



**Information and Privacy  
Commissioner/Ontario**  
**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **INTERIM ORDER M-807**

**Appeal M\_9600099**

**City of Stoney Creek**



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## **NATURE OF THE APPEAL:**

The City of Stoney Creek (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all documentation regarding communications between the Mayor of the City and certain named individuals. The request was divided into seven distinct categories, each of which described the subject matter, parties, and time frame for the specified communications.

The City advised the requester that no responsive records existed.

The requester (now the appellant) appealed the City's decision.

During mediation of the appeal, a copy of one of the documents identified in the original request letter was located by the City. This record is a copy of a one-page draft letter prepared on or about November 14, 1995 by outside counsel retained by the City (outside counsel). This draft letter is addressed to a named individual other than the appellant (the affected person).

The City issued a revised decision letter to the appellant, denying access to this record on the basis of the following exemptions contained in the Act:

- section 6(1)(b) - in camera meeting of council
- section 12 - solicitor-client privilege
- section 38(a) - exception to right of access to requester's own personal information

In this second decision letter, the City advised the appellant that the draft letter was not sent and the original had been destroyed. The City explained that the copy located by the City was found in the files of outside counsel. The City also advised the appellant that, because the letter was not communicated to anyone, it was not a "record" under the definition contained in section 2(1) of the Act.

The appellant disagreed with the various exemptions claimed by the City and also with the City's view that the document was not a "record". The appellant also continued to believe that more responsive records existed.

Further mediation was not possible, and this office sent a Notice of Inquiry to the appellant, the City and the affected person. Representations were received from the appellant and the City.

## **DISCUSSION:**

During the course of this inquiry, the appellant provided this office with a copy of a letter which he believed was responsive to his request and had not been identified by the City. In my view, this record is directly responsive to part 6 of the appellant's request. The letter is addressed to the Mayor of the City and members of council, from one of the companies identified by the appellant in his letter, during the time period covered by the request.

Because the existence of this letter raises issues regarding the reasonableness of the City's search for responsive records, I have decided to issue this Interim Order which will deal solely with the search issue. The remaining issues, and any additional issues which arise as a result of this Interim Order, will be dealt with in a final order.

## **REASONABLENESS OF SEARCH**

Where a requester provides sufficient details about the records which he is seeking and the City indicates that further records do not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. The Act does not require the City to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the City must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

The Notice of Inquiry provided to the parties in this appeal, asked the City to:

... provide [the Commissioner's office] with a written summary of all steps taken in response to the appellant's request. In particular, [the Commissioner's office] asks that you consider the following:

1. Was the appellant contacted for additional clarification of his request? If so, please provide details including a summary of any further information the appellant provided.
2. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? I would ask that you include details of any searches carried out in response to inquiries from this office during the course of mediation.
3. Is it possible that such records existed but not longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The City was advised that if the decision maker in the appeal was not satisfied with the City's response, further searches might be ordered. The City was also advised that it had the burden of providing documents or other evidence to support its position that responsive records did not exist, and that this evidence should be provided in affidavit form, sworn by the individuals who conducted the searches.

In response to the Notice of Inquiry, the City provided an affidavit sworn by the City's Freedom of Information and Privacy Co-ordinator (the Co-ordinator) which outlines the steps she took in responding to the appellant's request. The Co-ordinator states that she forwarded a copy of the appellant's request letter to the Acting Assistant to the Clerk with instructions to carry out a search of City records "to determine whether any of the requested documentation was in the

possession of the City.” The Acting Assistant to the Clerk also provided an affidavit stating that she in turn forwarded a copy of the appellant’s request letter to the Mayor’s secretary, asking her to determine if any responsive records existed in the offices of the Mayor or her secretary, and that “approximately two days later a copy of [the appellant’s] letter was returned from [the Mayor’s secretary] with a notation attached saying “nothing found” or words to that effect.”

Having reviewed the City’s representations regarding the search for responsive records, and in light of circumstances that have arisen since the commencement of this inquiry, I find that the City has not made sufficient efforts to identify and locate all responsive records.

I have reached this conclusion for a number of reasons:

1. The fact that the appellant has obtained a copy of a record which is directly responsive to one aspect of his request, and this record was not located by the City, raises questions about the adequacy of search.
2. The affidavits provided by the City are not sworn by the individuals who actually conducted searches in the Mayor’s office, the most likely location for responsive records given the wording of the appellant’s request.
3. Previous orders of the Commissioner’s office have determined that records which are in the possession of outside counsel may fall under the control of the institution for the purposes of the Act (eg. Order M-315). Correspondence provided by the City as part of its representations acknowledges that the one record located in outside counsel’s offices was under the City’s control, and the revised decision letter was issued by the City on this basis. However, the City’s representations do not address steps taken to locate responsive records in outside counsel’s offices.
4. In the same correspondence referred to under 3, above, reference is made to other communications between outside counsel and the Mayor which took place in the context of the one identified record, which raises questions about the adequacy of search.

Therefore, I will order the City to conduct a further search for responsive records, in accordance with the terms of this Interim Order outlined below.

Because the appellant already has a copy of the one record responsive to part 6 of his request, in my view, no useful purpose would be served in having the City issue a decision letter with respect to this record.

## **ORDER:**

1. I order the City to conduct further searches for responsive records within its custody or under its control, in accordance with its statutory responsibilities, and to advise the appellant of the results of this further search by **August 9, 1996**. These searches should include all relevant files in the Office of the Mayor and any other offices of the City

which could reasonably be expected to include communications between the Mayor and the various individuals identified in all seven categories specified by the appellant, for the time frames included in each part of the request.

2. I order the City to arrange for a search for responsive records under its control in the possession of outside counsel, in accordance with its statutory responsibilities, and to advise the appellant of the results of this search by **August 9, 1996**.
3. In the event that further records are located as a result of the searches mentioned in Provisions 1 and 2, I order the City to provide an access decision to the appellant, in the form contemplated by sections 19, 22 and 23 of the Act, by **August 9, 1996**.
4. In the event that further records are not located as a result of the searches mentioned in Provisions 1 and 2, I order the City to provide the appellant with a notice of refusal, in the form contemplated by section 22 of the Act, by **August 9, 1996**.
5. I order the City to provide me with an affidavit or affidavits, sworn by the individual(s) who actually conducted each of the various searches referred to under Provisions 1 and 2 by **August 9, 1996**. Any such affidavits should outline in detail the areas of search and the time frame covered by each category of the appellant's request. The affidavit(s) should be forwarded to me c/o Information and Privacy Commissioner, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
6. I remain seized of all matters arising from this appeal, including the issue of the adequacy of the further searches conducted by the City in compliance with this Interim Order.

Original signed by: \_\_\_\_\_ July 10, 1996  
Tom Mitchinson  
Assistant Commissioner