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

ORDER MO-2634

Appeals MA09-4-2 and MA09-5-2

City of Vaughan

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

These appeals concern two requests submitted to the City of Vaughan (the City) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The first was a five-part request for all records related to five specified emails sent by a senior employee (the senior employee) in the City's Information and Technology Management Department (the IT Department) to a named consultant (the consultant) during March and April 2006. The requester also sought access to all email chains and/or all email threads involving anyone associated with the five specified emails, as well as complete copies of related Excel documents attached to these emails.

The second was a four-part request for all records related to four specified emails sent between the senior employee and the consultant between November 2005 and April 2006. The requester also sought access to all email chains and/or all email threads involving anyone associated with the four specified emails. The requester also requested a complete copy of a specified Excel document attached to one of the four emails.

The City initially issued fee estimates in the amount of $180.00 for each request. The City indicated that the estimates were based on the searches required to locate records, namely, searches of a named employee's current mailbox, personal network drives and local computer, as well as email backup tapes**.** The appellant paid two deposits in response to the fee estimates, each in the amount of $90.00.

The City then issued final decisions advising that no records exist in response to the two requests. For each request, the City explained that the fee estimates were based on the presumption that responsive records for each request exist. The City stated that, subsequently, a staff member with direct knowledge of the information sought in the two requests assisted with the completion of the searches and advised that no responsive records were found. The City refunded the requester's deposits, based on its conclusion that no responsive records exist in regard to the two requests.

The requester appealed the City's decisions that no records exist. This office opened two appeals, one for the first request (Appeal MA09-4-2) and another for the second request (Appeal MA09-5-2).

The appeals were referred to the mediation stage of the appeal process. However, the parties were unable to resolve the appeals through mediation and the files were referred to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

The sole issue in these appeals is whether the City conducted reasonable searches for records responsive to the two requests. Since the appeals involve the same parties, related information and the same issue, I decided to adjudicate them together.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the City. The City responded with representations, including affidavits sworn by the senior employee and a technology specialist (the technology specialist).

I then sought representations from the appellant and enclosed a Notice of Inquiry and a complete copy of the City's representations for both appeals. The appellant delivered representations and I shared a severed version of them with the City and invited it to submit reply representations. Portions of the appellant's representations were severed due to confidentiality concerns. In her representations, the appellant raised concerns about communications between the City's senior employee and the consultant, and the propriety of the senior employee's search efforts. In inviting the City to provide further representations, I asked the City to follow-up with the third party vendor and, in doing so, to ensure that its point of contact was through the City's Freedom of Information Office the (FOI office), and not its IT Department.

The City delivered reply representations, which I shared in their entirety with the appellant and I invited the appellant to respond with sur-reply representations. The appellant provided sur-reply representations.

Shortly before the issuance of this order, I received, unsolicited, further correspondence from the appellant, along with a request that I consider this new correspondence during the course of my deliberations on the reasonable search issue.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

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].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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].

A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

Parties' representations

The City

The City provided an overview of its search efforts, together with two sets of affidavits (one for each appeal) sworn by the senior employee and the technology specialist.

In its overview, the City states that it did not contact the appellant for clarification of her request because it was satisfied that the degree of detail provided in the request was sufficient to enable an experienced employee to search for responsive records. The City adds that it neither narrowed nor expanded the scope of the request and that it "searched for the nine requested emails, their respective chains/threads, and their attachments (where applicable)."

The City also submits that on January 16, 2009 the senior employee searched for the requested information, with the assistance of the technology specialist, and then documented their search efforts in two sets of affidavits, one for each appeal. The City reports that the searches conducted by its two employees did not produce records responsive to either of the appellant's requests. The City speculates that it is "possible, but unlikely that the requested records existed but no longer exist." The City adds that the senior employee, who was identified in the access requests as the sender of eight of the nine emails and the recipient of the ninth email, advised that he "did not send or receive the requested emails."

The City states in its overview that "although [it] does not have a retention schedule for electronic records, it is the City's practice to keep year end email back up tapes for seven years." The City submits that it had retained the email back-up tapes for 2005 and 2006 and that it also searched these tapes for records responsive to the appellant's request.

In its overview, the City also provided the following explanations regarding its "email recovery processes":

- During the time of the requests, City email was backed up onto tapes on a yearly basis.
- The year-end tapes are kept for seven years.
- The tapes consist of all email data as of the last calendar day of each year.
- Data is saved in .bkf format.

- .bkf format is a Microsoft back-up format.
- .bkf format is used because the City uses Microsoft Exchange email servers.
- Email data is restored from .bkf format to a temporary location on the City's server.
- A utility called *Ontrack* is used for two recovery functions:
    - extraction of email contents to the mail store
    - extraction of the mail store and conversion of the extracted data into .pst format
- Content in .pst format can be accessed via Microsoft Outlook, the City's email software.

As stated above, the City provided two affidavits from each of the senior employee and the technology specialist. These affidavits document the steps that each took in responding to the appellant's two requests. The steps taken and documented by both the senior employee and the technology specialist for each request are virtually identical.

The senior employee outlines the following sequence of events in his two affidavits:

- Upon being notified of each request by the City's Records Management Supervisor, he asked the technology specialist to restore his email content for the years 2005 and 2006 to .pst format.
- On January 16, 2009, the technology specialist restored his email content for 2005 and 2006 in .pst format and then installed it on his computer.
- He sorted the items in his "Sent Items" folder by the "to" field and then searched for email sent to a named email address for both requests.
- Specifically for the request relating to Appeal MA09-4-2, he also searched for emails in the "subject" line using particular keywords words identified in the appellant's request.
- Specifically for the request relating to Appeal MA09-5-2, he also sorted his "Inbox" by the "from" field and then searched for emails from the consultant.
- Also with regard to the request relating to Appeal MA09-5-2, he searched for emails by "subject" line referencing a particular phrase identified in the appellant's request.
- For each request, he used the Windows XP search feature to search the files contained on his "C:\drive" (the hard drive of his computer) for file names containing particular keywords and phrases identified in the appellant's requests.
- For each request, he used the Windows XP search feature to search the files contained on his "H:\drive" (a network storage drive attached to his City user ID) for file names containing particular keywords and phrases identified in the appellant's requests.

- For each request, he used the Windows XP search feature to search the files contained on the "O:\drive" (a drive for the City's IT Department) for file names containing particular key words and phrases identified in the appellant's requests.

The senior employee states in his two affidavits that despite all of his search efforts, no records responsive to the appellant's requests were found.

The technology specialist corroborates the evidence provided by the senior employee in his two affidavits.

The appellant

The appellant provides detailed representations, which include an extensive package of attachments in support of her view that responsive records ought to exist.

The appellant asserts that she has provided substantial evidence to establish that the information she is seeking is "legitimate and originated from the City's email system."

The appellant's representations can be summarized as follows:

- Based on the information contained in the affidavits submitted by the senior employee, it appears that the senior employee misspelled the name of the consultant for the email address that he searched (for emails sent to or received from him), thus resulting in skewed search results.

- There must be records responsive to the requests because the individuals named in the requests - the senior employee and the consultant - were conducting business together on behalf of the City and various private companies respectively. The appellant submits that the senior employee would have signed off on all electronic invoices issued to the City by the consultant.

- Given the number of transactions that took place between the City and the consultant during the period in question, as evidenced by the supporting documentation she provided with her representations confirming these transactions, she finds it incomprehensible that the senior employee found no records responsive to her request.

- With respect to the request relating to Appeal MA09-4-2, she submits that the "Inbox" and "Deleted Items" folders should have been searched, not only the "Sent Items" folder.

- Since emails sent and received by the senior employee were a target of the access requests, the appellant questions the appropriateness of having that person conduct the search for responsive records. The appellant suggests that the senior employee may have deleted responsive emails from the City's server. The appellant argues that only an independent information technology expert with knowledge in retrieving erased data would be able to retrieve any erased emails. The appellant asserts that the City should be

required to retain a "third party vendor that the appellant would agree on, at arm's length with the City […] to secure the records without the knowledge of those involved in the email." The appellant believes strongly that the senior employee should not have conducted the search because of his relationship with the information requested and the circumstances surrounding the request.

- The City, without notifying those involved in the alleged email chains, should have contacted a named third party vendor (the third party vendor) and obtained a letter from it confirming whether the emails exist or not. The appellant argues that this would have been the most efficient and discreet manner of handling the request.

- Both email correspondence and an invoice issued to a former senior official with the City confirm the issuance of a quote for computer equipment provided by the consultant to the senior employee for a dollar amount specified in the appellant's request. The appellant, therefore, believes that emails should exist confirming this transaction.

City's reply

The City's reply representations respond to the appellant's submissions relating to Appeal MA09-4-2. Despite also being invited to do so, the City does not specifically address the appellant's submissions relating to Appeal MA09-5-2.

The City acknowledges that its original search appears to have been done using an incorrect spelling of the consultant's name. The City submits that it conducted a fresh email search using the correct spelling and that no responsive records were located. The City provided a fresh affidavit sworn by the senior employee setting out the steps followed in conducting the new search.

The City submits that the request was for "sent" emails and any resulting chains. Accordingly, it viewed searching the "Sent Items" folder as a logical step in conducting the search.

The City contends that the senior employee and the technology specialist are "more than qualified to retrieve erased data and search a mailbox using provided parameters." The City states that the mailbox in question was retrieved, but that it didn't contain any records that are responsive to the requests. The City states that the appellant has provided no justification for asserting that the senior employee should not have been involved with the searches.

The City states that it did not contact the third party vendor as part of its search efforts as its responsibility under the *Act* is to search for records within its custody or control. The City submits that records that may or may not be held by a third party, which is not an institution under the *Act*, are not subject to the *Act*. The City submits that while it may, in specific circumstances, consult with third parties to obtain their views regarding the release of third party or personal information, it is not required to do so to determine the existence of information.

The City states that it undertook searches for responsive records within its IT Department, which was the location identified by the appellant in her requests as the source of the responsive records and the only department within the City that might have held records responsive to the appellant's request.

The City notes that in the appellant's representations she refers to and attaches considerable information as evidence to support her contention that the emails and attachments sought are legitimate and originated from the City's email system. The City states that it has never suggested anything contradictory, only that the requested records did not exist as of the date of the requests.

Appellant's sur-reply

The appellant states that the City ignored my direction to follow-up with the third party vendor through its FOI office. The appellant adds that the City's representations lack credibility, as evidenced by the acknowledged misspelling of the consultant's name and the use of internal City staff (who have "an interest in not disclosing the information requested") to commission the sworn affidavits.

The appellant finds it "incomprehensible that [the City's] original searches were conducted in such an unprofessional and questionable manner. The appellant submits that the records requested are financial in nature (invoices), and that according to the City's records retention by-law financial records are to be maintained for seven years. Accordingly, it is the appellant's view that the records requested should still exist. The appellant speculates that "the City's database has been compromised" and the records sought removed from it.

The appellant reiterates that the search for responsive records should not have been conducted by the senior employee "especially given the sensitivity and incriminating nature of the information contained in the emails." In expanding on this point, the appellant emphasizes that the need to have the search completed by an independent expert is not related to the qualifications of the senior employee, but rather related to the public importance of the records and the general optics of having the senior employee complete a search where any records found would reflect negatively on him. In the appellant's view, the existence of responsive information will "help prove whether there has been a serious case of fraud or corruption and must be brought forward in the interest of the public and the taxpayers…" Under the circumstances, the appellant believes strongly that the senior employee should be removed from the search process.

The appellant concludes that emails were regularly exchanged between the senior employee and the consultant and that these emails should be stored on "back-up tapes".

Appellant's unsolicited letter and attachments

As stated above, shortly before issuing this order, I received an unsolicited letter from the appellant together with a series of attachments, including portions of the transcript of an interview by an RCMP officer of a City employee. I sought clarification from the appellant regarding the relevance of this new information to the reasonable search issue before me in this

inquiry. The appellant states that the excerpts of the interview "re-affirm the evidence and statements made to [the Commissioner's office] during the appeal process and adjudication process…" The appellant adds that she hopes that this new information is "helpful in explaining why the City has not been forthcoming" in the processing of these appeals. The appellant concludes that she believes there has been a "total mishandling of this file on the part of the City where the decision maker had a personal interest in the records" and that, accordingly, his participation in the search for responsive records placed him in a conflict of interest.

Analysis and findings

I have carefully reviewed and considered all of the evidence presented to me by the City and the appellant. I am satisfied that the City has conducted a reasonable search for records responsive to the appellant's two requests.

In conducting this inquiry, the sole issue for me to decide is whether the City has taken *reasonable* steps to search for records responsive to the appellant's requests [Orders P-85, P-221, PO-1954-I] that are within its custody or control [Orders P-624, MO-2185]. A reasonable search is one in which an experienced employee expending *reasonable* effort conducts a search to identify any records that are *reasonably* related to the request [Order M-909]. The key is, therefore, *reasonableness*. An institution is not required to go to extraordinary lengths to search for records responsive to a request. As well, the *Act* does not require an institution to prove with absolute certainty that records do not exist. Accordingly, an institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to a request [Order P-624].

In this case, I have been provided with a detailed breakdown of the process the City undertook to respond to the appellant's requests, supported by the affidavit evidence of two qualified City employees, which documents their efforts in responding to the requests. The affidavits submitted by the senior employee provide a coherent and systematic review of the steps that he took upon being notified of the requests and then, subsequently, searching for records responsive to the requests. The technology specialist's affidavits document the steps that he took to restore the senior employee's email content to enable him to conduct searches of all relevant City hard drives.

I recognize that in conducting its initial search the City erred in spelling the name of the consultant that corresponds with the email address that it searched. While I acknowledge that this error rendered the results of the initial search unreliable, it did not, in my view, negate the process that the City followed in conducting its search, which I find was coherent, systematic and reasonable. Accordingly, I am satisfied that upon being notified of its error by the appellant the City re-applied a sound process and took reasonable steps to search for records responsive to the appellant's requests.

I appreciate the appellant's desire to require the City, through its FOI office, to consult the third party vendor, with whom the consultant was engaged, regarding the existence of responsive records, and to have an independent expert conduct further searches for responsive records due to a perceived conflict of interest on the part of the senior employee in conducting the search.

Due to the unusual allegations raised by the appellant, I took the extraordinary step of asking the City to consult the third party vendor at the reply stage of the inquiry. The City chose to not do so, responding that its responsibility under section 17 is to search for records in its custody or control, not to consult third parties that are not subject to the *Act*. The City added that it undertook searches for responsive records within its IT Department, which was the location identified by the appellant in her requests as the source of the responsive records and, in doing so, followed the parameters outlined by the appellant in her requests.

On balance, I am satisfied that the City took reasonable steps in this case to respond to the appellant's requests. The third party vendor is not a scheduled institution under the *Act*. It is an independent commercial entity with which the City has an arm's length business relationship. I have not been provided with any evidence to suggest that records held by the third party vendor are in the custody or control of the City. In my view, the senior employee and the technology expert were the City staff best qualified to conduct the searches for the records requested and I concur with the City that it discharged its obligations reasonably under the *Act* by searching for records within the IT Department's record holdings.

It may be possible that records of interest to the appellant once existed and that the absence of a retention schedule for electronic records may have resulted in the destruction of such responsive records. However, this view is speculative and, at this juncture, of no assistance in addressing whether such records existed at the time of the request. While the City would be well advised to create a records retention schedule for electronic records on a going forward basis, in my view, the absence of one in this case is not relevant to the search issue.

To conclude, I am satisfied that the City has conducted a reasonable search for records responsive to the appellant's requests under section 17.

ORDER:

I uphold the City's search for records responsive to the appellant's request and dismiss the appeal.

Original Signed By: June 30, 2011
Bernard Morrow
Adjudicator