

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2749

Appeal MA10-474

City of Sault Ste. Marie

June 12, 2012

Summary: The city received a request for records relating to the closing of a laneway at a specified location. The city provided access to 100 pages of records, in their entirety. The requester believes more records should exist in response to her request, including some in the possession of a named city councillor. In this decision, I partially uphold the reasonableness of the city's search and direct it to conduct an additional search for certain records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 4(1), 17.

Orders and Investigation Reports Considered: MO-2610.

OVERVIEW:

[1] The City of Sault Ste. Marie (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the closing of a laneway at a specified location. In a decision dated November 19, 2010, the city provided access to 100 pages of records, in their entirety. The requester (now the appellant) appealed the city's decision. In her appeal letter, she stated that some of the information she had requested was not included in the group of records disclosed.

[2] During mediation, the appellant explained that in response to her access request, the city arranged for her to view two particular files. She recalls seeing records in those files that were not included in the records disclosed. The appellant prepared a list of records she believed were not included in the records disclosed to her, that were part of the files that she viewed at the city and provided it to the mediator. With the appellant's consent, the mediator forwarded the list to the city.

[3] During mediation, the appellant also explained that there were records containing her personal information which she believes are either incorrect or should not be part of city files. The appellant agreed to file a separate request for correction to the city in this regard and may file a new appeal with this office if she is not satisfied with the city's decision.

[4] The city did a further search and disclosed additional records to the appellant with a covering letter dated April 27, 2011. After reviewing the additional records disclosed by the city, the appellant maintained the position that other records responsive to her request should exist. She explained that she was still looking for certain specific records, such as an email string which is missing page 3 of 3, an email where the acronym "LOL" was used, emails sent by an identified city councillor to nine individuals, as well as other records.

[5] The city indicated during mediation that there are no emails from the identified councillor that form part of the records responsive to the appellant's request. The city further explained that unless the city was copied, the city would not have emails from the councillor in its custody or control. The appellant believes the emails from the councillor should form part of the records that are responsive to her request.

[6] As a result of the information provided by the appellant, the city conducted additional searches for responsive records and issued two more supplementary access decisions dated June 6, 2011 and July 14, 2011, disclosing additional records, and indicating that there were no more responsive records. The appellant, however, continues to believe that additional records responsive to her request should exist.

[7] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During the course of the inquiry, the city submitted an affidavit from its city solicitor, stating that she is the designated head for the purposes of the *Act*, and describing the various searches which it conducted for responsive records. The city stated, among other things, that the city councillor was asked to provide any email correspondence containing the acronym "LOL" particularly, and relating to the lane closing application. The councillor provided the city with a number of email exchanges, which were in turn attached to the affidavit.

[8] The adjudicator shared the city's representations with the appellant, including the affidavit and portions of the attachments. The appellant was invited to submit representations in response, which she did. The adjudicator then requested the city to reply to certain issues raised by the appellant, summarized in the adjudicator's letter. The city provided representations in reply.

[9] In the following decision, I determine that the city conducted a reasonable search for some, but not all responsive records and I direct it to search for particular records.

ISSUES:

- A. Did the city conduct a reasonable search for responsive records?
- B. Is email correspondence with a named city councillor, covered by the applicant's request, in the custody or control of the city?

[10] Although these are two distinct issues, I will deal with them together in the discussion below, as the representations and facts are intertwined.

DISCUSSION:

Representations

[11] The appellant provided extensive representations, portions of which were not directed at either of the two issues before me but, rather, address the issue of the closing of the lane, the positions taken by her neighbours, and her views on it. She also objects to aspects of the city's processes in relation to the decision to close the lane. I will not address issues that are not encompassed by the scope of this appeal as described above and my authority under the *Act*.

[12] Following the supplementary decision letters and additional disclosures during mediation, the remaining items the appellant believes exist are:

- A "stamped, signed and dated" version of the laneway closure petition;
- Photographs that a neighbor passed around to city councillors at a meeting about the lane closing;
- An email from a named individual to the former city solicitor containing the acronym "LOL";
- Emails sent by a named city councillor in response to emails from nine individuals sent just prior to the city council meeting of September 13, 2010;
- Page 3 of 3 in an email string;
- A response from a named individual to a letter from the former city solicitor sent after the meeting of September 13, 2010.

[13] With respect to the photographs, the appellant submits that since they were passed around to council, they should have been kept with the city records or been copied. With respect to the "LOL" email, the appellant states that she distinctly remembers seeing this on an email when she was reviewing the lane closing file at the city. She identifies the author and recipient of the email (the former city solicitor), the date of the email (August 25, 2010), and the location of the "LOL" on the email. When the city copied the records she requested, none of them had "LOL" on them, including the copy of the email she believes it was in.

[14] With respect to the emails from the city councillor, the appellant states that she spoke with one of the individuals who stated that he had received a reply from the councillor, which has not been identified as a responsive record by the city.

[15] With respect to the page 3 of 3, the appellant provided copies of the email string which includes emails dated August 21, 2010, August 25, 2010 and August 26, 2010. Pages 1 of 3 and 2 of 3 were provided to her, but not page 3 of 3.

[16] The city's affidavit describes the steps it took to respond to the appellant's request. It states that lane closing applications are handled exclusively by the Legal Department for the city. When it received the request, the city retrieved its lane closing file for the named property and permitted the appellant to review it in its entirety. The appellant identified the records she wished to have copied, and was given access to them.

[17] The city states that during mediation, it received a letter from the appellant listing certain documents she believed were missing from the lane closing file. Although, in its view, the items listed went beyond the scope of the initial request, the city took steps to address the appellant's concerns. The city went beyond its lane closing file to retrieve additional documents from other sources. As well, it directed the [then] city solicitor to review his email correspondence for emails relating to the request. The city states that this individual searched his email and found no email containing "LOL". As indicated above, additional records, including emails, were disclosed through supplementary decision letters.

[18] During the course of preparing its representations on the appeal, the city also requested that the councillor provide any email correspondence containing "LOL", and relating to the lane closing application. The councillor responded to the request by providing a number of email exchanges with respect to the lane closing, none of which contain "LOL".

[19] The city also states that it found the appellant's descriptions of who wrote the "LOL" email confusing.

[20] With respect to a "stamped, signed and dated" petition, the city explained the process for making a laneway closing application. An owner who has an interest in closing a lane and transferring a portion to him or herself must complete a petition in a form provided by the city. That individual is responsible for taking the petition to all abutting owners. Usually, the owner drops off a copy of the petition at the neighbours' homes and there may therefore be more than one piece of paper that constitutes "the petition." In this case, it states, there were four petitions, none of which are "date stamped". It states that the petitions it disclosed are in the original form in which they were received by the city.

[21] The city states that the appellant was given full access to the Legal Department file. Additional requests following her review went beyond the documents the appellant initially identified as those she wished to have. It states that these types of applications are one of the most administrative and routine functions of the Legal Department and it does not generally receive information from councillors relating to lane closing applications.

Analysis and findings

[22] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the city has conducted a reasonable search for the records as required by section 17 of the *Act*.

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

[24] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

[25] As identified above, in the course of this appeal the appellant specifically identified the records she believed ought to exist, and addressed those in her representations.

[26] On my review of the representations, I am satisfied that the city has conducted a reasonable search for a "stamped, dated and signed" petition, and disclosed the four documents which together comprise the petitions in relation to the laneway closing. The city's explanation of the laneway closing process is reasonable and the appellant's representations do not convince me that there must be one petition, stamped, dated, and signed, pertaining to the issue of the laneway closing.

[27] I also find the city's search for the photos to be reasonable. It is not in dispute that the photos belonged to the homeowner who brought the laneway closing application, and that he passed them around to council during its meeting on the issue. I accept the city's evidence that they are not in its possession, and the appellant's representations do not lead me to doubt this evidence.

[28] The appellant's representations provide a reasonable basis for believing that page 3 of 3 of the email string, and an email from an individual to the former city solicitor containing "LOL", exist. She provides details about her review of the laneway closing file, her recollection of the "LOL" email and specifics about the date and correspondents on that email. Although it is not clear that the appellant had, prior to her representations, identified the date of the "LOL" email, she had identified the general subject of that correspondence to the city, and its author and recipient. The city states that it directed its former city solicitor to search for records responsive to the appellant's request and no email containing "LOL" was found.

[29] The city states that the appellant seemed to provide conflicting details about the author of the "LOL" email, but I do not find a basis for any confusion on this matter. Although the city appears to interpret the appellant's request and clarifications as indicating that the author was either its former city solicitor or the city councillor, in fact, the appellant has been clear from the beginning that the author of the "LOL" comment was a private individual, and that it was contained in an email from this individual to the former city solicitor.

[30] In the circumstances, given the reasonable basis for the appellant's belief that these two records exist, I find that the city should have considered whether there were any other sources, whether paper or electronic folders, that might contain copies of these records. I find, therefore, that the search for these two records was not reasonable and I will direct the city to search for them again.

[31] The appellant also wishes to have access to the city councillor's replies to nine emails submitted by individuals supporting the laneway closing. These individuals sent these emails to the councillor just prior the council meeting of September 13, 2010. The appellant has provided a reasonable basis for believing that such records exist in that she indicates that one of these individuals advised her that he had received a reply from the councillor.

[32] In the letter from the adjudicator requesting reply representations, the city was asked to respond to the issue of whether there should have been additional emails from the city councillor in the September 2010 time frame. Its reply representations do not establish that the councillor was asked to search for emails in this time frame. The city's representations, which contain the request made to this councillor, indicate that the councillor was only requested to search for emails in relation to the laneway closing in one specific time frame, May 2009. The nine individuals sent emails to the city councillor in September 2010 so her replies, if any, would be in that time frame, and not May 2009.

[33] In the circumstances, I am not convinced that the city has conducted a reasonable search for the city councillor's replies to the nine individuals' emails, in September 2010.

[34] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. This office has recognized that municipal councillors perform both "constituency" functions, and official responsibilities as members of municipal council. When performing constituency work, past decisions have established that councillors are not "officers" and, accordingly, records related to their constituency work is not in the custody or control of an institution. However, records that arise out of the councillor's official responsibilities as a member of council or some aspect of council's mandate would be subject to the *Act*. [MO-2610]

[35] In this case, the city does not dispute that emails from the city councillor arise out of her official responsibilities as a member of council or some aspect of council's mandate. The city did not take issue with its search encompassing emails involving this councillor in relation to the laneway closing, and in fact has provided copies of its emails in which it requests the councillor to search for such records. It did not request the councillor to search for emails sent in the time frame September 2010, responding to the nine individuals who had sent her emails supportive of the laneway closing.

[36] In these circumstances, I will direct it to conduct a search for these records.

[37] The appellant also made submissions about the possibility that there should be an additional record, consisting of a reply from a private individual to a letter from the city solicitor, following the council meeting of September 13, 2010. On my reading of this letter, it is not reasonable to conclude that a reply should exist. I am not satisfied that the content of the letter required a response, and that there is a reasonable basis to conclude such a response was made.

ORDER:

I order the city to undertake a search a search for the following documents:

- An email from a named individual to the former city solicitor containing the acronym "LOL";
- Emails sent by the named city councillor in response to emails from nine individuals sent just prior to the city council meeting of September 13, 2010; and
- Page 3 of 3 in an email string.

and provide the appellant and myself with a letter describing the outcome of those searches, along with a decision letter respecting access to any responsive records which are located, using the date of this order as the date of the request and without recourse to a time extension under section 20 of the *Act*.

Original Signed by: _____
Sherry Liang
Senior Adjudicator

_____ June 12, 2012