



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

FINAL ORDER MO-2479-F

Appeal MA08-146-3

City of Toronto



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NATURE OF THE APPEAL:

This order disposes of the remaining issues arising from my interim decision in Order MO-2451-I.

The appeal arises out of an access request submitted to the City of Toronto (the City), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request was submitted on February 22, 2008 and was for the following information pertaining to the Emery Village Business Improvement Association (the EVBIA):

Minutes to the [EVBIA] from July 2007 to the present, along with all sub-committee minutes and minutes to the approved Annual General Meeting of November 28, 2006.

In April 2008, the requester (now the appellant) filed an appeal with this office, advising that he had not received a decision from the City in response to his request. The City of Toronto subsequently issued a decision to the appellant on April 28, 2008, and that appeal was closed.

Pursuant to its decision, the City granted full access to information responsive to the appellant's request. In its decision, the City states as follows:

We asked staff of the Economic Development, Culture and Tourism Division to search for records responsive to your request. This decision reflects the results of their search and we have confirmed with [a named representative] of the [EVBIA] that all minutes for the period have been provided.

The City also provided the following statement regarding future requests of this nature:

Please note that, because of changes in the *City of Toronto Act*, Business Improvement Area Boards are now considered to be separate institutions under the *Municipal Freedom of Information and Protection of Privacy Act*. Any future requests for records should be directed to the BIA Board.

The appellant appealed the City's decision to this office, contending that additional records exist and disputing the EVBIA's status as a separate institution under the *Act*.

In his appeal letter, the appellant confirmed receipt of the following records:

- Agenda to the 2007 Annual General Meeting of the EVBIA dated October 25, 2007
- Treasurer's Report including financial statements, Capital Cost-sharing request with the City of Toronto, 2008 Budget Summary and Capital Projects schedule
- Streetscape Committee Minutes of August 13, 2007
- Streetscape Committee Minutes of November 29, 2007
- Streetscape Meeting Minutes of January 9, 2007

The appellant also indicated that pages 5-10 had been omitted from the records package released to him. In addition, he asserted that the following records should exist:

- Minutes of the following board meetings:
 - EVBIA Board of Management Meeting of January 31, 2008
 - EVBIA Board of Management Meeting of October 6, 2007
 - Annual General Meeting of November 28, 2008 (approved in the 2007 Annual General Meeting minutes)
- Signed copy of the EVBIA Capital Cost Share Request
- Minutes of the following sub-committees (and notes if quorum not met):
 - Treasury
 - Streetscape
 - New Transportation
 - Transportation
 - Security
 - Arts & Heritage
 - Diversity

The appellant also contended that business improvement associations (BIAs) should not be considered separate institutions under the *Act* since they are wholly dependent on the City, both legislatively and financially.

During the mediation stage of the appeal process, further searches were conducted and additional records were located. The City issued a second decision letter, pursuant to which it released additional records to the appellant and provided some explanation as to why certain records do not exist. Details regarding the City's further search efforts and additional disclosure are set out below:

- The City located and released pages 5-10 to the appellant, which comprise minutes for the Annual General Meeting of the EVBIA held on November 28, 2006.
- The City issued a supplementary decision to the appellant, dated July 31, 2008, advising that searches were conducted by its Economic Development, Culture and Tourism Division and the EVBIA. As a result, the City advised that the following additional records had been obtained from the EVBIA and were being released to the appellant:
 - Minutes of the EVBIA Board of Management meeting held October 3, 2007
 - Minutes of the EVBIA Board of Management meeting held January 31, 2008

- Minutes of the EVBIA Streetscape Sub-committee meeting held January 31, 2008
- Signed EVBIA Capital Cost Share Request

- The City stated that the lawyer for the EVBIA had advised the City that the applicable minutes of the Streetscape Sub-committee for 2007 had already been provided to the appellant.

- The City stated that the lawyer for the EVBIA had advised the City that the Treasury Sub-committee does not exist.

- The City stated that the lawyer for the EVBIA had advised the City that the New Transportation Sub-committee does not exist.

- The City stated that the lawyer for the EVBIA had advised that no meetings were held from 2007 to the present of the Security, Arts and Heritage and Diversity Sub-Committees, as issues normally discussed by these sub-committees were discussed by the Board directly, as a whole.

- The City advised that with respect to the written recommendations from the Historical Name Selection Report for the park naming at 115 Torbarrie, the lawyer for the EVBIA had advised that no written recommendations exist.

- The City wrote to the appellant regarding the activities of the Transportation Sub-Committee, indicating that the Executive Director of the EVBIA had advised that the last meeting of this sub-committee was held on March 7, 2007 and on that basis the City concluded that no responsive records exist.

The appellant advised the mediator that he was not satisfied with the results of the City's further search efforts and that he wished to proceed to adjudication on both the question of whether the EVBIA is an institution under the *Act* and the reasonable search issue. With regard to the reasonable search issue, the appellant indicated that he believes minutes exist for the following City sub-committees: Treasury, Security, Transportation, New Transportation, Heritage, Arts and Diversity and Streetscape. He stated his view that these sub-committees have met and that minutes were taken. In addition, the appellant maintained that there are written recommendations regarding the historical name selection and, in support of his position, asserts that they are referred to in certain City Council records.

The file was then transferred to the adjudication stage of the appeal process for a written inquiry. I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the City and the EVBIA on the question of whether the EVBIA is an institution under the *Act* and on the reasonable search issue. Both the City and the EVBIA submitted representations in response, which were shared, in their entirety, with the appellant, who then submitted representations of his own.

In Order MO-2551-I I addressed the EVBIA's status as an institution under the *Act* and certain issues around the sharing of his representations that arose from the appellant's representations.

With regard to the EVBIA's status as an institution under the *Act*, I concluded that it qualifies as an institution under section 2(1)(b) as a "city board". In reaching this decision, I also considered the relevant provisions of the *City of Toronto Act*, the *Municipal Act*, Chapter 19 of the City's *Municipal Code* and City By-Law No. 636-2007.

Having made my finding regarding the EVBIA's status as an institution, I then addressed the sharing of the appellant's representations on the reasonable search issue. I concluded that the rules surrounding procedural fairness require that the EVBIA be given an opportunity to respond to the arguments submitted in the appellant's representations on the reasonable search issue and I ordered the sharing of substantial portions of the appellant's representations with the EVBIA, absent any information that is irrelevant or would reveal the identity of the appellant. In reaching this conclusion, I considered the application of this office's sharing criteria, as set out in *IPC Practice Direction 7*. I concluded that significant portions of the appellant's representations do not fall within the IPC's confidentiality criteria and that much of the information contained in the appellant's representations on the reasonable search issue is relevant and responsive to that issue, and should, therefore, be shared in order to give the EVBIA a fair opportunity to respond to the appellant's views on that issue. In addition, I noted that many of the appellant's submissions referenced meetings conducted on specific dates by the EVBIA, its board of management and/or various committees associated with the affairs of the EVBIA and that, under the circumstances, the EVBIA should be aware of these meetings and ought to be in a position to respond to whether records responsive to them exist.

Pursuant to my decision in Order MO-2451-I, I issued the following order provisions:

1. I find that the EVBIA is an institution under the *Act*.
2. I order the sharing of the appellant's representations on the reasonable search issue with the EVBIA, in accordance with the severed version of the appellant's representations included with his copy of this interim order. For the sake of clarity, I have highlighted those portions of the appellant's representations that I propose to sever. I will share this severed version of the appellant's representations with the EVBIA after **September 8, 2009**.
3. I remain seized of this appeal to address any issues arising from this interim order as well as to determine whether the EVBIA has conducted a reasonable search for records responsive to the appellant's request.

Having determined that the EVBIA is an institution under the *Act*, I shared a severed version of the appellant's representations with the EVBIA and invited the EVBIA to provide representations on the adequacy of its search for records responsive to the appellant's access request, pursuant to section 17 of the *Act*.

The EVBIA responded with representations, comprised of two affidavits submitted by the Executive Director of the EVBIA. The EVBIA's representations were then forwarded to the appellant for comment. The appellant responded with further representations.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Having received representations from the EVBIA and the appellant on the adequacy of the EVBIA's search for records responsive to the appellant's request, the issue to be determined is whether the EVBIA has conducted a reasonable search for records as required by section 17 of the *Act*.

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 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

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 [Orders M-909, PO-2469, PO-2592].

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 [Order MO-2246].

Parties' representations

Central to the appellant's view that further responsive records should exist is his argument that past EVBIA minutes of meetings make reference to specific committees and their membership. The appellant specifically identifies the following committees: Security Committee, Streetscape Committee, New Transportation Sub-committee, Transportation Sub-committee, Arts and Heritage Committee and Diversity Committee. The appellant submits that if these committees exist, it would be reasonable to conclude that they conducted meetings, had discussions and made decisions, and that the details of their proceedings would have been documented in minutes or notes. The appellant asserts that if there were no meetings of these committees then this information should be clearly stated through affidavits from certain City staff and the Chairs of each committee he has identified.

In response to the appellant's submissions, the EVBIA submitted two affidavits sworn by its Executive Director. The first affidavit, sworn October 6, 2009, addresses the reasonable search issue. The second affidavit, sworn October 7, 2009, does not however directly address the reasonable search issue and is of no direct assistance to me in addressing this issue. Rather, it aims to clarify the distinction between the EVBIA's "Arts and Heritage Committee" and a volunteer community organization known as the "Emery Village Historical & Arts Advisory Committee" that pre-dates the creation of the EVBIA by the City. Accordingly, in examining the EVBIA's position on the reasonable search issue, I will examine and make reference to the October 6th affidavit only.

In her October 6th affidavit, the Executive Director attempts to clarify some discrepancies which the appellant has identified in his representations regarding the existence of various committees and their activities. In particular, she states:

- There were no meetings held of the Security, Arts and Heritage and Diversity Committees during the period of the appellant's request (i.e. between July 2007 and February 22, 2008)
- The "New Transportation Sub-committee" never existed and any references to it in the EVBIA's minutes were made in error.
- The minutes of the EVBIA's Transportation Sub-committee for the period covering the appellant's request were delivered to the City's Corporate Access and Privacy Office by the EVBIA and a copy should have been received by the appellant from the City.
- There is no Treasury Sub-committee. The listing of the "Treasurer's Report" under the "Standing Committee Reports" in the 2007 EVBIA Annual General Meeting agenda may have been done out of inadvertence.

With regard to records relating to the Transportation Sub-committee, I note that the Executive Director appended a copy of the minutes of the Transportation Sub-committee, dated January 9, 2008, to her October 6th affidavit for the appellant's benefit. I then shared these minutes in their entirety with the appellant, including the January 9, 2008 minutes of the Transportation Sub-committee.

The Executive Director submits that at all times the EVBIA acted in a reasonable manner with respect to its search for records responsive to the appellant's request. The Executive Director provided the following timeline with regard to her search efforts:

- During March 2008 she was advised by the City's Access and Privacy Office of the details of the appellant's request.
- She then conducted a "review of the [EVBIA's] electronic and hard records."

- In or about the end of March 2008, she provided the City's Business Improvement Area Office and the Access and Privacy Office with those portions of the requested records that may have been outstanding.
- On June 19, 2008, she was advised in an email from the City's Access and Privacy Office that the appellant believed there were "missing/incomplete documents" that had not been provided.
- On July 23, 2008, counsel from the EVBIA wrote to the City's Access and Privacy Office to respond to the appellant's allegations regarding "missing/incomplete documents."

Analysis and findings

I have carefully reviewed and considered the parties representations. I acknowledge the appellant's concerns regarding the whereabouts of records relating to the activities of specifically identified committees and sub-committees of the EVBIA. However, in my view, the EVBIA has provided a sufficiently detailed and credible explanation regarding the activities of the EVBIA's committees and sub-committees that are of interest to the appellant and the whereabouts of records relating to these entities.

I accept the EVBIA's explanation that the New Transportation and Treasury Committees do not exist and I am satisfied that no meetings were held of the Security, Arts and Heritage and Diversity Committees during the period of the appellant's request. With regard to the Transportation Sub-committee, the EVBIA has acknowledged that responsive minutes exist, which it understood had been previously provided to the appellant by the City. Nevertheless, in the interests of ensuring that the appellant has received this information, the EVBIA disclosed it in its representations, and those representations were provided to the appellant. Based on the evidence before me, I am satisfied that these are the only minutes of meetings of the Transportation Sub-committee.

I note that the Executive Director's October 6th affidavit does not specifically address the activities of the "Streetscape Committee". However, I also note that the City disclosed the minutes of the January 31, 2008 "Streetscape Sub-committee" during the mediation stage of this appeal and that the appellant acknowledged receiving in his letter of appeal, which is referenced above, the minutes of the "Streetscape Committee" for January 9, 2007, August 13, 2007 and November 29, 2007. While I appreciate that the appellant believes that further minutes should exist for the "Streetscape Committee" or "Sub-committee", in my view, the appellant has not provided me with adequate evidence to support his belief in the existence of such additional records.

As stated above, the *Act* does not require the EVBIA to prove with absolute certainty that further records responsive to the appellant's request do not exist. Rather, the EVBIA must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In my view, the EVBIA has met this standard. I am satisfied that EVBIA took the appellant's request seriously from an early stage, having been engaged in March 2008 in the

search for records responsive to the appellant's request, long before I found the EVBIA to be an institution under the *Act* in Order MO-2451-I. The EVBIA has demonstrated that an experienced employee knowledgeable in the subject matter of the request expended reasonable efforts to locate records which are reasonably related to the appellant's request. In short, I am satisfied that the EVBIA has conducted a reasonable search for responsive records, as required by section 17 of the *Act*.

ORDER:

I uphold the EVBIA's search for responsive records and I dismiss the appeal.

Original signed by: _____
Bernard Morrow
Adjudicator

November 27, 2009