

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4426-I

Appeal MA21-00624

City of Stratford

August 23, 2023

Summary: The City of Stratford (the city) received a request under the *Act* for access to records pertaining to the city's arrangements with specified corporate entities relating to the annexation of land for use by a named glass manufacturer. The city conducted a search for responsive records and notified the requester that no responsive records had been identified. The requester appealed to the IPC stating that they had reasonable grounds for believing that responsive records ought to exist. The city maintained that the records located in its searches were not responsive to the request. This appeal determines the issues of the scope of the request and the reasonableness of the city's searches for the purposes of section 17 of the *Act*.

In this order, the adjudicator finds that some records located in the city's searches are responsive to the request and orders the city to issue an access decision in relation to them. The adjudicator does not uphold the city's search and orders the city to conduct a further search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.5, as amended, sections 4(1) and 17.

Orders Considered: Orders P-134 and P-880.

OVERVIEW:

[1] This appeal concerns the scope of a request for records of the municipality's engagement of a named company or its affiliates in relation to the annexation of

specified land and the searches conducted in response to the request.

[2] The Corporation of the City of Stratford (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

All contracts, letters of understanding, letters of agreement, letters of intent and the like between [the city] or "Invest Stratford" (Stratford Economic Enterprise Development Corporation) and [a named company] or its affiliates and related companies, related to the annexation of land from Perth South for the potential use by [a specified glass manufacturer], and related to the employment land justification of said land, and related to the request for a ministerial zoning order from the Province of Ontario and any letters, term sheets, requests for proposals or other documents related to the above contracts or letters.

[3] The city conducted a search and notified the requester that no responsive records had been identified.

[4] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC). A mediator was appointed to explore possible resolution.

[5] During mediation, the appellant advised that they believed that the company specified in the request was working under an arrangement with the city in relation to the proposed land development by the glass manufacturer and that records pertaining to that arrangement ought to exist. The city maintained that a thorough search had been conducted and no responsive records were located.

[6] As a mediated resolution was not achieved, the file was transferred to the adjudication stage of the appeal process for determination of the sole issue of the reasonableness of the city's search, as required by section 17 of the *Act*.

[7] I decided to conduct an inquiry and sent a Notice of Inquiry to the city inviting representations addressing the issue of the reasonableness of its searches.

[8] In its representations, the city stated that its searches had located records but that they were not responsive to the request. These records comprised of invoices and email correspondence. Following receipt of the city's representations, I decided to add the issue of the scope of the request to the appeal. I then invited and received representations from the appellant and reply representations from the city on the issue of the scope of the request.

[9] The parties' representations were shared in accordance with section 7 of the IPC *Code of Procedure and Practice Direction 7*.

[10] In this order, I find that the invoices located in the city's search are responsive to the appellant's request and I will order the city to issue an access decision in relation to them. I find the records of email correspondence located by the city are not responsive to the request. I do not uphold the city's search and will order it to conduct a further search, including taking steps to locate responsive records that are in the possession of the former CAO.

RECORDS:

[11] The records at issue consist of three invoices (5 pages) and email correspondence (5 pages).

ISSUES:

- A. What is the scope of the appellant's request for records? Which records are responsive to the request?
- B. Did the city conduct a reasonable search for records?

DISCUSSION:

Issue A: What is the scope of the appellant's request for records? Which records are responsive to the request?

[12] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. Section 17 states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record, and specify that the request is being made under this Act;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the records;

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] To be considered responsive to the request, records must “reasonably relate” to the request.¹ Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester’s favour.²

[14] The city’s position is that the appellant’s request was clear and did not require clarification, allowing the city to begin conducting a search of its records to determine what, if any records, existed in response to the request.

[15] In its affidavit evidence, the city explains that its searches located the records that are in issue in this appeal, namely the three invoices and the email correspondence. The city determined that these records are not responsive to the appellant’s request.

[16] The appellant submits that the city has taken a narrow view of their request such that because the word “invoice” does not appear in the request, it decided the invoices that it located are not responsive.

[17] The appellant states that they were not notified of the fact that records were located in the city’s searches until the adjudication stage of the appeal process. The appellant submits that the request includes the words “and the like” and “other documents” making it broad enough to capture the invoices and the correspondence.

[18] The appellant explains that they have learned via other sources that the city engaged an individual from the named company to write a report in relation to the land annexation process. The appellant submits that an agreement must exist reflecting the terms of that engagement. The appellant speculates about any such arrangement being verbal and submits that even a verbal arrangement is evidenced in bill payment so that the invoices at issue are responsive to the request.

[19] In reply, the city states that the request was unambiguous and clearly identified the records being sought. The city states that it decided to respond to the appellant’s request “literally.” The city acknowledges that the named company performed work on behalf of the city and states that no responsive records were located detailing the company’s engagement.

[20] Regarding the records at issue, the city submits that the three invoices were sent to the city by the named company for services rendered. The city’s position is that the invoices do not contain correspondence or documentation relating to the engagement of the named company and/or the city, nor any report relating to the specified glass manufacturer or the annexation of land by the city. The city states that the disclosure of the invoices would allow for inferences to be drawn about the nature of the services provided to which the payments relate.

¹ Orders P-880 and PO-2661.

² Orders P-134 and P-880.

[21] Regarding the correspondence, the city submits that it relates to the contracting of a third party company to complete natural heritage work in the area and is entirely unrelated to the request. The city states that it provided general details of the non-responsive records to the mediator.

Analysis and finding

[22] I have reviewed the request, the city's affidavits and the parties' submissions. For the reasons that follow, I find that the city has defined the scope of the request too literally and that the invoices that are at issue in this appeal are responsive to the appellant's request. I find that the five pages of email correspondence are non-responsive to the request.

[23] Previous orders of the IPC have held that to be consistent with the spirit of the freedom of information legislation, ambiguities regarding the scope of a request should be resolved in the requester's favour. In Order P-880, Adjudicator Anita Fineberg adopted this approach when considering the equivalent provision to section 17 in the provincial version of the *Act* and stated:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

[24] Similarly, in the appeal giving rise to Order P-134, former Commissioner Sidney B. Linden resolved the ambiguity between the parties with reference to the spirit of the *Act*, stating:

... the appellant and the institution had different interpretations as to what [is] meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the Act compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

[25] I agree with this approach and adopt it in this appeal. The city submits that the request was unambiguous and clearly identified the records being sought. I accept that the city did not need to clarify the scope of the request prior to beginning its searches.

However, an ambiguity arose when the city's searches located the records that are at issue in this appeal and whether those records are responsive to the appellant's request.

[26] To resolve the ambiguity in a manner consistent with the spirit of the *Act*, I find that a liberal interpretation of the scope of the request includes the invoices located in the city's searches. In my view, invoices document billing for services rendered pursuant to a commercial arrangement and are therefore records that relate to the arrangement. The city unilaterally interpreted the scope of the request narrowly when it decided that the express reference to "all contracts, letters of understanding, letters of intent and the like" did not include invoices. However, I accept the appellant's submission that their use of the phrase "and the like" broadens the scope of the request to include the invoices. I am satisfied that the appellant's request is for records pertaining to the commercial relationship between the named company in the request and the city for services provided in relation to the annexation of land and the processes described in the request.

[27] I do not agree with the city's submission that the invoices are not responsive because they do not contain correspondence or documentation between the named company and the city relating to the company's production of a report or reports relating to the specified annexation of land. The appellant has indicated that they have learned that a report has been produced for the city in relation to the land annexation. The appellant's submission is that knowing that a report has been produced for the city records should exist in relation to the commercial arrangement between the city and the named company for the production of that report. However, I find that the appellant has not defined their request submitted under the *Act* by reference to any report.

[28] The request refers to records pertaining to the engagement of the named company by the city or InvestStratford in relation to the annexation of the specified land, the employment land justification of the annexed land and the request for a ministerial zoning order or other documents related to the company's engagement. I find that the scope of the request is broad enough to include records relating to the engagement of the named company to prepare reports for the city but it is not limited to this specific work.

[29] Regarding the correspondence, I am satisfied that the emails are not records that are responsive to the appellant's request. From my review of the emails and without disclosing their contents, I am satisfied that they relate to third party natural heritage work contracted by the city. Notwithstanding that this work is in relation to the land specified in the appellant's request, I find that the emails are not records of an arrangement between the company named in the request and the city. I accept the city's submission that these emails are not records that are responsive to the appellant's request.

[30] As a result of my findings, I will order the city to issue an access decision for the invoices that it located in its searches. I will now consider the reasonableness of the city's searches.

Issue B: Did the city conduct a reasonable search for records?

[31] The appellant claims that additional records exist that are responsive to the request. When a requester claims that additional records exist beyond those located by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17 of the *Act*.³ 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.

[32] 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.⁴

[33] 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;⁵ that is, records that are "reasonably related" to the request.⁶

[34] 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.⁷ 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.⁸

[35] The city has provided affidavits from the three individuals who coordinated its response to the appellant's request. These individuals are the city clerk, the city's corporate initiatives lead in the Chief Administrative Officer's (CAO) office and the Chief Executive Officer (CEO) of the city's economic development corporation, InvestStratford.

[36] In their affidavits, the city's employees describe how the city clerk, who is responsible for responding to requests made under the *Act*, reviewed the request and arranged for two employees to conduct searches to determine if records existed that would be responsive to the request.

³ Orders P-85, P-221 and PO-1954-I.

⁴ Order MO-2246.

⁵ Orders P-624 and PO-2559.

⁶ Order MO-2554.

⁷ Orders M-909, PO-2469 and PO-2592.

⁸ Order MO-2185.

[37] The employee in the CAO's office states that they conducted searches of the former CAO's email inbox and sent folder and of all electronic files located in a folder bearing the name of the glass manufacturer specified in the request. These searches were carried out using key words and covered email records in a period from March 1, 2018 to March 4, 2021. The corporate initiatives lead states that these searches located the invoices and email correspondence that are at issue in this appeal. These records were provided to the city clerk to review and determine whether they fell within the scope of the request.

[38] The city clerk states that they also asked that the CEO of InvestStratford to conduct a search of all of its email and hard copy paper files using key words. In their affidavit, the CEO describes these searches and the keywords used and states that these searches did not locate any responsive records.

[39] The non-confidential portions of the city's affidavits were shared with the appellant. As I have noted above, the appellant submits that the records located in the city's searches are responsive to the request. The appellant submits that additional records must exist because of their understanding that an employment lands justification report was prepared for the city by an individual from the company named in the request. The appellant believes that records exist in relation to that arrangement.

[40] The appellant does not directly address the adequacy of the city's searches, except to submit that the city has not provided an affidavit from its former CAO whom the appellant believes may have responsive records in their possession.

[41] In reply, the city states that the named company prepared a draft planning justification report for the city. The city states that this report was considered in Order MO-4353. The city acknowledges that the company named in the request performed work on behalf of the city but states that no responsive records were located detailing the engagement. The city states that the employment lands justification report dated February 2020, referred to in the appellant's representations, was prepared by InvestStratford.

[42] The city states that the former CAO is no longer employed with the city and was not employed at the time that the city conducted its searches. The city submits that "an exhaustive search" of the former CAO's records was completed, in the records saved both electronically and in paper format.

Analysis and finding

[43] For the reasons set out below, I am not satisfied that the city has expended reasonable efforts to locate records in its custody or under its control that are reasonably related to the appellant's request. I find that the city has not taken steps to locate any responsive records that may be in the possession of the former CAO. I also find that there is insufficient evidence supporting the city's submission about the

physical searches that it carried out.

[44] The city acknowledges that the company named in the request performed work on its behalf but states that no responsive records have been located detailing this engagement. The city provides no explanation as to why records relating to its arrangement with the company do not exist nor, if they did exist, why they do not any longer. In these circumstances and in light of my findings below in relation to the city's evidence of its searches, I am satisfied that there is a reasonable basis for the appellant's belief that records exist in addition to those located by the city.

[45] The city's evidence is that searches were conducted in two locations: InvestStratford and the office of the CAO. The searches described in the affidavits are key word searches.

[46] I find it reasonable that the city conducted a search of InvestStratford's records for those responsive to the appellant's request.

[47] In relation to the other searches, the city searched the former CAO's email inbox and sent folder and one folder of electronic files on its server.

[48] The appellant submits that the city should have obtained an affidavit from the former CAO as they may have responsive records in their possession. The appellant's submission raises the issue of whether it was reasonable for the city to conduct a search for responsive records that might exist that are not in the city's possession. The city's position is that the former CAO is no longer employed by the city and was not employed at the time that the searches were carried out. The city relies upon the searches it conducted of the former CAO's records that are in the city's possession.

[49] An institution may still have an obligation to search for records that are not in its possession because under section 4(1) of the *Act*, the right of access applies to any record that is in the institution's custody *or* under its control.⁹ In order to determine that the city has conducted a reasonable search, I must satisfy myself that all reasonable steps have been taken to locate and identify responsive records that are in the city's custody *or* under its control.

[50] From my review of the city's evidence, I am not satisfied that the city has taken steps to locate responsive records that may exist and that are not in its possession but are under its control. In the circumstances of this appeal, where the city's searches have focused on the former CAO's email records, I find that a reasonable search for responsive records includes taking steps to locate records that are in the former CAO's possession and that may be under the city's control.

[51] In its reply representations, the city states that an "exhaustive" search of the

⁹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

former CAO's records, both electronic and paper, was completed. The city states that "records from the former CAO were saved electronically and in paper format in the CAO's office and a search through those records was conducted."

[52] From my review of the affidavit of the individual who conducted the city's searches of the former CAO's records, I am not satisfied that the city's position is supported by the evidence.

[53] The corporate initiatives lead states that from 24 February 2021 to 4 March 2021 searches were undertaken through the former CAO's email inbox and sent folder. The affidavit also states that a search was conducted of all files located in an electronic folder in the CAO's office bearing the name of the specified glass manufacturer. The affidavit evidence does not mention any searches of physical records.

[54] I am not satisfied that the city has expended reasonable efforts to search physical records located in the CAO's office, in response to the appellant's request.

[55] Taking account of all the above, I find that the city has not demonstrated that it has conducted a reasonable search to locate records that are reasonably related to the request in accordance with section 17 of the *Act* and there is a reasonable basis for the appellant's belief that additional records exist. I will order the city to conduct a further search.

ORDER:

1. I order the city to issue an access decision to the appellant for the invoices located in its past searches in accordance with the *Act*, treating the date of this order as the date of the request.
2. I order the city to conduct a further search for records responsive to the appellant's request under the *Act* including a search of physical records in the city's possession and taking steps to locate responsive records in the possession of its former CAO.
3. I order the city to issue an access decision to the appellant regarding any records located in its further searches conducted pursuant to provision 2 and even if no records are located, in accordance with the *Act*, treating the date of this order as the date of the request for administrative purposes.
4. I order the city to provide me with an affidavit sworn by the individual(s) who conducted the city's searches pursuant to this order by **September 27, 2023**, describing the search efforts. The affidavits should include the following information:
 - a. The names and positions of the individual(s) who conducted the search;

- b. Information about the types of records searched, the nature and location of the searches and steps taken in carrying out the search;
 - c. The results of the search; and
 - d. Details of whether additional records could have been destroyed, including information about record maintenance policies, practices and retention schedules.
5. I remain seized of this appeal in order to deal with any outstanding issues arising out of provisions 1 to 4.

Original Signed by: _____
Katherine Ball
Adjudicator

_____ August 23, 2023