Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4116

Appeal MA19-00749

City of Greater Sudbury

October 25, 2021

Summary: The City of Greater Sudbury (the city) received a request for information about statistics relating to dogs and cats that were housed in a shelter or pound operated by a named former animal control service provider and the city. The city granted partial access to the responsive records. The requester appealed on the basis that, amongst other things, the city had control over responsive records that may be in the custody of the named former animal control service provider, but had not included such records in its access decision. In Order MO-3832, the adjudicator found that the city conducted a reasonable search for responsive records within its custody, but that the city has control over any responsive records in the custody of the named former animal control service provider. The city was ordered to request responsive records from the named former animal control service provider and to issue an access decision on any records that are provided to it. The city's subsequent access decision indicated that creating a process or query function capable of producing a responsive record would unreasonably interfere with the city's operations. In this order, the adjudicator finds that responsive records can be generated for the city by the named former animal control service provider and the process of producing them would not unreasonably interfere with the operations of the city. The city is ordered to conduct further searches for the records responsive to the appellant's request, in accordance with the findings in this order, and to issue a new access decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) ("definition of record"), 4(1), 45(1), Regulation 823, sections 1, 6(5) and 6(6).

Orders Considered: Orders MO-2129, MO-3832, MO-3894, PO-2730 and PO-3002.

Cases Considered: *Ontario (Criminal Code Review Board) v Doe*, 1999 CanLII 3805 (ON CA); *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

OVERVIEW:

[1] An individual submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) to the City of Greater Sudbury (the city) for access to the following information:

> Please provide the following statistics (separate information for each shelter or pound, separate information for dogs and cats) for the past 5 years:
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> ([A named former animal control service provider] and City Animal Services)
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> • Number of animals to enter each shelter
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> • Number of animals returned or claimed by owner
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> • Number of animals adopted
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> • Number of animals euthanized and the reason why - medical or behavioral
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> • Number of animals - if any - sold or gifted to a research facility or a similar program
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> • Number of animals gifted or sold to research facilities returned after to shelter for adoption vs. number euthanized
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> Please provide all requests from research facilities asking for animals from each shelter - including any emails and or any other correspondence relating to animals for research.

[2] The city issued a decision granting partial access to the records it identified as responsive to the request. The city denied access to the remaining records under section 15(a) (information published or available to the public) of the *Act* and directed the requester to its website.

[3] The appellant appealed the city's decision. At mediation the appellant raised the reasonableness of the city's search for responsive records.

[4] At this stage, the following records had been disclosed to the appellant:

- Animal Control Reports of the named animal control service provider for the years 2012, 2013, 2014, 2015 and 2016;
- Two Intake Detail Reports for the time period of January 1, 2017 to April 6, 2017;
- Nine Outcome Summary Reports for the time period of January 1, 2017 to April 6, 2017;
- Four Euthanasia History Reports for the time periods of January 1, 2017 to April 6, 2017 and October 24, 2016 to December 31, 2016;
- A Report described in the city's decision letter as being "Animal Care and Control Next Steps: Trap/Neuter/Return (TRN) and Spay/Neuter Programs Report" [available online].

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process.

[6] I conducted an inquiry under the *Act* and issued Order MO-3832.

[7] In the order, I found that the information requested by the appellant with respect to animals neutered or spayed at a research facility, or otherwise, fell outside the scope of the request and that the city conducted a reasonable search for responsive records within its custody, but that the city has control over any responsive records in the custody of the named former animal control service provider and therefore the general right of access in section 4(1) applies to those records. I ordered the city to request responsive records from the named former animal control service provider and to issue an access decision on any records that were provided to it.

[8] In particular, the order provisions in Order MO-3832 were the following:

1. I uphold the reasonableness of the city's search for responsive records within its custody.
2. I order the city to request responsive records from the former animal control service provider requiring it to provide the city with a copy of any records that are located.
3. I order the city to issue an access decision on any responsive records that are provided to it by the former animal control service provider, without claiming that the request is frivolous or vexatious and without recourse to a time extension, in accordance with the requirements of sections 19, 21, 22 and 45 of the *Act*, as applicable, and to send me a copy of the decision letter when it is sent to the appellant.

[9] In accordance with Order MO-3832, the city requested responsive records from the former animal control service provider and received its response. The city then issued an access decision. The decision read, in part:

> In compliance with [Order MO-3832], the [city] has requested from [the named former animal control service provider] any records responsive to your request. They have advised that the reports they generated during the term of their contract with [the city], copies of which have already been provided to you (Records 2 to 6), are the only responsive records. As such, **there are no additional record[s] responsive to your request**. [The city's emphasis]
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> It should be noted that section 1 of Regulation 823 provides that "[a] record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution."
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> [The named former animal control service provider] have advised that they use a custom database that does not have the capacity to produce records to respond to your request. Additionally, to create a process or query function capable of producing a responsive record would unreasonably interfere with the operation of the institution.

[10] The appellant appealed the city's access decision.

[11] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process.

[12] I sought and received representations from the city on the facts and issues set out in a Notice of Inquiry. The city's representations were shared with the former animal control service provider who did not provide responding representations, although it did provide submissions in response to an earlier letter, which I set out below. I determined that it was not necessary to seek representations from the appellant to make my findings in this appeal.

[13] In this order, I find that responsive records can be created for the city by the former animal control service provider and that the process of producing them would not unreasonably interfere with the operations of the city. I order the city, in collaboration with the former animal control service provider, to conduct further searches for the records responsive to the appellant's request, in accordance with the findings in this order, and to issue a new access decision. The city is reminded of the fee and fee estimate provisions in the *Act* and Regulation 823.

DISCUSSION:

[14] The sole issue in this appeal is whether the records in the custody of the former animal control service provider are "records" under the *Act*. The city claims that they are not, because the process of producing records responsive to the appellant's request would unreasonably interfere with the city's operations.

[15] Section 2(1) of the *Act* defines a "record" as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
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> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
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> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

[16] Section 1 of Regulation 823 under the *Act* states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the *Act* if the process of producing it would unreasonably interfere with the operations of an institution.

The representations

[17] In its representations, the city explains the process it went through to obtain the information that it set out in its decision letter. It explains that the named former animal control service provider uses a different computer system than the city, and it does not have the same capacity to produce reports similar to those that the city supplied to the appellant.

[18] The city submits that in order to produce reports like the ones it provided to the appellant, the named former animal control service provider would have to make changes to their computer system.

[19] The city further submits that in addition to statistics, the appellant sought access to "the reason why - medical or behavioral" for the euthanasia of animals. It asserts that this is the only requested category of information included in the city's reports but

that category is not included in the reports of the named former animal control service provider. The city submits that the named former animal control service provider's computer system does not include the same functionalities to query and report on reasons for euthanasia.

[20] Relying on the definition of record in section 2 of the *Act*, as limited by section 1 of Regulation 823, the city submits that there is no obligation for it to create a record, and relies on the following passage from Order MO-2129, where adjudicator Bhattacharjee writes:

> [...] if the requested information falls within paragraph (b) of the definition of a record, the Police have a duty to provide it in the requested format (e.g., a list) if it can be produced from an existing machine readable record (e.g., a database) by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution, and doing so will not unreasonably interfere with the operations of the Police. …

[21] The city submits that the named former animal control service provider does not have sufficient resources and staff to produce a record, taking the position that it would unreasonably interfere with the named former animal control service provider's operations.

[22] The city also supplied confidential representations in support of its position that I have reviewed and considered, but cannot be set out in this order. The city also relied on correspondence that it received from the named former animal control service provider, which the city also asked to be held in confidence. I have reviewed and considered this information, which I am also not setting out in this order due to confidentiality concerns.

[23] In response to a letter it received in the course of adjudication the named former animal control service provider stated that it is no longer under contract to the city and is not contractually required to perform any duties for it. Further, it submits that there are no records to produce as it was not required to "keep and report on these matters and we did not keep records or report on these matters".

Analysis and finding

[24] Generally speaking, an institution is not required to create a new record in response to a request under the *Act*.[1] In addition, this office has previously stated that

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[1] See Order MO-1989 upheld in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed.[2]

[25] I have carefully reviewed the information the city has provided, some of which it asked not to be shared due to its confidentiality concerns. I find that the former animal control service provider has historically provided routine reports to the city and notwithstanding its assertions that there are no records, as reflected in the correspondence that the city attached to its representations, it does have a database of information. In that regard, the city's representations, and the responding submissions of the former animal control service provider, do not accurately reflect the ability of the former animal control service provider to locate responsive information within its record holdings. I am therefore satisfied that the former animal care service provider has responsive information.

[26] In *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*[3] the Ontario Court of Appeal was dealing with a journalist's request for information relating to racial profiling. The information he sought was stored in two electronic databases maintained by the Toronto Police Services Board (the police), but contained personal identifiers. In order to avoid infringing the privacy rights of the individuals in question, the journalist asked that the unique identifiers for each individual be replaced with randomly generated, unique numbers, and that only one unique number be used for each individual. The police had the technical expertise needed to retrieve the information in question in the format requested, but to do so, they would have to design an algorithm that was capable of extracting and manipulating the information that presently existed in the two electronic databases and reformatting it. The adjudicator whose order was subject to the appeal[4] had found that the information being sought by the journalist constituted a "record" under the *Act* and ordered the police to respond to the requests by issuing access decisions in accordance with the notice provisions of the *Act*. The police applied to the Divisional Court for judicial review of that decision and explicitly raised for the first time the argument that the information requested did not constitute a "record" within the meaning of section 2(1)(b) of the *Act* because it could only be produced by means of software that the police did not normally use. The Divisional Court found that the adjudicator's interpretation of section 2(1)(b) was unreasonable and allowed the application. In allowing an appeal of the judicial review and upholding the adjudicator's decision, the Court of Appeal discussed the application of a contextual and purposive analysis of section 2(1)(b) of the *Act*:

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[2] See the postscript to Order M-583. But also see Orders PO-2904 and PO-3100.
[3] 2009 ONCA 20.
[4] MO-1989.

A contextual and purposive analysis of s. 2(1)(b) must also take into account the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored. This technological reality tells against an interpretation of s. 2(1)(b) that would minimize rather than maximize the public's right of access to electronically recorded information.

The Divisional Court made no mention of these principles of interpretation in constructing s. 2(1)(b) of the *Act* and in concluding that the Adjudicator's interpretation was unreasonable. This omission led the court to give s. 2(1)(b) a narrow construction – one which, in my respectful view, fails to reflect the purpose and spirit of the *Act* and the generous approach to access contemplated by it.

The Divisional Court's interpretation of s. 2(1)(b) would eliminate all access to electronically recorded information stored in an institution's existing computer software where its production would require the development of an algorithm or software within its available technical expertise to create and using software it currently has. In my view, other provisions in the *Act* and the regulations tell against this interpretation.

Sections 45(1)(b) and (c) of the *Act* require the requester to bear the "costs of preparing the record for disclosure" and "computer and other costs incurred in locating, retrieving, processing and copying a record," in accordance with the fees prescribed by the regulations. Subsections 6(5) and (6) of Reg. 823 were enacted pursuant to s. 45(1) of the Act. These provisions state:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
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> …
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> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
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> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

In my view, a liberal and purposive interpretation of those regulations when read in conjunction with s. 2(1)(b), which opens with the phrase "subject to the regulations," and in conjunction with s. 45(1), strongly supports the contention that the legislature contemplated precisely the situation that has arisen in this case. In some circumstances, new

> computer programs will have to be developed, using the institution's available technical expertise and existing software, to produce a record from a machine readable record, with the requester being held accountable for the costs incurred in developing it. [reference omitted]

[27] In Order MO-2129, Adjudicator Bhattacharjee addressed the obligations of an institution when dealing with a request for information that may not be in the format requested by an appellant:

> … If the request is for information that currently exists in a recorded format different from the format asked for by the requester, as is the case in this appeal, the Police have dual obligations.
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> First, if the requested information falls within paragraph (a) of the definition of a record (e.g., paper records), the Police have a duty to identify and advise the requester of the existence of these related records (i.e., the raw material). However, the Police are not required to create a record from these records that is in the format asked for by the requester (e.g., a list).
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> Second, if the requested information falls within paragraph (b) of the definition of a record, the Police have a duty to provide it in the requested format (e.g., a list) if it can be produced from an existing machine readable record (e.g., a database) by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution, and doing so will not unreasonably interfere with the operations of the Police. In such circumstances, the Police have a duty to create a record in the format asked for by the requester.
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> In my view, a reasonable search for records responsive to an access request would include taking steps to comply with these two obligations. …

[28] With respect to section 2(1)(b), the IPC has previously found that where an institution routinely uses or is required to use an external consultant to produce a record, this may satisfy the requirements of paragraph (b) that the record is capable of being produced by "computer hardware and software or any other information storage equipment and technical expertise normally used by the institution."

[29] In Order PO-2730, the institution appeared to concede that the hardware needed to respond to the request was one that the institution normally used, but submitted that it required a consultant to modify the parameters of the software used to extract the data in the format requested. The fact that the institution could contract with a consultant to do so, and therefore not rely on in-house resources, did not support a

finding that the institution's operations would experience unreasonable interference:

> In my view, the simple fact of being required to retain a consultant is not, in and of itself, evidence of unreasonable interference. The consultant is not a PGT staff member assigned to other duties, so there can be no "interference" on that basis. And as noted earlier, the Regulation expressly provides for fees to be charged for this work. I am not satisfied that the need to retain [sic] consultant constitutes "unreasonable interference" in the circumstances of this case.

[30] In addition, in PO-3002, former Commissioner Cavoukian found:

> Based on its evidence, it is clear that the Board normally hires consultants to develop reports using the Actuate program. The Board refers to this in its evidence concerning the "project currently underway" to develop the other seven reports, which was used as the basis for much of its fee estimate. It is therefore evident that this technical expertise is "normally" used by the Board when new reports are needed, and the fact that external consultants are used does not negate this fact.[5]

[31] In the recent decision MO-3894, Adjudicator Cardy found, however, based on the evidence before her, that the use of an external consultant did not meet the section 2(1)(b) requirements:

> …I accept that as an alternative to processing the tapes in-house, the city could hire an external contractor with the proper technical expertise to complete some of the data processing work. The city has identified the company that provided its former backup system as a suitable external contractor for this task. Although the appellant maintains that the city "works closely and regularly with a firm from the US/California for various reasons related to IT," I accept the city's submission that it stopped using this company's backup system at the end of 2015. Additionally, unlike the situation in Order PO-3002, where an external contractor was already engaged by the institution to develop other reports similar to the one at issue in that appeal, there is no evidence before me to suggest that the city is currently using this company's services to conduct data processing similar to that which would be necessary here. Accordingly, I am satisfied that the city does not normally use the technical expertise of the external

[5] At paragraph 56.

> contractor that it would need to engage for the purpose of responding to the appellant's request...[6]

[32] That said, unlike the circumstances before Adjudicator Cardy in Order MO-3994, in this appeal the city outsourced the entire responsibility to the former animal control service provider, rather than engaging the former animal control service provider to simply perform a data processing or recovery function. Furthermore, in this appeal the former animal control service provider has access to responsive information in its record holding and can, in my view, generate responsive records.

[33] As I discussed in Order MO-3832[7], in outsourcing this function to a third party, the city was not, in my view, relieved of its responsibilities under the *Act*.

[34] Simply put, by choosing to engage the named former animal control service provider to perform what was, essentially, a city function, the city cannot divest itself of its responsibility and accountability in relation to records directly related to that city function, which, but for the interposition of the named former animal control service provider, would clearly have been within both the city's custody and control. In this connection, the decision of the Court of Appeal in *Ontario (Criminal Code Review Board) v Doe*[8], is instructive, where the Court stated:

> ... [T]he Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfil its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put an other way, the Board cannot avoid the access provisions of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act. [9]

[35] Therefore, while Order MO-3894 may represent an upper limit on an institution's responsibilities under the *Act*, it applies to different circumstances than the ones before me.

[36] In that regard, the argument that the named former animal control service provider does not have sufficient resources and staff to produce a record, and doing so

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[6] At paragraph 42.
[7] At paragraph 47.
[8] 1999 CanLII 3805 (ON CA).
[9] Ibid, at paragraph 35.

would unreasonably interfere with the named former animal control service provider's operations, is misdirected. The question is whether the process of producing a responsive record unreasonably interferes with the city's operations.

[37] As discussed above, the former animal control service provider has historically provided routine reports to the city and does have a database of information. I am satisfied that responsive information can be provided in a format that can be generated by means of computer hardware and software, or other means. In my view, this satisfies section 2(1)(b) because the record can be produced by "computer hardware and software or any other information storage equipment and technical expertise." In this case, I am satisfied that responsive information can be provided in a format that can be generated by means of computer hardware and software, or other means, and that the process of producing it would not unreasonably interfere with the city's operations. The only issue is the cost.

[38] Section 45(1) requires an institution to charge fees for requests under the *Act*. Those fees set out the amounts prescribed by the regulations for a variety of costs including the costs of every hour of manual search required to locate a record and computer and other costs incurred in locating, retrieving, processing and copying a record.

[39] In addition, subsections 6(5) and (6) of Reg. 823 state:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
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> …
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

[40] The city has provided no evidence to support an argument that even with the payment of a fee, providing the information would still unreasonably interfere with the operations of the city. I remind the city of the fee and fee estimate provisions of the *Act* and Regulation 823.

[41] Accordingly, I will order that the city conduct further searches in collaboration with the named former animal control service provider for the records responsive to the appellant's request, in accordance with the findings in this order, and to issue a new access decision.

ORDER:

1. I order the city to conduct further searches in collaboration with the named former animal control service provider for the records responsive to the appellant's request, in accordance with the findings in this order.

2. I order the city to issue a new decision to the appellant, with recourse to the fee and fee estimate provision of the *Act* and Regulation as appropriate. For the purposes of the timelines the city must adhere to, the date of this order is to be treated as the date of the request.

3. I order the city to provide this office with a copy of the new decision letter that they issue to the appellant.

Original Signed by: October 25, 2021

Steven Faughnan
Adjudicator