Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER MO-3838-F

Appeal MA17-298

The Corporation of the City of North Bay

September 23, 2019

Summary: This final order follows Interim Order MO-3684-I. The appellant made a request to the city under the *Act* for all records relating to a specific position. The city located one responsive record and withheld it from disclosure, in full. The appellant appealed the city's access decision and argued that additional responsive records ought to exist. Relevant to this Final Order, in Interim Order MO-3684-I, the adjudicator found that the city did not conduct a reasonable search for responsive records and ordered the city to conduct another search. In this final order, the adjudicator finds that the city conducted a reasonable search for responsive records 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.

Order Considered: Interim Order MO-3684-I

OVERVIEW:

[1] This final order disposes of the remaining issue from Interim Order MO-3684-I, specifically whether the Corporation of the City of North Bay (the city) has conducted a reasonable search for records, as required by section 17 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant filed an access request with the city under the *Act* for all records relating to a specific position with the city. The city located on responsive record, an employment agreement, and denied the appellant access to it, in full. The city claimed the record was excluded from the scope of the *Act* under section 52(3)2 (employment

or labour relations). In the alternative, the city claimed the application of a number of exemptions, including section 6(1)(b) (closed meeting) and 14(1) (personal privacy) to withhold the record. The appellant appealed the city's decision and claimed additional responsive records ought to exist.

[3] In Interim Order MO-3684-I, I found that the record was not excluded under section 52(3)2 due to the application of the exception to the exclusion in section 52(4)3 (agreement between an institution and employee). In addition, I found that the record was not subject to the section 6(1)(b) exemption. I also found that the record is not subject to the section 14(1) exemption, with the exception of certain salary information. However, I found that the public interest override in section 16 applied to the salary information and ordered the city to disclose the record to the appellant, in full. Finally, I found that the city did not conduct a reasonable search for responsive records and ordered it to conduct a further search.

[4] In response to Interim Order MO-3684-I, the city conducted a further search for responsive records. The city located a number of responsive records, including emails, draft agreements and other draft language, and issued a supplementary access decision to the appellant, denying him access to the records. The appellant filed an appeal of that decision and Appeal MA19-00007 was opened. To be clear, this final order only reviews the city's search for responsive records, not the city's access decision.

[5] The city also provided the IPC with three affidavits describing its search efforts, which I shared with the appellant in accordance with this office's *Code of Procedure* and Practice Direction Number 7. The appellant provided representations in response. I then sought and received reply representations from the city and, subsequently, further sur-reply representations from the appellant.

[6] In this final order, I conclude that the city has now conducted a reasonable search for responsive records and dismiss the appeal.

DISCUSSION:

[7] The only issue before me in this final order is whether the city conducted a reasonable search for responsive records.

[8] Where a requester claims additional responsive 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*.[1] If, after conducting an inquiry, the adjudicator is satisfied the institution carried out a

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

reasonable search in the circumstances, the adjudicator will uphold the institution's search. If the adjudicator is not satisfied, the adjudicator may order further searches.

[9] 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 it made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be *reasonably related* to the request.[3]

[10] 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 reasonably related to the request.[4] An adjudicator will order a further search 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.[5]

[11] Although the 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.[6]

Interim Order MO-3684-I

[12] The appellant's original request read as follows:

> Any written record related to the job, job description, powers, duties of position of "Corporate Advisor" and/or "Corporate Adviser" including initial job advertisement/posting/offering.

[13] In its original representations, the city claimed that it only identified one responsive record in its search: the Confidential Employment Agreement at issue in Interim Order MO-3684-I. The city asserted that, "no other records were found to be responsive to the appellant's request." The city did not provide any other representations on the search it conducted in response to the appellant's request.

[14] The appellant took the position that additional responsive records ought to exist. During mediation, the appellant claimed that documents such as a job description, job advertisement/posting/offering, memos or emails between staff leading to the creation of the agreement ought to exist. In his representations, the appellant submitted that there should be additional emails or notes from an identified individual (the affected party) or city staff regarding such a highly paid position within the city.

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[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

[15] In reply, the city submitted that it conducted a thorough search for records relating to the "Corporate Advisor" and/or "Corporate Adviser" position. The city stated that, upon receipt of the appellant's request, it made the following inquiries:

1. The Human Resources Department was requested to complete a search for their records for all documentation in relation to the position of "Corporate Advisor" and/or "Corporate Adviser"

2. Information Services was requested to conduct a search of [an affected third party's] electronic files for any documentation in relation to the position of "Corporate Advisor" and/or "Corporate Adviser."

[16] Based on my review of the city's representations, I found, in Interim Order MO-3684-I, that the city did not provide sufficient evidence to demonstrate that experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to locate records reasonably related to the request. I found that the city's representations on search were lacking in detail. I noted that the Notice of Inquiry asked the city to "provide a written summary of all steps taken in response to the request."[7] Specifically, I asked the city to "provide details carried out including: by whom [the searches] were conducted, what places were searched and finally, what were the results of the searches?"[8] I reviewed the city's representations and found that it did not provide sufficient details of the searches it conducted. For example, the city did not identify the individuals who conducted the searches, the files and/or locations searched by the Human Resources Department or the individuals who were contacted in the course of the search.

[17] In addition, I found that the city appeared to narrow the scope of the appellant's request inappropriately in conducting its search. According to its representations, the city searched two locations: the Human Resources Department and the affected party's electronic files. Furthermore, the city searched for documentation relating to the position of "Corporate Advisor" and/or "Corporate Adviser." Based on my review of the information in the appeal, it did not appear that the appellant narrowed his request from "all records" the city may have relating to "the job, job description, powers, duties of position of 'Corporate Advisor' and/or 'Corporate Adviser' including initial job advertisement/posting/offering." As such, it was unclear why the city restricted its search to the Human Resources Department and the affected party's electronic files, when it is possible that additional records may exist within other departments at the city. It was also unclear whether the city conducted a search for records relating to the job description, powers, duties or the advertisement/posting/offering for the role because the city did not provide any clarification regarding its search.

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[7] Page 29 of the Notice of Inquiry dated October 26, 2017 sent to the city.
[8] *Ibid*.

[18] Furthermore, the appellant stated in his representations that it is "hard to believe that there are no additional emails or notes from the CAO or staff" regarding the newly created position of "Corporate Advisor" or "Corporate Adviser" with the city. I agreed that it is reasonable to conclude that there was likely earlier correspondence or discussion regarding this position and/or the affected party's transition into this role before the agreement was signed. I acknowledged that further records may not exist, but found that the city failed to address this issue with sufficient detail in its representations or reply representations.

[19] Accordingly, I found that the city did not conduct a reasonable search for records responsive to the appellant's request. As a result, I ordered the city to conduct a further search for responsive records and to provide a reasonable amount of detail to this office regarding the results of its search.

The city's search and parties' representations

[20] In response to Interim Order MO-3684-I, the city conducted further searches for responsive records. The city identified a number of records, including draft agreements, "draft language" and emails. The city issued an access decision to the appellant, denying him access to the records in their entirety. The city advised the appellant it withheld the records under the discretionary exemption in section 12 (solicitor-client privilege) of the *Act*. The appellant appealed the city's decision and Appeal MA19-00007 was opened to deal with the city's decision regarding these records.

[21] The city also provided the IPC with three affidavits sworn by its City Clerk, Managing Director of Corporate Services (the Managing Director) and a City Solicitor regarding the searches conducted. In her affidavit, the City Clerk stated that, pursuant to Interim Order MO-3684-I, she conducted a further search of the mayor's Microsoft Outlook Inbox, Deleted Emails and Sent Emails for emails containing the words "Corporate Advisor" and/or "Corporate Adviser." The City Clerk states that she did not locate any responsive records. The mayor's administrative assistant also searched the mayor's paper files and did not locate responsive records. In addition, the City Clerk conducted a further search of the affected party's Microsoft Outlook Inbox, Deleted Emails and Sent Emails for emails containing the words "Corporate Advisor" and/or "Corporate Adviser." The City Clerk located one responsive record.

[22] In addition, the City Clerk states that the Chief Administrative Officer's assistant searched the paper files and Records Management System of the Office of the Chief Administrative Officer. The City Clerk states that the assistant did not locate any records.

[23] Finally, the City Clerk states that the city does not archive emails, so if emails were deleted, they are no longer available. The City Clerk states that the city does back up data but "this is not an archive it is a snapshot and backups are overwritten."

[24] In her affidavit, the Managing Director states that she conducted a further search

of her Microsoft Outlook Inbox, Deleted Emails and Sent Emails for emails that contain the words "Corporate Advisor" and/or "Corporate Adviser." The Managing Director states that she located two responsive records. In addition, the Managing Director searched the city's Records Management System (SIRE) for records that contain the terms "Corporate Advisor" and/or "Corporate Adviser." The Managing Director states that she located three responsive records.

[25] In his affidavit, the City Solicitor states that he conducted a search of the Microsoft Outlook Inbox, Outbox, Deleted Items, Sent E-mails and electronic sub-files maintained by himself, a law clerk, the City Clerk, the mayor, the Managing Director, and the affected party. The City Solicitor states that he also conducted a search of the Outlook Calendars of these individuals. The City Solicitor states that these searches were conducted using his corporate city-issued Dell desktop computer.

[26] In addition, the City Solicitor conducted a search of the electronic files on his corporate city-issued Dell desktop computer, his corporate city-issued Dell laptop computer and corporate city-issued Microsoft Surface. Finally, the City Solicitor states that he also conducted a search of the city's Legal Department files for records responsive to the appellant's request.

[27] The City Solicitor states that he located a number of emails, draft agreements, draft language and Outlook Calendar appointment entries.

[28] The appellant raised a number of concerns regarding the city's search, upon review of the city's affidavits, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. First, the appellant submits that the city should have searched for mobile phone text messages. The appellant also submits that the employment contract states that the Mayor and the affected party held numerous discussions regarding the transition plan for the replacement of the affected party. However, the appellant submits that the city did not locate a single responsive record relating to these discussions. The appellant questions whether the city conducted a reasonable search for responsive records, given these circumstances.

[29] In addition, the appellant notes that one of the emails disclosed by the city refers to a "revised agreement." The appellant submits that this language implies that there was an initial agreement that needed to be revised. The appellant submits that this initial agreement was not disclosed to him.

[30] The appellant also noted that the in-camera meeting dated December 8, 2015 was "not listed as an area of search for the City." The appellant submits that this meeting dealt with the subject matter of his request. The appellant submits that the city should have located and disclosed the Minutes, Resolution of Council, Direction, Vote or similar information relating to this meeting.

[31] With regard to the city's representations on its email retention policy, the appellant states that he "would think the City would have a more robust policy in place

for its email retention." The appellant also submits that the current policy does not adhere to "best practices" in the "IT world" and makes disclosure of "important information" impossible in certain cases.

[32] Finally, the appellant seeks clarification as to the term *paper files* used by the city.

[33] In response, the city confirms that text messages are not recorded or retained by the Information Services Department. The city submits that the mayor also confirmed that he does not have text messages between himself and the affected party. With regard to the appellant's suggestion that the mayor and the affected party had meetings to discuss the employment contract, the city submits that the mayor and the affected party's offices are in the same area, so there is no need to make an appointment before having a discussion.

[34] With regard to the "revised agreement", the city states that the original agreement was provided to the IPC with the Managing Director's affidavit. These draft agreements are at issue in Appeal MA19-00007.

[35] With regard to the records relating to the in-camera meeting, the city states that these documents are at issue in Appeal MA19-00007.

[36] Finally, the city confirmed that the *paper files* would include handwritten notes of both the mayor and the affected party.

[37] In further sur-reply, the appellant submits that the city should record or retain text messages relating to city business. In addition, the appellant takes issue with the city's claim that the mayor and affected party conducted casual discussions regarding the "Corporate Advisor" position and did not make more formal appointments. The appellant also submits that the city's explanation regarding records relating to an in-camera meeting is evasive and insufficient. Finally, the appellant continues to raise concerns regarding the city's email retention policy.

Findings

[38] For the reasons that follow, I am satisfied the city has now conducted a reasonable search for responsive records pursuant to Interim Order MO-3684-I. I am satisfied the city's further searches demonstrate it made a reasonable effort to locate responsive records in fulfillment of its obligations under the *Act*. I am not persuaded by the appellant's arguments that the city failed to conduct a reasonable search for records responsive to his request.

[39] Based on my review of the three affidavits provided by the city, I am satisfied that experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to locate records relating to "to the job, job description, powers, duties of position of 'Corporate Advisor and/or 'Corporate Adviser' including

initial job advertisement/posting/offering." The three affiants, particularly the City Clerk, are clearly experienced employees knowledgeable in the circumstances surrounding the creation and hiring of the "Corporate Advisor" role. Based on my review, I am satisfied the affiants made a reasonable effort to locate records responsive to the appellant's request.

[40] The appellant takes the position that the city should have a more robust retention policy in relation to its text messages and emails. However, my review is limited to whether the city conducted a reasonable search for responsive records. In this case, I am satisfied the city demonstrated that it conducted a reasonable search for these types of records. In addition, I find that the appellant did not provide me with a reasonable basis for his belief that these additional records exist. In any case, I remind the city of its obligation under the *Act* to have a robust retention policy and to ensure that it can respond to access requests in a comprehensive manner.

[41] I have reviewed the remainder of the appellant's concerns regarding draft or "revised" or "initial" agreements and records relating to an in-camera meeting and find that the city has demonstrated that it conducted a reasonable search for these records. As noted above, 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 it made a reasonable effort to identify and locate responsive records.[9] Based on my review of the city's affidavits and representations, I am satisfied it has submitted sufficient evidence to demonstrate that it conducted a reasonable search for records responsive to the appellant's request.

[42] In conclusion, I find that the city has now conducted a reasonable search for records, as required by section 17 of the *Act*.

ORDER:

I uphold the city's search as reasonable and dismiss the appeal.

Original signed by	September 23, 2019

Justine Wai
Adjudicator

[9] Orders P-624 and PO-2559.