INTERIM ORDER MO-2135-I

Appeal MA-060119-1

City of Toronto

I am issuing this interim order in Appeal MA-060119-1 to address issues related to the scope of the appellant's request and the adequacy of the search conducted by the City of Toronto in response to that request.

NATURE OF THE APPEAL:

Background

In January of this year, the City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> All documents related to the purchase of Toronto's street lights and expressway lights by Toronto Hydro Street Lighting Inc., including but not limited to the following:
>
> - The agreement(s) of sale.
> - The agreement(s) for Toronto Hydro Street Lighting Inc. to provide street lighting and expressway lighting services to the City.
> - Staff reports related to the sale.
> - Staff reports related to the service agreement(s).

The City located approximately 271 pages of responsive records and granted access to one page in a decision letter dated February 13, 2006. Access to some 62 pages was denied under the discretionary exemptions at sections 6(1)(b) (closed meeting) and 15(a) (information available to the public). In addition, the City informed the requester that there was information in the first 208 pages to which the mandatory exemption at section 10(1) (third party information) may apply and that notice would be given to the third party pursuant to section 21 of the *Act* to offer the opportunity for the third party to make representations.

In a supplementary decision letter dated March 15, 2006, the City informed the requester that partial access to information contained in the first 208 pages of records may be granted as these did not meet the requirements of the mandatory exemption for third party information at section 10(1). The third party was provided an opportunity to appeal.

Meanwhile, the requester (now the appellant) appealed the decision to deny access to certain records which had been withheld under section 6(1)(b) of the *Act*. The appellant also informed this office that he would not pursue an appeal of the decision to deny access to one of those records because the same record was already the subject of a related matter (Appeal MA-050410-1). The appellant also chose not to pursue an appeal of the part of the decision relating to records for which the City was claiming the application of section 15(a).

In a third decision letter issued May 5, 2006, the appellant was informed that the City would be granting partial access to the records referred to in the March 15, 2006 letter as the third party had not objected to their disclosure. However, the remaining portions of those records, which form parts of the agreements requested, were withheld under section 10(1). The City also mentioned for the first time in this decision letter that it was claiming the application of sections

11 (valuable government information) and 14(1) (personal privacy) to deny access to the undisclosed portions of certain records.

No mediation of the issues was possible and this appeal was moved to the adjudication stage of the process. In correspondence sent to this office in June 2006 regarding the related appeal (MA-050410-1), the appellant expressed dissatisfaction with what he construed as the City's unwillingness to engage in mediation to resolve any of the issues in this appeal because of its concurrent involvement with him in the related appeal.

Shortly thereafter, and while I was preparing the initial Notice of Inquiry to send to the City, correspondence was received from the appellant, confirming that on July 5, 2006, he had received copies of the records to which the City was granting either partial or full access (per the May 5, 2006 decision letter) and that he would be pursuing his appeal of the City's decision to deny access to the undisclosed portions.

It was only when the appellant corresponded with this office in July 2006 that I became aware of the existence of the May 5, 2006 decision letter, as it had not been copied to this office. It was also evident upon closer review that this office had not yet received copies of the index of records or copies of the approximately 208 pages of records related to the May 5th decision letter. I asked the City to forward copies of the records and documents. After several telephone calls and an exchange of correspondence between this office and the City's Corporate Access and Privacy (CAP) Office, those records and the other documents were forwarded to this office.

Circumstances of this Interim Order

On August 23, 2006, the appellant corresponded with the City by email, requesting clarification of certain matters relating to the responsiveness of some of the records identified. The appellant also raised the possibility that the City had not conducted an adequate search for records in response to his request and listed four different records, or categories of records, he believed existed but had not yet been identified or located. The appellant's email communication with the City was copied to this office.

It appears that the City chose not to respond to the appellant's email communication directly on the basis that there was a concurrent inquiry process underway at this office.

The appellant responded to the City's decision at that time not to communicate with him directly during the inquiry by corresponding with the Commissioner and Assistant Commissioner (Access) in a letter dated September 13, 2006. A copy of this letter was provided to me for information purposes.

Based on my consideration of the information received by this office from the appellant, I added "Scope of the Request/Responsiveness of Records" and "Search for Responsive Records" as issues in this appeal. These issues were included in the initial Notice of Inquiry for Appeal MA-060119-1, dated September 26, 2006, which I sent to the City and to the company named in the

request (the affected party) to seek representations on the issues pertinent to their respective involvement in this appeal. I received representations from the City and the affected party.

After addressing issues related to the sharing of representations on November 16, 2006, I sent a modified Notice of Inquiry to the appellant on December 5th, enclosing copies of the non-confidential representations of the City and the affected party.

On December 6, 2006, I received a copy of an email sent by the appellant that day to the City's Corporate Access and Privacy (CAP) Office, requesting a response to his August 23, 2006 email.

I next heard from the appellant on December 11, 2006, when I received a letter addressed jointly to me, the Commissioner and the Assistant Commissioner (Access). The appellant's letter included a copy of the December 7th response received by email from the City's CAP Office. The City's CAP Director stated:

> Upon receiving your email of August 23rd, the [CAP] Office contacted the Office of the Information and Privacy Commissioner of Ontario (IPC) and it was determined that substantive communication about the access request/appeal should be addressed through the appeals process. As you know, your appeal of the City's decision on this matter is currently before the IPC at the adjudication stage. *The City has responded to the [IPC's] Notice of Inquiry by submitting representations on the issues identified in the appeal…* Since we believe that *it would not be appropriate for the City to provide comments outside the IPC's processes*, while the IPC is seized of the matter, we trust that you will direct your questions to the IPC adjudicator who has carriage of your file. [emphasis added to original]

Upon further consideration of the recent exchange between the City's CAP Office and the appellant, and given the information already available to me relating to the scope of the appellant's request and the adequacy of the search conducted by the City in response, I determined that it would be both appropriate and expedient to issue an interim order on those issues before proceeding with the remainder of my inquiry.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

General Principles

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section 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;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; . . .
>
> (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).

It is a well-settled principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. Furthermore, previous orders of this office have established that to be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Background

In the September 26, 2006 Notice of Inquiry, under the headings for the issues of Scope of the Request/Responsiveness of Records and Reasonable Search, I asked the City to provide me with detailed information relating to the manner in which it had responded to the appellant's request generally. I also sought specific information relating to the appellant's August 23, 2006 email communication to staff at the City's CAP office. I quoted extensively from the appellant's August 23rd email.

The appellant prefaced his questions in that email with the following statement:

> I am writing further to the City's March 15 and May 5, 2006, decision letters to inquire whether those letters fully disclose all the records responsive to my request.

The appellant went on to state:

> First, I understand that the City and Toronto Hydro Street Lighting Services Inc. executed a Confidentiality and Non-Disclosure Agreement, dated August 8, 2005. The existence of this record has not been disclosed in [response] to this FOI request [06-0082].
>
> Second, in response to another FOI request (05-2642) [Appeal MA-050410-1], you disclosed the existence of a staff report dated September 23, 2005. Our

> position is that pages 1-4 of that report are not responsive to request 05-2642. Those pages would seem, however, to be directly relevant to this request, 06-0082. I believe that there should exist at least two different versions of this staff report, perhaps more.
>
> Third, I understand that there exist minutes of meetings and conference calls (all of which I believe took place during 2005) between City officials and Toronto Hydro officials, related to the sale of the street lights and expressway lights. There also exist agendae of those meetings, and "action logs" that were distributed to participants at or prior to the meetings. The existence of those records has not been mentioned.
>
> Fourth, I understand that there was extensive e-mail correspondence, concerning this matter, between City officials and Toronto Hydro officials. Again, none of these records have been mentioned.

The final paragraph of the appellant's August 23, 2006 email reads:

> Would you please be able to inform me whether the March 15 and May 5 decision letters disclose all of the responsive records in the City's custody or control, or whether a further decision letter will be issued?

As described in the Nature of the Appeal section on page 3, above, under *Circumstances of the Interim Order*, the City did not respond to the queries contained in the appellant's email, choosing to defer instead to this office's jurisdiction to process the appeal through my inquiry.

Representations

In his letter of September 13, 2006 to the Commissioner and Assistant Commissioner (Access), the appellant stated that he had become aware of the existence of additional records responsive to his request in Appeal MA-060119-1 as a result of a separate, but related, request made to Toronto Hydro (now known as Appeal MA-060129-1).

In the September 26, 2006 Notice of Inquiry, the City was asked to confirm its understanding of the scope of the appellant's request in specific reference to the appellant's additional email communication of August 23rd. The following questions were posed to the City and received the following responses (in italics):

> Did the City contact the requester for additional clarification of the request?
>
> *The City did not contact the requester for additional clarification. It understood the request to be as indicated in its decision letter* [emphasis added].

> If the City did not contact the requester to clarify the request, did it:
>
> - choose to respond literally to the request?
>
> - choose to define the scope of the request unilaterally? If so, did the City outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the City inform the requester of this decision? Did the City explain to the requester why it was narrowing the scope of the request?
>
> *The City did not narrow the request* [emphasis added].

Analysis and Findings

I have carefully reviewed the representations provided by the City in response to the September 26th Notice of Inquiry and I have specifically considered them in the broader context of the history of this appeal and the related appeal, Appeal MA-050410-1.

As set out in the previous section, the City has taken the position in its representations that it interpreted the appellant's request to be as indicated in the "decision letter". Although no date was given to identify which decision letter the City is alluding to, it seems likely that it is a reference to the initial decision letter of February 13, 2006. For this reason, it may be instructive to set out the appellant's request once again. The request reads:

> *All documents related to* the purchase of Toronto's street lights and expressway lights by Toronto Hydro Street Lighting Inc., *including but not limited to the following* [emphasis added to original]:
>
> - The agreement(s) of sale.
> - The agreement(s) for Toronto Hydro Street Lighting Inc. to provide street lighting and expressway lighting services to the City.
> - Staff reports related to the sale.
> - Staff reports related to the service agreement(s).

I note that the City's February 13th decision letter echoes, for the most part, the wording of the request and quotes at least one of the portions of the introductory wording to which I have added emphasis in the excerpt set out above, namely "including but not limited to the following…". The first four words, "[a]ll documents related to" do not appear in the City's decision letter, but these are not as crucial as the phrase appearing at the end of the introductory wording, in my view, since they are replaced with reference to "information pertaining to" the subject matter of the request, that is, the sale and service agreements for City street and expressway lighting.

In my view, the appellant communicated to the City, in his August 23rd email, that he had learned of the existence of certain additional records and identified the possible existence of others. I find that it was clear that his query about these specific additional records was premised on a belief that the records he referred to fell within the scope of his original January 3, 2006 request.

I agree with the appellant.

Although the appellant itemized four specific records, or categories of records, in the list provided with his January 3rd request, the introductory wording of the request itself demonstrates a clear intention, in my view, to keep the door open to the inclusion of any and all documents regarding the sale and service agreements relating to the City's street and expressway lighting within the scope of his request.

I find that the records, or categories of records, specifically mentioned by the appellant in his August 23rd communication to the City are reasonably related to, and fall within the scope of, his original request and were not intended to represent an exclusive or all-encompassing list of records sought.

More specifically, I find that the scope of the request *includes* the following: a Confidentiality and Non-Disclosure Agreement between the City and Toronto Hydro Street Lighting Services Inc. dated August 8, 2005; other versions of the September 23, 2005 City staff report (identified as responsive to the request in Appeal MA-050410-1); minutes of meetings and conference calls between City officials and Toronto Hydro officials related to the sale of the street and expressway lights; any agendae and/or "action logs" available to participants in those meetings; and email correspondence between City and Toronto Hydro officials with regard to the sale and/or service agreements. I also find that the scope of the appellant's January 3, 2006 request is *broader than the specific listed items* that it is meant to include.

I think it is important for me to state that the City need not have taken the approach it did. In all likelihood, it would have been more helpful to all of the parties had the City responded to the appellant's questions in the August 23, 2006 email since this may have served to narrow or clarify the issues for adjudication in this appeal. At that point, I had not issued the initial Notice of Inquiry to the City. It is regrettable that the City chose instead to inform the appellant that because this matter was under appeal, he should be communicating only with this office.

Furthermore, when I did send a Notice of Inquiry to seek the City's representations on the issues, including the specific questions posed to the City in the appellant's August 23, 2006 email, the City further compromised the prospect of cooperation in the clarification of the scope of this appeal by its decision to offer me no representations whatsoever in response to the presentation of the appellant's August 23rd queries.

In addition, the appellant received the following response (set out in full on page 3, above) to his recent (December 6th) email to the City: "The City has responded to the Information and Privacy Commissioner's Notice of Inquiry by submitting representations on the issues identified in the

appeal… [It] would not be appropriate for the City to provide comments outside the IPC's processes, while the IPC is seized of the matter…" Given my observation that the City did not, in fact, provide representations to me to consider regarding the appellant's August 23rd communication, although asked, this response is, in my opinion, somewhat disingenuous.

The lack of a meaningful response on this issue, either to the appellant directly or to this office, through the inquiry being conducted in this appeal - in spite of pointed inquiries - is at the very least unfortunate. I am also of the view that it represents an overly strict and narrow interpretation of the scope of the appellant's request in this appeal.

I will now proceed with my review and findings with regard to the City's search for records.

SEARCH FOR RESPONSIVE RECORDS

The issue of reasonable search is raised in this appeal because the appellant has submitted additional and detailed evidence challenging the completeness of the records identified by the City in response to his request.

General Principles

Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an 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 by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the City to carry out further searches.

The *Act* does not require the City to prove with absolute certainty that further records do not exist, but the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Similarly, 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.

Representations

As previously noted, I asked the City in the September 26, 2006 Notice of Inquiry to provide an affidavit summarizing all the steps taken in undertaking the searches required in response to the appellant's request. I quoted directly from the appellant's August 23, 2006 email communication to the City.

The City did not provide the requested affidavit in support of its representations on this issue, stating that "time has not permitted for affidavits to be prepared for each of the staff who

conducted searches". In fact, I received *no* affidavits sworn by *any* of the staff who conducted searches. Instead, the City submitted the following responses, which appear below in italics, to the questions posed in the Notice of Inquiry:

> 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.
>
> *Details of the searches are as follows (time has not permitted for affidavits to be prepared for each of the staff who conducted searches):*
>
> *The CAP office initially contacted Transportation Services on **1/17/06**, which had provided records in response to the first request* [Appeal MA-050410-1]. *Transportation Services referred CAP to the Director of Corporate Finance Division for additional records responsive to this request*. [bolding added to original]
>
> *Staff in Corporate Finance including the Manager, Business Investments and Intergovernmental Finance and the Senior Financial Analyst conducted searches of their files and provided copies of all responsive records, including their copies of staff reports to CAP on **1/25/06*** [bolding added to original].
>
> *The Director of Corporate Finance also forwarded the request to the City's Legal Services Division – Municipal Law on **1/25/06**. The relevant solicitor conducted searches of her files and forwarded copies of all records located to the CAP office including all agreement, memos, receipts, and other staff reports on **2/7/06*** [bolding added to original].
>
> 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.
>
> *General records in the Finance and Legal Divisions such as contracts and agreements, legal negotiations and supporting correspondence are currently being retained permanently pending approval of new by-law retention schedules. Therefore, no records have been destroyed.*
>
> *The City submits that thorough searches have been conducted by knowledgeable staff in the circumstances of this request.*

This represents the full extent of the City's representations on the issue of the adequacy of the search.

The City's representations regarding searches conducted in response to the appellant's request relate solely to the period of time immediately following receipt of the request in January 2006. There is no reference in the City's submissions to any search efforts undertaken by City staff after receiving the appellant's August 23rd email, which described the possible existence of additional responsive records. The representations contain no reference at all to those records or to the appellant's August 23rd email.

Analysis and Findings

For the reasons that follow, I find that the City has failed to provide sufficient evidence to persuade me that it conducted a reasonable search to identify and locate records which are within the scope of, and responsive to, the appellant's original January 2006 request.

I note that the City asked for, and received, an extension of the deadline for the submission of representations in response to the September 26th Notice of Inquiry. I granted the requested extension, in part, to allow the City to obtain the necessary affidavit, or affidavits, in support of the representations relating to the issue of the adequacy of the search conducted. As previously noted, I received no affidavits with the City's representations, which arrived on October 26th, or thereafter.

In describing its search efforts in January and February 2006, the City stated that it contacted staff from several areas of City administration, such as Corporate Finance and Legal Services. There is no suggestion that these same individuals, or others who might have direct knowledge of pertinent information, were contacted again regarding the whereabouts of records specifically listed by the appellant in his August 23, 2006 email. In my view, it is telling that the City did not refer to these records at all in response to my direct questioning about them in the Notice of Inquiry dated September 26, 2006.

Similarly, the City has made no attempt to inform the appellant's or my understanding of the status of the City staff reports to which the appellant referred in the second point of his August 23rd email. There continues to be a unfortunate lack of clarity around the September 23, 2005 City staff report identified as responsive to the appellant's request in the related appeal (MA-050410-1) and the existence of other versions of the same staff report.

In light of my finding that the City's search for additional records responsive to the appellant's January 2006 request in this appeal cannot be upheld, I will order the City to conduct further searches. I will order that the City search for the records specifically identified by the appellant in the August 23rd email and for any other records which fit within the scope of the request in Appeal MA-060119-1, using my findings in this interim order as a guide.

To be clear, I am requiring the City to conduct searches of its record-holdings for: the Confidentiality and Non-Disclosure Agreement between the City and Toronto Hydro Street Lighting Services Inc., dated August 8, 2005; other versions of the September 23, 2005 City staff report (identified as responsive to the request in Appeal MA-050410-1); minutes of meetings and

conference calls between City officials and Toronto Hydro officials related to the sale of the street and expressway lights; any agendae and/or "action logs" available to participants in those meetings; and email correspondence between City and Toronto Hydro officials with regard to the street and expressway sale and/or service agreements.

After the City has completed further searches for these and any other records which may be responsive to the appellant's January 2006 request, I order the City to issue a new access decision to the appellant, outlining the results of those searches, and a decision respecting access to any records located.

ORDER:

1. I order the City to conduct further searches for the records responsive to the appellant's January 3, 2006 request and the August 23, 2006 clarification of the request.

2. I order the City to issue a new access decision to the appellant, including a fee decision, within 45 days of this order.

3. I order the City to provide this office with a copy of the new decision letter issued to the appellant.

4. I remain seized of this matter in relation to an appeal of the City's new decision by the appellant and as regards all other outstanding issues in Appeal MA-060119-1.

Original signed by: December 20, 2006
Daphne Loukidelis
Adjudicator