

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3768-F

Appeal MA14-378-3

The Corporation of the City of Oshawa

May 14, 2019

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* for communications between a named city councillor and an individual the city retained to investigate a particular matter. The city denied access on the basis that such communications would not be within its custody or control. After the appellant appealed, Orders MO-3281 and MO-3511 found that 1) the communications in question are in the city's control, and 2) the city had not conducted a reasonable search for records. Following the issuance of Order MO-3511, which ordered the city to search its electronic holdings for records, the city conducted another search and disclosed additional records. The appellant appealed on the basis that the city had still not conducted a reasonable search for records. In this order, the adjudicator upholds the reasonableness of the city's search following Order MO-3511 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.

Orders and Investigation Reports Considered: Order PO-3050.

OVERVIEW:

[1] At a City of Oshawa (city) council meeting on May 21, 2013, council passed a motion to appoint a named lawyer to investigate allegations of misconduct on the part of city employees and departments. The allegations of misconduct were contained in a then recently-released report of the city's Auditor General, and related to the city's acquisition of a property to house its operations depot. Before and following that meeting, a city councillor and the investigator exchanged emails.

[2] This appeal relates to a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

I am requesting all communication between [the named city councillor and the investigator] from March 1, 2013 through to October 1, 2013.

[3] In response to the request, the city stated the following:

All records responsive to your request, should they exist, would have been generated by the councillor in their personal capacity or as an elected official and not as an officer or employee of the City of Oshawa. Accordingly, access cannot be granted as the records are not within the custody and control of the City.

[4] The requester appealed the city's decision to this office and Appeal MA14-378 was opened. The requester submitted an Ombudsman's letter that identified an email the councillor had sent to the investigator on May 21, 2013.¹

[5] That appeal was resolved by Order MO-3281, in which I found that the email sent by the councillor to the investigator on May 21, 2013 was under the city's control, and ordered the city to issue an access decision to the appellant.

[6] The city then issued an access decision pursuant to which it disclosed two emails with attachments. One of the emails was the May 21, 2013 email referenced above from the councillor to the investigator, attaching a draft resolution appointing the investigator. The other was an email also dated May 21, 2013 from the investigator to the councillor, attaching his "long" curriculum vitae.²

[7] Upon receiving the city's decision and the emails, the requester appealed to this office on the basis that additional emails should exist. A second appeal file, Appeal MA14-378-2, was opened. During the mediation stage of that appeal, the city conducted an additional search and provided the appellant with the following decision:

The City of Oshawa has consulted [the named councillor] who has confirmed that to the best of her recollection, there were a total of four emails, but with the exception of the two that were previously provided to you, the other emails were minor in nature and deleted soon after the time they were exchanged.

¹ The Ombudsman's letter was in response to a complaint that the councillor had met with other councillors in an improperly closed meeting. That complaint was dismissed.

² The city withheld small portions of the emails, relying on the third party information (section 10) and personal privacy (section 14(1)) exemptions in the *Act*. Those redactions are not at issue in this appeal.

[8] Mediation did not resolve the appeal, and it was moved to the adjudication stage. Adjudicator John Higgins conducted an inquiry into the issue of whether the city had conducted a reasonable search. During that inquiry, the councillor provided evidence. She then died before the inquiry was completed.

[9] The appeal was resolved by Order MO-3511, in which Adjudicator Higgins found that the city had not conducted a reasonable search and ordered the city to search its own electronic record holdings. The basis for his finding was, in part, explained as follows:

[T]he fact that the first released email came from the councillor's personal email account and was forwarded from her personal email to another unidentified email account in her name strongly suggests the possibility that the councillor did forward or copy the unrecovered emails to her city email account.

The simplest way to determine whether any unrecovered emails and any other related records are available on the city's servers would be for the city to conduct a search of its electronic records....

In my opinion, it is possible that the unrecovered emails and other records may exist within the city's electronic record holdings because the councillor may have forwarded them to her city email account. Unfortunately, we cannot ask her whether she did, and the only way to obtain a definitive answer is to look.

Given the findings of control in Order MO-3281 and this order, and given the ambiguity concerning the way the released email was forwarded, I am not satisfied that the city has conducted a reasonable search. The appellant is not required to prove that additional records exist, and the question of what is a reasonable search is contextual. In this case, I find that the city's failure to search its own record holdings renders its search unreasonable. I will therefore order it to conduct an additional search.

[10] The adjudicator ordered the city to "conduct a search of its electronic record holdings for responsive records."

[11] In response to Order MO-3511, the city conducted additional searches and located two records, including an exchange of emails between the councillor and the investigator on May 21 and 22, 2013.³ The records were provided to the appellant, again with small redactions that are not at issue.

³ The other record was another copy of the May 21, 2013 email and attached draft resolution from the councillor to the investigator.

[12] The appellant appealed the city's decision to this office, again on the basis that further records should exist, and the present appeal, Appeal MA14-378-3, was opened. Mediation did not resolve the appeal and it moved to the adjudication stage. I conducted an inquiry, during which I received representations from the city, which were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7. I then sought and received representations from the appellant.

[13] In this order, I uphold the city's searches subsequent to Order MO-3511 as reasonable, and dismiss the appeal.

DISCUSSION:

[14] The sole issue in this appeal is whether the city conducted a reasonable search of its electronic record holdings for responsive records, as ordered in Order MO-3511.

The city's representations

[15] The city submits that the scope of its searches was as ordered in MO-3511, and with reference to the appellant's original request.

[16] The city provided representations, an affidavit sworn by its Manager of Records Information Systems (the Manager), and an affidavit sworn by its Records Information Analyst (the Analyst). The representations and affidavits describe a number of searches that the city conducted following order MO-3511, and which can be summarized as follows:

- Shortly after the issuing of MO-3511, the Manager conducted a search of the named councillor's email account by keywords, which included the investigator's name, his email address, the name of his former law firm, the address of the property in question, and the words "investigation" and "depot."
- The Manager also conducted an email-by-email review of each email sent to or received by the councillor during the relevant time period.
- As a result of these searches, two responsive records were located, and provided to the appellant with some redactions that are not at issue in this appeal.
- In addition, the Analyst conducted a search of the late councillor's city-issued computer. No additional responsive records were located.
- An additional search of the councillor's city-issued computer was conducted in April 2018 by the same Analyst, at the request of an IPC intake analyst. Each folder on the councillor's computer was searched by relevant keywords, which included the investigator's name, the address of the property in question, the name of the law firm where the investigator previously practised, the terms "auditor" and "auditor

general”, and the title of the auditor general’s report. No responsive records were located.

- In September 2018, the Manager of Records Information Systems conducted another search of the named councillor’s city-issued computer and personal network (F:) drive, using some additional keywords. No responsive records were located.

[17] The city submits that these searches were conducted by city records staff, with city IT staff assisting by providing access to the named councillor’s email account and city-issued iPad.

[18] I also asked the city whether there are records that no longer exist, or could have been destroyed. The city submits that it cannot speak to the personal practices of the named councillor, but that since her passing and the preservation of her email account, personal network drive and city-issued computer, no records have been authorized for destruction in accordance with the city’s information management practices.

The appellant’s representations

[19] The appellant argues that the city unilaterally adjusted the scope of the searches to not include the councillor’s personal email account, and that Order MO-3281 provides authority for the proposition that a councillor’s personal email account should also be reviewed as part of a reasonable search. He states that in Order MO-3281, I decided that the councillor’s emails were business records of the city and that as such, they fell under the city’s responsibility to preserve in an accessible format.

[20] The appellant also submits that the city’s search was not reasonable, because the city’s representations and the affidavits of those who conducted the searches “refused to clarify which email account(s) of the former councillor” were searched. The appellant again submits that Order MO-3281 provides authority for the proposition that the city should have searched for records in other email accounts besides the councillor’s city account. He further submits that the city also failed to search its own database, server and archived records. He argues that if the city had conducted a proper search earlier, more records might have been found.

[21] The appellant submits that the city should have searched email logs, not just emails. He further submits that he suspects that there is a disaster recovery year-end tape maintained for each year. He asks that I order the city to provide its 2013 tape for inspection by a third party.

[22] The appellant also submits that the councillor deleted responsive records, which were later recovered and disclosed to the appellant. For this reason, the appellant submits that the city should not have trusted her to preserve relevant records.

[23] The appellant submits that the city should specifically have conducted searches for emails sent from the named councillor's personal/non-city address(es) to the councillor's city-owned address. The appellant maintains that given the councillor's history of sending emails between accounts, a reasonable search should include looking for emails sent from her personal account to her city one.

[24] The appellant also makes general arguments about other matters including the city's record-keeping practices and its actions in response to other access requests. I will not repeat those arguments here.

Discussion and finding

[25] The sole remaining issue in this appeal is whether the city conducted a reasonable search of its electronic record holding for responsive records, as ordered in Order MO-3511.

[26] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.⁴

[27] 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.⁵ To be responsive, a record must be "reasonably related" to the request.⁶

[28] 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.⁷

[29] 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.⁸

[30] 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.⁹

⁴ Orders P-85, P-221 and PO-1954-I.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

⁷ Orders M-909, PO-2469 and PO-2592.

⁸ Order MO-2185.

⁹ Order MO-2246.

The councillor's personal email account

[31] Throughout his representations, the appellant makes reference to the named councillor's personal email account. The appellant contends that a reasonable search for responsive records should have at some stage included searches of the councillor's personal email account.

[32] In Order MO-3511, Adjudicator Higgins concluded that a search of the councillor's personal email account was no longer possible, on the basis of evidence from the councillor's internet service provider. Therefore, while the appellant continues to make references to the councillor's personal email account throughout his representations, I consider the question of whether this account is part of a reasonable search to be settled following Order MO-3511, which ordered only that the city search its own electronic record holdings.

The appellant's argument that the city did not state which email account it searched

[33] The appellant argues that the city's representations and the affidavits of those who conducted the searches "refused to clarify which email account(s) of the former councillor" were searched.

[34] The Manager's affidavit states that he completed a search of the email account assigned to the councillor. Given that the city was ordered to search its own electronic record holdings, it is clear that the Manager is referring to the councillor's @oshawa.ca account.

Specifics searches for emails from the named councillor's personal email to the councillor's city address

[35] The appellant argues that a reasonable search should have included specific searches for emails from the named councillor's personal or other accounts to her city-issued email address.

[36] In its representations, the city detailed several searches of the councillor's city email account. Two types of searches were conducted: searches of the councillor's email account by relevant keywords, and email-by-email searches. Since the issuing of Order MO-3511, in which further searches were ordered, both types of searches were conducted on multiple occasions.

[37] According to the city's representations, six further searches have been conducted since Adjudicator Higgins' order. It seems unlikely that any responsive emails from the named councillor to her city address would not have been discovered during keyword search and the email-by-email searches. Given the known propensity of the late councillor to send emails to her other addresses, it seems unlikely than an experienced staff member would have missed emails with the councillor's name as both sender and

recipient during two email-by-email searches.

[38] Accordingly, I do not consider that a reasonable search requires that the city specifically search for emails to the councillor, from the councillor. In my opinion, any such emails would reasonably be expected to have been found in the searches the city conducted. The appellant has not provided a reasonable basis to conclude that additional searches of the councillor's city email account would yield any further responsive records.

Backed up and/or archived email logs

[39] Throughout his representations, the appellant notes that the city does not appear to have conducted any searches of archived data or backups. The appellant speculates that such a search may return further responsive records, given that the named councillor had previously deleted emails on her personal device.

[40] In Order PO-3050, Commissioner Beamish noted that a reasonable response to an access request does not necessarily require a search of backup data, unless there is reason to assume such a search is required on the basis of evidence provided by the requester.

[41] In view of this, what constitutes a reasonable search in any given appeal is a contextual inquiry. The appellant is correct in stating that the named councillor had previously deleted records that, once recovered, were responsive to the request.

[42] However, this fact must be considered in light of the six searches that have been conducted following Adjudicator Higgins' order in this appeal, and in light of the records that have been located and disclosed as a result of those searches.

[43] First, while the councillor stated that, to the best of her recollection, she deleted what she considered to be emails that were "minor in nature" shortly after they were sent, she also recalled that there were only four emails in total.

[44] Second, my review of the records that have been located and disclosed to the appellant does not satisfy me that I should require the city to search its archives for responsive records. Those records are as follows:

- May 21, 2013: Email from the investigator to the councillor attaching his "long" CV
- May 21, 2013: Email from the councillor to the investigator attaching a draft resolution
- May 21 and 22, 2013: Exchange of emails between the councillor and the investigator after the council meeting

[45] I have reviewed the contents of these records. The appellant also filed a letter

from the Ombudsman written after the Ombudsman investigated (and dismissed) an allegation that the councillor and others had held an improperly closed meeting. The letter refers to the May 21, 2013 email from the councillor to the investigator and states that the councillor "contacted" the investigator on May 18, 2013. No record of this contact has been located, nor would one necessarily exist, if the contact was via telephone.

[46] My review of the Ombudsman's letter, and the various emails that have now been disclosed to the appellant, suggests that the investigator may have also sent the councillor a "short" CV. This email, if it ever existed at all, let alone on the city's server, has not been recovered. Otherwise, there is nothing in the records that indicates to me that there were any other communications on or before May 21, 2013.

[47] I have also reviewed the emails exchanged on May 22, 2013. In one of the emails, the investigator asked the councillor for further background information about the matter he was retained to investigate. The councillor responded that such inquiries should be directed to the city Clerk. She also stated, "I will, of course, co-operate in any inquiries you have of all members of Council". The contents of these emails do not, in my opinion, provide a reasonable basis for believing that any responsive records exist after May 22, 2013.

[48] In my view, it would not be reasonable to require the city to conduct a search of its archives, email logs or year-end tapes (if any exist) for any further records that may exist or specifically for an email attaching the investigator's "short" CV. Such an email, if it ever existed at all, may not have ever been sent to the councillor's city email account. With his representations, the appellant provided emails wherein city records and information staff outline the complexities involved in attempting to search archived/backed-up material.

[49] The purpose of backed up information is to retain it for future reference, and the city would be wise in future to ensure that information from outdated technological environments is more easily retrievable. However, requiring the city to search its archives would go well beyond the reasonable effort required in the circumstances of this appeal. As noted above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist.

[50] The city was ordered to conduct a search of its electronic record holdings for responsive records. It conducted searches of the late councillor's emails, as well as her city-issued computer and personal network drive, and found further records, which it disclosed. As noted above, and as also noted by Adjudicator Higgins, the inquiry into what constitutes a reasonable search is a contextual one. In my opinion, while it is possible that other records exist, the further searches that the city conducted were reasonable in the circumstances. There is no requirement that a search be exhaustive, only that it be reasonable. In my view, the circumstances of this appeal do not warrant my requiring the city to conduct any further searches.

ORDER:

I uphold the city's search for responsive records pursuant to Order MO-3511 as reasonable. Accordingly, I dismiss this appeal.

Original Signed by _____
Gillian Shaw
Senior Adjudicator

_____ May 14, 2019