

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-4329-I

Appeal MA21-00653

City of Thorold

February 16, 2023

**Summary:** The sole issue in this appeal is whether the City of Thorold (the city) conducted a reasonable search for records responsive to item 2 of the appellant's request under the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the city did not conduct a reasonable search, and orders it to conduct a further search.

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

**Order:** Interim Order MO-2721-I.

### OVERVIEW:

[1] The City of Thorold (the city) received a two-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). As explained below, only item 2 of the request remains at issue:

2. To receive a copy and to examine the original files for images INTERIM 2019.JPG and NON CAPPED FIN.JPG - As a picture taken by [specified city employee]

[2] The appellant appended a copy of the .JPG images referred to above to the original access request.

[3] The city issued a decision to the requester, stating "Our office will not be processing this request as you were already provided the responsive records on August 20, 2020, October 29, 2020 and September 29, 2020."

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

[5] During mediation, the parties participated in a teleconference and narrowed the scope of the appeal to item 2 of the request. Specifically, the records that were previously disclosed to the appellant in JPG format.

[6] The appellant advised that the original files for the JPGs should exist. The city responded that the original files no longer exist and the records are only available in JPG format, as previously disclosed. The city also advised that no further searches for these records could be conducted. The appellant maintained his position and requested that the appeal move to adjudication, on the basis of reasonable search.

[7] As no further mediation was possible, this file was transferred to the adjudication stage.

[8] The adjudicator originally assigned to this appeal invited the city to submit representations in response to a Notice of Inquiry, which summarized the facts and issues in the appeal. The city requested and was granted an extension however, it did not submit representations. The appellant was then invited to submit representations and did so.

[9] The file was assigned to me to continue the adjudication of the appeal.

[10] For the reasons that follow, I find that the city did not conduct a reasonable search for records responsive to item 2 of the appellant's request and order it to conduct a further search.

## **DISCUSSION:**

[11] The sole issue to be determined is whether the city conducted a reasonable search for records responsive to item 2 of the appellant's request.

[12] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.<sup>1</sup> If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

[13] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.<sup>2</sup>

[14] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;<sup>3</sup> that is, records that are "reasonably related" to the request.<sup>4</sup>

[15] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.<sup>5</sup> The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>6</sup>

[16] If the requester failed to respond to the institution's attempts to clarify the access request, the IPC may decide that all steps taken by the institution to respond to the request were reasonable.<sup>7</sup>

### **Representations, analysis and findings**

[17] In the absence of representations from the city, I find that it did not conduct a reasonable search.

[18] The city was sent a Notice of Inquiry inviting its representations on whether its search for responsive records was reasonable. It was asked to provide its explanation of all the steps it took in response to the request including: whether or not the request was clarified, whether responsive records once existed but no longer do, and details of its search efforts including who searched, in what places and for which types of files. As noted above, the city did not provide representations in response to the Notice of Inquiry, despite requesting and receiving an extension.

[19] In his representations, the appellant notes that the city provided him with copies of the two files identified in item 2 of the request. He reiterates his belief that the "original picture files" exist. The appellant submits that original files from any camera include numbers and/or symbols, and have not been manipulated, cropped, "save[d] as" or renamed.

[20] As noted above, the city informed the appellant during mediation that the original files no longer exist, that they are only available in JPG format, and that no

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<sup>2</sup> Order MO-2246.

<sup>3</sup> Orders P-624 and PO-2559.

<sup>4</sup> Order PO-2554.

<sup>5</sup> Orders M-909, PO-2469 and PO-2592.

<sup>6</sup> Order MO-2185.

<sup>7</sup> Order MO-2213.

further searches could be conducted. As the city did not submit representations, there is no evidence before me with respect to the reasons no responsive records exist. Likewise, there are no details before me regarding who searched, for which types of files, in what manner and in what places.

[21] The institution in Interim Order MO-2721-I also did not submit representations outlining its search efforts. The adjudicator made the following comments, which I find helpful here:

It may well be that the municipality has conducted a reasonable search; however, due to its complete absence of representations I must conclude that it has failed to *demonstrate* that it has conducted a reasonable search for records responsive to the appellant's request. [emphasis in the original]

[22] Without the city's representations in response to the Notice of Inquiry, I am unable to conclude that the city conducted a reasonable search. Accordingly, I find that the city has not met its search obligations under section 17 the *Act* and order it to conduct a further search for records responsive to item 2 of the appellant's request.

## **ORDER:**

1. I order the city to conduct a further search for records responsive to item 2 of the appellant's request.
2. I order the city to provide me with affidavit evidence describing its search efforts, **by March 17, 2023**. At a minimum, the affidavit(s) should include the following:
  - i. The name(s) and position(s) of the individual(s) who conducted the search(es) and their knowledge and understanding of the subject matter and the scope of the request;
  - ii. The date(s) the search(es) took place and the steps taken in conducting the search(es), including information about the type of files searched, the nature and location of the search(es), and the steps taken in conducting the search(es);
  - iii. Whether it is possible that responsive records existed but no longer exist. If so, the city must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and
  - iv. If it appears that no further responsive records exist after further searches, a reasonable explanation for why further records do not exist.

The city's representations will be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in Practice Direction Number 7, which is available on the IPC's website. The city should indicate whether it consents to the sharing of its representations with the appellant.

3. I remain seized of this appeal to deal with issues arising from order provisions 1 and 2.

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

Hannah Wizman-Cartier  
Adjudicator

February 16, 2023 \_\_\_\_\_