Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3584

Appeal PA14-266

Mackenzie Health

March 10, 2016

Summary: The appellant submitted a request to the hospital for records relating to a presentation the hospital made to the City of Vaughan, including related correspondence. Initially, the hospital granted the appellant partial access to the records, claiming that the withheld portions qualified for exemption under the *Act*. The appellant appealed the hospital's decision. However, the hospital subsequently withdrew its discretionary exemption claims and conducted a further search. As a result, most of the records were disclosed to the appellant and two additional records were located and disclosed. In response, the appellant confirmed that it was not interested in pursuing access to the portions of the records still being withheld. However, the appellant raised questions about the reasonableness of the hospital's search. The adjudicator finds that the hospital's search was reasonable and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s.24.

OVERVIEW:

[1] A community organization, represented by a law firm (the appellant) submitted a request to Mackenzie Health (the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a presentation the hospital made to the City of Vaughan during one of its council meetings.

[2] The hospital granted the appellant partial access to the records claiming that the withheld information qualified for exemption under a number of exemptions under the *Act*.

[3] The appellant appealed the hospital's decision to this office and a mediator was assigned to the appeal.

[4] During the mediation process, the hospital revised its access decision and provided the appellant with access to additional information in the records. No further issues were resolved in mediation and the file was transferred to adjudication, in which an adjudicator conducts an inquiry.

[5] During the inquiry process, the hospital again revised its access decision and withdrew its discretionary exemption claims. As a result, the majority of the records were disclosed to the appellant. A small portion of the records were withheld under the mandatory personal privacy exemption under section 21(1). However, the appellant confirmed that it was not pursuing access to this information.

[6] The hospital also conducted a further search for responsive records. Two additional records were located as a result of the hospital's further search but the appellant had questions about the reasonableness of the hospital's search.[1] Accordingly, the parties' were invited to provide representations on whether the hospital's search was reasonable under section 24.

[7] In this order, I find that the hospital conducted a reasonable search and dismiss this appeal.

DISCUSSION:

[8] The sole issue remaining in this appeal is whether the hospital conducted a reasonable search for responsive records.

[9] The appellant submitted the following request under the *Act*:

> A copy of any presentation, correspondence, report or other written or electronic record submitted to the City of Vaughan Council or staff in connection with an in camera meeting attended by MacKenzie Health representatives at the City of Vaughan on January 30, 2014, relating to a proposed ground lease for the proposed Vaughan Hospital.

[10] 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 24.[2] 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.

[11] The *Act* does not require the institution to prove with absolute certainty that

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[1] The hospital located two letters, dated December 2, 2013 and January 6, 2014, totaling 3 pages which were disclosed in full to the appellant.
[2] Orders P-85, P-221 and PO-1954-I.

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.[3]To be responsive, a record must be "reasonably related" to the request.[4]

[12] 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.[5]

[13] 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.[6]

[14] 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.[7]

[15] The institution was asked to provide a written summary of all steps taken in response to the request. It provided detailed representations in support if its position that the search was reasonable. The appellant takes the position that the searches were not reasonable. I review the positions of the parties below.

Representations of the parties

[16] The appellant makes three main arguments in support of its position that the hospital's search for responsive records was not reasonable.

1) The appellant argues that the content of the disclosed records suggest that additional records should exist.

[17] The appellant submits that the content of two letters, dated December 9, 2013 and January 6, 2014 reference other communications or correspondence which was exchanged between the City of Vaughan and the hospital's board, but not identified as responsive. The appellant also submits that the December 9, 2013 letter suggests that an additional record capturing communications between the hospital's President/Chief Executive Officer [CEO] and board chair should exist.

[18] The appellant also submits that the disclosed records suggest that several hospital board members assisted the chair in planning the meeting. Accordingly, the appellant takes the position that additional records regarding these board member's planning and attendance of the meeting should exist.

[19] The hospital submits that "any substantive discussions" regarding the proposed

[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.
[7] Order MO-2246.

lease took place at the January 30, 2014 meeting. The hospital goes on to state:

> Communications prior to the January 30, 2014 meeting would have been logistical in nature, for example, requests to set up a meeting, identifying attendees, arranging dates and so forth. These discussions would have occurred primarily through telephone conversation and email correspondence. Email correspondence of this nature is treated as a transitory record because it does not have any operational value and need not be retained. In accordance with [the hospital's] practices and ongoing Inbox maintenance and management activities, if there were records of this nature, they would have been deleted once the operational needs of the transitory record were met. This would have occurred prior to the receipt of the request on April 29, 2014.

2) The appellant argues that the hospital failed to provide this office with sufficient details of its search efforts.

[20] In response to the Notice of Inquiry sent by this office, the hospital conducted a further search for responsive records and located two additional records.

[21] The hospital submits that its Chief Privacy Officer and Privacy Consultant coordinated the hospital's search for responsive records, which included contacting its Executive Coordinator, in addition to the CEO, Vice-President of Strategy and Redevelopment [Vice-President]. The hospital advised that these three individuals were directed to search for "any presentations, correspondence, reports or other records submitted to the City of Vaughan Council or staff in connection with an in camera meeting attended by [the hospital board and staff] at the City of Vaughan on January 30, 2014".

[22] In its representations, the hospital states:

> Correspondence between board members and the city would typically be funneled through [the Executive Coordinator's office], as Board Liaison, or through the office of the CEO or [Vice-President].
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> [The] Executive Coordinator to the CEO and Board,…processes and maintains all records on behalf of the Board. The January 30, 2014 meeting would have been attended by the hospital's Board Members and as such, it was reasonable to assume that most of the responsive records related to presentations, correspondence and reports would reside in her office.

[23] The appellant submits that the hospital failed to meet the requisite criteria to establish that a reasonable search had taken place. In support of this position, the appellant states:

> As part of its representations, the [hospital] provided affidavit evidence [from the Executive Coordinator, CEO and Vice-President]. The affidavits of all three individuals provided that a search was initiated for the Original Request. However, the affiants neglected to depose on the search terms used; whether they had deleted any e-mails about the Meeting; what other searches, if any, had been done in addition to that of their email accounts; and finally, whether the affiants were aware of any other individual who may possess records relating to the Original Request.
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> Most significantly, however, the affiants failed to depose that no further records were found. This strongly suggests that the [hospital] is aware of additional records responsive to the Original Request, and have withheld these records.

[24] The appellant also takes the position that the hospital "is required to search not only the e-mail databases belonging to [it], but also the personal email databases of the [hospital's] employees who were involved with the Meeting". The appellant also submits that the hospital should have conducted an electronic and paper search of the board chair's records. Finally, the appellant states that the hospital "was required to request and search for [responsive records] that are in the possession of the [City of Vaughan's Mayor and Interim City Manager as well as the records of a named former member of Parliament]".

[25] In response, the hospital submits that all hospital business is required to be conducted on its servers and not personal email accounts. The hospital also submits that it conducted a reasonable search and that responsive records, whether sent or received, electronic or a paper record, "would have been sent through the Executive Coordinator on behalf of the hospital's CEO and Board's chair".

[26] The hospital also states:

> Each individual conducted his or her own search in accordance with detailed instructions provided for the search by [the Privacy Consultant]. Each individual confirmed having searched all physical and electronic records, including all email folders (inbox, sent items, deleted items). All responsive records were provided to [the Privacy Consultant]. Since the request related to a well defined event and time period, individuals were able to search all of their physical and electronic records directly.
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> …
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> Records in possession of the Mayor, [the Interim City Manager and former Member of Parliament] are not in [the hospital's] custody and control and it is not reasonable to expect that a search would include records held by the City and a former member of parliament. [The hospital] does <u>not</u> have a right of possession to records held by [these individuals]. [The hospital] does not have any authority to regulate those records, nor were any of

> those individuals acting on behalf of [the hospital]. [The appellant] has the right to make an access to information request to the institution that has custody or control of records held [by these individuals]. In any event, the request relates to records submitted by [the hospital] in relation to the meeting, and any such records would be held by the individuals identified as taking part of the search. [Emphasis in Original]

3) Given the significance of the January 30, 2014 meeting, additional records should exist.

[27] Throughout its representations, the appellant submits that additional records beyond those identified by the hospital should exist given the importance of the January 30, 2014 meeting.

[28] The hospital agrees that the meeting in question was significant but advises that the substantive issues were discussed at the meeting and as a result records capturing substantive discussions leading up to the meeting do not exist. As previously stated, the hospital acknowledges that communications, such as e-mails, setting up the logistics of the meeting would have been created but advises that such records would have been deleted from its record holdings pursuant to its practices and ongoing Inbox cleanups.

Analysis and Decision

[29] I have carefully reviewed the representations of the parties and am satisfied that the hospital conducted a reasonable search for responsive records. In making my decision, I reviewed the wording of the appellant's request along with the search parameters used by the hospital to search for responsive records.

[30] In my view, the appellant failed to provide a reasonable basis for believing that additional records should exist. The appellant submits that the content of the disclosed records suggest that additional records exist. In particular, the appellant argues that the contents of two letters, dated December 9, 2013 and January 6, 2014 suggest that additional paper records should exist. However, having reviewed these letters I am not persuaded that the content of these letters demonstrate that other paper records were created. In my view, the appellant's evidence merely demonstrates that some form of communication between the city and hospital occurred during the exchange of these letters.

[31] In its representations, the hospital concedes that it did not retain records they describe as "logistical in nature", such as meetings requests which occurred before the January 30, 2014 meeting. The hospital advises that these type of discussions typically occur by telephone or email and they are not required to retain these types of records. In my view, the hospital provided a reasonable explanation as to why its search efforts did not locate additional records of this nature.

[32] With respect to the appellant's argument that additional records should exist given the significance of the January 30, 2014 meeting, I find that the contents of the

disclosed records support the hospital's submission that substantive issues relating to the proposed ground lease were reserved for discussion at the scheduled meeting.

[33] The appellant submits that the hospital's search should have also included personal email accounts. In my view, the appellant has not established a reasonable basis for searching beyond the hospital's server and into the personal email accounts of its staff and board members. Accordingly, I find the hospital's search of its servers and electronic/paper record holdings in the circumstance of this appeal is reasonable.

[34] The appellant also submits that the hospital's search should have included a search of some of the board members records, including the board's chair. However, given the Executive Coordinator's role as a liaison for the board, I am satisfied that her search for responsive records was reasonable. The appellant has not provided sufficient evidence to demonstrate that it is reasonable to believe that additional records, which are not duplicates of records already located, would be located if additional searches in the record holdings of other board members were undertaken. In making my decision, I note that the paper and email records disclosed to the appellant clearly indicate the instances where board members received a copy of correspondence sent or received by the board chair.

[35] The appellant also takes the position that the hospital has an obligation to request or search the City of Vaughan's Mayor's and Interim Manager's records in addition to the record holdings of a former Member of Parliament [MPP]. The appellant has failed to provide sufficient evidence to establish that there is a reasonable basis to believe that a search of the city's record holdings along with the records of a former MPP would locate records, which have not already been located. Even if I found that there was reasonable basis to conclude that additional responsive records may exist in another institution's record holdings, my view is that the appellant should make a new request under the *Act* to the institution that the appellant believes has custody or control of these records.[8] In making my decision, I find that the wording of the request does not trigger the hospital's obligation under section 25 to forward or transfer the request to another institution on the appellant's behalf.

[36] Finally, having regard to the hospital's evidence, I am satisfied that, the hospital's searches were conducted and directed by individuals having knowledge about the subject-matter of the request and the hospital's record holdings. I am also satisfied that a reasonable effort was expended to locate responsive records, which included the hospital's further search which yielded two additional records.

[37] Having regard to the above, I find that the hospital's search for responsive records was reasonable and dismiss the appeal.

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[8] Section 24(1)(a) states: A person seeking access to the record, shall make a request in writing to the institution that the person believes has custody or control of the record.

ORDER:

The appeal is dismissed.

Original Signed By: March 10, 2016

Jennifer James
Adjudicator