

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3850

Appeal MA17-692

City of St. Catharines

October 23, 2019

Summary: The City of St. Catharines (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to complaints made by and against a property management company. The city did not conduct a search for records. The city claimed that the costs of a search would be prohibitive to the appellant and that a search would be absurd because the city would either refuse to confirm or deny the existence of responsive records pursuant to section 8(3), and/or claim that they were exempt from disclosure pursuant to section 8(1)(d) (confidential source of information) of the *Act*. In this order, the adjudicator finds that because the city refused to conduct a search, it has not complied with its obligations under the *Act* and orders the city to respond to the access request in accordance with its obligations under the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M.56, as amended, sections 17(1) and 45.

OVERVIEW:

[1] The City of St. Catharines (the city) received a four-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

1. A copy of all complaints filed by [a property management company] in the last 10 years
2. A copy of all complaints filed against [the property management company at a specified address] in the last 10 years

3. 10 reports filed to city hall prior to August 28/2017
4. 10 reports filed to city hall after August 28/2017.

[2] The requester later clarified that this request relates to a complaint dated August 28, 2017 (the August 2017 complaint) that the named property management company made against him to the city regarding a shed he built on his property intended to provide shelter to feral cats.

[3] Following further communications between the parties, the city issued a decision. The city wrote, in part:

In response to number 1 above, the following applies:

In accordance with Section 8(d)¹ of the *Act*, we can neither confirm nor deny the existence of a record if disclosure would identify a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

No records responsive to your request can be located. As previously noted in an email dated November 9, 2017, specific property owners and/or property addresses must be provided in order for us to search for these records. [The property management company] is a management company and does not own the properties. Complaints are filed and attached to the property address or owner only, and must pertain to a City By-law.

[4] The city also wrote in its decision that, because it believed the appellant's request was related to a 2012 investigation involving the Ontario Society for the Prevention of Cruelty to Animals (OSPCA), city employees would not have been involved as that type of investigation did not call for enforcement of a city by-law.

[5] The requester, now the appellant, appealed the city's decision.

[6] During mediation, the city confirmed that it previously explained to the appellant that it stores information about complaints in its computer system by property owner's name or property address, and asked the appellant to provide this information before the city could continue to process any part of his request.

¹ This appears to be a typographical error, since the exemption reference is section 8(1)(d). This decision also appears to allude to section 8(3) of the *Act*, under which an institution may refuse to confirm or deny the existence of a record, when the record, if it exists, would qualify for exemption under part of section 8(1) or 8(2).

[7] Following further discussions during mediation, the city issued a revised decision, in which it wrote that:

As noted in our decision letter dated November 21, 2017, records responsive to your request cannot be located. We are unable to search for the requested complaints in bullets numbered 1 & 2 as you have not provided enough information pertaining to the records you seek. For bullets numbered 3 & 4 please provide clarification on what type of reports you are seeking.

You were informed in an email dated November 9, 2017 that specific property owners and/or property addresses must be provided in order for us to search for those records. [The property management company] is a management company and does not own the properties. Complaints are attached to the property address or owner only, and must pertain to a City By-law. Planning and Building Services, along with our Information Systems Department have confirmed that the records you are seeking cannot be found as per your specific request. Kindly provide us with this information and we will perform a proper search.

[8] The appellant clarified that the reports he sought (at paragraphs 3 and 4 of the request) are complaint reports relating to investigations by the city involving the property management company made before and after the August 2017 complaint. He also advised that he was seeking access to the name of the person who complained about his shed.

[9] Also during mediation, the city withdrew its claim that the exemption at section 8(1)(d) applies as it had not yet conducted a search for responsive records.

[10] The appellant provided the city with additional information about the property management company named in his request. He did not, however, identify any other property addresses or property owners' names, taking the position that the city should be able to locate responsive records based on the information that he had already provided.

[11] As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*. I conducted an inquiry, during which both the appellant and the city made representations that were shared in accordance with *IPC Practice Direction 7*.

[12] Based on the above, the only issue to be adjudicated is whether or not the city conducted a reasonable search for records responsive to the request.

[13] In this order, I find that the city did not conduct a reasonable search and order it to respond to the access request in accordance with its obligations under the *Act*.

DISCUSSION:

Did the city conduct reasonable search for responsive records?

[14] 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 17.² If I am satisfied 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.

[15] The *Act* does not require the city to prove with absolute certainty that records do not exist. However, the city must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records.³

[16] 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

[17] 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 such records exist.⁵

Representations

The city's representations

[18] The city says that it made several attempts to obtain additional clarification from the appellant and to assist him to reformulate his request in a manner that the city can respond to. The city submits that the difficulty with the appellant's request is that the appellant wants the city to conduct a search on the basis of identifying a specific individual or organization that he believes has made complaints about him.

[19] The city says that it will not identify a confidential source of information in respect of a by-law enforcement matter. The city says that, even assuming that the search requested were possible, it would involve identifying a by-law complainant and that would be contrary to section 8(1)(d)⁶ of the *Act*, so that the records would ultimately be withheld.

² Orders P-85, P-221 and PO-1954-I.

³ Orders P-624 and PO-2559.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2246.

⁶ Section 8(1)(d) of the *Act* states that an institution may refuse to disclose a record if the disclosure could reasonably be expected to 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.

[20] Finally, the city submits that its by-law enforcement records are organized by property address and property owner, not by complainant. It submits that the requested search would therefore “likely be impossible using efficient search procedures.” The city also says that, theoretically, a physical search is possible of all by-law complaint records for a ten-year period to determine if any of them were initiated by the property management company, but that the time to conduct a search would be cost prohibitive to the appellant and in the end would result in the city invoking section 8(3) of the *Act* to refuse to confirm or deny the existence of any records to protect the identity of a confidential source. It says that conducting an extremely time-consuming search to find if there are any records that the city would inevitably refuse to confirm or deny exist would be absurd.

The appellant’s representations

[21] The appellant disputes the city’s position that the city cannot conduct a search because the property management company manages many properties in the city and that, if complaints are filed, they are filed using the address that is the subject of the complaint and not by the property management’s name or its corporate address.

[22] The appellant submits that he told the city that he wanted access to each complaint filed under the property management company’s corporate address that appears on the company’s letterhead used to make the August 2017 complaint. He submits that because the August 2017 complaint originated from the property management’s corporate address, then that address should be searchable for complaints by or against it, or for complaint records about it.

[23] The appellant submits that the property management company manages the property next door to his home. He says that the property management company has complained to the city about his property, and specifically about his shed that provides shelter for feral cats, which the appellant says the property management company poisons or otherwise removes.

[24] According to the appellant, a by-law officer attended the appellant’s property in order to inspect the shed, which was found not to violate any of the city’s property standards. The appellant argues, however, that in order for the city to have sent a by-law officer to his property, it must have first received a complaint regarding the shed on a city-issued complaint form. The appellant provided a copy of the August 2017 complaint letter from the property management company, written on its corporate letterhead. The letter alleged, among other things, by-law infractions including that the appellant had more than the permissible number of cats on his property, and that the shed may be encroaching on the neighbouring property, may not conform to the city’s building code or be structurally sound.

[25] The appellant argues that complaints other than the August 2017 complaint must exist that would have prompted city inspectors to attend his property, however, because he says that the August 2017 complaint predates the existence of the shed.⁷

Analysis and findings

[26] The onus is on the city to provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. As the city is clear that no search was conducted, I find that the city has not made a reasonable effort to identify and locate responsive records.

[27] The city claims that it requires clarification of the appellant's request. The city does not submit in its representations that the request is unclear, but rather that a search would be too cumbersome. While the city's representations seem to suggest that the request may be broad, the city does not say in its representations that it did not conduct a search because the request is not clear. Rather, it says it did not search because: it stores information about by-law complaints by property owner *or* address; a search by complainant name would be inefficient, time-consuming and therefore cost-prohibitive to the appellant; and that, if the city had conducted a search, it would refuse to confirm or deny the existence of records and/or deny access under section 8(1)(d).

[28] With respect to the city's representations that it cannot conduct a search for complaints without a property owner's name or address, I note that the August 2017 complaint letter from the property management company provided by the appellant contains three addresses: the appellant's, that of the neighbouring condominium property managed by the property management company, and the property management company's corporate address. The August 2017 complaint, which alleges by-law infractions, identifies both the appellant's and the condominium's address. The city's representations do not explain why the city cannot search for complaints using any of these three addresses. The city's representations give no reason why the city cannot search for complaints made against the appellant's address, which could presumably yield information that would include the complaints to which the appellant seeks access, and not all of which would necessarily be exempt under section 8(1)(d) in their entirety. Once located, the city may then decide whether any exemptions apply to all or part of any responsive records.

[29] Similarly, the city's representations do not explain why it cannot search for complaint records associated with the property management company using the corporate address of the property management company identified in the August 2017 complaint letter, which the appellant has provided. As noted above, in response to the

⁷ The appellant submits that the August 2017 complaint is fraudulent because the shed, a prefabricated structure, was erected on his property one to two days after the August 2017 complaint.

city's request for clarification of the information sought at paragraphs 3 and 4 of his complaint, the appellant informed the city that he sought access to complaint reports relating to investigations by the city involving the property management company.

[30] In my view, the city has also presumptively and prematurely determined that all responsive records would be exempt under section 8(1)(d). The city has made this decision without first searching for and identifying responsive records to determine what portions, if any, would be subject to the section 8(1)(d), or any other, exemption.

[31] The city's position that it did not conduct a search because it would claim section 8(3) for any records it finds is also untenable. If the city is of the view that it may rely on section 8(3) to refuse to confirm or deny the existence of records responsive to the request, or part of the request, the appropriate course is for the city to issue a decision refusing to confirm or deny the existence or responsive records on the basis of section 8(3). Such a decision would be subject to appeal to this office. The city cannot avoid its obligations under sections 18-22 and 45 of the *Act* on the basis that it "would" claim the application of section 8(3) to any responsive records.

[32] I also find that the city's reasons for not conducting a search fail to consider that, pursuant to section 45 of the *Act*, the city was required to issue a fee estimate and an interim access decision. As a result, the city's position denies the appellant the opportunity to consider his options in light of the city's estimated fee for access to records, if any, and also denies him recourse to the fee waiver provisions in section 45 of the *Act*.

[33] Section 45(1) of the *Act* is mandatory and requires an institution to charge fees for access requests. Where the fee exceeds \$25, section 45(3) requires the institution to provide a requester with a fee estimate. The purpose of a fee estimate is to give a requester, in this case the appellant, enough information to make an informed decision on whether or not to pay the fee and pursue access. A fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁸

[34] Since the city appears to take the position that the fees will exceed \$100, its fee estimate may be based on a review of a representative sample of records.⁹

[35] In these circumstances, where the city has presumptively applied exemptions before identifying responsive records, where it has not complied with section 45 of the *Act*, and where it has not provided a satisfactory explanation for why it cannot search for responsive records using the addresses provided by the appellant, I cannot make a

⁸ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁹ Order 81. See also Fees, Fee Estimates and Fee Waivers (IPC:2008) <https://www.ipc.on.ca/wpcontent/uploads/2018/fees-fee-estimates-fee-waivers-e.pdf>.

finding that it conducted a reasonable search.

[36] In the circumstances of this appeal, I find that the appropriate remedy is to order the city to respond to the appellant's access request in compliance with the city's obligations under the *Act*, and in particular the fee estimate provisions in section 45.

ORDER:

1. I do not uphold the city's search for responsive records.
2. I order the city to respond to the appellant's access request in accordance with the requirements of sections 17, 18, 19, 21, 22 and 45 of the *Act*, and without recourse to a time extension under section 20. The date of this order is to be treated as the date of the request for the purposes of the city's response.

Original Signed By: _____
Jessica Kowalski
Adjudicator

_____ October 23, 2019