

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3774-I

Appeal MA16-494 and MA16-494-2

Toronto Transit Commission

May 28, 2019

Summary: The TTC received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the construction directions for all of the “step-test” steps used by a named company in assessing Wheel-Trans eligibility. The TTC conducted a search, and disclosed all the records it found to the appellant. The appellant claimed that the TTC did not conduct a reasonable search and that further responsive records should exist. In this order, the adjudicator finds that the TTC did not provide sufficient evidence to show that it conducted a reasonable search for the quote for the construction, and orders it to provide further evidence regarding the nature of the searches conducted for the quote.

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

Orders and Investigation Reports Considered: Order MO-1285.

OVERVIEW:

[1] The appellant submitted a request to the Toronto Transit Commission (the TTC) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Please send me copies of the construction directions and receipts for all of the “step-test” steps used by [named company] in assessing Wheel Trans eligibility appeals, along with any other documentation relating to the construction or purchase of the “step-test” steps. Please indicate the

directions/receipts specific to the "step test" steps depicted in TTC ATI request 16-39.

[2] The TTC issued a decision in which it indicated that no records exist and that the records requested would be in the custody and control of a named company.

[3] The requester, now the appellant, appealed the TTC's decision to this office.

[4] During the course of mediation, the appellant advised the mediator that he was of the view that responsive records should exist. The TTC located one responsive record, an invoice dated September 23, 2014, and issued a decision granting access to it.

[5] The appellant advised the mediator that he was of the view that additional responsive records should exist. The TTC advised the mediator that no further records exist. The appellant advised the mediator that he would like to pursue the appeal at adjudication on the basis that additional responsive records should exist. Accordingly, appeal MA16-494 was moved to the adjudication stage of the appeal process. The originally assigned adjudicator conducted an inquiry under the *Act* on the issue of whether the TTC had conducted a reasonable search for records responsive to the appellant's request. The appeal was then transferred to me to continue the adjudication of the appeal.

[6] During the adjudication stage of appeal MA16-494, the TTC located another responsive record, an invoice, and granted partial access to it with severances pursuant to sections 10(1), 14(1) and 38(b) of the *Act*. The appellant appealed the TTC's decision and appeal MA16-494-2 was opened.

[7] During the course of mediation involving MA16-494-2, the appellant advised the mediator that he was pursuing access to the withheld information contained within the responsive record. Following consultations with the named company, the TTC issued a revised decision in which it granted full access to the responsive record.

[8] The appellant advised the mediator that he was of the view that additional responsive records should exist including an "authentic and complete" version of the invoice that was disclosed to him during mediation as well as an attachment to the record. The TTC advised the mediator that no additional records exist in relation to this record that was disclosed to the appellant.

[9] As mediation did not resolve the issue of reasonable search, the file was moved to the adjudication stage of the appeals process. I commenced the inquiry concerning appeal MA16-494-2 by seeking representations of the parties. Representations were received and shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[10] Because the only issue in both MA16-494 and MA16-494-2 is the reasonableness

of the TTC's search pertaining to the same access request, I am issuing one order which relates to both files.

[11] In this order, I find that the bulk of the TTC's search for responsive records was reasonable; however I find that it did not provide sufficient detail with regard to its search for a quote referenced in the records provided to the appellant and I order it to conduct a further search and provide that detail.

DISCUSSION:

[12] As noted, the sole issue in this appeal is the reasonableness of the TTC's search for records responsive to the appellant's access request.

[13] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[14] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

[15] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴

[16] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[17] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁶

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

Representations

[18] As a result of consolidating appeal files MA16-494 and MA16-494-2, I have considered the representations made by the parties in both appeals. I will only summarize the relevant portions of those representations in this order, although all of the submissions have been considered. Further, the appellant has requested that portions of his various representations remain confidential. These portions will not be set out in this order but were considered in making this decision.

[19] The TTC submits that its departments affected by the request searched their respective computer systems and secured cabinets for all responsive records. The TTC submits that it contacted the named company who carried out the "step-test", the eligibility assessor, and had it search its record holdings in order to assist in processing the request.

[20] The TTC provided an affidavit, sworn by its freedom of information coordinator who coordinated the search. The affiant states that when she received the request she did not contact the appellant and chose to respond to it literally. She contacted the assistant manager in the Wheel-Trans department and the head of the Wheel-Trans department at the TTC and asked that they conduct a search for information relating to the request. The affiant states that she was advised by a community services representative at the TTC that her department did not have anything on file relating to the step-test steps construction directions or receipts and that she was waiting to hear from the Wheel-Trans maintenance department who were conducting a search for any information with respect to the request. The community services representative also stated that they were waiting to hear from the named company (the eligibility assessor) regarding the contract paperwork for the contractor that was hired to recreate the step-test steps.

[21] The affiant stated that she was advised that the Wheel-Trans department had conducted a search for responsive records but that no records were in existence given that the department created the original design for the step-test steps over 15 years ago, that these documents were not kept, and that there were no longer any personnel in the department who had worked on creating the original design.

[22] The affiant also states that she was informed by the Wheel-Trans department that the eligibility assessor had the step-test steps reconstructed a few years prior but the TTC was not charged for the reconstruction. The affiant indicated that she was advised by the Wheel-Trans department that it contacted two employees of the eligibility assessor to confirm whether it had re-built the steps and it confirmed that it had done so around the spring/summer of 2014, that they were exactly the same as the previous model and that the TTC was not charged.

[23] The affiant further states that she was advised by the supervisor of customer services within the Wheel-Trans department that they had no record of any communication between the TTC and the eligibility assessor about construction,

directions and receipts for any step-test steps used by the eligibility assessor in assessing Wheel-Trans eligibility appeals nor did they have any documentation relating to the construction or purchase of the step-test steps. The affiant states that she was advised by the supervisor at Wheel-Trans that she contacted the eligibility assessor asking that it search for any records such as receipts for materials, instructions for design etc. relating to the step-test steps. The affiant stated that she was advised that the eligibility assessor's finance department was searching its records for an invoice from when the step-test steps were reconstructed at its offsite archive. In addition, its IT department searched its archived emails for any relevant records. The affiant stated that she received an invoice from the eligibility assessor for the reconstruction that took place in 2014.

[24] The appellant was provided with a copy of the TTC's representations and provided his own representations in this appeal. He refers to his earlier access requests in order to put the request at issue in this appeal into context. In an earlier request (request 16-39) he requested a photograph of a set of steps used by the same eligibility assessor to assess Wheel-Trans for the TTC. The appellant submits that when he received the photograph from that request, he thought that the photograph was of a different set of steps from what he remembered being used during his eligibility test, which began a months-long attempt to verify documentation related to the information provided by the TTC in response to that earlier request. During this time, the appellant submits that it became apparent that the steps had been replaced since his test, with the implication that the steps depicted in the photographs may be a different set of steps from what had been referred to in his access request. According to the appellant, that led to the access request in this appeal.

[25] The appellant submits that the following indicators show that additional documentation exists and that the TTC has not conducted a reasonable search:

- The TTC does not appear to have followed the instruction in the Notice of Inquiry as it did not adequately explain why it narrowed the request to exclude the eligibility assessor, and did not disclose its search details or its records retention and destruction of documents policy.
- Although the TTC indicated that the step-test steps were created over 15 years ago and that documents "were not kept" it did not adequately explain why records were not kept or if and when they were destroyed.
- One confidential part of the appellant representations refers to another reason why he believes further records should exist, which I have considered but not refer to in this order.
- Exhibits F, G, H and I to the affidavit provided by the TTC provide little detail regarding the eligibility assessor's internal search and records retention policy.

- The TTC neglected to answer a specific question by the original adjudicator about what step-test steps are depicted in request 16-39.

[26] The appellant also submits that there appear to be conspicuous absences and contradictions in the records provided by the TTC. He submits:

- That an email in exhibit C is cut off mid-sentence.
- That in another ongoing appeal involving himself and the TTC, there were numerous discrepancies in the TTC's internal email correspondence. He raises the question of whether TTC staff were put in a conflicted position in searching their own emails for correspondence which could be personally damaging.
- That in one of the emails provided by the TTC setting out its search efforts, an individual from the eligibility assessor refers to a "quote" for the destruction and replacement of the "step-test" steps and that same email refers to "specifications that were passed to the contractor." The appellant submits that none of the emails contains the mentioned quote or the referenced "specifications".
- That the TTC never provided a detailed explanation of its search and retention policies.
- That an email dated July 26, 2016 mentions that the eligibility assessor reconstructed the steps a few years ago, yet no other correspondence indicates that the eligibility assessor ever told the TTC that the steps were falling apart.
- That correspondence from the TTC (i.e. the emails between departments with respect to the TTC's search) begins on July 11, 2016 but a letter claiming the requested document/s do not exist is dated July 8, 2016. As a result, the appellant queries how the TTC records department could have determined that the documents do not exist prior to making inquiries of the Wheel-Trans department with respect to its record holdings.
- That there are several emails from a TTC employee to Wheel-Trans management that do not have responses which appears to imply that there are additional communications besides the provided emails, which may include recordings of phone conversations, notes or other documentation.

[27] A severed copy of the appellant's representations was provided to the TTC and the original adjudicator⁷ asked it the following specific questions about its search:

⁷ As noted above, Appeal MA16-494 was transferred to me after the parties had provided their representations.

- In the email at Exhibit "I" to the affidavit, [a specified employee of the eligibility assessor] makes reference to a quote for the stairs. Has the eligibility assessor provided the TTC with a copy of this quote? Has the TTC asked the eligibility assessor for a copy of it? Please explain.
- In the email at Exhibit "I", [the specified employee of the eligibility assessor] also states that she asked IT to search the archived emails for the specifications that were passed to the third-party contractor. Please provide particulars of the search conducted by IT and the results of that search.
- The email string in Exhibit "C" is cut off at the bottom. Since this string contains information regarding the TTC's searches, please provide the full string.
- In the email at Exhibit "F", the Customer Service Supervisor states that "we do not have any documentation relating to the construction or purchase of these "step-test" steps. Please advise what searches were carried out in the Customer Service department.

[28] The TTC provided reply representations submitting the following responses to the adjudicator's questions:

- The eligibility assessor provided it with a copy of the relevant third party invoice for the work done on the stairs and the eligibility assessor requested that it not be released to the appellant.⁸
- The person who conducted the search for the eligibility assessor requested its IT department to extract all emails that were sent and received by the manager responsible for reconstructing TTC's step-test stairs and, after reviewing the emails from that time period, was unsuccessful in locating any specifications that were passed to the third-party contractor. That employee informed the TTC that the specifications for the stairs were never sent to the eligibility assessor, rather they were taken by the contractor by measuring the original stairs to confirm the appropriate measurements.
- The TTC also attached the full string of the email string that had been cut off.
- The customer service department responded to the request for information on the searches that were conducted. It stated that it reached out to the eligibility assessor to find out if it had any copies of correspondence between Wheel-Trans and itself for records relating to the construction or purchase of the step-test steps, but none was found as the documents would have been too old and had

⁸ This record was subsequently released and is not at issue.

been destroyed. The customer service department stated that the eligibility assessor took a long time going through its files but was unable to locate any responsive information.

- The customer service department also confirmed that it reached out to its internal purchasing department but it did not have any records.

[29] The TTC's reply representations were forwarded to the appellant who was asked to respond to the four points that the TTC's addressed. The appellant submits that he is not in receipt of the "quote" referenced in the TTC's email, noting that the record that he has received is labelled "invoice" and does not appear to be a job quote. The appellant also submits that on closer inspection of the new copy of the invoice (the unmarked version sent to him November 22, 2016) it appears to have been altered with information being whited out.

[30] The appellant submits that the TTC claims that relevant documents were destroyed but that it has refused to provide sufficient particulars of its maintenance and retention policies. The appellant submits that the TTC's representations suggest that it reached out to the eligibility assessor for correspondence between the eligibility assessor and Wheel-Trans but was informed that it could not find anything as the documents were too old and records have been destroyed. The appellant submits that the TTC and the eligibility assessor should have copies of additional emails between them as the TTC had previously informed him that emails more than two years old are stored off-site. The appellant also submits that in this case, the access request for information relating to the steps was made in May 2016 and the invoice for the new steps is dated September 2014, which is less than the two-year retention period referred to by the TTC.

[31] The appellant submits that the TTC has previously provided false information in relation to this request and that it appears that it is using its "misrepresentations" to draw out the process. The appellant refers to the email string provided by the TTC in its recent submission regarding its search, noting that its decision letter stating that "record does not exist," is dated July 8, 2016, yet the emails show that the TTC had not yet heard back from Wheel-Trans until at least July 20, 2016. The appellant submits that the TTC could not have known on July 8, 2016 that no records exist.

[32] As noted, I invited representations in Appeal MA16-494-2 and ultimately the issue in both appeals ended up being solely reasonable search relating to the same request. The parties' representations on this issue in Appeal MA16-494-2 were very similar to those provided in Appeal MA16-494 and only new and relevant information will be summarized here.

[33] The appellant submits that the TTC produced some records in MA16-494 and that an invoice dated September 23, 2014 indicates "see att'd". Moreover, an email from the TTC employee states "here is the quote that I received." The appellant submits that since he was not provided with a record that would constitute the quote

referenced in the email, this is evidence that more records exist and that the TTC's search was not reasonable. Further, the appellant submits that initially the TTC denied that such a document existed and then provided three different versions of it. He submits that one version was significantly altered by whiting out an entire section of the record, without notice to him that this had been done.

[34] In its representations, the TTC provided detail on its search for responsive records. With regard to the record that was at issue in MA16-494, the TTC confirms that after consulting with the eligibility assessor as well as the third-party contractor who constructed the test-steps, it issued a revised decision in which full access to the record was granted. It also submits that it took the following steps before concluding that no additional records existed:

- The TTC's FOI coordinator contacted the eligibility assessor to inquire if any lines on the invoice had been whited out. The eligibility assessor advised that no lines had been whited out on the clean copy and that the printer was having issues, which was the reason why the printed copy looks the way it does.
- The TTC asked the eligibility assessor for a clean copy of the invoice and was informed that they believe they only have the electronic copy.
- The TTC asked the eligibility assessor about the writing on the invoice that says "see att'd" and whether there was another document in play. The eligibility assessor confirmed that as far as it was aware this was all that it had.
- The TTC asked the eligibility assessor about a stamp in the middle of the invoice that mentions a supplier and "looks like it says 4," querying whether something was removed. The eligibility assessor confirmed that the stamp was something it put on its invoices so it can code them for its internal accounting system and were uncertain if this was a "4".
- The TTC also asked about the electronic version of the invoice, wondering if there was a cleaner copy, to which the eligibility assessor responded that this was the only version available the time they looked.

[35] The TTC submits that by email dated April 24, 2018, the eligibility assessor advised that it had "gone back through our archives and unfortunately the only version we have been able to located is the same as the one that has been provided."

[36] The appellant was provided with a copy of the TTC's representations and made his own in reply. The appellant again submits that the TTC and the eligibility assessor have not provided details of their records retention policies as directed in the Notice of Inquiry.

Analysis and finding

[37] The issue in this appeal is whether the TTC has conducted a reasonable search for records responsive to the appellant's request.

[38] As set out above, in appeals involving a claim that further responsive records exist, the issue to be decided is whether the TTC conducted a reasonable search for records as required by section 17 of the *Act*. If I am satisfied that the TTC's search for responsive records was reasonable in the circumstances, the TTC's search will be upheld. If I am not satisfied, I may order that further searches be conducted.

[39] I am satisfied that the search was carried out by an experienced TTC employee, being the freedom of information/records management coordinator. I accept the coordinator's evidence that upon receipt of the request she chose to respond literally to it since when reviewing the actual request, it was clear what the appellant was requesting.

[40] However, the appellant suggests that there is a conflict in having employees of the TTC search for responsive records that would be personally damaging. I am not satisfied that a conflict of interest exists in this appeal as regards to the individuals who conducted the searches. In Order MO-1285, Adjudicator Cropley discussed the factors to consider when addressing whether a conflict of interest exists. She wrote:

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Order M-640).

[41] Relying on the findings in Order MO-1285, I find that I do not have enough evidence to conclude that the TTC employees have a personal or special interest in whether the records are disclosed. I find there was no conflict of interest in these employees searching their own emails for responsive records.

[42] The appellant takes issue with the TTC reference to records being destroyed as they were "too old" submitting that the TTC neglected to provide a copy of its records retention policy. However, in my review of the TTC's representations, the reference to records being too old had to do with the original design and building of the steps which, according to the TTC, took place more than 15 years before the appellant's request. In my view, it is not incumbent upon the TTC to provide a copy of its retention policy with regard to records that are this old. The TTC's representations do not state that more recent records were destroyed.

[43] On my review of the appellant's representations, it appears that he is of the view that because he was not provided with a quote and specifications for the work done, both of which were mentioned in an email to the TTC from the eligibility assessor, this is evidence that the TTC's search was not reasonable. The appellant also suggests that there appears to be a portion on the provided invoice that looks like it was whited out and also questions where the attached document is, since on the invoice is the wording "see att'd".

[44] In its reply representations in MA16-494, the TTC addressed the "specifications" mentioned in the email. According to the TTC, it had contacted the eligibility assessor who informed the TTC that it had requested its IT department to extract all emails that were sent and received by the manager responsible for reconstructing the step-test steps, and the IT department was unable to locate any specifications that were passed to the contractor. The eligibility assessor explained that these specifications were never sent to it; rather, they were taken by the third-party contractor by measuring the original stairs in order to confirm the appropriate measurements. Therefore, it appears that this was not a document that was ever in the eligibility assessor's possession. I accept that the TTC has provided a reasonable explanation of why it was unable to locate the "specifications" mentioned in an email, and I do not find the absence of such "specifications" to be evidence that its search was not reasonable. I will address the quote below.

[45] The appellant points to a portion of the provided invoice which contains the words "see att'd" and suggests that there must have been an attached document which was not provided by the TTC. However, I accept the TTC's submission that it contacted the eligibility assessor, who stated after checking its records again, that there were no other documents in play. I accept that the eligibility assessor could not find a responsive document that would have been attached to the invoice. I find that evidence supports that the TTC is unable to locate any further record that may have been attached to the invoice. In my own review of that record, I note that a sticky note (which was disclosed to the appellant in one version of the record provided to him) had been attached to the record with more information about the steps. In my view, it is more likely that the words "see att'd" were in reference to that sticky, especially since the eligibility assessor confirmed that it was unable to locate another responsive record.

[46] The TTC also submitted that no information on the invoice had been whited out after following up with the eligibility assessor. The TTC submits, and I accept, that the eligibility assessor explained that it only has an electronic copy of the invoice and that no lines had been whited out on the clean copy before it was printed. The eligibility assessor further explained that the printer was having issues which would be the reason why the printed copy looks the way it does.

[47] As noted, the *Act* does not require the TTC to prove with absolute certainty that further records do not exist. I find that it has provided sufficient evidence to show that it is unable to locate the "specifications" and that they may have never been in the

eligibility assessor's possession. In addition, I accept the evidence that the eligibility assessor provided the invoice that it had in its file, that it did not white out any information, and that no further documentation could be located to address the "see att'd" note on the invoice. Therefore, I find that these aspects of the TTC's search were reasonable.

[48] However, after considering the representations of the parties with respect to the referenced quote, I find that the TTC has not provided sufficient evidence to establish that a reasonable search was conducted for this responsive record. I make this finding for the following reason.

[49] Although I find that the TTC's search for most of the records is reasonable, it has not addressed the issue of the quote adequately and I cannot find that its search for this particular record is reasonable. In the inquiry for Appeal MA16-494, the appellant, referencing the TTC's affidavit, pointed to Exhibit "I" which is an email from the eligibility assessor to the TTC. In that email, the eligibility assessor states "[h]ere is the quote that we received," while also stating that it was working hard to retrieve the actual invoice.

[50] In his representations, the appellant confirmed that he was not in receipt of a quote, suggesting that this was evidence that further records exist. The original adjudicator invited the TTC to provide reply representations and specifically asked it to speak to the quote referenced in the email. In its reply submission, the TTC speaks only to the invoice and does not address the referenced quote.

[51] In my view, it is incumbent upon the TTC to either provide a copy of the quote or provide a reasonable explanation as to why the quote cannot be located after searching again for it. Therefore, I do not find that the TTC's search with respect to this quote is reasonable. As a result, I will order the TTC to conduct another search for this record and provide details of its search.

ORDER:

1. I order the TTC to ask the eligibility assessor to provide it with a copy of the quote referenced in Exhibit "I" to the affidavit dated May 16, 2017 provided by the TTC.
2. If the TTC receives a copy of the abovementioned quote, I order it to issue an access decision to the appellant in respect of the quote, treating the date of this order as the date of the request.
3. I order the TTC to provide me with an affidavit concerning the above search for the quote by **July 10, 2019**. If the eligibility assessor is unable to locate a copy of the quote, the affidavit must provide an explanation for the reference to "quote" in Exhibit "I" to the TTC's May 16, 2017 affidavit.

4. I remain seized of the appeal to address issues arising from order provisions 1 and 3 of this order.

Original Signed by: _____

Alec Fadel
Adjudicator

_____ May 28, 2019