

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-4342-I

Appeal MA20-00246

Corporation of the City of Belleville

March 7, 2023

**Summary:** The City of Belleville (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to any plans for development or changes to a specified city block. The city issued a decision disclosing one email record. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario, because she believed that additional records responsive to her request should exist. In Order MO-4216-I, the adjudicator found that the city failed to demonstrate that it conducted a reasonable search for responsive records and ordered further searches.

The city filed a reconsideration request which was denied on the grounds that the city failed to file its request within the timelines set out in the IPC's *Code of Procedure* to reconsider Interim Order MO-4216-I. In Reconsideration Order MO-4273-R, the adjudicator exercised her discretion to not initiate a reconsideration on her own initiative in response to the city's evidence that the order provisions in Interim Order MO-4216-I inadvertently expanded the search area identified in the request. Reconsideration Order MO-4273-R lifted the interim stay relating to the order provisions set out in Interim Order MO-4216-I and the city was ordered to conduct the further searches originally ordered. The city subsequently submitted evidence it says demonstrates that further searches were conducted.

In this order, the adjudicator considers the city's evidence and finds that the city's further search efforts do not address one of the deficiencies outlined in Interim Order MO-4216-I. Accordingly, the adjudicator finds that the city's further search was not reasonable and orders further searches.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17. IPC's *Code of Procedure*, section 18.04(b).

**Related Orders:** Interim Order MO-4216-I and Reconsideration Order MO-4273-R

## **OVERVIEW:**

[1] The background of the appeal is that the Corporation of the City of Belleville (the city) and the appellant have been involved in litigation and the city says that it provided 1598 pages of documents to the appellant as a result of that litigation. In Interim Order MO-4216-I (the interim order), I found that the city was obligated under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to locate and identify records that are responsive to the request<sup>1</sup>, regardless of whether an exemption under the *Act* applies or the record was previously provided to the appellant outside the *Act*.

[2] In addition, in the interim order, I stated that:

... disclosure of a record under the *Act* is essentially “disclosure to the world” which means that no conditions can be placed on the requester’s use of the record. This is quite different from being provided documents through a litigation process which may come with conditions and/or undertakings regarding the use of the documents. Accordingly, the appellant is entitled to seek access to records under the *Act* even if they have been already provided to her outside the *Act*.

[3] Initially, the city appeared to work towards complying with the order provisions in the interim order and submitted 24 affidavits to me. Upon my review of the affidavits I asked the city for an index or chart to organize the affidavits.

[4] In response, I received a request to reconsider the interim order outside the 21-day time frame required by section 18.04(b)<sup>2</sup> of the *Code*. The city’s reconsideration request alleged that the interim order “both extended the search timeline to June 22, 2022, some two and a half years past the original request, and significantly expanded the search area beyond that of the original request.” I subsequently wrote to the city and told it that I had declined its reconsideration request on the basis that it was filed outside the 21-day timeline. Though the time for the city to request a reconsideration had expired, I told the city that I have the discretion to reconsider the interim order on my own initiative and I may be inclined to do so if there is evidence that the order provisions contain an error or another mistake that does not reflect my intent in the

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<sup>1</sup> The appellant’s request under the *Act* sought “all records” from 2009 to the date of the request relating to “any and all plans for development or changes” regarding a specified block located in the city.

<sup>2</sup> Section 18.04(b) of the *Code* states:

A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:

(b) where decision does not require any action within any specified time period or periods, within 21 days after the date of the decision.

decision.<sup>3</sup> I invited the city to provide me additional submissions regarding its allegation that order provision 1 in the interim order inadvertently extended the boundaries of the search area identified in the request.

[5] With respect its allegation that the interim order extended the time line for the search to June 22, 2022, my letter to the city confirmed that the search timeline remains from 2009 to the date of the request.<sup>4</sup>

[6] In Reconsideration Order MO-4273-R (the reconsideration order), I considered the city's supplemental submissions but declined to exercise my discretion to reconsider the interim order on my own initiative. Accordingly, I lifted the interim stay and ordered the city to comply with the order provisions set out in interim order.

[7] The city, in turn, provided the IPC with an updated affidavit signed by its Manager of Information Systems. The city also made short representations via email. The city also confirmed that it relies on the 24 affidavits it had sent the IPC before it filed its reconsideration request. Finally, the city issued an access decision to the appellant. For the remainder of this order, I will refer to these documents as the city's submissions.<sup>5</sup>

[8] I have considered the city's submissions and am not satisfied that the city has conducted a reasonable search. Accordingly, for the reasons that follow, the city is ordered to conduct a further search.

## **DISCUSSION:**

[9] The sole issue before me is whether the city's further search in response to the interim order is reasonable.

[10] In the interim order, although I found that the searches conducted by the city in response to the request was "extensive in terms of the number of departments and individuals involved," I concluded that a reasonable search did not take place and in doing so identified two major deficiencies in the city's search.

[11] In paragraphs 28-30 of the interim order, I provided my reasons in support of my finding that the city's evidence showed that it did not direct staff members to use

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<sup>3</sup> Section 18.01(c) of the *Code* provides that "The IPC may reconsider an order or other decision where it is established that there is a clerical error, accidental error or omission or similar error in the decision."

<sup>4</sup> My letter to the city explained that the wording in order provision 2 "treating the date of this order as the date of the request for administrative purposes" does not extend the search timeline to June 22, 2022. Instead, the reference relates to the time the city has to issue an access decision under sections 19(a) and (b) of the *Act*.

<sup>5</sup> I did not provide the appellant copies of the city's submissions nor did I request her representations in reply. However, the appellant sent an email to the IPC upon her receipt of the city's new access decision. In her email, the appellant takes the position that additional records should exist.

consistent search terms. I went on to say that the lack of consistent terms can provide inconsistent results, which I concluded is what appeared to have happened in this case.

[12] In paragraphs 31 to 34 of the interim order, I provided my reasons for finding that there was sufficient evidence to conclude that the city's search located additional responsive records but that it decided not to identify these records in its access decision. In its reply representations, the city had stated:

... the appellant has already received 1598 pages of documents, unredacted, in the litigation she commenced against the City. Indices were provided for all of these documents. The appellant has also made multiple requests through the *MFIPPA* process for the same, or similar records (including six in 2020). Given the volume of documents the City has now disclosed pursuant to the litigation, the City does not resend each of these documents. If the City did resend these documents each time, it would be required to issue a fee estimate and the appellant would be required to pay for reproducing material she already has. All documents dealing with other properties that would not have been captured through the litigation process have been disclosed, unless the City believed that an exception applied.

[13] In paragraph 33 of the interim order, I found that the city was obligated under the *Act* to locate and identify records that are responsive to the request, regardless of whether an exemption under the *Act* applies or the record was previously provided to the appellant outside the *Act*.

[14] Accordingly, I ordered the city to do the following in order provisions 1 and 2 of the interim order:

1. I order the city to conduct a further search for records responsive to the appellant's request filed under the Act, using, at a minimum, the following search terms: development(s), development issue(s), change(s), project(s), planning, land use, non-conforming, non-compliance, duplex, second unit, converted dwelling, and semi-detached, along with the street names stated in the request to identify a specified city block.
2. I order the city to issue an access decision to the appellant regarding any records located as a result of the search(es) ordered in order provision 1, including those identified by city departments through past searches in accordance with the Act, treating the date of this order as the date of the request for administrative purposes.

[15] I will now review the city's submissions relating to its further searches conducted after the issuance of the interim order.

## **The city's submissions**

### ***Search affidavits and email representations***

[16] As noted above, the city filed a total of 25 affidavits. The city, in its email representations state that "all staff were provided with the specific wording from [the interim order], in quotes, and that they have advised that they complied with that direction in conducting the searches."

[17] I have reviewed the 25 affidavits and make the following observations:

- 23 individuals in the city's Finance, Fire & Emergency Services, Recreation Culture & Community Services, Environmental Services, including its water department attested to having conducted or directed their staff to conduct electronic searches for records,
- These individuals report that the search terms used were the terms referenced in the interim order. Of the 23 affidavits provided, 20 reported that "no records" were located, an Archivist indicated that "None of the results looked relevant to the query" and two individuals<sup>6</sup> did not confirm whether any records were located as a result of their search, and
- The remaining two affidavits were prepared by the city's Manager of Information Services. Both affidavits attest that the manager conducted electronic searches of the city's email server and that an estimated 20,000 records were located. The manager says in his affidavit that his searches used the search terms identified in the interim order.

[18] The city also stated in its representations that the manager "... has access to every email account and server and has sworn that he completed the searches as per the criteria outlined in the Interim Order ... and that more than 20,000 documents resulted."

[19] The city went on to state that it "maintains that the one document sent to the appellant originally, relating to the construction of a community garden on the relevant West Hill City block, remains the only relevant document. The city reiterates that it has never contemplated redeveloping the entire block, as alleged by the appellant, and so there cannot be any relevant documents on that issue."

### ***The city's revised access decision***

[20] The city also issued a revised access decision to the appellant, which states:

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<sup>6</sup> The two individuals who filed affidavits with incomplete information were the Acting Director of the Finance department and Fire Chief in the Fire and Emergencies Services department.

Further to Interim Order MO-4216-I, the City has conducted additional searches for documents that are relevant to your request. No further documents have been located.

*Decision and analysis*

[21] 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>7</sup> that is, records that are "reasonably related" to the request.<sup>8</sup> Having regard to the city's evidence, I am not satisfied that the city met its search obligations under section 17 of the *Act* as one of the major deficiencies identified in the interim order was not remedied.

[22] Having regard to the affidavit evidence provided by the city, I am satisfied that the city's further search remedied the issues related to inconsistent use of search terms. There is no reason for me to not accept the city's affidavit evidence that the individuals conducting the further searches ordered deviated from the search terms referenced in order provision 1 of the interim order. Accordingly, I am satisfied that these searches were conducted by experienced staff members knowledgeable in the subject matter of the request.

[23] Though I am satisfied that the city has demonstrated that it conducted further searches in response to the interim order, I am not satisfied that the searches were reasonable given that it again appears that the city failed to identify records that would respond to the request.

[24] As stated earlier in this order, the city took the position during the inquiry which led to the interim order, that it was not necessary for it to identify records which would respond to the appellant's request but were previously provided to her outside the *Act*. The city's own evidence confirmed that in processing the present request it decided not to identify these records. In addition, the city said that any documents not captured through the litigation process, were already disclosed (presumably by other access requests under the *Act*) or where withheld because an exemption under the *Act* applies.

[25] The city appears to have not moved from this position despite the fact that in both the interim and reconsideration order, I found that the city is obligated under the *Act* to locate and identify records responsive to the request, regardless of whether an exemption under the *Act* applies or the record was previously provided to the appellant outside the *Act*.<sup>9</sup> In addition, order provision 2 ordered the city to issue an access decision identifying any additional records located, "including those identified by city departments through past searches in accordance with the *Act*."

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<sup>7</sup> Orders P-624 and PO-2559.

<sup>8</sup> Order PO-2554.

<sup>9</sup> See paragraph 33 in Interim Order MO-4216-I and paragraph 8 in Reconsideration Order MO-4273-R.

[26] Now the city asserts that its further electronic searches located an estimated 20,000 records but does not make any attempt to identify how many of these records respond to the request. Instead, the city submits that it already identified the one “only relevant document” given its assessment that the “entire block” in question was never being considered for redevelopment. The city’s reasoning is that since it did not contemplate redevelopment then “there cannot be any relevant documents on that issue.” The city issued a revised decision to the appellant taking the position that “no further documents have been located” while also asserting that its further search located an estimated 20,000 records.

[27] The city also appears to argue that the work involved to identify responsive records in the 20,000 records located is too burdensome in that it would have to issue a fee estimate and request a deposit from the appellant. However, the issuance of a fee estimate, which can be based on a representative sample of records, is what the *Act* requires in situations where the search results yield voluminous records and the institution is not able to clarify the request with the requester.<sup>10</sup>

[28] While the city believes it is unlikely that further responsive records exist given its institutional knowledge of the city block in question, there is insufficient evidence before me to suggest that the city took steps to met its obligations under the *Act* to identify such records in its search results.

[29] Accordingly, I am not satisfied that the city’s further search is reasonable and will order it to conduct a further search to locate responsive records in its search results. I remind the city of my observation in the reconsideration order that the city’s evidence that it does not have the ability to enter cross-streets or intersections when it enters a street name in a field may reveal a limitation in its search methodology.<sup>11</sup> The fee provisions under the *Act* also contemplate situations in which institutions may charge a fee for computer costs.<sup>12</sup>

[30] For the reasons set out above, I will order the city to conduct a further search and issue a decision letter identifying additional responsive records.

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<sup>10</sup> The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters pay the prescribed fees associated with processing a request unless it is fair and equitable that they not do so. [Order P-81](#) is often cited as introducing the principles governing the issuance of a fee estimate/interim notice. See also the [IPC’s Fees, Fee Estimates and Fee Waivers, June 2018](#) and the [IPC’s Processing Voluminous Requests: A Best Practice for Institutions, September 2002](#).

<sup>11</sup> Paragraph 17 of Reconsideration Order MO-4273-R. I went on in paragraph 20 of Reconsideration Order MO-4273-I to state that it was my view that the city’s evidence revealed “an issue in its search methodology in that there may be limitations in its present ability to remove non-responsive records from the results of its electronic records.”

<sup>12</sup> See section 45(1)(c) of the *Act* and section 6.6 of *Regulation 823*.

**ORDER:**

1. I order the city to conduct a further search for records responsive to the appellant's request filed under the *Act*, using, at a minimum, the following search terms: development(s), development issue(s), change(s), project(s), planning, land use, non-conforming, non-compliance, duplex, second unit, converted dwelling, and semi-detached, along with the street names stated in the request to identify a specified city block.
2. I order the city to issue an access decision to the appellant (copy to my attention) regarding any records located or not located as a result of the search(es) ordered in order provision 1, including those identified by city departments through past searches in accordance with the *Act*, treating the date of this order as the date of the request for administrative purposes. To be clear, even if no records are located I require the city to provide the both the appellant and I with a decision letter indicating this.
3. I remain seized of this appeal in order to deal with any outstanding issues arising from order provisions 1 and 2.

Original signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ March 7, 2023