

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-4028-F

Appeal MA17-302

The City of Windsor

March 18, 2021

Summary: In this final order, the adjudicator upholds the reasonableness of the city's further search, which she ordered in Interim Order MO-3987-I. The adjudicator also dismisses the appeal, following the city's decision to disclose the records remaining at issue and the additional records it located during its further search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, section 17.

Orders and Investigation Reports Considered: Interim Order MO-3987-I.

OVERVIEW:

[1] This final order resolves the two outstanding issues in this appeal. First, the reasonableness of the city's search for records responsive to the appellants' request for records relating to their 2016 service call to 311 regarding an incident with their neighbour. Second, whether the 20 emails remaining at issue should be disclosed.

Provisions 2 and 3 of Interim Order MO-3987-I

[2] In order provision 2 of Interim Order MO-3987-I, issued December 14, 2020, I ordered the city to conduct a further search for all records responsive to the appellants' request, as set out in paragraph 1 of the Interim Order and including the records specified in items 1 through 7.d of paragraph 30 of the Interim Order. In order provision 3, I ordered the city to provide me with affidavits sworn by individuals who have direct knowledge of the additional search ordered. The affidavits were to include,

at a minimum, the names and positions of the individuals who conducted the search, the steps they took, the types and locations of files searched, and the results of each search.

[3] In paragraphs 1 and 30 of Interim Order MO-3987-I, I wrote:

[1] ...The appellants' access request states and seeks:

All records including but not limited to reports, call logs, memos, emails, notebook entries, post-its, audio recordings, computer terminal usage, City of Windsor network usage, and WAN/internet logs generated, considered, or linked to a call made by the requester on [specified date] to the Windsor Police Service Board Chair's office via 311. [Named individual] spoke with the requester regarding a systemic Police Service Act deficiency, viewed supplementary (digital) material, called the Windsor Police Service with the requesters' knowledge, then viewed additional supplementary materials. Access logs are available. [*sic*]

...

[30] In their detailed representations on the city's search for records, the appellants provide a reasonable basis for concluding that additional records exist. The appellants assert that the city did not conduct a reasonable search for responsive records because it did not identify or locate many records that they know exist or that they believe should exist. Specifically, the appellants state:

1. The city did not provide records of, or respond to their request for, computer terminal usage (user login and logout times) from relevant workstations.
2. The city did not provide records of, or respond to their request for, network usage including WAN/Internet logs. Records released in response to another request support their assertion that these types of records exist, or did exist, but were ignored by the city.
3. They sent a letter to the Mayor dated September 26, 2016 that was not identified as a responsive record.
4. Records confirming the Mayor's receipt of their September 26 letter should exist.
5. When they called the Mayor's office on September 27, 2016, they were told that no one in the office would speak with them. Records such as emails, texts or memos, should exist within the Mayor's office communicating and disseminating this position internally.

6. Records generated by city employees who responded to the appellants' call on September 27, 2016 to the Mayor's office should also exist.

7. The four 311 Service Request Summary Reports disclosed to them, Records 1, 3, 4 and 17, contain information supporting their position that additional records exist as follows:

a. Record 1 refers to "EIS records and file history reviewed" and "noise complaint package to be sent to complainant." The file history and noise complaint package, and any notes on the complaint that were prepared for the police officer who attended their residence should be included in the responsive records.

b. Record 3 states "Forward to Appropriate Department" and "sent a copy to the Mayor's office" and assigns a "311 Email Notification" to employee KS. All of these referenced records should be included in the responsive records.

c. Record 4 states "Forward to Appropriate Department" and "SR 37303 was forwarded to the Mayor's office" and assigns a "311 Email Notification" to employee KS. All of these referenced records should be included in the responsive records.

d. Record 17 refers to "Email Notification to CAO" assigned to employee LM and to a "Custom Email" sent on September 23, 2016 at 4:05 PM. All of these referenced records should be included in the responsive records.

The city's decision to disclose the emails remaining at issue

[4] On January 22, 2021, the city disclosed to the appellants all 20 of the emails remaining at issue in this appeal, without severances. Accordingly, these 20 emails are no longer at issue in this appeal.

The city submits it has complied with Interim Order MO-3987-I

[5] On February 12, 2021, the city submitted five affidavits in response to Interim Order provision 3. The affidavits were sworn by, the Chief of Staff for the Mayor, the former Chief of Staff for the Mayor, the Chief Information Officer/Executive Director for Information Technology (the CIO), the Supervisor of the city's 311 Call Centre, and the city's Manager of Records and Elections and Freedom of Information Coordinator. The affidavits describe the steps each affiant took to search for responsive records.

[6] In his affidavit, the current Chief of Staff for the Mayor confirms that he searched all the freedom of information files for 2017 and found 67 pages of records related to

the appellants' request. All 67 pages of records are attached as Exhibit "B" to his affidavit. He also confirms that he had his staff conduct searches on their computers for any emails or other documents related to the request and no records beyond the 67 pages in Exhibit "B" were located.

[7] In her affidavit, the former Chief of Staff for the Mayor confirms that she was responsible for maintaining the records of the Mayor's Office during her tenure, but she did not maintain a log of all documents or communications or save all the correspondence, including emails, that the Mayor's Office received. She also confirms that upon receiving a freedom of information request, the Mayor's Office would gather all relevant documents and place them in a file related to the year of the request and that she did this with the appellants' request. Attached to her affidavit as Exhibits "A", "B" and "C" are eight pages of records that include the former Chief of Staff's handwritten notes of a telephone conversation with one of the appellants, an email she sent to the Windsor Police and another email she received from the assistant of the city's Freedom of Information Coordinator regarding the appellants' request. Finally, the former Chief of Staff confirms that she gave no directive, verbal or written, to any staff at the Mayor's Office that they were not to take any telephone calls from one of the appellants and, therefore, no records regarding such a directive exist.

[8] In his affidavit, the CIO confirms that the city does not have the computer terminal usage and network usage, including WAN/Internet logs—detailed in items 1 and 2 of paragraph 30 of the Interim Order—that the appellants seek. He confirms that the city keeps records related to terminal usage and internet logs, but only for short periods of time that vary from a few days up to one year, depending on the type and volume of activity and available log storage at that time. The CIO affirms that the city would have no records existing on April 24, 2017—the date of the appellants' request—of computer terminal usage, and WAN or internet logs that occurred on September 26, 2016 or close to that date. He states that he is unable to search the computer of the former Chief of Staff for the Mayor because it was discarded.

[9] In her affidavit, the Supervisor of the city's 311 Call Centre affirms that she searched the centre's records for any additional records responsive to the appellants' request and located none. She also confirms that no additional records exist regarding the references noted by the appellants to "EIS records and file history reviewed," "noise complaint package to be sent to complainant," and "forward to appropriate department." Attached as an exhibit to this affidavit is a blank copy of the standard form usually sent by regular mail to an individual who has made a noise complaint.

[10] In her affidavit, the city's Manager of Records and Elections and Freedom of Information Coordinator states that she has held her position since April 22, 2019, and in response to Interim Order MO-3987-I, she pulled the original file from the city's records retention centre and reviewed it to familiarize herself with the responsive records. The Manager confirms that additional searches for responsive records were conducted in the Council Services Department, the 311/211 Call Centre, the Information

Technology Department, the Mayor's Office, Windsor Police Services and By-law Enforcement. She also confirms that as a result of her inquiries, she located additional records—recordings of calls made by the appellants to the 311 Call Centre, copies of 27 letters the appellants sent to the Mayor's former Chief of Staff addressed to various city staff, and the file history reviewed by a By-Law Enforcement Officer—that she intended to disclose to the appellants on February 16, 2021.

[11] I shared the five affidavits with the appellants and asked them to consider the evidence in the affidavits and the city's decision to disclose the records at issue and the additional responsive records it located, and to let me know if they were satisfied that the city's search was reasonable and that there remain no outstanding issues in this appeal. I also invited the appellants to provide representations in response if they continued to challenge the reasonableness of the city's search or had any concerns about the city's compliance with the provisions of Interim Order MO-3987-I.

The appellants submit that additional responsive records exist

[12] The appellants provide representations addressing the city's further search and arguing that the city has additional responsive records that it should disclose. They begin by acknowledging that the city disclosed the 20 emails at issue in this appeal and the additional records it located during its further search. However, they note that the exhibits to the five affidavits contain six records that the city did not previously identify as responsive records.

[13] The appellants submit that, based on the content of certain records, additional records should exist. For example, they argue that there should be records related to the city's preparation of a "formal response" to them that is mentioned in an email sent by the Chief Administrative Officer (the appellants identify it as Record 10 in one paragraph and then as Record 16 in another). They state that it is obvious to them, from this record, that the CAO awaited the results of an investigation into past complaints and an employee's statement that she would "look into" an issue mentioned in that email. They submit that because they received no "formal response" from the city, they are left to reasonably assume that the CAO halted this activity on the advice of counsel.

[14] The appellants also argue that the city should produce all of the records on which the city solicitor relied when she made an allegedly disparaging statement about them in Record 12, an email from the solicitor to other city staff. The appellants demand that the city produce 18 specific records that they believe were relied on by the city solicitor. All 18 records listed by the appellants are records of the Windsor Police Service—calls for service, general occurrence reports and police officers' notes—relating to an incident that occurred in 2009 and three incidents that occurred in 2012. The appellants continue by providing a detailed account of each of the underlying incidents involving the police on the specified dates in 2009 and 2012. The appellants assert that none of the affidavits provided by the city to the IPC contradicts their "plain, unambiguous view" that additional records should reasonably exist.

The city has disclosed all responsive records and has conducted a reasonable search for responsive records

[15] I have reviewed the city's evidence in its five affidavits and the records it has disclosed to the appellants, and the detailed submissions of the appellants regarding the additional records they claim should exist. Considering all the evidence and information before me, I am satisfied that the extensive evidence from the city about its additional search for responsive records establishes that the city has conducted a reasonable search for responsive records.

[16] The appellants' submissions do not persuade me that there is a reasonable basis to conclude that additional responsive records exist in the city's custody or control. The appellants' submissions reflect their understanding of the contents of the records and their assumptions about what additional records should exist based on their interpretation of statements in city staff emails. The appellants' submissions also reflect their knowledge of records from the Windsor Police Service that they appear to possess from other appeals they have made to the IPC. These assumptions and interpretations are subjective, and not necessarily accurate. Similarly, the appellants' contention that records from 2009 and 2012 are responsive to this appeal is based on conjecture; they believe that city staff must have relied on these older records to make certain statements about them in the responsive records that were disclosed. The appellants' conjecture does not persuade me that additional responsive records exist, or that the city should have located and produced, as responsive, records of the Windsor Police Service from 2009 and 2012.

[17] Finally, I do not accept the appellants' argument that the city's affidavits are insufficient. The affidavits were sworn by experienced employees knowledgeable in the subject matter of the request, who appear to have made a reasonable effort to locate records that are reasonably related to the request. Accordingly, I find that the city has conducted a reasonable additional search for responsive records.

No issues remain to be addressed in this appeal

[18] As noted above, the city has disclosed to the appellants the remaining records at issue and the additional records it located through its further search. It also disclosed six records in its affidavits that it had not previously identified as responsive.

[19] As a result of the city's decision to disclose all identified records to the appellants and my conclusion that the city's search was reasonable, I am satisfied that there are no remaining issues to be addressed in this appeal. Accordingly, I dismiss this appeal.

FINAL ORDER:

1. I uphold the reasonableness of the city's further search for records, which I ordered in Interim Order MO-3987-I, and I dismiss the appeal.

Original signed by: _____
Stella Ball
Adjudicator

_____ March 18, 2021