Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3764-I

Appeal MA18-328

City of Hamilton

May 2, 2019

Summary: The appellant made a thirteen-part request to the City of Hamilton (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to parking enforcement issues. In response, the city identified certain responsive records, disclosing some in full, and one in part. The city relied on the mandatory personal privacy exemption at section 14(1) and the discretionary law enforcement exemption at section 8(1)(d) (confidential source) of the *Act* to withhold portions of the record at issue. The appellant's appeal to this office proceeded through mediation, where the issue of reasonable search was added. In this order, the adjudicator finds that the city has not discharged its burden of proof regarding the application of either the mandatory personal privacy exemption at section 14(1) or the discretionary exemption at section 8(1)(d). She orders the city to disclose the information at issue. She also finds that the city's search was not reasonable, and orders a new search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definitions of "law enforcement" and "personal information"), 8(1)(d), 14(1), 17, and 42.

OVERVIEW:

[1] The City of Hamilton (the city) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*):

> I. Glossary of term, approved short forms, or any other such documents that contain abbreviations used by parking enforcement officers in the remarks section of parking infraction notices. This includes, but is not limited to, the terms "SVP", "APO", "NVPV", "P/P", "B/P" and "M/W".

II. City of Hamilton policies, procedures, regulations, by-laws, and any other documents related to the process by which on-street parking regulations are changed.

III. Cost to erect No Parking signs on [a specified street] in Stoney Creek.

IV. Any and all documents, including but not limited to records, memos, or email communications, related to the new No Parking restrictions on [the same specified street] in Stoney Creek, and other similar changes to parking regulations on City of Hamilton streets this winter.

V. Number of parking tickets issued on [the specified street], and amount of revenue received from said tickets, since January 1, 2018.

VI. Any documents, including but not limited to records, memos, or email communications from Hamilton Fire Service and/or Hamilton Emergency Services regarding the need to restrict parking on city streets in winter months.

VII. Specific communications from Hamilton Fire Service and/or Hamilton Emergency Services for the need to restrict parking on [the specified street] in Stoney Creek.

VIII. Evidence/rational for restricting parking on [the specified street] in Stoney Creek.

IX. Minimum street width for new subdivisions currently in effect.

X. Minimum street width for new subdivisions that were in effect when the [named subdivision], which includes [the specified street], was approved.

XI. Current width of [the specified street].

XII. Any documents, including but not limited to records, memos, or email communications, from Hamilton Fire Service and/or Hamilton Emergency Services about requesting changes to on-street parking related to narrowing of usable street width in winter months.

XIII. Any documents including but not limited to measurements records, memos, email communications produced by Hamilton Fire Service and/or Hamilton Emergency Services, or any other City of Hamilton Department in support of changing on street parking in winter months to accommodate Emergency Vehicles.

[2] After issuing an extension of time letter to process an anticipated large volume of records,[1] the city issued an access decision. It granted full access to some records, pointed the appellant to publicly available locations where he could access other records, and granted partial access to an e-mail chain, the record at issue. The city withheld access to some information in the e-mail chain on the basis of the discretionary law enforcement exemption at section 8(1)(d) (confidential source), and the mandatory exemption at section 14(1) (personal privacy), taking into account the presumption at section 14(3)(b) (investigation into possible violation of law) of the *Act*.

[3] The requester (now the appellant) appealed the city's decision.

[4] Mediation was attempted, but did not resolve the dispute. The issue of reasonable search was also added to the scope of the appeal at this stage. Since further mediation was not possible, the appeal proceeded to the adjudication stage.

[5] I began my inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the city and an affected party. The affected party did not provide representations, despite attempts made by this office to contact that party about doing so. The city did not provide representations in response, despite being granted multiple extensions to do so. I then requested and received written representations from the appellant. Through his representations, personal identifying information was removed from the scope of the appeal. His representations were shared with the city, on consent. The city initially did not provide representations in reply, although granted an extension to do so.

[6] The city later sent late reply representations, arguing that most issues in this appeal are moot because the record at issue is not actually a responsive record. I invited the appellant to make sur-reply representations. I then invited the city to respond to his representations, and my questions about the scope of the request/responsiveness of the record, under section 17 of the *Act*. The city did not respond.

[7] For the reasons that follow, I find that the city has not met its burden in this appeal. It has not persuasively explained why the record it had initially identified as responsive is not, in fact, responsive, and has not demonstrated that either section 14(1) or section 8(1)(d) apply to the non-identifying information in the record. In addition, the city has provided insufficient evidence of its search efforts, so I order the city to conduct a further search.

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[1] Pursuant to section 20(1) of the *Act*.

RECORDS:

[8] The information at issue is found in a six-page e-mail chain between an affected party and a city councillor, with other affected parties copied, and then other city officials copied on subsequent e-mails. The fire chief is copied on one email, and is the sender of another.

ISSUES:

A. What is the scope of the request? Is the record at issue responsive to the request?

B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Does the discretionary law enforcement exemption at section 8(1)(d) apply to the record?

D. Did the city conduct a reasonable search for records?

DISCUSSION:

Issue A: What is the scope of the request? Is the record responsive to the request?

[9] As mentioned, although the city initially identified the record at issue as responsive to the appellant's multi-part request, it took the position late in the inquiry that the record was, in fact, not responsive. If the record at issue is not responsive to the request, then the city's position is correct: any questions about the application of exemptions are moot. However, as I will explain, the record at issue in this appeal is responsive to the request.

[10] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
> >
> > . . .

> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1)

[11] Institutions should adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2]

[12] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

[13] The city initially identified the record at issue as responsive to the request.

[14] In its reply representations, the city took the position that the request concerns a specific street in Stoney Creek, and that the record at issue does not pertain to that street, is not related to it, and in fact "concerns municipal roads in Binbrook, Ontario." In support of its position, the city submits that this was verified through Google mapping and through the city's Geographic Information System. The city attached a copy of Google maps showing the distance between the street specified in the request and Binbrook, Ontario.

[15] The appellant was provided with some disclosure in response to his request, and on the basis of that disclosure, he argues that there were clearly several areas of concern in the city that a named city councilor had flagged with respect to street parking. The appellant submits that the record at issue is, indirectly, but materially, responsive to the request because its contents appeared to form the "genesis" for the evaluation of the parking concerns.

[16] When given an opportunity to respond to the appellant's representations about this, the city did not respond.

[17] The city also did not respond to my invitation to provide representations about the scope of the appeal/responsiveness of the record in light of the wording of the request (at parts IV, VI, X, XII and/or XIII), or the detailed language of the Notice of Inquiry for Scope of the Appeal/Responsiveness of the Records.

[18] While I do not have access to the records already disclosed to the appellant to assess his position fully, I do have full access to the information withheld and the wording of the request. Based on my review of the information at issue, I find that the city's characterization of it as "concerning municipal roads" is overly broad. It is clear

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[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.

that the record has to do with street parking restrictions in the areas referenced, and this, by its nature "concerns municipal roads". Having reviewed the record, I find that the wording of Parts IV, VI, XII, and XIII of the appellant's request is broad enough to capture the record at issue as responsive. Those parts of the request relate to records (including e-mail communications) about parking restrictions in the city and/or involving the city's fire service. From my review of the information at issue, it clearly falls within the scope of those parts of the request. The city's initial identification of the record is consistent with this view.

[19] In summary, based on my review of the record, I find that it relates to parking concerns within Binbrook, Ontario, which is a southeast community within the city, according to publicly available resources. In light of the IPC's approach to the question of responsiveness described above, I find that the record reasonably relates to the request and that the city's late re-interpretation of the request was too narrow. Since I have found that the record is responsive to the request, I will now go on to consider whether the exemptions claimed by the city apply to the withheld information.

Issue B: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[20] The city withheld information based on the mandatory personal privacy exemption at section 14(1) of the *Act*. Therefore, I need to decide if there is "personal information" in the record.

[21] During the inquiry, the appellant made it clear that he is not seeking access to personal identifying information such as names and contact information in the record, and that he sought maximum disclosure of all other parts of the record. Therefore, I do not need to assess the city's decision to withhold those portions of the record consisting of that type of personal information.

[22] In section 2(1) of the *Act*, "personal information" is defined as "recorded information about an identifiable individual."[4] Examples of personal information that are listed in the *Act* (other than names and contact information) include information about an identifiable individual's views or opinions.[5] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under the listed examples may still qualify as personal information.

[23] However, to qualify as personal information, it must be reasonable to expect that

[4] This is part of the introductory wording of the definition of "personal information," found at section 2(1) of the *Act*.
[5] Ibid, paragraphs (e) and (g).

an individual may be identified if the information is disclosed.[6] As noted above, the appellant does not seek access to any identifying information.

[24] Despite the removal of commonly perceived types of identifying information from the scope of the appeal, based on my review of the record, there are small portions of the record that may identify an affected party if disclosed (or in connection with other information that may be available). I cannot elaborate further without revealing information that has been withheld. Since the appellant is not seeking information that would identify an individual, I have identified discrete portions of the record that should, therefore, remain withheld.

[25] At the beginning of the inquiry, I asked the city (and an affected party) to provide me with representations on the question of whether an individual would be identifiable if name and contact information was removed from the records at issue. Neither party responded. Based on my review of the record, apart from the identifying portions already withheld or which will be ordered to remain withheld, I do not find that the views or opinions expressed by the affected party or referenced by public officials in the record could reasonably identify the affected party, or another individual. Therefore, when the identifying severances are made, the remaining portions of the record do not fit the definition of "personal information" under the *Act*.

[26] If a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless an exception in the law[7] applies.

[27] In this case, as discussed, the appellant does not seek identifying information and so the information that I have found to be identifying is not at issue. Since I have found that the remaining information in the record does not constitute "personal information" as defined under the *Act*, the personal privacy exemption at section 14(1) cannot apply to it. Subject to my findings about the other exemption claimed, this information will be ordered disclosed.

Issue C: Does the discretionary law enforcement exemption at section 8(1)(d) (confidential source) apply to the record?

[28] Under section 42 of the *Act*, if an institution refuses access to a record (or part of a record), the burden of proof that the record (or part of the record) falls within one of the specified exemptions in the *Act* lies upon the institution.

[29] The city initially relied on the discretionary law enforcement exemption at section

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[6] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[7] At paragraphs (a) to (f) of section 14(1) of the *Act*.

8(1)(d) (confidential source) to withhold the information at issue in the record. In its access decision, it stated the following before citing section 8(1)(d) and its discretion to refuse disclosure under it:

> Investigations undertaken by City Fire Department staff in response to a complaint are considered to be law enforcement matters in which the City has an interest, and a complainant is considered to be a confidential source in respect of law enforcement matters.

[30] Section 8(1)(d) says:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source[.]

[31] The city provided no representations to show why the exemption at section 8(1)(d) applies. Without representations from the city on the application of this discretionary exemption, I find that the city has not established that disclosure of the record could reasonably be expected to reveal the identity of a confidential source of information or disclose information furnished only by the confidential source. The affected party did not submit representations, so I also have no evidence from that person with respect to any expectation of confidentiality. Therefore, the exemption does not apply. As a result, it is unnecessary for me to consider what factors the city may have considered in claiming this discretionary exemption.

Issue D: Did the city conduct a reasonable search for records?

[32] The appellant claims that additional records exist beyond those identified by the institution, so the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[8] 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. That is the case here.

The appellant's evidence

[33] 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

[8] Orders P-85, P-221 and PO-1954-I.

basis for concluding that such records exist.[9]

[34] The appellant's relevant arguments on this issue are that the city did not contact him to seek clarification about his request, and did not respond to Parts IV and VIII of his request. Part IV pertains to the appellant's request for records from the Public Works Department, which had not initially located any records. Part VIII deals with records concerning the rationale for changing the parking regulations on the street specified in the appellant's request. The appellant argues that it is not reasonable that a change in the parking rules for the months in question would have come about without the generation of any records. He submits that there must be records in existence when changes to any official street signage is requested, considered, approved, and installed, and is concerned that Public Works did not conduct a search for records that would reasonably be expected to exist as a result.

The city's evidence

[35] 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.[10] To be responsive, a record must be "reasonably related" to the request.[11]

[36] 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.[12]

[37] 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.[13]

[38] I found the city's representations on the issue of search to be insufficiently detailed for me to find that its search was reasonable. The city lists which departments or sections of the city were forwarded the details of the request, and states that within the specified departments, the request was further reviewed and disseminated to "the most appropriate divisions/sections to complete records searches." However, the city's representations do not sufficiently help me understand what was searched (including any parameters searched), who conducted the search, and when and where the search was conducted. It is difficult to find that the city's search efforts were reasonable without this type of information, keeping in mind that a reasonable search is one in

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[9] Order MO-2246.
[10] Orders P-624 and PO-2559.
[11] Order PO-2554.
[12] Orders M-909, PO-2469 and PO-2592.
[13] Order MO-2185.

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." The city had been asked to provide information about its search by the person(s) who conducted the search, but that information is clearly not before me if multiple departments were approached, because the evidence from the city is limited to the representations of the access and privacy officer.

[39] Furthermore, because there does not appear to have been a response to Part VIII of the request, the lack of more detailed information about the city's search efforts makes it more difficult for me to find that the attempts, if any, to locate responsive records in relation to Part VIII were reasonable.

[40] I note that the city's representations state that, at the appellant's request, a secondary search was completed by staff from the Roads and Traffic division of the Public Works department, apparently addressing Part IV of the appellant's request. The city states that as a result of the secondary search, an additional two-page record had been identified as responsive. The city stated that this record would be disclosed to the appellant in full, but as of this office's last communication with the appellant several weeks after the date of the city's representations, it had not been. Without more information about who searched for what in the Public Works department, or evidence that this record was sent to the appellant, I am not in a position to find that this aspect of the city's search is reasonable.

[41] Therefore, based on the city's representations, there is insufficient evidence before me to demonstrate that it has conducted a reasonable search. As a result, I find the city has not conducted a reasonable search for responsive records and order it to conduct a further new search for records responsive to Parts IV and VIII of the request.

ORDER:

1. The city is ordered to disclose the un-highlighted portions of the enclosed copy of the record to the appellant by **June 6, 2019** but no earlier than **May 31, 2019**.

2. I do not uphold the city's search for records responsive to the request. I order the city to conduct a further search for responsive records in relation to Parts IV and VIII of the request. The search should be conducted by an experienced individual or individuals employed by the city who would be reasonably knowledgeable in the subject matter of the request. This would include any employees in the city's IT department. I further order the city to provide me with an affidavit sworn by an employee or employees who have direct knowledge of the search, including the following information:

    - the name(s) and position(s) of the individual(s) who conducted the search;

- the steps taken in conducting the search;
- the results of the search; and
- if no records are located, a detailed explanation for why no records are located.

3. I order the city to provide representations and affidavits to the appellant and this office, within 30 days of this order, detailing the further search for records responsive to the request.

4. If the city locates further records responsive to the request as a result of the search, I order the city to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

5. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 2 and 3 of this order.

Original signed by
Marian Sami
Adjudicator

May 2, 2019