANDA"). She then states that there are no documents revealing a consultation with either the superintendent or a licencing facilitator, or that there was a review of the MLE history of the property, or a phone call made to her residence. However, it is not clear to me that any of these actions (a consultation, phone call, or review of the relevant MLE history) were made in relation to her residence in the time period covered by the request. If there was evidence that a consultation, phone call, or review of the relevant history was required and/or took place, then I could accept the language of this protocol as a reasonable basis for the appellant's belief that additional records exist. But I do not have evidence that any of those actions were required or took place, so I cannot accept the language of the protocol as a reasonable basis for believing that the city should have located additional records as a result of its search.

[28] Second, the appellant also concludes that additional records must exist because the city located additional records through the mediation process. However, I do not find that such a conclusion necessarily follows from the fact that the city located additional records during mediation. I also find that this conclusion fails to take into account the city's explanation for finding the additional records, and the narrowness of the scope of the request itself (for correspondence relating to a specific address during a specific relatively short period of time).

[29] In conclusion, I find that the city has provided evidence that it conducted a reasonable search for responsive records, and the appellant has not provided a basis for her belief that additional records exist. Therefore, I will not order the city to conduct a further search.

ORDER:

I uphold the reasonableness of the city's search, and dismiss this appeal.

Original Signed by: _____

Marian Sami
Adjudicator

December 6, 2018