

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3752-I

Appeal MA16-377

City of Hamilton

April 15, 2019

**Summary:** The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Hamilton (the city) for records relating to a specific property and a minor variance application. The city located responsive records and granted the appellant partial access to them. The appellant appealed the decision, challenging the adequacy of the city's search. During the inquiry, the adjudicator invited the city to make representations on its search for records. The city did not make any representations in response to the Notice of Inquiry or the appellant's representations, despite a number of extensions. In this order, the adjudicator finds that the city did not conduct a reasonable search for responsive records and orders it to conduct a further search in response to the appellant's request.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17(1).

### OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Hamilton (the city) for all records relating to an identified property and an identified minor variance application. The appellant stated that he sought records created between January 1, 2015 and May 19, 2016. The appellant further stated that responsive records would include correspondence, emails, written documents, notes, memoranda, letters, audio recordings, plans, drawings, photographs, applications for building permits, applications for minor variances, meeting agendas, meeting minutes, reports, work orders, payments, complaints and inquiries. Finally, the appellant stated that he makes his

request in the public interest and requested the city waive or reduce any possible fees.

[2] The city conducted a search and located approximately 150 pages of responsive records. The city issued an access decision granting the appellant access to the majority of the records. The city advised the appellant that it withheld two pages, in full, and four pages, in part, on the basis that the information withheld was not responsive to his request. The city directed the appellant to contact the Committee of Adjustment Clerk and the City Records Manager for their public records such as city council agendas and minutes.

[3] The appellant appealed the city's decision. The appellant took the position that the city did not conduct a reasonable search for responsive records.

[4] During mediation, the appellant confirmed he does not pursue access to the information withheld from disclosure. Accordingly, this information is not at issue in this appeal. However, the appellant maintained his belief that the city's search for responsive records was not reasonable. The city conducted a second search and located additional responsive records. The city issued a supplementary access decision and disclosed the newly located records to the appellant.

[5] After reviewing the newly located records, the appellant confirmed that he believes additional responsive records ought to exist and identified emails that he believes should exist. The city then conducted a third search and identified additional responsive records in its Committee Adjustment file. The city stated that the file is public information and the records can be retrieved for a fee. The appellant advised the city that he visited the Committee of Adjustment to review these records. The appellant also maintained that additional responsive records ought to exist and the city did not conduct a reasonable search for records.

[6] The appeal could not be resolved at mediation. Consequently, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry into the issues under appeal. I began my inquiry by inviting the city to submit representations in response to a Notice of Inquiry, which summarizes the facts and issues in the appeal. The city did not submit representations, despite receiving a number of extensions and follow-up from this office. I then invited the appellant to submit representations in response to the Notice of Inquiry. The appellant submitted representations.

[7] I decided to seek representations from the city in response to the Notice of Inquiry and the appellant's representations, which were shared with the city in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The city did not submit representations.

[8] In the discussion that follows, I find that the city did not conduct a reasonable search for responsive records and order it to conduct another search.

## **DISCUSSION:**

### **Did the city conduct a reasonable search for responsive records?**

[9] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17 of the *Act*.<sup>1</sup> If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the city's decision. If I am not satisfied, I may order the city to conduct further searches.

[10] The *Act* does not require an institution to prove with absolute certainty that further records do not exist. However, the city must provide sufficient evidence to show that it made a reasonable effort to identify and locate responsive records.<sup>2</sup> To be responsive, a record must *reasonably relate* to the request.<sup>3</sup>

[11] 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 that are reasonably related to the request.<sup>4</sup>

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

[13] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.<sup>6</sup>

### ***Representations***

[14] The Notice of the Inquiry sent to the city asked it to provide a written summary of all the steps it took in the searches conducted in response to the appellant's request. Specifically, the Notice of Inquiry asked the city to provide details of the searches conducted, such as who conducted the searches, the locations searched, who was contacted in the course of the searches, the types of files searched and the results of the searches. The city did not submit any representations in response to the Notice of Inquiry. In addition, the city did not respond to the appellant's representations on the issue of search when I invited it to do so at the Reply Stage of the inquiry.

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

<sup>2</sup> Orders P-624 and PO-2559.

<sup>3</sup> Order PO-2554.

<sup>4</sup> Orders M-909, PO-2469 and PO-2592.

<sup>5</sup> Order MO-2185.

<sup>6</sup> Order MO-2246.

[15] The appellant submits that the original search for responsive records was not reasonable. The appellant submits that the additional responsive records that were located during mediation demonstrate that the city's original search was inadequate.

The appellant also submits that the second search for responsive records was not reasonable. The appellant states that he provided the city with a description of four records that he obtained through other means that should have been located in its searches.<sup>7</sup> The appellant identified the four records missing from the city's search as follows:

- An email from an identified city employee to an architect dated January 8, 2015;
- Written correspondence (undefined) between the city and the appellant's neighbour confirming the front lot line for the neighbour's property;
- An email exchange between an identified city employee and an architect/designer dated November 5, 2015; and
- An email from the city's Director of Planning to an identified city councillor dated August 18, 2015.

The appellant claims that the city has not addressed the existence of these four records during the appeal process.

[16] The appellant submits that the city has not described its searches for responsive records. The appellant submits that the city should disclose the steps of its search procedures. The appellant submits the city did not provide any evidence to demonstrate that its searches for responsive records were reasonable.

[17] I note the appellant submits that the city has "an obligation to confirm or deny the existence of records." I note there is no obligation on the part of the city to confirm or deny the existence of records under section 17 of the *Act*. However, under section 14(5) of the *Act*, the city may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy. In addition, section 8(3) of the *Act* provides that the city may refuse to confirm or deny the existence of a record to which the law enforcement exemptions in sections 8(1) and (2) apply. The city did not claim sections 14(5) or 8(3) to any of the records and this exemption is not at issue in this appeal. The only issue before me is the city's search for records. Therefore, I will not consider the appellant's arguments regarding the city's obligations to confirm or deny the existence of records he identified in his appeal letter in this order.

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<sup>7</sup> The appellant identified these four records in his appeal letter dated July 7, 2016. The appellant also shared these records with the city in a letter dated June 30, 2017.

### ***Analysis and Findings***

[18] The city did not provide this office with submissions describing its search. During the inquiry, I asked the city to provide representations on its search twice. The first time, I asked the city to respond to a Notice of Inquiry, which included detailed questions for the city to respond to as well as a request for documentation in support of its searches. The city asked for and received a number of extensions with respect to the first Notice of Inquiry, but ultimately provided no representations in response. I then invited the city to make submissions in response to the appellant's representations as well as the original Notice of Inquiry. The city requested and was granted an extension to submit representations but, again, it did not submit representations. The city's lack of response to the Notice of Inquiry means that there is little evidence before me regarding the searches the city conducted to identify records responsive to the appellant's request. In the absence of representations on its search, I find that the city's searches were not adequate.

[19] The city did not provide any details regarding the searches conducted in response to the appellant's request or during mediation. For example, the city did not identify the individuals that conducted the searches. As such, I cannot determine whether experienced employees knowledgeable in the subject matter of the request conducted the searches. The city also did not describe the locations or the types of files it searched. In the absence of any representations from the city, I find that its search for records responsive to the appellant's request was not reasonable and order the city to conduct a further search for records.

[20] Furthermore, I note the city conducted additional searches during mediation that resulted in additional responsive records. The fact that the city located additional records in its subsequent searches suggests that the city did not conduct a reasonable search for records responsive to the appellant's request.

[21] In addition, I am satisfied the appellant provided sufficient evidence to demonstrate that additional responsive records ought to exist and have not been identified by the city through the searches it conducted to this point. From my review, it appears the city provided the appellant with an explanation regarding the existence of some of these records during mediation. However, the information provided by the city during mediation is not enough to satisfy me that its search was reasonable. Moreover, the city did not provide a more fulsome explanation regarding the existence of these records during the inquiry. In the absence of representations on these records or its search, I find the city did not provide sufficient information to demonstrate that it conducted a reasonable search. Therefore, I find the city did not conduct a reasonable search for responsive records and I order it to conduct a further search for records responsive to the appellant's request.

**ORDER:**

1. I order the city to conduct a further search for records responsive to the appellant's request.
2. I order the city to issue an access decision to the appellant regarding access to any records located as a result of the search ordered in provision 1, in accordance with the *Act*, treating the date of this order as the date of the request.
3. I order the city to provide representations on the new search referred to in provision 1 and to provide me, by **May 17, 2019**, an affidavit outlining the following:
  - a. The names and positions of the individuals who conducted the searches;
  - b. Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;
  - c. The results of the search;
  - d. Information regarding the four outstanding records identified by the appellant in his appeal letter, referred to in paragraph 15 of this order; and
  - e. Details of whether the record(s) could have been destroyed, including information about record maintenance policies and practices such as retention schedules;

The city's representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in Practice Direction Number 7 of the IPC's *Code of Procedure* and is available on the IPC's website. The city should indicate whether it consents to the sharing of its representations with the appellant.

4. I remain seized of this appeal in order to deal with any other outstanding issues arising from order provision 2 in this interim order.

Original signed by: \_\_\_\_\_  
Justine Wai  
Adjudicator

\_\_\_\_\_ April 15, 2019