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

INTERIM ORDER MO-1904-I

Appeal MA-040226-1

City of St. Catharines

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NATURE OF THE APPEAL:

The City of St. Catharines (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of "all records of information, regardless of how it is recorded" relating to construction projects for an identified address from January 1, 1995 to the date of the request. The request specified that it was for:

> All correspondence, including without limiting to; Computer entries/electronic records, hand written, unedited reports, meeting minutes, log books, records of inspection, daily diaries. Mileage/traveling log books memoranda, call notes, emails, faxes, photographs, receipts, messages, accounts, (etc.).

The request also referred to two specific permit numbers.

The City responded to the request by granting partial access to the responsive records, and denying access to portions of the records on the basis of the exemption found in section 12 (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed the City's decision to deny access to records, and also took the position that additional responsive records exist.

During the mediation stage of the appeals process, a number of matters were resolved. The City granted access to certain records, and the appellant advised that he was not pursuing access to records which the City claimed were exempt under section 12 of the *Act*. Accordingly, section 12 is no longer at issue in this appeal.

Also during mediation, the appellant advised that he was seeking access to travel/mileage logs pertaining to the identified construction projects. The City conducted a further search for responsive records, and advised that responsive records do not exist because inspectors submit total mileage for a whole day's visits. The City stated that it was therefore not possible to identify the mileage for specific site visits.

The appellant subsequently clarified his request with respect to (1) inspector's appointment books; (2) entries made on a particular computer program; (3) daily diaries; (4) copies of nine particular facsimile transmissions; and (5) photographs. The City conducted a further search for records responsive to the clarified request, and issued a revised decision. That decision explained why mileage records and logbooks do not exist, and identified certain information relating to the entries made on a particular computer program. With respect to the request for access to "travel log books" or "appointment books", the City stated:

> … there are no such documents kept within the City. More particularly, the information you have requested concerning the specific times at which inspections were commenced or the duration of inspections is not maintained in any records by the City. A daily list of building inspection requests is kept by the City, which records only basic information such as the date of the request and the project/property it relates to, for the purpose of conveying the request to the individual inspector involved with that project to make any further scheduling arrangements. The list of building inspection requests are only kept for a period

> of approximately two years, following which they are destroyed and, as such, any lists which may have indicated inspections requested with regard to the relevant building projects which are the subject of [this access request] would have been destroyed. Further, any "daily diaries" that may have been kept during that period by individual building inspectors would be their own personal dairies, and as such are not records maintained or in the possession of the City that are capable of being produced.

The letter also stated:

> … I have been advised that all other existing records that relate to your request concerning these projects were provided to you previously.

The revised decision did not address the request for photographs or the nine requested facsimile sheets.

In response, the appellant advised that he was satisfied with the information disclosed to him regarding the computer program entries, and also with the explanation provided to him regarding the existence of the travel/mileage logs. However, concerning the request for appointment books, daily dairies, or inspector's log books, he takes the position that these records do exist. In support of that position he refers to a letter written by the Assistant City Solicitor for the City and dated February 2, 2000, which reads:

> I confirm that [an identified inspector] established the date of the notes **by consulting his daily log book.** The inspectors keep a daily log of the inspections they conduct so that the Chief Building Official is aware of what buildings are being inspected, at what times, and also for purposes of claiming their mileage. [Emphasis added]

Accordingly, the issue of whether the City has custody or control of any "appointment books, daily dairies, or inspector's log books" that may have been kept by the individual building inspectors, is an issue in this appeal.

The appellant also referred to one of the records disclosed to him, which contains the following statement: "Do not destroy file box in City Hall basement". He stated that additional records may be in that box, and maintained that additional photographs and facsimile sheets exist.

Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the process.

Following the transfer of the file to the inquiry stage, the City provided two further letters to the appellant identifying information relating to the requested facsimile sheets and the photographs. The appellant subsequently confirmed that he was not pursuing access to the facsimile sheets, and they are no longer at issue.

Accordingly, the remaining issues in this appeal are whether the requested appointment books, daily dairies, or inspector's log books are in the custody or the control of the City, and whether additional photographs responsive to the request exist.

I sent a Notice of Inquiry to the City, initially, and the City provided representations in response.

DISCUSSION:

CUSTODY OR CONTROL

Section 4(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

In this appeal I sent a Notice of Inquiry to the City in which I identified that this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution [Orders 120, MO-1251], and I invited the City to provide representations on the issue with reference to the list of factors. I also identified that some of the listed factors may not apply in this appeal, while other unlisted factors may apply. The list of factors included:

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner),* above]
- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]
- Does the content of the record relate to the institution's mandate and functions? [Orders P-120, P-239]

- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]

- Does the institution have a right to possession of the record? [Orders P-120, P-239]

- Does the institution have the authority to regulate the record's use and disposal? [Orders P-120, P-239]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?

- To what extent has the institution relied upon the record? [Orders P-120, P-239]

- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

I also identified for the City that the following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record? [Order M-315]

- Who paid for the creation of the record? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the record?

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the

creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner),* [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the record and others in a similar trace, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue? [Order MO-1251]

The City's representations

The City provided representations in response to the Notice of Inquiry. The City's representations state:

> We confirm that any appointment books, daily diaries, or log books that may have been kept during the relevant time period by individual building inspectors employed by the City would be their own personal diaries, and as such are not records in the custody or control of the City. Further, the City does not rely on any records that fit this description for any purpose related to the core activities of the City.
>
> …these records are not in the custody or control of the City but rather are intended and treated, both by the City and the individual employees, as being for their own personal use. This is evidenced by the fact that the City does not regulate their contents, monitor their use, or indeed even require their use.

> Furthermore, the contents of the date books are not relied on by the City or integrated with the City's records. Accordingly, these records are not treated as being included among the records that the City maintains or is responsible for and are not included in the City's retention by-law.
>
> Moreover, the City has no knowledge of their actual contents or whether they would even include any reference to the appellant's property. As such, the City can only speculate as to what the contents of these records might be. The actual practice with regard to the use and disposal of these records likely varies from employee to employee in view of the fact that these records are the personal property of the individual employees.
>
> Please note that the City does not have either physical possession of the date books or a right of possession in respect of them. As such, even if there are in fact date books in existence to date for the time period relevant to the appellant's request, which dates back to 1995, they would be in the possession of the individual employees, and the City would have no authority to require their possession.

The City then refers to Order P-1532 in support of its position that it does not have custody or control of the records. The City states:

> … in this regard the circumstances relating to the maintenance and use of these date books is similar to those of the journal entries which were the subject of Order P-1532 … which were found not to be in the custody or control of the institution involved in that appeal.

Furthermore, the City refers to the types of records which it does keep. It indicates its understanding that the appellant is seeking particulars concerning the specific times at which inspections of his property were commenced and their duration. The City then states that this information "is not maintained in any existing records by the City." The City states:

> … the records that are actually required to be maintained by City employees are "Inspection Notes", in order to document the dates, results, and consequences of particular inspections. These inspection notes are filed in the City's building files according to the property or construction project they relate to and are generally maintained in a standard format. To the best of my knowledge, inspection notes do not include information pertaining to the duration of inspections or the times they were commenced or completed, as the City does not require that this information be documented. We note that the appellant was provided with copies of inspection notes pertaining to the building permits issued in respect of his property…

Finally, as identified above, the appellant maintains that appointment books, daily dairies, or inspector's log books exist, and he referred to a letter written by the Assistant City Solicitor and dated February 2, 2000, which reads:

> I confirm that [an identified inspector] established the date of the notes **by consulting his daily log book.** The inspectors keep a daily log of the inspections they conduct so that the Chief Building Official is aware of what buildings are being inspected, at what times, and also for purposes of claiming their mileage. [Emphasis added]

The City responds to this position as follows:

> With regard to the City's letter dated February 2, 2000 … which indicates that certain inspectors keep a daily log of the inspections they conduct, the City recognizes that it may be the case that some building inspectors make use of date books of some description, which the City provides as a general organizational tool. However, the fact that these records may exist in some format is not determinative of the issue of whether the City should be considered to have custody or control of them.

Findings

I have carefully reviewed the City's representations in support of its position that the City does not have custody or control of records responsive to the request, and I find that the City has not provided me with sufficient information to find that these records, if they exist, would not be in the custody or control of the City.

As a preliminary note, it appears that the City has not conducted a search for or determined whether any responsive records actually exist and, if they exist, where they might be located, or what the understanding of the creators of the records may have been. Rather, the City has taken the position that records of this nature are "de facto" records outside the City's custody or control. I do not accept the City's position.

As identified above, the courts and this office have applied a liberal and purposive approach to the custody or control question. As stated by the Federal Court of Appeal under the federal access to information scheme in *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 at 244-245:

> The notion of control referred to in subsection 4(1) of the *Access to Information Act* … is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access

> only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.

The Federal Court of Appeal continued (at p. 245):

> It is, in my view, as much the duty of courts to give subsection 4(1) of the *Access to Information Act* a liberal and purposive construction, without reading in limiting words not found in the *Act* or otherwise circumventing the intention of the legislature as "[i]t is the duty of boards and courts", as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the *Canadian Human Rights Act* … "to give s. 3 a liberal and purposive construction, without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature" . . . It is not in the power of this court to cut down the broad meaning of the word "control" as there is nothing in the *Act* which indicates that the word should not be given its broad meaning . . . On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the *Act* to government information . . .

The Court of Appeal for Ontario adopted this approach in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 (at p. 6, para. 34). It is based on this approach that this office developed the list of factors to consider in determining whether or not a record is in the custody or control of an institution (see Order 120), and the City was invited to address the factors. The City has chosen to address only a few of the factors listed.

I will now review the factors to consider whether the records of the nature requested are in the custody or control of the City. In doing so, I apply the approach taken by former Commissioner Linden in Order P-120 when he stated:

> These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

Addressing the applicable factors outlined in Order 120, I find that any records responsive to the request which may exist would consist of note book entries made by the City's building inspectors, whom the City identifies as its employees. These entries or notes may or may not have been made in date books which the City has identified it provides to the inspectors as a "general organizational tool". Any such entries or notes that relate to the inspections of the properties would likely document the actions taken by the inspectors in the course of carrying out their duties as building inspectors. Although not incorporated into the official records the City has identified it keeps on file, in my view records of this nature would relate directly to the professional employment responsibilities of the building inspectors, as well as the related mandate of the City with respect to its obligation under the *Ontario Building Code*.

I do not accept the City's position that any appointment books, daily diaries, or log books that may have been kept during the relevant time period by individual building inspectors employed by the City would be "their own personal diaries", nor do I accept the City's position that these records "are intended and treated, both by the City and the individual employees, as being for their own personal use". Instead, I find that any records of this nature relating to the identified properties would rather be used and relied on by the creators of these records in the course of carrying out their duties as City employees.

Order P-1532

The City has referred to Order P-1532 in support of its position that it does not have custody or control of the records. I have carefully reviewed that order and, in my view, it can be distinguished from the circumstances of this appeal. Because the City has relied on it, I will review that order in some detail.

In Order P-1532, Adjudicator Mumtaz Jiwan determined that journal entries made by an employee of the Ministry of the Environment (the Ministry) were not found to be in the custody or control of the Ministry. That appeal involved a request for the handwritten notes of three employees. The notes of two of the employees were identified as responsive to the request; however, the third employee (the District Manager) stated that he did not make notes because he relied on the notes of the other two employees and did not have occasion to take notes. It was later identified that the District Manager had maintained a "personal Daily Journal of meetings and telephone conversations", which he entered every evening at home, and which he considered to be "personal material protected from public access even though they do record daytime workplace-related, as well as personal activities." The Ministry stated that it had never seen this journal and that it did not have access to these notes, which were maintained at the District Manager's home.

In that appeal, the Ministry stated that there was no requirement for such records to be held at an employee's home. Interestingly, the Ministry did require its employees to record all business-related activities in a notebook (for environmental officers or investigators) or on loose sheet paper for others. The loose sheets were sent to be filed and the notebooks are considered to be in the Ministry's custody and control at all times.

The Ministry noted that the journal was purchased by the employee and entries were made on his personal time, at his residence. The Ministry stated that it did not have a right of possession to the record, that the record was kept by the employee at his residence and that it was never been integrated with Ministry records. The Ministry submitted that it had no custody or control over the record, and no authority to dispose of it.

The District Manager explained that he is a professional engineer and he maintained a daily personal journal recording the day's activities "as a memory aid and as a personal history of [his] activities". He identified that he used a daily journal since 1972 and prior to his employment with the Ministry, that the record was kept at home in his personal possession, that although the

record did contain some work related information, it did not contain details of any meeting discussions, and that the Ministry never relied on the record and did not have the right to it.

In Order P-1532, based on the facts and the evidence of both the Ministry and the creator of the record, adjudicator Jiwan found that the Journal entries in that appeal were not in the Ministry's custody or control.

In my view, the circumstances of that appeal are very different from the ones in this appeal. In P-1532, the journal entries at issue were recorded and kept by the employee at his home and on his personal time, whereas any notebook entries that would have been kept were considered to be in the Ministry's custody or control. Furthermore, the author of the record was contacted and asked to provide information regarding his understanding when he created the records.

In this appeal the City has not identified whether or not any responsive records exist, but has simply taken the position that any records of the nature requested would fall outside of the City's custody and control. Unlike the situation in Order P-1532, the City has neither contacted the authors of the records to determine whether responsive records exist, nor identified the views of the authors of responsive records to determine their understanding of the nature of any responsive records. It also appears, based on the City's description of records relating to this appeal, that any responsive records would likely be comparable to the notebook entries, which were in the Ministry's custody or control in Order P-1532, as opposed to the specific and unique personal journal entries kept by the District Manager.

Accordingly, I do not accept that the finding in Order P-1532 applies directly to the circumstances of this appeal.

After reviewing the representations of the City, as well as taking into account the indicia of control outlined by former Commissioner Linden in Order 120 and the previous orders of this office, I find that the City has not provided me with sufficient information to find that these records, if they exist, would not be in the custody or control of the City. Accordingly, I will order the City to conduct searches for any responsive appointment books, daily diaries, or log books that may have been kept, and to issue a decision in accordance with the requirements of the *Act* with respect to any responsive records which may exist.

REASONABLE SEARCH

As identified above, the appellant has taken the position that additional photographs responsive to his request exist.

The request resulting in this appeal was for all records relating to the identified building permits, and specifically included photographs. As identified above, the City conducted a search for responsive records when it received the request, and also conducted additional searches for records during the mediation stage of the process. The decision letter issued to the appellant following those searches stated:

> … I have been advised that all other existing records that relate to your request concerning these projects were provided to you previously.

After this file was transferred to the inquiry stage of the process, the City provided two further letters to the appellant. One of the issues addressed by the City in one of the letters relates to the request for photographs, and states:

> Further to our [earlier letter] … please find enclosed copies of 4 photographs, taken by a building inspector on [a specified date], provided in accordance with your request for photographs. Please note that these are the only photographs in the City's files which were taken by the City of the property in respect of this matter. Further, please find enclosed copies of photographs that we understand you provided to the City…. We note that you likely already have these photographs in your possession as we understand that you were the originating source of the same.
>
> Please be advised that these are the only photographs in the City's files with respect to your request.

The appellant remained unsatisfied with the City's decision, and maintained that additional photographs exist.

The City's representations

In its representations, the City identifies the steps taken to respond to the appellant's request. The City states that searches were conducted and that:

> … copies of all photographs in the City's files were provided to the appellant. More particularly copies of 4 photographs, taken by a building inspectors on April 30, 1998, were provided to the appellant, being the only photographs taken by an employee of the City in the City's files pertaining to the construction projects that were the subject of the appellant's request. Further, copies of photographs that the City received from the appellant on August 18, 2000, were also disclosed to him. Please be advised that no other photographs were found in the City's files relevant to the appellant's request, and there is no evidence, in these files or otherwise, to indicate that any further photographs ever existed.

The City then summarizes the steps taken and the process followed to respond to the request, and identifies the files and departments where searches were conducted. The City also identifies that, following the opening of this appeal file, further records were provided to the appellant by the City. The City states:

> Generally speaking, it appeared that these records were not initially disclosed to the appellant either because the appellant was the originating source of the

> records, and was presumed to already have the originals in his possession, or because they were not directly related to the request.

The City also states that further records were located following the issuance of the Mediator's Report in this appeal. The City states that, as a consequence of the issuance of that report:

> … a further search was conducted of the City's building files pertaining to the construction projects cited in the appellant's request, which included the files in storage in the basement of City Hall referred to in the Mediator's Report. As a result, the aforementioned photographs were located and provided to the appellant …

In support of its position that the City conducted a reasonable search for responsive records, the City also provides an affidavit sworn by the Director of Corporate Services.

Findings

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 [Orders P-85, P-221, PO-1954-I]. 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.

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 [P-624].

In the circumstances of this appeal, I have not been provided with sufficient evidence to convince me that the City has made a reasonable effort to identify and locate responsive records.

In this appeal, it is clear that the City has expended considerable time and effort in attempting to respond to the request for records. Indeed, as a result of its effort and the involvement of the mediator, the appellant was eventually provided with numerous responsive records, or with satisfactory explanations regarding identified items.

However, concerning the request for photographs, although the appellant was eventually provided with four photographs, as well as a number of additional photographs which may have been taken by him, I have not been provided with sufficient evidence to convince me that the City has conducted a reasonable search for responsive records.

In its representations the City generally reviews the files and departments in which searches were conducted. It indicates the departments to which the original request was circulated, and that each of these departments conducted a search. It also states that the records originally identified as responsive to the request were located, and why and how further records were disclosed to the appellant in the course of this appeal.

However, I find that the representations provided by the City are general in nature. They review the searches and the results of the searches, but do not indicate who conducted the searches, who was asked to provide information regarding the possible existence of additional records, or why records stored "in the basement of City Hall" were only located after the appellant referred to the possible existence of those records.

Furthermore, although the City provides an affidavit in support of the position that it conducted a reasonable search, I am not satisfied that the affidavit is sufficiently detailed or specific to support the position taken by the City. In the Notice of Inquiry I sent to the City, I referred to the information that I was seeking from the City, and the possibility of the City providing an affidavit in support of its position. The relevant portion of the Notice of Inquiry stated:

> … 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? Please include details of any searches carried out to respond to the request.
>
> … Is it possible that such records existed but no 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.
>
> ***If the City chooses to provide its representations in the form of an affidavit, the affidavit should be sworn by the person or persons who conducted the actual search. It should be signed and sworn or affirmed before a person authorized to administer oaths or affirmations.***

The City has not provided me with information concerning who conducted the searches or who was contacted in the course of the search. It also does not appear that any individuals who may have been involved in creating the records or taking pictures were ever consulted.

In addition, contrary to the request set out in the Notice of Inquiry, the affidavit provided by the City does not indicate that it was sworn by the person who conducted the actual search, nor does it identify who actually conducted the search. Rather, the affidavit identifies generally the departments that were searched, and indicates the results of those searches. In three places in the one-page affidavit the affiant identifies that he "is advised and verily believes" that either a reasonable search has been conducted or that no other records or photographs responsive to the request exist; however, other than the general references to the files and searches, the affiant does not refer to who advised him, who conducted the search nor (other than in a very general way) why he believes that the searches were reasonable. In my view the affidavit is not sufficiently detailed to satisfy me that a reasonable search was conducted for responsive records.

In making my finding that the affidavit is not sufficiently detailed, I have had reference to the *Rules of Civil Procedure*. Subrule 4.06(2) sets out the general requirement for the contents of affidavits in Court as follows:

> An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

Subrules 39.01 (4) and (5) set out the necessary contents of affidavits which contain statements of the deponent's information and belief. Both of these subrules require that any such affidavit must specify the source of the information in the affidavit. Subrules 39.01 (4) of (5) state:

> (4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.
>
> (5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

The affidavit provided to me by the City is not confined to statements of facts within the personal knowledge of the deponent. The facts are contentious, yet the affidavit contains statements of the deponent's information and belief. Even so, the source of the information is not specified in the affidavit.

Although the *Rules of Civil Procedure* do not apply to appeals under the *Act*, I find that they provide a useful guideline as to the amount of weight to give to the information contained in an affidavit intended to speak to an issue in contention. In my view, they support my finding that the information contained in the affidavit provided by the City is insufficiently detailed, as it does not specify the nature or source of the information upon which the affiant's information and beliefs are based.

In my view, the City's representations, including the affidavit, fall short of providing the type of information necessary to satisfy me that a reasonable search was conducted for responsive records, and I will order the City to conduct a further search for responsive records.

ORDER:

1. I order the City to conduct a search for appointment books, daily dairies, or inspector's log books responsive to the request, and to issue a decision under the *Act* to the appellant, treating the date of this Interim Order as the date of the request.

2. I order the City to conduct a further search for photographs responsive to the appellant's request, and to provide me with an affidavit sworn by the individual who conducts the search within 30 days of the date of this Interim Order. At a minimum, the affidavit should include information relating to the following:

(a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
(b) a statement describing the employee's knowledge and understanding of the subject matter of the request;
(c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
(d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
(e) the results of the search.

3. If, as a result of the further searches, the City identifies any additional records responsive to the request, I order the City to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*, considering the date of this order as the date of the request.

4. The affidavit referred to in Provision 2 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC *Practice Direction 7*.

5. I remain seized of these matters with respect to compliance with this interim order or any other outstanding issues arising from this appeal.

Original Signed By: February 24, 2005
Frank DeVries
Adjudicator