

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3874-F

Appeal MA16-377

City of Hamilton

December 12, 2019

Summary: This final order follows Interim Order MO-3752-I. The appellant made a request to the city under the *Act* 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 city's decision, challenging the adequacy of the city's search. In Interim Order MO-3752-I, the adjudicator found that the city did not conduct a reasonable search for responsive records and ordered it to conduct a further search. In this final order, the adjudicator finds that the city has now 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.

Orders and Investigation Reports Considered: Interim Order MO-3752-I.

OVERVIEW:

[1] This final order disposes of the only issue remaining from Interim Order MO-3752-I, specifically whether the City of Hamilton (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 submitted a request under the *Act* with the city for all records relating to an identified property and 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.

[3] The city conducted a search and located approximately 150 pages of responsive records. The city issued a decision granting the appellant access to the majority of the records. The appellant appealed the city's decision, taking the position that the city did not conduct a reasonable search for responsive records.

[4] During mediation, the city conducted two additional searches and located additional responsive records. The city disclosed these additional records to the appellant. However, the appellant maintained his position that additional responsive records ought to exist and the city did not conduct a reasonable search for responsive records.

[5] Mediation could not resolve the issue of reasonable search and the appeal was transferred to the adjudication stage of the appeal process. During the inquiry, I sought representations from the city and the appellant. However, I only received representations from the appellant, despite numerous extensions and follow up with the city.

[6] In Interim Order MO-3752-I, I found that the city did not conduct a reasonable search for responsive records and ordered it to conduct another search.

[7] In response to Interim Order MO-3752-I, the city conducted a further search for responsive records. The city located a number of responsive records, including email correspondence, and issued a supplementary access decision to the appellant. The city also submitted representations on its search and provided affidavits to support its representations. I invited the appellant to submit representations in response to the city's representations, but he did not do so.

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

DISCUSSION:

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

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

[11] 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

[12] 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 under its control.⁵

[13] 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-3752-I

[14] During the inquiry, I asked the city to provide a written summary of all the steps it took in the searches conducted in response to the appellant's request. However, the city did not submit any representations initially, nor did it 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.

[15] In his representations, the appellant submitted that the searches the city conducted were not reasonable. He stated that he provided the city with a description of four records that he obtained through other means that the city should have located. The appellant also identified these records in his representations. The appellant submitted that the city did not address the existence of these four records during the appeal process.

[16] Furthermore, the appellant submitted that the city did not describe its searches

¹ Orders P-85, P-221 and PO-1954-I.

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.

for responsive records and should have explained the steps it took in conducting the searches for records. The appellant submitted that the city did not provide any evidence to demonstrate that its searches for responsive records were reasonable.

[17] In the absence of any representations from the city, I found that the city's searches for records responsive to the appellant's request were not adequate. I stated,

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.

[18] In addition, I was satisfied that the appellant provided sufficient evidence to demonstrate that additional responsive records ought to exist and had not been identified by the city through the searches it conducted to this point. While the city appeared to have addressed some of the outstanding records identified by the appellant during mediation, the information it provided the appellant during mediation was not sufficient to satisfy me that it conducted a reasonable search for records.

[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 representations

[20] In response to Interim Order MO-3752-I, the city conducted further searches for responsive records. The city identified a number of records, including emails, and issued an access decision to the appellant, granting him access to the records.

[21] The city also submitted representations explaining the searches it conducted in response to the appellant's request and provided three affidavits regarding the searches conducted. The city submits that, upon receipt of the appellant's request, it prepared an Information Sheet and emails to two relevant city departments, Planning and Economic Development and Public Works. The city also contacted the office of a councillor to search for records responsive to the appellant's request.

[22] The city states that responsive records were located in the Planning and Economic Development department, the Public Works department and the named councillor's office. The city submits that it granted the appellant access to the majority of the records. After it received notice of the appellant's appeal, the city submits that it

conducted additional searches and located additional records with the Planning and Economic Development department. Additional searches were conducted by staff in the Public Works department and the councillor's office, but no additional records were located. The city provided the IPC with copies of the email correspondence between the Access and Privacy Officer with the Office of the City Clerk and the employees asked to search for responsive records both during the request period and after the appellant filed his appeal.

[23] In response to Interim Order MO-3752-I, the city submits that the staff in its Planning and Economic Development department undertook another search for records to locate any additional records in relation to the property identified in the appellant's request. Three individuals conducted these additional searches: (1) a City Building Inspector (formerly a Permit Application Specialist), (2) the Director of Planning and Chief Planner, and (3) the current Director of Housing, Healthy and Safe Communities (formerly of the Planning and Economic Development department). In addition, the city submits that the executive assistant to the councillor conducted a search for records in response to Interim Order MO-3752-I.

[24] The City Building Inspector searched her archived Outlook email items and located the January 8, 2015 email identified by the appellant in his representations. The City Building Inspector advised that the email was sent in response to a general zoning inquiry about the property. However, because the City Building Inspector's name was not identified in the original access request, she was not originally contacted to complete a search for records.

[25] With respect to the records relating to an identified city employee, the city contacted this employee to conduct a search for responsive records. The employee located a number of emails, including the emails dated November 5, 2015. The city provided an affidavit sworn by the Construction Services Secretary who explained that she failed to print these emails inadvertently during the request stage. In any case, the city issued an access decision to the appellant dated November 8, 2019 regarding these email records. I acknowledge that there was a significant delay between the May 17, 2019 compliance date of Interim Order MO-3752-I and the supplementary access decision. I confirm that the delay was not caused by this office. In future, I expect the city will be more expeditious in complying with orders of this office, as per its obligations as an institution under the *Act*.

[26] With regard to the email from the city's Director of Planning and Chief Planner, the city submits that this was not listed in the original request. However, in accordance with Interim Order MO-3752-I, the city conducted a search for these records. The Director of Planning and Chief Planner advised that he conducted an Outlook search of his inbox, outbox and calendar but did not locate any responsive records. The Director of Planning and Chief Planner also searched his 2015 day planner but did not locate any written notes.

[27] The city also submits that the current Director of Housing in the city's Healthy

and Safe Communities department conducted a search of his emails regarding the identified property but did not locate any emails or records relating to meetings.

[28] In addition, the city submits that staff from the councillor's office conducted an additional search of the councillor's emails and calendars but did not locate any further responsive records. The city submits that it has now conducted a reasonable search for responsive records.

[29] I provided the appellant with a copy of the city's representations and affidavits regarding the searches it conducted and invited him to submit representations in response. The appellant did not submit representations.

Analysis and Findings

[30] For the reasons that follow, I am satisfied that the city has now conducted a reasonable search for responsive records pursuant to Interim Order MO-3752-I. I am satisfied the city's further searches demonstrate it made a reasonable effort to locate responsive records in fulfilment of its obligations under the *Act*. In the absence of any representations from the appellant, I am not persuaded that there is a reasonable basis for his belief that additional responsive records exist.

[31] Based on my review of the city's representations and affidavits, I am satisfied that experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to locate records relating to the identified property and the minor variance application. I find that the individuals who participated in the search, including the Access and Privacy Officer, the City Building Inspector, Director of Planning and Chief Planner, the Director of Housing, and the councillor's Executive Assistant, are experienced employees knowledgeable in the subject matter of the request. Based on my review, I am also satisfied that these individuals made a reasonable effort to locate records responsive to the appellant's request.

[32] In the representations he submitted during the inquiry, the appellant identified a number of records or types of responsive records that should exist but were not identified by the city. Because the city did not address these records during the inquiry, I ordered it to conduct further searches for responsive records. I have reviewed the representations and affidavits the city prepared in response to Interim Order MO-3752-I and find that it has adequately addressed these records or types of records. Moreover, in the absence of any representations from the appellant in response to the city's additional searches, I find that the appellant has not provided me with a reasonable basis for his belief that further records exist.

[33] 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.⁷ 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. 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: _____
Justine Wai
Adjudicator

December 12, 2019 _____

⁷ Orders P-624 and PO-2559.