

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3877-I

Appeal MA18-00751

City of Thunder Bay

December 17, 2019

Summary: The City of Thunder Bay (the city) received an eight-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to a specified splash pad; three parts of the request are at issue. The city relied on the discretionary exemption at section 15(a) (information published or available to the public) of the *Act* to refuse access to the detailed budget information requested in relation to the specified splash pad. In addition, the city did not disclose invoices and/or purchase orders responsive to two parts of the request because it took the position that the responsive invoices were disclosed through a previous access request made by the appellant. On appeal, the appellant raised the issue of reasonable search (under section 17 of the *Act*) with respect to the parts of the request dealing with invoices and/or purchase orders.

In this order, the adjudicator does not uphold the city's reliance on section 15(a). The adjudicator also finds that there is insufficient evidence that the city's search for responsive records in the circumstances was reasonable, and orders a further search for items responsive to two parts of the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 15(a), 17, and 22(1)(a).

OVERVIEW:

[1] The City of Thunder Bay (the city) received an eight-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*) for information related to a specified splash pad. At issue in this appeal are items 2, 5, and 6 of the request, as follows:

2 - All invoices/ P.O's [purchase orders] [for the specified splash pad] for fixtures, mechanical, electrical for pad [specified company]

5 - All invoices/P.O's any extras from [specified company]

6 - Budget breakdown for [the specified splash pad] development from Parks + Open Spaces/ All relative budget information

[2] In response, the city provided the requester with a decision letter stating that all invoices in response to items 2 and 5 of the request were previously disclosed to the appellant through another request she had made to the city under the *Act*. With respect to item 6, the city relied on the discretionary exemption at section 15(a) of the *Act* (information published or available to the public) to refuse disclosure. The city's letter stated that the budget could be found on the city's website or by contacting the city's Financial Services directly; it also listed certain line items used for various projects at the specified park since a particular year.

[3] The requester, now the appellant, appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] During mediation, the scope of the issues was clarified to be limited to items 2, 5, and 6 of the request. The issue of reasonable search was added to the scope of the appeal, due to the appellant's belief that the city did not provide her with all invoices and purchase orders in relation to items 2 and 5, and specifically with respect to the splash pad fixtures (the individual devices that spray the water) and the mechanical or electrical equipment.

[5] No further mediation was possible, and the appeal moved to the adjudication stage, where a written inquiry is conducted under the *Act*.

[6] As the adjudicator of this appeal, I sent a Notice of Inquiry, setting out the facts and issues on appeal, first to the city and then to the appellant. I sought and received written representations in response from the parties, which I shared amongst the parties, on consent.

[7] For the reasons that follow, I find that the exemption at section 15(a) does not apply, and I will order the city to issue the appellant an access decision in compliance with the *Act*, in response to item 6 of her request. In addition, as set out below, I find that there is insufficient evidence to uphold the city's search in respect of items 2 and 5 as reasonable, and I will order the city to conduct a further search for responsive records in relation to items 2 and 5 of the request.

ISSUES:

- A. Does the discretionary exemption at section 15(a) apply to the records responsive to item 6 of the request?
- B. Did the city conduct a reasonable search for responsive records in relation to items 2 and 5 of the request?

DISCUSSION:

Issue A: Does the discretionary exemption at section 15(a) apply to the records responsive to item 6 of the request?

[8] The appellant appealed the city's decision to rely on section 15(a) because she believes the city's online budget breakdown is insufficient. She states that a detailed breakdown of the costs is not publically available. For the reasons that follow, I find that the city is not entitled to rely upon section 15(a) in response to item 6 of the request.

[9] Section 15(a) states:

A head may refuse to disclose a record if,

the record or the information contained in the record has been published or is currently available to the public;

[10] Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access.

[11] In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the record that is *responsive* to the request.¹

[12] Here, item 6 of the request relates to a detailed budget for the splash pad at the specified park in the city, and the parties agree, and I find, that that information is not published on the city's website. The appellant submits that the budget information online is general and/or confusingly displayed and she cannot find the detailed budget information she has requested. The city's position is that it does not maintain "records having the level of detailed information relative to particular projects such as those requested" by the appellant. In addition, the city specifically highlights previous orders

¹ Order MO-2263.

of this office that have stated that institutions have no obligation under the *Act* to create records *that do not exist* in order to respond to a request.²

[13] The parties' submissions (and my own review of the online budgets) lead me to the conclusion that the city relied on section 15(a) to refuse access to a record (or information) that has not been published or is not currently available to the public. This means that section 15(a) was not properly claimed because for section 15(a) to apply, the city must have established that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre³ – and that presupposes the existence of a responsive record (or responsive information).

[14] If the city's position is that the requested record (or information) does not exist, it cannot rely on the discretionary exemption at section 15(a) to refuse access to it. Rather, the city should have relied on sections 22(1)(a)(i) and (ii) of the *Act* in its access decision. For ease of reference, these sections say:

22 (1) Notice of refusal to give access to a record or part under section 19 shall set out,

(a) where there is no such record,

(i) that there is no such record, and

(ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists[.]

[15] For these reasons, given the city's position that the requested record (or information) does not exist in response to item 6 of the request, I find that the city cannot rely on section 15(a) of the *Act*. As a result, I will order the city to issue an access decision to the appellant in compliance with the *Act* in relation to item 6 of the request.

Issue B: Did the city conduct a reasonable search for responsive records in relation to items 2 and 5 of the request?

[16] The appellant believes that additional responsive records exist in relation to items 2 and 5 of the request. Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the

² Orders P-50 and MO-2996.

³ Orders P-327, P-1387 and MO-1881.

institution has conducted a reasonable search for records as required by section 17.⁴ For the reasons that follow, I find that there is insufficient evidence that the city's search was reasonable in the circumstances, so I will order a further search.

[17] As discussed, items 2 and 5 of the request are for the following:

2 - All invoices/[purchase orders] [for the specified splash pad] for fixtures, mechanical, electrical for pad [specified company]

5 - All invoices/[purchase orders] any extras from [the specified company named in item 2]

[18] The *Act* does not require an 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 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.⁷

[19] Furthermore, 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.⁸

The city's initial evidence

[20] The city's initial representations did not indicate that it had conducted a search for responsive records to items 2 and 5 of the request, at all. In its initial representations, there is no mention of a search being performed by any city employee in any reasonably expected location. Rather, the city stated that the information requested "could not be released...because these records are not, and have never been, in the custody or under the control of the city."

[21] In addition, the city initially submitted the following:

. . . the purchase and installation of the splash pad . . . was made under a fixed fee arrangement where the contractor was not required to provide

⁴ Orders P-85, P-221 and PO-1954-I.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

⁷ Order MO-2185.

⁸ Order MO-2246.

the city with its costs or invoice breakdowns *and it did not, in fact, provide the city with any* such information. [Emphasis added.]

[22] I do not accept this submission because it is difficult to reconcile with the city's access decision under appeal, which indicated that access was being denied because all invoices from the company named in the request had been disclosed to the appellant through a request she had previously made.

The appellant's position

[23] The appellant made extensive representations regarding the request for proposals (RFP) process, various explanations from the city about the existence or non-existence of records, and the disclosure made to her thus far. She points to such disclosure and argues that invoices and purchase orders are the types of records required by city policy in order for payments corresponding to the RFP to be released.

The appellant also states that the city disclosed such records for splash pad items paid for with money raised by an entity other than the city.

[24] Furthermore, the appellant particularly points to the listing of specified elements of the splash pad in the previously disclosed winning bid (of the company named in her request), at the price point of \$185,390. She submits:

I have enclosed other documentation related to all the expansion and additions to this park. Quotes, invoices, purchase orders for all additions in completion. This is REQUIRED by the City of Thunder Bay using the R.F.P. or [q]quotes for smaller jobs. Every single piece of equipment in this park is accounted for, down to rocks and dirt, but not the largest and mostly costly piece of equipment in this entire expansion. That is completely nonsensical. [Emphasis in original.]

[25] In response, the city submitted that the *Act* does not require it to create a responsive record, and that this "implicitly" means that the city does not have to explain why it did not create a record in a given circumstance, and that it has no obligations under the *Act* to explain or justify its public procurement process. In addition, the city released (or re-released)⁹ a full copy of a purchase order related to the \$185,390 expenditure.

[26] Given the appellant's position, and her above-noted submission in particular, it

⁹ The parties appear to disagree about whether this purchase order was released in its entirety through a previous access request made by the appellant. However, for expediency and convenience, the city attached a full copy of this purchase order to its reply representations, and this was shared with the appellant, on consent.

should be stated that the mere fact that something could reasonably be expected to exist does not necessarily mean that it exists, regardless of other considerations such as what "good business practice" (the appellant's words) may be. What I am tasked to determine in this appeal is whether the city's search efforts were reasonable in the circumstances and whether the appellant has provided a reasonable basis for believing additional responsive records exist.

[27] I find that the appellant has provided a reasonable basis for believing that additional responsive records exist to related to the \$185,390 expenditure and the company named in her request. She has flagged the size of an arguably significant cost relating to the splash pad (\$185,390), and the overall money paid to the company that installed it (about \$500,000), and explained, with supporting documentation, that the city provided similar records for the other companies involved and for the other equipment or products purchased. In my view, this is sufficient to establish a reasonable basis for the appellant's belief that additional responsive records exist in relation to items 2 and 5 of her request.

[28] However, I note that in addition to the above, the appellant submits that the city initially advised her that the splash pad was a "lump sum fee contract" but that it later stated there were no contracts, only requests for proposals or quotes for smaller jobs. While I appreciate the city's submission that the *Act* does not require the city to explain or justify its public procurement process, the form of contract may be relevant to the question of whether a reasonable search was conducted because it would go to what records could reasonably be expected to exist. If, for example, the form of contract authorizing the splash pad was separate from the RFP disclosed to the appellant, then such a record would reasonably be expected to be identified as a responsive record to a request for invoices and purchase orders that flowed from that contract. Without clear evidence from the city about what the form of contract was, I accept that the appellant has provided a further a basis for believing additional responsive records may exist by raising this issue in her submissions.

The city's additional evidence

[29] In response to the appellant's representations, the city provided additional evidence. The city submitted that:

- all relevant responsive records that exist and are in the city's "possession" and control have been provided to the appellant through "this or previous" requests under the *Act*;
- it is for the city to establish that it made a reasonable effort to locate existing records that are reasonably related to the request, and that it met this obligation; and

- the appellant has made several requests, summarized in a table, over the last couple of years “on the very same subject matter that is the subject of this current request[.]”

[30] To explain the steps taken to conduct a search in compliance with its obligations under the *Act*, the city listed the staff contacted to search for the appellant’s previous six *MFIPPA* requests, and those contacted to search for records responding to the present request (which is the subject of this appeal).

[31] With respect to the staff engaged for previous searches, I note that the Notice of Inquiry sent to all parties specified that 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*.¹⁰ While it is agreed that the appellant’s previous requests all relate to the specified splash pad, I do not accept, on the evidence before me in this appeal, that the appellant sought identical records through her previous requests. Accordingly, a listing of the titles of staff engaged to search for responsive records to previous requests is irrelevant to whether the city took reasonable steps to search for records responsive to the request that is the subject of this appeal.

[32] Regarding the request before me, the city’s list of staff engaged in the search for responsive records is insufficient to establish the reasonableness of its search. The Notice of Inquiry specifically asked the city for evidence relating to its search efforts, to be provided by affidavit(s) from the person(s) conducting the search, including:

. . . details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

[33] No affidavit was provided in response, nor was the requested information provided in any form.

[34] Instead, the city submitted that the staff responsible for coordinating *MFIPPA* requests did the following:

made enquires with [c]ity staff, who are experienced and knowledgeable on the matter, particularly: Manager of Parks & Open Spaces and Supervisor of Parks & Open Spaces Planning, and Coordinator of Parks Services.

¹⁰ Orders M-909, PO-2469 and PO-2592.

[35] I find that this submission does not assist the city in demonstrating that its search efforts were reasonable in the circumstances. The city did not identify the locations searched (and why responsive records could reasonably be expected to be found there), particulars about searching in those locations (such as keywords used, and their relevance), and the types of records that would likely be found in each of these locations, by each of the employees involved. This information was specifically requested in the Notice of Inquiry. The lack of this evidence weighs against finding that the city's search efforts were reasonable in the circumstances.

[36] For these reasons, I conclude that the city has not provided sufficient evidence for me to conclude that it conducted a reasonable search for records responsive to the appellant's request. The appellant has provided a reasonable basis to believe that one or more additional responsive records exist. As a result, I do not uphold the reasonableness of the city's search and will order a further search for responsive records.

ORDER:

1. I do not uphold the city's decision under section 15(a) regarding item 6 of the request.
2. I order the city to issue the appellant an access decision in response to item 6 of the request, in compliance with the *Act*.
3. I do not uphold the city's search as reasonable in response to items 2 and 5 of the request. Accordingly,
 - a. I order the city to conduct further searches for responsive records in relation to items 2 and 5. The searches 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.
 - b. I further order the city to provide me with an affidavit sworn by any employee or employees who have direct knowledge of the search, including the following information:
 - i. the name(s) and position(s) of the individual(s) who conducted the search;
 - ii. the steps taken in conducting the search, and if a type of search that would normally be expected (such as a paper or electronic search) is not conducted, an explanation as to why that is;
 - iii. the results of the search; and

- iv. if no records are located, an explanation for why no records are located.
4. I order the city to provide representations and affidavits to this office in compliance with provision 3 of this order, within 45 days of this order. This information may be shared with the appellant, unless there is an overriding confidentiality concern, which must be identified by the city in compliance with *Practice Direction 7* of this office's *Code of Procedure*.
5. 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 for the purposes of the procedural requirements of the access decision. In order to verify compliance with this order, I reserve the right to require a copy of this revised decision.
6. I remain seized of this appeal in order to deal with any issues arising from provisions 3 and 4 of this order.

Original signed by: _____

Marian Sami
Adjudicator

December 17, 2019 _____