

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3745-F

Appeal MA17-133

City of Vaughan

March 25, 2019

Summary: This final order disposes of the only remaining issue in this appeal: whether the City of Vaughan (the city) conducted a reasonable search in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In Interim Order MO-3693-I, the adjudicator found that there were several reasons to believe that additional responsive records exist, and ordered the city to conduct a further search for responsive records relating to a specified study (Study B). She also reserved her findings on the issue of a reasonable search for records related to another specified study (Study A), pending further information from the parties. In compliance with Order MO-3693-I, the city conducted another search for responsive records, provided further information about Study A, and issued an access decision for Study B to the appellant. In this order, the adjudicator upholds the reasonableness of the city's further search for Study B, confirms that Study A is outside the scope of the appeal, and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1)(b), 15(a), and 17.

OVERVIEW:

[1] In Interim Order MO-3693-I, I ordered the City of Vaughan (the city) to conduct a further search for records responsive to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The original request was as follows:

1. All records, including but not limited to, notes, emails, reports, letters, facsimiles, documents and voice mail messages, prepared, held, sent or received in the City's custody respecting the [specified Study A];
2. All records, including but not limited to, notes, emails, reports, letters, facsimiles, documents and voice mail messages, prepared, held, sent or received in the City's custody respecting [specified Study B] (2016);
3. Without limiting the generality of the forgoing, all records, including but not limited to, notes, emails, reports, letters, facsimiles, documents and voice mail messages, prepared, held, sent or received in the City's custody which answer/address the matters noted on the sheets attached to the enclosed Access Request Form.

[2] In Order MO-3693-I, I noted that it was not clear when the city split the request for records by study, or if the requester was made aware of that. Since the search memos were issued in relation to Study B but resulted in the location of records related to Study A and not Study B, I found that, without further explanation, this was one of the reasons I could not uphold the city's search.

[3] The city was ordered to provide representations in support of the further search I ordered in Order MO-3693-I, as well as supporting affidavits from the employees who conducted further search efforts. The city complied, and its representations were shared with the appellant, on consent. I invited the appellant to provide representations in reply to the city's representations, but the appellant did not do so.

[4] Having considered the city's representations and affidavits in support of its further search, for the reasons that follow, I uphold the reasonableness of the city's search and dismiss this appeal.

DISCUSSION:

[5] The sole issue outstanding from Interim Order MO-3693-I is whether the city has conducted a reasonable search for records as required by section 17,¹ and in light of the provisions of Interim Order MO-3693-I.

[6] The *Act* does not require an 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.² To

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

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

No evidence from the appellant

[7] 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.⁵

[8] The appellant was given an opportunity to respond to the city's representations and supporting affidavits concerning the city's further search conducted following Interim Order MO-3693-I. However, the appellant declined to do so.

The city's evidence about its search efforts

[9] As I explained in Interim Order MO-3693-I, there were several aspects of the evidence initially before me about the city's search efforts that were not clear to me, or that otherwise supported a reasonable basis for believing that additional responsive records exist.⁶ Given the city's further search, those issues have been satisfactorily addressed, for the reasons that follow.

Proper notice to the appellant

[10] In Interim Order Mo-3693-I, I reviewed the city's stated steps taken to respond to the original request. I deferred making findings about the search for records related to Study A because it was not clear that the appellant was aware that the city had split his request by study.

[11] In accordance with the interim order, I wrote to the parties separately about Study A. The appellant did not respond, and the city included its response with its representations in support of its further search. Having reviewed the city's representations and supporting evidence, I find that the appellant was advised of the splitting of his request, and I am satisfied that Study A is properly outside the scope of this appeal. I note that one source of the lack of clarity on this issue was the search results themselves: search memos were sent for Study B, but the search results were

³ Order PO-2554.

⁴ Order MO-2185.

⁵ Order MO-2246.

⁶ The city's representations in support of the search ordered in Order MO-3693-I state that the city was not afforded the chance to respond to the appellant's representations about the city's search. However, the city was afforded this opportunity, and I invite it to review its submission to this office at the Reply stage of the inquiry.

all for Study A, which I will discuss next.

Search memos for Study B, search results for Study A

[12] In Interim Order MO-3693-I, I noted that the search memos issued by the city only mentioned Study B, but the records located and at issue on appeal only relate to Study A, not Study B. I found that the city's representations did not establish why this result occurred. I also found that these search results were inconsistent with, and raise reasonable questions about, the basis for the city's representations that it had to split the request into two files (one for each study) for being "voluminous." Therefore, I found that the appellant's position that the city has failed or refused to provide the specified records in relation to Study B to be a reasonable basis for concluding that such records exist. I raised the lack of search memos in relation to Study A because of the then-unexplained search results (responsive records located in relation to Study A, and none for Study B when the search memos were for Study B).

[13] The city has now provided a satisfactory explanation for this. It states that the Access and Privacy Office "has since clarified the relationship between [the two studies] and has found that Study B was done before Study A, and that the record found for Study A feeds into Study B." It further explains that the Policy Planning department advised that these records were still distinct enough to be considered separate files. In addition, the city states that "[t]he two are related, though the order in which they are listed was not initially correct" and that "the Access and Privacy Office was not made aware of the relationship between the two studies at the time of the initial request..." With this explanation, I find that it is sufficient to put this aspect of the search to rest.

"Voluminous" request

[14] As mentioned, in Interim Order MO-3693-I, I found (at paragraph 85) that the search results just discussed are inconsistent with, and do raise reasonable questions about, the basis for the city's representations that it had to split the request into two files (one for each study) for being "voluminous."

[15] The city argues that it was reasonable for it to find that a request that included twenty-one questions met the threshold for potentially above average processing, and I do find that that is reasonable. I had raised the city's own characterization of the request as "voluminous" as a concern in relation to the search results that were before me at the time: no records found in relation to Study B.

[16] However, in response to Interim Order MO-3693-I, the city conducted further search efforts, which yielded an access decision regarding Study B that includes a fee estimate of over \$1200, and which identifies types of records and anticipated exemptions that would apply to them. I find that this search result is consistent with the city's initial characterization of the request as "voluminous," thereby resolving the issue I raised in my interim order on this point.

Answering questions

[17] The third part of the original request refers to an attachment with more details about the records sought in relation to Study B, which the appellant reproduced again in their representations during the initial inquiry.

[18] The city submits that it did not “pick and choose” which questions to answer, but its representations in the initial inquiry clearly refer to “decid[ing] to respond” to certain questions. I also find nothing improper in the provision of additional details about a request in an attachment. Furthermore, if the city believed, as it argues, the original request would interfere with its operations, it was open to the city to issue a decision with respect to being frivolous and vexatious,⁷ but it did not.

[19] Nevertheless, I accept the city’s explanation as to why it did not respond to certain questions initially (because it hoped that the records it did provide would answer them), so I am satisfied with this aspect of the search.

[20] The city also explained that certain types of records listed in the attachments (staff reports), were publicly available. It states that “[t]he [*Act*] does not consider records that are already public.” However, I must draw the city’s attention to section 15(a) of the *Act*, which allows the city to refuse to disclose records that are public because they are publicly available. The city may also choose to respond to such a request by providing them anyway. Therefore, upon identifying that certain responsive records were already in the public domain, the correct approach would have been to include that in the city’s access decision and claim the section 15(a) discretionary exemption if the city was choosing not to expend its resources to disclose it through a request made under the *Act*. In any event, the presence of these records online does not detract from the reasonableness of the city’s further search efforts after the issuance of Interim Order MO-3693-I.

Time period searched

[21] In Interim Order MO-3693-I, I noted that there was a discrepancy in the time period covered by the request and the time period searched. I found that this unexplained narrowed timeline undermined the reasonableness of the city’s search, especially in the context of an apparent discrepancy between what was searched (records relating to Study B) and what was found (only records relating to Study A).

[22] The city has since provided a reasonable explanation for the time period searched. I accept that the city was advised by staff in the department at issue that there were several studies mentioning the area specified in the request, so they limited

⁷ Pursuant to section 4(1)(b) of the *Act*.

the search to that one year for that particular employee to facilitate a more accurate search for responsive records.

Search terms used

[23] In Interim Order MO-3693-I, I made a finding that the search terms used by the city were too narrow. However, given the city's additional search and the additional responsive records being found, I am satisfied that the city's search is now reasonable.

[24] Turning to the search for staff reports specifically, in the interim order, I noted that it was unclear why the searches conducted by some employees were limited to staff reports, given the many types of records listed in the request. It was also unclear why specified departments had not been asked for staff records, though they were specifically flagged by the appellant at the clarification stage of the request as being of interest.

[25] The city has now explained that its Access and Privacy Office consulted with the city's Planning division to determine which of its subsections would have responsive records, and that the structure of the city is such that Development Planning does different work than Policy Planning. This would result in different types of records being found. The city further explained that Development Planning holds records on specific development files (not active studies), and Policy Planning creates study-specific records. I accept the city's explanation in relation to the reasonableness of the city's search for staff reports.

Locations searched

[26] In the interim order, I identified a number of gaps in the information about the locations searched, as described in the city's affidavits. I found that those deficiencies also undermined the reasonableness of the city's search.

[27] In response, the city's submits, and I find, that a significant period of time has now passed since the initial searches were conducted, so it is reasonable to expect that some search details were forgotten by the time the affidavits were prepared. I note that in the context of a search that turned up no records for Study B, these gaps took on a greater potential prominence. However, in light of the city's new access decision, this aspect of the informational gaps is resolved.

The city's latest search efforts

[28] Turning now to the city's further search efforts following the issuance of Interim Order MO-3693-I, I am satisfied that they were reasonable. As noted, they resulted in the location of additional responsive records. I accept the city's evidence with respect to the human resources and departmental changes that have occurred since the time of the request, which contributed to some delay in compliance with the interim order.

[29] On my review of the affidavits submitted, I find that the city asked experienced employees knowledgeable in the subject matter of the request to search for responsive records, and that these employees expended a reasonable amount of effort doing so.

[30] The following twelve employees were asked to conduct searches, and provided affidavit evidence that they did so, with descriptions of their efforts to search for responsive records:

- From the Development Planning department – two planners and an administrative coordinator;
- From the Infrastructure Planning & Corporate Asset Management department – a Project Manager, Development Charge Infrastructure;
- From the Infrastructure Delivery department – Manager of Infrastructure;
- From the Development Engineering department – a Transportation Engineer;
- From the Policy Planning department – the Manager, a Special Policy Advisor, and an Administrative Assistant to the Director of Policy Planning; and
- From the Financial Planning and Development Finance department – the interim Director, the Project Manager (Fiscal Policies and Forecasting), and the Capital Coordinator.

[31] Having reviewed each employee's affidavit, I am satisfied that the employees expended a reasonable amount of effort in conducting a further search for responsive records in this appeal. The city submits, and I find, that there was "some miscommunication and confusion between the Access and Privacy Office and the departments surrounding the processing of the initial request" but that it has now performed a reasonable search for responsive records. I also agree with the city that it has been able to clarify the relationship between Studies A and B, and explained why some overlap is to be expected between them.

ORDER:

I uphold the reasonableness of the city's search and dismiss this appeal.

Original signed by _____
Marian Sami
Adjudicator

_____ March 25, 2019