

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3493-I

Appeal MA16-83

The Corporation of the City of Oshawa

September 14, 2017

**Summary:** The appellant made a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the materials contained on the F: drive of a city computer provided to a named investigator retained by the city. The city issued a decision stating that it has no records that respond to the request. The appellant appealed, claiming that the city had not conducted a reasonable search for records. In this order, the adjudicator orders the city to conduct a further search for records.

### BACKGROUND:

[1] The appellant submitted an access request to the City of Oshawa (the city), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the following information:

All materials contained on the F drive of the city owned computer provided to [a named investigator] during his investigation of [a particular matter].

[2] The city issued a decision stating that it has no available records which respond to the request. The appellant appealed the city's decision to this office.

[3] At the intake stage of the appeal process, the city clerk advised this office's intake officer that no records exist because the investigator did not use the city's computer and did all his work from home. The appellant disagreed and provided this office with documentation which he had obtained in response to a previous access

request. According to the appellant, this documentation (consisting of various emails passing between the investigator and the city) supports his view that the investigator worked on the city's computers. The appeal was then moved to the mediation stage.

[4] During mediation, the mediator advised the city of the documentation relied upon by the appellant and asked the city to confirm whether it is its position that the investigator did not use the city's computer or work at the city's offices and that on that basis, the city has no responsive records. The city responded as follows:

...the City Clerk advises that the IT [department] confirmed that the F: drive created for [the investigator] was never utilized or accessed by either them or him.

The Clerk initially assisted [the investigator] with starting his computer as he had difficulty logging into the PC. On that day, he apparently wasn't successful in logging in and forgot to turn off his computer before he left for the day, which is why he apologized for leaving his computer on. He was provided with a temporary password in order to log in, as is everyone, and would then have been asked to change it to his own personal password when he logged on. He had changed his password that first day but didn't have time to do anything else. The next day he could not get the password to work and apparently gave up on using the computer altogether.

The IT [department] clarified that reference to the F: [drive] and transferring electronic files referred to [the investigator's] email, not the F: drive.<sup>1</sup>

Lastly, the request for authority to remove items from his city office related to boxes and binders of hard copy files which were provided to him as part of his investigation. This request also related to office supplies (stationery etc.).

[5] The appellant was advised of the city's response and advised the mediator that he wished to proceed to adjudication. Accordingly, the file was moved to the adjudication stage of the appeal process, with the issue being whether the city had conducted a reasonable search for records. I began my inquiry by inviting representations from the city, followed by representations from the appellant, reply from the city and sur-reply from the appellant. The parties' representations were shared with one another in accordance with this office's *Practice Direction 7: Sharing of representations*.

[6] The representations that the appellant filed in response to the sur-reply Notice of

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<sup>1</sup> As explained further below, the "reference to the F: drive" is found in an email from the Clerk to the investigator dated May 30, 2013, advising the investigator that documents had been placed on the F: drive.

Inquiry, however, touched on many issues and were not limited to reply to the city's reply representations. Therefore, I have not considered the appellant's sur-reply representations in coming to my findings in this order.

[7] In this order, I find that the city has not conducted a reasonable search for records and I order it to conduct a further search.

## **DISCUSSION:**

[8] The only issue in this appeal is whether the city conducted a reasonable search for records.

[9] In order to place the parties' representations in context, some additional background is helpful. As noted above, the appellant believes that there are records responsive to his request and in this regard, relies on information he has received as a result of another access to information request.

[10] In particular, the appellant refers to an email dated May 30, 2013 from the city clerk to the investigator whose subject line is "electronic records" and which states in part, "in addition to the hard copy records that have been placed in your office at City Hall, IT has transferred electronic records into your f: drive on your pc here. A member of the IT staff will be available when you are ready to review them to show you how to access them. Staff are being advised that should they have any additional electronic records for you, they are to email them to you directly rather than have them placed on your f: drive that way you can track what is new".

### **The city's representations**

[11] In the Notice of Inquiry that I issued to the city, I asked it for a summary, in affidavit form, of all steps taken in response to the appellant's request. The Notice of Inquiry included the following:

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[12] In its representations filed in response to the Notice of Inquiry, the city submits that its Records and Information Analyst in City Clerks Services (the analyst) contacted the relevant city branches, namely the city's Information Technology Services Branch

(IT branch) and its City Clerk Services Branch, both of which advised her that they did not have any relevant records in their possession.

[13] The city explains that the F: drive created for the named investigator was never utilized or accessed by either the city's IT branch or the investigator himself, and that this may have likely been due to the issues the investigator had with getting the city's computer system and his password to work. The city submits that the analyst's affidavit, to which I refer below, provides a reasonably detailed explanation as to why there were no responsive records in that as far as the city is aware, the investigator did not generally use the city's computer or work at the city's offices.

[14] The analyst's affidavit confirms that she asked the city's IT branch for all records responsive to the appellant's request, and that the IT branch advised her that it had no relevant records in its possession. She also contacted the City Clerk Services Branch for all records responsive to the request and received the same answer.

[15] The analyst also repeats the information that the city provided to the mediator, as set out above, namely:

- that the city clerk advised her that the IT branch confirmed that the F: drive created for the investigator was never utilized or accessed by either them or him
- that the city clerk advised her that the investigator gave up on using the computer altogether
- that the city clerk advised her that the IT branch clarified that the reference to the F: drive and transferring electronic files in fact referred to the investigator's email, not the F: drive
- that the city clerk advised her that the investigator's request for authority to remove items from his city office related to boxes and binders of hard copy files which were provided to him as part of his investigation, as well as office supplies (stationery etc.).

### **The appellant's representations**

[16] The appellant relies on the above-referenced email from the city clerk dated May 30, 2013 which states that "...IT has transferred electronic records into your f: drive on your pc here." He submits that this email and others in the string bear the subject line "electronic records" and that, in the absence of any evidence otherwise, it is reasonable to presume that these emails all relate to data provided on the F: drive, and suggest that the investigator did in fact access the F: drive contents. He also submits that, although the city clerk advised this office's intake officer that the investigator did not use the city's computer and that he did all his work from home, this is contradicted by the investigator's interim report, where the investigator states that the city clerk provided him with a fully-equipped office, which he used as the "centre" of his operations.

[17] The appellant also points out that the real issue goes back to his request for the contents of the F: drive, and that whether or not the investigator accessed the material prepared for his use does not change the existence of the material. He submits that since the computer provided to the investigator included an F: drive preloaded with data, the city's response that no records existed is clearly incorrect. He also submits that the analyst's affidavit does not provide any information on the extent of the search conducted by the city clerk or the IT branch personnel whom she requested to assist her, and that there is no evidence of reasonable effort expended by anyone other than her.

### **The city's reply representations**

[18] In the reply Notice of Inquiry, I asked the city to respond to the following questions:

1. Did the city search the F: drive created for the investigator? If not, why not? Please explain.
2. If the city did search the F: drive created for the investigator, were any records found? If no records were found, please explain, in light of [the above-mentioned May 30, 2013 email from the city clerk to the investigator regarding documents being placed on the F: drive].

[19] In its reply representations, the city refers back to the analyst's affidavit, and states that "Therefore, the City's Information Technology Services Branch conducted a search of the F: drive created for the investigator and communicated its results that it had no relevant records". The city also states that "the City's Information and Technology Services Branch also confirmed no records existed on the F: drive".

[20] The city submits, further, that the analyst's affidavit evidence "also clearly states ... that the reference to the F: drive [in the May 30, 2013 e-mail]<sup>2</sup> and to the transfer of electronic files did not relate to the F: drive but to the investigator's email account".

### **The appellant's sur-reply representations**

[21] I invited sur-reply representations from the appellant, specifically asking him to reply to the city's explanation that the reference to the F: drive in the May 30, 2013 email did not relate to the F: drive but to the investigator's email account. The appellant provided representations, but they do not respond to that issue, and are not limited to responding to the points raised in the city's reply representations. I have, therefore, disregarded the appellant's sur-reply representations in coming to my findings in this order.

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<sup>2</sup> The square brackets are the city's.

## **Analysis and findings**

[22] 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.<sup>3</sup> Where an adjudicator is satisfied that the search carried out was reasonable in the circumstances, the institution's decision will be upheld. Otherwise, further searches may be ordered.

[23] 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.<sup>4</sup> To be responsive, a record must be "reasonably related" to the request.<sup>5</sup>

[24] 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.<sup>6</sup> 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.<sup>7</sup>

[25] 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.<sup>8</sup>

[26] The city provided some information to the effect that the F: drive was never accessed or used by the investigator. While this is useful background information, I note that the appellant's request was for all materials on the F: drive. His request was not restricted to records on the F: drive that the investigator accessed or used.

[27] According to the analyst's affidavit, she asked the city's IT branch for all records responsive to the appellant's request, and the IT branch advised her that it had no relevant records in its possession.

[28] In my view, experienced personnel in the IT branch would be expected to be knowledgeable in the subject matter of the request, since the request was for records on a computer drive. However, nowhere in the analyst's affidavit does it state the experience or qualifications of the individual or individuals in the IT branch who informed her that no responsive records exist. More importantly, nowhere does the affidavit state that anyone in the IT branch actually conducted a search and if such a search was, in fact, conducted, who in the IT branch conducted the search and the steps involved in the search. The affidavit simply states that the IT branch advised that

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<sup>3</sup> Orders P-85, P-221 and PO-1954-I.

<sup>4</sup> Orders P-624 and PO-2559.

<sup>5</sup> Order PO-2554.

<sup>6</sup> Orders M-909, PO-2469 and PO-2592.

<sup>7</sup> Order MO-2185.

<sup>8</sup> Order MO-2246.

it had no responsive records.

[29] In the Reply Notice of Inquiry sent to the city, I specifically asked the city to advise whether the city searched the F: drive. In response, the city referred back to the analyst's affidavit and stated that "therefore, the [IT branch] conducted a search of the F: drive and communicated its results that it had no relevant records". With respect, I do not read the analyst's affidavit as stating that the IT branch did, in fact, conduct a search. The affidavit states only that IT branch advised that it had no responsive records. Moreover, the statement in the city's reply that "the [IT branch] confirmed no records existed on the F: drive" also does not indicate that the IT branch, in fact, searched the F: drive. It is, therefore, not clear that anyone in the IT branch actually conducted a search and if such a search was conducted, I have not been provided with the particulars of the search.

[30] I acknowledge that, from the other evidence provided by the city, it is possible that no records exist. While the appellant points to the city clerk's May 30, 2013 email to the investigator as evidence that documents were placed on the F: drive, the city states that the reference to the F: drive in that email relates to the investigator's email account, not the F: drive. However, the city's explanation on this point lacks detail and is provided third hand, with the analyst having been provided this explanation by the clerk who was in turn informed of it by the IT branch. In any event, I am not satisfied, based on the information provided to me by the city, that a reasonable search has been conducted. I will, therefore, order the city to carry out a further search for responsive records and to provide information to this office regarding the results of its search.

## **ORDER:**

1. I order the city to conduct a further search in response to the appellant's request. The search should be conducted by an experienced individual or individuals in the city's IT branch. I further order the city to provide me with an affidavit sworn by an individual in the IT branch who has direct knowledge of the search, including the following information:
  - The name(s) and position(s) of the individual(s) who conducted the search
  - The steps taken in conducting the search
  - The results of the search
  - If no records are located, a detailed explanation for why no records are located, given the contents of the city clerk's May 30, 2013 email.
2. I order the city to provide me with the affidavit by **October 5, 2017**.

3. If the city locates records as a result of its 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.
4. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 1 and 2 of this order.

Original Signed by: \_\_\_\_\_

Gillian Shaw  
Adjudicator

September 14, 2017 \_\_\_\_\_