

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-4083-I

Appeal MA18-386-3

The Corporation of the City of Oshawa

July 8, 2021

**Summary:** In the second interim order of this appeal, the adjudicator finds that the Corporation of the City of Oshawa (the city) has provided insufficient evidence of its search efforts, if any, in relation to items 3 and 5 of the original request, despite being ordered to conduct a further search for these items in Interim Order MO-3973-I. Accordingly, she does not uphold the city's search, as reasonable under section 17 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In doing so, the adjudicator also addresses issues raised by the city with respect to whether searching backups is required.

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

**Orders Considered:** Orders MO-2055-I, MO-2141-F, MO-3751-R, and MO-3973-I.

### OVERVIEW:

[1] This order addresses whether the Corporation of the City of Oshawa (the city) complied with Interim Order MO-3973-I by conducting the searches ordered in relation "items 3, 5, and 7," and whether those searches were reasonable, under section 17 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). As I will explain, the city has not provided sufficient evidence of its search efforts, and as a result, I do not uphold its search as reasonable.

[2] In Interim Order MO-3973-I, the city was ordered to conduct further searches in relation to three categories of records (or types of records), which I had labeled as items 3, 5, and 7 in the interim order. Items 3, 5, and 7 of the request were for the

following records:

- 3) the Planning & Development Services Department's "[street name]" property file;
- 5) correspondence with the two named previous real estate managers; and
- 7) a voicemail message referenced in Record 233.

[3] The city was ordered to provide the Office of the Information and Privacy Commissioner of Ontario (the IPC) with representations and affidavits in compliance with the specifics of the ordered searches, within 30 days of the Interim Order MO-3973-I.

[4] The city initially provided brief written representations in response, and citing the COVID-19 lockdown, stated that it could not provide supporting affidavits at the time. The city's representations were shared with the appellant, who provided written representations in response, and asked that affidavits be provided. The city was given an opportunity to provide representations in response, and it did so, along with two affidavits that were digitally signed. Upon my review of the city's reply representations, I determined that it was not necessary to ask the appellant for further representations.

[5] For the reasons that follow, I will order the city to conduct a search for items 3 and 5 of the request.

## **DISCUSSION:**

### **Did the city conduct a reasonable search in relation to items 3 and 5, in accordance with Interim Order MO-3973-I?**

[6] As I will explain below, the city has not provided sufficient evidence of further search efforts, and as a result, I will order the city to conduct a search for items 3 and 5 and provide supporting affidavit evidence regarding its search efforts.<sup>1</sup>

[7] Before discussing items 3 and 5 in greater detail, it is useful to set out the relevant provisions of Interim Order MO-3973-I relating to them:

3. I uphold the reasonableness of the city's search, in part. *I do not uphold the city's search for responsive records relating to items 3, 5 and 7, above. Accordingly,*

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<sup>1</sup> This order will not address the order provisions relating to items 2, 4, and 7 because they are subject to another appeal at the IPC.

a. *I order the city to conduct further searches for responsive records.* 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 questions in relation to which it conducted searches
- ii. the name(s) and position(s) of the individual(s) who conducted the search;
- iii. 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;
- iv. the results of the search; and
- v. 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 30 days of this order. This information may be shared with the appellant, unless there is an overriding confidentiality concern. [Emphasis added.]

[8] In summary, the city was ordered to conduct further searches in relation to items 3 and 5, and to provide affidavits to the IPC in compliance with the specifics set out in the order.

### ***Item 3***

#### *Interim Order MO-3973-I*

[9] In Interim Order MO-3973-I, I found that the city had not provided sufficient evidence regarding the issue of whether a *property file* exists, in relation to item 3. I noted that the city stated that no such file exists, but I found its responses to the points raised by the appellant to be vague and insufficiently detailed, in light of the evidence that appears to contradict the city's assertion that no property file exists (records 15 and 20, which had been disclosed to the appellant).

[10] As noted in Interim Order MO-3973-I, Record 15 is an email enclosing dozens of attachments, written by the city's director of Planning Services in the city's Development Services Department. In Record 15, the director of Planning Services

addresses two individuals and says:

[Name 1, the name of principal planner]: Print all and file in the [street name] file that [Name 2] will get for you. Then give the file to [Name 3] he has the report already

[Name 2]: pls get the file for [Name 1]

[11] The appellant had argued that Record 15 is evidence that a property file exists, that the plain meaning of this exchange means that a property file exists. He rejected the city's submission that this is a turn of phrase, and argued that the entire body of the email does not make sense if it was. He also pointed to the role of the writer of the email (as director of Planning Services) and the high degree of familiarity that he is said to have had regarding the city's record-keeping practices and holdings.

[12] In addition, the appellant pointed to other evidence that is consistent with there being a property file. He provided a copy of Record 20, which is an email with attachments, signed by the same director, which contains an instruction to print to file. He also noted the city's representations about its record-keeping practices for departing staff members, specifically, that all relevant correspondence be saved into relevant folders (either electronically or on paper).

[13] Furthermore, in Interim Order MO-3973-I, I noted that if other properties were being considered as surplus by the city, it would be reasonable to expect that the city kept separate files for these properties.

[14] Having considered the representations of the city and the appellant, and the contents of records 15 and 20, I stated the following:

In my view, if there is an alternate explanation for "print all and file in the [street name] file . . . [t]hen give the file to [name]," the city did not sufficiently provide it. The city states that reference to the "[street name] file" is "an informal turn of phrase used to describe a collection of records" and that "the use of this phrase is not necessarily a guarantee that the city has a file that actually bears that name." I find that this response is a vague assertion, and is insufficiently detailed to accept in the circumstances.

[15] I will now turn to the evidence the city provided, in light of that analysis, after it was ordered to conduct a further search in relation to item 3.

*The city's initial representations, after Interim Order MO-3973-I was issued*

[16] The city's initial representations regarding item 3 were brief. After stating that the FOI Branch Request Form that was sent out to (unidentified) staff in Development Services for items 3 and 5, the city states the following:

Staff in Development Services (including Planning Services) conducted further searches of both electronic and physical files using the above parameters, as ordered. Resulting from the supplemental searches, staff concluded that the appellant has already been provided with a complete copy of what could be termed the "Patton Street Property File." Therefore, no further responsive records exist for this portion of the request.

*The appellant's representations*

[17] In response to the city's representations, the appellant asks that affidavits be provided and states the following about item 3, the property file, in part:

Given the email correspondence between staff specifically referring to the "Patton Street" property file (records 15 and 20 of original access decision), the City once again provides a vague statement that no further responsive records were found.

*The city's reply representations*

[18] In reply to the appellant's representations on the property file, the city states the following:

The City maintains that a file entitled "Patton Street" or "Patton Street Property File" does not exist; therefore, the City is unable to supply a collection of records labelled "Patton Street Property File," or a variation thereof. This conclusion is consistent with the results of the search efforts of City staff, which are detailed further below.

[19] It also repeated a submission (before I made my decision in the interim order) that the appellant has been provided with all records in the custody and/or under the control of the city related to what could have been termed the "Patton Street Property File," if such a file ever existed (which the city denies).

[20] In addition, the city submitted that it cannot "compel sworn affidavits from former employees regarding a search that they did not conduct" because they are no longer employed by the city "and/or associated with the issue at hand, the records under the custody and/or control of the City, or the City itself."

[21] With this set of representations, the city also provided two affidavits. One affidavit was that of the Information, Access and Privacy Officer (the information officer), but this employee only conducted a search in relation to items 2 and 4, not items 3 and/or 5. The other affidavit was that of the Manager, Policy in Planning Services (the manager). This employee had provided an affidavit that I considered in

Interim Order MO-3973-I.<sup>2</sup>

[22] The manager characterized the order to conduct additional searches with reference only to the following language, and not to the fact that I was not upholding the city's search efforts relating to items 3, 5, and 7:

I order the city to conduct further searches for responsive records. 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.

[23] She then attests, "As such, I received a Secondary FOI Branch Request Form requesting that a search be conducted for the following: "Copy of the entire contents of the Planning and/or Development Services' 'Patton Street Property File'."

[24] The manager then attests that:

*In response, I confirmed to City Clerk Services staff no responsive records exist in addition to those that were previously provided to the appellant in response to my initial search on this file. [Emphasis added.]*

[25] She then goes on to describe her initial search efforts (that is, those take before Interim Order MO-3973-I was issued), including her confirmation to City Clerk Services "that the 'property file' referred to by the appellant is the file that the City has already provided to the appellant."

*Analysis/findings re: item 3*

[26] Based on my review of the parties' representations and the city's affidavits, I am not satisfied that the city has provided sufficient evidence regarding its search efforts in relation to item 3, as ordered in Interim Order MO-3973-I.

[27] The city's initial representations only specify the parameters of the search, using the wording of the request, so I find that the parameters presented to staff were reasonable.

[28] However, the city did not specify which staff in Development Services (including Planning Services) conducted searches of electronic and physical files. There is no indication from this statement about how many employees were involved, what their experience levels were, or why they would be considered reasonably knowledgeable in the subject matter of the request.

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<sup>2</sup> In that order, she was referred to as "the principal planner," based on the title in the affidavit that before me at the time.

[29] Furthermore, the only affidavit evidence that relates to item 3 does not indicate that the manager conducted a search (or that any city employee did) for item 3 at all, after Interim Order MO-3973-I was issued. Rather, the manager attests that in response to receiving the FOI Branch Request Form, she confirmed to the city clerk that no responsive records exist in addition to those previously provided to the appellant in response to her initial search. In her affidavit, the manager listed steps initially taken to conduct a search, but not a search conducted after the interim order was issued. In the circumstances, I find the city's evidence to be unclear. On the one hand, the city states that unspecified employees in a certain department conducted searches, but on the other, the city provided an affidavit from an employee who does not appear to have conducted any search after Interim Order MO-3973-I was issued, despite being ordered "to provide me with an affidavit sworn by any employee or employees who have direct knowledge of the search."

[30] In addition, neither the city's representations nor the manager's affidavit address records 15 and 20, which appeared on their face to point to the existence of a file relating to the property in question, or the following analysis in relation to that evidence, in Interim Order MO-3973-I:

In my view, if there is an alternate explanation for "print all and file in the [street name] file . . . [t]hen give the file to [name]," the city did not sufficiently provide it. The city states that reference to the "[street name] file" is "an informal turn of phrase used to describe a collection of records" and that "the use of this phrase is not necessarily a guarantee that the city has a file that actually bears that name." I find that this response is a vague assertion, and is insufficiently detailed to accept in the circumstances.

[31] As the above concerns were not addressed in the city's representations and/or affidavits, they remain.

[32] For these reasons, I find that the city has provided insufficient evidence that it conducted any search in compliance with Interim Order MO-3973-I.

### ***Item 5***

#### *Interim Order MO-3973-I*

[33] In Interim Order MO-3973-I, I found that it was not clear that the city had searched for records responsive to item 5, and stated the following:

Item 5 is correspondence with the two named previous real estate managers. The appellant provided supporting evidence of their involvement in subject matter of the request, which the city has not disputed. What the city has said is that these individuals are no longer employed with the city. The city also stated what its standard practice was towards past employees' records, but it is not clear that these employees'

record holdings were actually searched. I find that their records, if any, about the subject matter of the request are within the scope of the appeal, considering the opening words of the request. I disagree that their records amount to "correspondence" and that "correspondence" is outside the scope of the request, when clearly some of what was disclosed to the appellant was correspondence between other individuals (for example, records 15 and 20, discussed below). Therefore, I will order the city to conduct searches of the record holdings of those two past employees.

*The city's initial representations, after Interim Order MO-3973-I was issued*

[34] After the interim order was issued, the city provided brief representations about item 5. After stating that the FOI Branch Request Form that was sent out to (unidentified) staff in Development Services for items 3 and 5, the city stated the following about item 5:

. . . staff were unable to find any additional correspondence from previous Real Estate Managers related to the "Patton Street Road Allowance" that had not already been provided to the appellant. Therefore, no further responsive records exist for this portion of the request.

*The appellant's representations*

[35] In response to the city's representations, the appellant flagged the fact that the city had previously stated in its submissions (before the interim order was issued) its practice is to have supervisors review the email inboxes of departing staff members before destruction.

[36] The appellant notes that it had become apparent that the city had not conducted searches of the two employees' mailboxes.

[37] He submits that nothing indicates that the city has done so yet.

[38] He also submits that because the city's stated practice is to delete employees' email mailboxes, doing a search for records responsive to item 5 would have required the city to search its archive/back for data, and not its live email system (which would not yield any results, after the deletion of mailboxes). As a result, the appellant wants to know where the city conducted its search, such that it can offer a valid statement that it conducted a reasonable search. He states that the city should search the appropriate email archive for records responsive to the request and provide details as to what and where it searched, and provide affidavit evidence that includes the date of any such search. The appellant submits that if the city put forth results of an empty search, as he believes it did, then he objects to the reasonableness of the entire search, and submits that it was done in bad faith and did not comply with the spirit of the *Act*. He submits that it would also mean that the employees who conducted the search were not reasonably experienced or knowledgeable in the subject matter of the request if they failed to search the archive/backups for the appropriate periods.



[39] In addition, the appellant submits that the city should search the entire mailbox belonging to the two employees, and not limit it to just the inboxes. He submits that this would result in inclusion of from folders holding sent items and any additional mailbox folders or shared departmental mailboxes.

[40] With regards to the city's submission that it did not locate any additional records relating to the previous employees, the appellant states that he would like to make it very clear that the city has not provided any records at all in relation to those employees.

[41] As a result, he submits that the city has not complied with provision 3 of the interim order to provide representations and affidavits with regards to no records being found at all in response to the request. He also states that he has provided the IPC with proof of email correspondence and faxed letter correspondence (with transmittal page) with the city, none of which has been contested. Accordingly, he submits that there is sufficient proof that these records should exist, and asks that I order detailed sworn affidavits from the directly involved individuals, as the adjudicator did in Final Order MO-2141-F. (Having reviewed that order, I believe that the appellant is referring to the interim order which was issued before that final order, Interim Order MO-2055-I.) The appellant submits that otherwise the entire freedom of information process might as well not exist.

[42] Finally, the appellant submits that the city states that its search was conducted by staff in Developmental Services (including Planning Services), and describes this as a limitation, and one which should not have been in place. He states that the city should identify the supervisory staff that performed the city's mailbox review in accordance with what the city describes as best practices when the two ex-employees left the city. He states that the emails and files of these supervisory staff should be searched too because of the practice that the city described regarding destroying records.

*The city's reply representations*

[43] The city provided reply representations and two affidavits in response to the appellant's representations. Neither of the affidavits mentions, or indirectly refers to, item 5 of the request.

[44] The city submits that it is neither required nor able to retain every record in its original location and format in perpetuity, unless it is deemed necessary by a business, fiscal, or legal requirement. However, the city states that it is required to retain official records in accordance with the record-keeping provisions of the *Municipal Act, 2001*,<sup>3</sup> in conjunction with its Records Retention By-Law.

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<sup>3</sup> S.O. 2001, c. 25.

[45] The city reiterates that it is standard practice for the mailboxes of departing staff to be reviewed by their direct supervisor and destroyed only after all official records have been appropriately saved to the associated electronic file(s). As a result of this process, the city states that all records related to city business are to be saved in the appropriate location(s) on corporate servers in order to ensure all business records are retained in accordance with the City's Records Retention By-Law. It submits that this practice is consistent with records management best practice and compliant with the *Municipal Act, 2001*.

[46] The city states that the mailboxes of staff members who no longer work for the city no longer exist, so the city is unable to search them. However, it states that, as emails deemed to be official records are transferred from the mailboxes of former staff into the appropriate electronic folders, any existing emails of former staff members would have been provided to the appellant as responsive to the request.

[47] Regarding the appellant's request that the city search an archive or backup for the original mailboxes of former employees, the city states that it is generally accepted that backups are not considered a record of their own accord; rather they are created as an emergency recovery measure. Therefore, the long-term retention of backups was not included as part of the city's Record Retention By-law at the time the original request was submitted, or when the former staff worked for the city.

[48] Therefore, the city maintains that all records that are responsive to the appellant's request have already been provided, including any responding email correspondence(s) originating from the mailboxes of former or current City staff.

*Analysis/findings re: item 5*

[49] At the outset, I wish to address the appellant's submission that if I do not order affidavits from specific individuals, as the adjudicator of Interim Order MO-2055-I had, the entire freedom of information process may as well not exist. The *Act* requires that institutions provide sufficient evidence to explain the steps taken to conduct a search. There may be many reasons why specific individuals may not be in a position to provide affidavits, including relocation or death, and the absence of affidavits from people possibly in the best position to provide evidence due to such reasons will not render the freedom of information process meaningless. In any event, I am not satisfied that I am in a position to specify who should be required to provide affidavits about the search efforts for records responsive to item 5 because I have minimal evidence in that regard. This does not appear to have been the case for the adjudicator of Interim Order MO-2055-I, and I decline to follow the specificity of the provisions of that order.

[50] The city's initial representations were brief and vague regarding item 5, and somewhat incoherent. On the one hand, the city states that it sent an FOI Branch Request Form to staff in a certain department, which would suggest that a search was conducted. On the other hand, its representations suggest that no search was conducted in relation to item 5, and neither of the affidavits provided relates to item 5 although I specifically directed the city to provide such evidence in Interim Order MO-

3781-I. I also note that the city's representations do not identify the staff members and locations searched, so I have insufficient evidence to assess whether the employee(s) involved were experienced employees in the subject matter of the request and if they searched locations that records would reasonably be expected to be found in the circumstances. Therefore, I find that the city has not provided sufficient evidence of its search efforts, if any, in relation to item 5 of the request.

[51] The city's reply representations also contain statements relating to two issues that need to be addressed: the issue of whether backups should be searched in order for a search to be found reasonable, and the suggestion that backups are not usually considered a record of their own accord.

A reasonable search may not necessarily require a search of backups

[52] In addition to the lack of sufficient evidence about the city's search efforts, if any, discussed above, what also suggests that the city did not conduct a search is its assertion that locating records responsive to item 5 would require searching backups. The city asserts that it has no legal obligation to do so.

[53] The city's position regarding searching backups does not withstand scrutiny.

[54] Past IPC orders indicate that an institution may be required to search its backup data for its search to be upheld as reasonable. In Final Order MO-3768-F, Senior Adjudicator Shaw stated this directly, in an appeal involving the city:

In Order PO-3050, Commissioner Beamish noted that a reasonable response to an access request does not necessarily require a search of backup data, unless there is reason to assume such a search is required on the basis of evidence provided by the requester.

In view of this, what constitutes a reasonable search in any given appeal is a contextual inquiry.

[55] After issuing Final Order MO-3768-F, the appellant in that appeal brought information to the attention of Senior Adjudicator Shaw appearing to show that the city had in fact created a backup of an (F:) drive before the drive was deleted. In Reconsideration Order MO-3751-R, Senior Adjudicator Shaw found that in the inquiry leading to Final Order MO-3532-F, the city failed to provide information central to the issue to be decided (reasonable search), and that this constitutes a fundamental defect in the adjudication process. As a result, she allowed the reconsideration request relating to Final Order MO-3768-F.

[56] Therefore, I do not accept the city's position that it is not required to search its backups in order for its search to be found reasonable. Whether or not a search of backups will be required in this appeal will depend on the circumstances in this appeal.

[57] In this appeal, the city has already stated that emails were deleted. This raises

questions about whether those deleted emails can be retrieved, and what the city's retention policy is for such records. The city states that, on the one hand, the mailboxes cannot be searched because they were deleted, but on the other, emails deemed to be official records are transferred from the mailboxes of former staff into the appropriate electronic folders, any existing emails of former staff members would have been provided to the appellant. I am unable to clearly understand from this that the city conducted a search, or if it had conducted a search where those "appropriate electronic folders" would be, and who would be best to search them. Due to this ambiguity, I will be ordering the city to provide me with affidavit evidence regarding both the applicable retention period for records responsive to item 5 and the possibility of retrieving any emails transferred from former staff by searching the city's backup record holdings. The city is asked to explain whether the deleted mailboxes including responsive emails could be retrieved from the city's backup record holdings.

### ***Conclusion***

[58] For these reasons, I am not satisfied that the city has provided sufficient evidence of its search efforts with respect to items 3 and 5 of the request, if any, and as a result, I will be ordering the city to conduct a further search for items 3 and 5 of the request.

### **ORDER:**

1. I do not uphold the city's search, if any, conducted in response to Interim Order MO-3973-I.
2. I order the city to provide me with affidavit evidence addressing the concerns relating to item 3 and Records 15 and 20, as described in this order.
3. I order the city to provide me with affidavit evidence regarding the applicable retention period of records responsive to item 5 and the possibility of retrieving these records from the city's backup record holdings.
4. I order the city to conduct a further search for records responsive to item 3 of the original request, and item 5, if that is still possible. The search(es) 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.
5. 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:
  - a. whether the search was for item 3 or item 5;

- b. the name(s) and position(s) of the individual(s) who conducted the search;
  - c. 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;
  - d. the results of the search; and
  - e. if no records are located, an explanation for why no records are located.
6. I order the city to provide representations and affidavits to this office in compliance with provisions 2 and 3 of this order, within 30 days of this order. This information may be shared with the appellant, unless there is an overriding confidentiality concern.
7. 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 access decision.
8. I remain seized of this appeal in order to deal with any issues arising from provisions 2, 3, 4, and 5 of this order.

Original Signed by: \_\_\_\_\_

Marian Sami  
Adjudicator

July 8, 2021 \_\_\_\_\_