Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3442-I

Appeal MA15-621-2

The Corporation of the City of Oshawa

May 18, 2017

Summary: The appellant made a request to the city under the *Act* for all records of communication between the city and the owners or agents of a named business for a specified time period. The city provided an interim access decision that set out a fee estimate in the amount of $115.00 indicating 628 pages of responsive records. On receipt, the appellant only received 68 pages and disputes the fee estimate. In addition, the appellant claimed that other records should exist and that the city should conduct a further search for responsive records. In this order, the adjudicator upholds the fee estimate. The adjudicator also orders the city to conduct a further search for records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17, 57(1).

BACKGROUND:

[1] The appellant made a request to the Corporation of the City of Oshawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records of communications between the city and the owners or agents of a named business between October 1, 2012 and September 30, 2013 inclusive.

[2] The city issued an interim decision advising that the estimated fee to process the request would be $11,566.48.

[3] The requester filed an appeal to this office and appeal file MA15-621 was opened. This file was settled at mediation when the requester narrowed his request to

exclude archived records. The city, in response, issued a revised interim decision setting out an estimated fee of $115.00, comprised of search time, preparation time and the cost of one CD-ROM. The interim access decision setting out the estimated fee of $115.00 was the third decision. The second decision set out a fee of $145.00. The city's fee estimate anticipated that there would be 628 pages of records responsive to the narrowed request. The appellant paid the fee.

[4] Subsequently, the city issued a final decision granting partial access to the responsive records. Access was denied to the withheld information pursuant to sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*.

[5] The requester (now the appellant) filed an appeal to this office and a mediator was assigned to the appeal.

[6] During the mediation, the mediator spoke to both the appellant and the city. The appellant advised that in good faith he paid the fee, in full, yet instead of receiving 628 pages of records, he received only 65 pages of records. The appellant took the position that all responsive records had not been disclosed to him.

[7] The mediator advised the appellant that if he believed that additional records responsive to his *narrowed* request existed beyond the 65 pages disclosed to him, the issue to be decided was whether the city had conducted a reasonable search for records. The appellant advised that he wished to pursue a reasonable search appeal.

[8] The appellant further advised that he wanted the $115.00 fee to be revisited. He took the position that the fee ought to be reduced because he received only 65 pages of records.

[9] Following further discussions with the mediator, the appellant advised that he was not interested in pursuing access to the limited information that the city had withheld pursuant to sections 10(1) and 14(1) of the *Act*. Therefore, the exemptions claimed by the city are not at issue.

[10] The only issues in this appeal are the reasonableness of the city's search for responsive records and the fee.

[11] As mediation did not resolve the dispute, this appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. As the adjudicator in this appeal, I invited the parties to make written representations. Representations were received and shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Note 7.

[12] In this order, I uphold the city's fee estimate, however, I also find that the city should conduct another search for responsive records.

ISSUES:

A. Did the institution conduct a reasonable search for records?

B. Should the fee or fee estimate be upheld?

DISCUSSION:

Issue A: Did the institution conduct a reasonable search for records?

[13] As the appellant claims that additional records exist beyond those identified by the city, the issue for me to determine is whether the city conducted a reasonable search for records as required by section 17.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the city's decision. If I am not satisfied, I may order further searches.

[14] The *Act* does not require the city to prove with absolute certainty that further records do not exist. However, the city must provide sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[15] 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.[4] In Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[16] 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.[5]

[17] 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

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.

basis for concluding that such records exist.[6]

[18] I adopt the approach taken in the above orders.

Parties' Representations

[19] In its representations, the city described its process for dealing with the appellant's request. It noted that the Records and Information Analyst (the analyst) coordinated the city's response to this access request. The city notes that the analyst works closely with the city clerk and the Manager, Records Information System and liaises with those staff in all of the city's branches who are responsible for departmental record maintenance and searching, each of whom is trained specifically for that role.

[20] It is the city's position that its staff conducted a thorough and effective search of its records for the appellant's access requests. The city acknowledged that rarely is a requester in a position to indicate precisely which records the institution has not identified and noted its practice to foster and maintain an open and collaborative dialogue with all requesters, including assisting requesters as much as possible to obtain records available to them under the provisions of the *Act*.

[21] The city notes that the initial search for responsive records was conducted by its analyst and involved the city's Building Permits and Inspections Services, Economic Development Services, Legal Services, Planning Services, Strategic and Business Services, Councillor's Office, Mayor's Office and Information Technology Services Branches. The city states that those branches provided the analyst with all responsive records in their possession.

[22] The city noted that its analyst contacted the appellant to try to narrow the search parameters. This was unsuccessful. However, following a mediation teleconference call on the related file, the appellant narrowed down his request to those records currently on hand at the city without undertaking an Information Technology rebuild of the city's historical email system, which reduced the fee estimate from $11,566.48 to $115.00.

[23] In his representations, the appellant states that the city did not conduct a reasonable search for records. He refers to the affidavit provided with the city's representation noting that it did not provide proof of any search processes or procedures other than the analyst transferring her responsibility to other members of staff. The appellant states that the search process of the analyst was to ask other members of staff to conduct searches and respond to her request.

[24] The appellant states that there is no information contained within the city's representation or the affidavit of the analyst which outlines or details the process by

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[6] Order MO-2246.

which the searches were conducted. Whereas the analyst transferred the responsibility to actually perform any search to other members of staff, she is unable to provide personal knowledge of the processes used by other staff.

[25] The appellant also notes that contrary to the city's information, he never received an index of records and was simply provided with the two records: Severed Records Economic Development-2015-143 (3 pages); and Severed Records Legal-2015-143.

[26] The appellant confirms that at the heart of this appeal is the actual volume of released records (total of 65 pages) as compared to the estimated responsive records in the notice of fee estimate from the city (628 pages).

[27] It was the appellant's understanding that the responsive records were to be inclusive of the originally quoted 628 pages. The appellant states that he would never have agreed to a reduced or narrowed search that did not include all responsive records. The appellant states that he only agreed to narrow the search after being assured that all records were available, without the rebuilding of the computer system.

[28] The appellant refers to a specified report that is publically available online. In section 5.1 of that report a process (to search the email server and back-up tapes) by the city is discussed. The appellant submits that the city did not refer to this process, or any other process being utilized in its search for records responsive to his request and argues that this is proof that the city's search was not reasonable.

[29] In referring to his own communications with the city, the appellant states that he came to the opinion that city IT staff was not aware how archived records were created, configured, or archived. He states that if this is the case, then the city is grossly negligent in their record management system in regards to the requirements of the *Act*. In addition, he submits that without this basic knowledge of archived records, there is absolutely no way that an effective and reasonable search of records could have been conducted.

[30] The appellant noted that the oldest record released pursuant to his request was an email string initiated by the solicitors for the purchaser of the subject property dated March 26, 2013, stating that they had a "draft offer for the above lands." The appellant submits that it is inconceivable that there would not have been earlier communication, at least to inquire on the potential availability of the land in question as no-one would submit a draft offer on land without first determining if it is available for sale. The appellant notes that the first communication from the city was dated April 5, 2013 and begins "as you may be aware," referencing earlier voicemail messages. The appellant contends that earlier records do exist from the Real Estate Manager or the Economic Development office which is copied on the email. He also states that records should also exist from notes of telephone conversations or meetings between the parties, as per section 2 of the *Act* and under Bill 8 which became effective on January 1, 2016.

The appellant states that the duty to document, while formalized in Bill 8, should have been a standard practice by institutions well prior to legislation. The appellant submits that it would be expected that the Real Estate Manager and the Economic Development office would have contacted the owners or agents of the property prior to the legal department being involved with an offer to purchase.

[31] In its reply-representations, the city noted that as described their analyst's affidavit the analyst is dedicated to coordinating the city's response to this access request under the *Act*. According to the city, the analyst liaises with staff in all of the city's branches who are responsible for departmental record maintenance and searching, each of whom is trained specifically for that role. In this particular case, the city cast a broad net in its initial search for responsive records. The city branches contacted to conduct searches included the city's Building Permits and Inspections Services, Economic Development Services, Legal Services, Planning Services, Strategic and Business Services, Councillor's Office, Mayor's Office and Information Technology Services Branches, some of whom from the outset may have had at best a tangential relationship to subject matter of the access request.

[32] The city states that given the variety of branches involved and varying business practices, it is reasonable for City Clerks Services' staff to rely on the knowledge of staff within the identified areas to conduct searches for records. As noted in the analyst's affidavit, each of the above branches provided the analyst with all responsive records in their possession.

[33] The city states that the IPC has held that 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." Section 17 establishes an expectation that "the individual or individuals conducting the search must be familiar with the subject matter to which the records relate and have a detailed knowledge of the institution's information management systems." The city submits that for each operational area from which records were sought, the search was conducted by experienced staff with knowledge of the functions of the branch, a general awareness of the specific transaction in question and specific records collections maintained by the area. The city submits that the individuals within the branches contacted by City Clerks Services have knowledge of the specific functions conducted by their respective areas, how information is filed (both in hard copy and electronically) and have sufficient knowledge of the particular project to source information from the appropriate staff and filing locations in response to the request. Given the number of individuals employed by the organization, the city submits that it is reasonable for City Clerk Services' staff to proceed in the above manner.

Analysis and finding

[34] As set out above, the *Act* does not require the city to prove with absolute certainty that further records do not exist. However, the city must provide sufficient

evidence to show that it has made a reasonable effort to identify and locate responsive records.[7] While I take no issue that the search was conducted by an experienced employee knowledgeable in the subject matter of the request who expended a reasonable effort to locate records which are reasonably related to the request, I conclude that the city has not conducted a reasonable search for records responsive to the appellant's request for the following reasons.

[35] In the final decision (third access decision) where the city estimated a total cost of $115.00, it also estimated that there were a total of 628 pages in their preliminary review of the records. I note that in their second decision (second access decision), the city estimated a total of 190 pages of records. The city never explains this discrepancy or why there were actually only 65 pages of records resulting from their search. The appellant states that he expected to receive the number of pages indicated in the access decision but received significantly less. The city was provided with an opportunity to make reply representations, after being sent the appellant's representations for review, but it failed to address the number of pages issue.

[36] The appellant, in his representations, referred to the oldest record released pursuant to his request, being the email dated March 26, 2013. In that email, solicitors for the purchaser are contacting the city about a potential purchase of a property from the city. The email attaches a draft offer of purchase and sale. The appellant states that it is inconceivable that there would not have been earlier communications, to at least inquire on the potential availability of the land in question. I agree that it is reasonable to conclude when examining this record that there was likely earlier communication before a draft offer was made. While it may be possible that such a record does not exist, the city failed to address this issue when they were given the opportunity to address the appellant's representations in their reply representations.

[37] Accordingly, I find that the appellant has raised a reasonable basis to conclude that the city has not conducted a reasonable search for records responsive to his request. As a result, I will order the city to conduct a further search for responsive records and to provide a reasonable amount of detail to this office regarding the results of said search. Specifically, the city should search for records that pre-date the aforementioned record that was an email attaching a draft offer of purchase and sale.

Issue B: Should the fee or fee estimate be upheld?

[38] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads, in part:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

[7] Orders P-624 and PO-2559.

> (a) the costs of every hour of manual search required to locate a record;
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> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;

[39] More specific provisions regarding fees for access to general records are found in sections 6, 7 and 9 of Regulation 460. Those sections read, in part:

> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
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> 1. For photocopies and computer printouts, 20 cents per page.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

[40] Where the fee for access to a record exceeds $25, an institution must provide the requester with a fee estimate.[8] Where the fee is $100 or more, the fee estimate may be based on either the actual work done by the institution to respond to the request, or a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[9]

[41] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[10] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[11]

[42] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[12]

[43] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

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[8] See section 57(3) of the *Act.*
[9] Order MO-1699.
[10] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[11] Order MO-1520-I.
[12] Orders P-81 and MO-1614.

Parties' Representations

[44] In its representations, the city noted that it issued a revised fee estimate and interim access decision to the appellant ("the revised fee estimate") after the mediation that settled MA15-621. It issued a second revised fee estimate and interim access decision on March 15, 2016 ("the second revised fee estimate").

[45] In his representations, the appellant speaks to the initial fee estimate of $11,566.48 which is not at issue in this appeal. However, he notes that he is aware that he cannot revisit this original fee estimate and waiver request. The appellant states that over the course of 6 months, and through the original mediation, the city provided 3 fee estimates, each significantly different, not only in the fee itself, but in the records identified, and in the processes used and staff time estimated.

[46] The appellant states that he participated in mediation relating to MA15-621 in good faith and with an open mind to satisfactory resolution. As indicated by the Mediator's Report, the appellant was anticipating full access to the records, as indicated on the second revised fee estimate, indicating 628 pages of records. The appellant states that upon receipt of the released records, a revised notice of fee was issued with the exact same charges as indicated on the second revised fee estimate, but with a severely reduced number of records.

[47] It is the appellant's belief that through the mediation process, the city had made a concession on the costs, in good faith, to satisfy the requirements of the 'modified' access request, which was further based on the city's good faith assurance that 628 records were available.

[48] In its reply representations, the city comments on the appellant's initial request for a fee waiver resulting from its earliest fee assessment in the amount of $11,566.48. However, this is not at issue in this appeal. While it may appear that the appellant is requesting a fee waiver relating to this fee estimate, in fact what he is arguing is that the fee should be reduced as he received only 65 pages when the interim access decision indicated that he should have received 685 pages.

Analysis and finding

[49] An interim access decision approximates the number of pages that will be found in an upcoming search in order to provide a fee estimate to a requester. As stated above, the purpose of the interim access decision is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.

[50] In examining the actual fee estimate from the city's interim access decision, the city set out the following fees:

1.0 hours of search time by Economic Development staff	
@7.50 for each 15 minutes	$30.00
0.50 hours for search time by Legal Services	
@$7.50 for each 15 minutes	$15.00
1.0 hours of search time for Planning Services	
@ $7.50 for each 15 minutes	$30.00
1.0 hours for preparation time for City Clerk Services	
@ $7.50 for each 15 minutes	$30.00
1 CD-ROM @10.00 each	$10.00
TOTAL ESTIMATED COST	$115.00

[51] The fee estimate also set out the anticipated number of pages but did not assign a fee for photocopying as the appellant chose to receive the records on a CD-ROM. I note that even if the appellant had opted to receive photocopies of the record, the charge for 68 pages would have been $13.00 for photocopying charged at $0.20 per page as set out in the *Act*.

[52] It appears from the appellant's representations that he believes that the city has identified 628 records but only disclosed 68 pages of same. That is not the case. Once the city actually completed its search, it identified only 68 pages of records and not the 685 that it estimated existed. While there were minor severances to the 68 pages the city is not withholding more than that. The minor severances were not at issue in this appeal as the appellant indicated to the mediator that he was not pursuing access to that limited information.

[53] Since the fee estimate in the interim access decision did not contain a charge for the number of pages photocopied and only a fee for a CD-ROM, I find that it complies with the fee provisions in the *Act* and Regulation 460.

ORDER:

1. The city is ordered to conduct a further search in response to the appellant's request relating to this appeal. I order the city to provide me with an affidavit sworn by the individual(s) who conducts the search(es), by **June 19, 2017** deposing their search efforts. At a minimum, the affidavit(s) should include information relating to the following:

a. The names and positons of the individuals who conducted the searches

b. Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search, and

c. The results of the search.

This information should be provided by way of representations with an affidavit which may be shared with the appellant, unless there is an overriding confidentiality concern.

2. If the city locates additional records as a result of its further search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

3. I remain seized of this appeal in order to deal with any outstanding issues arising from item 1 of this order.

4. The appeal relating to the fee estimate is dismissed.

Original Signed by: May 18, 2017

Alec Fadel
Adjudicator