Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3828

Appeal MA18-113

City of Toronto

September 11, 2019

Summary: The City of Toronto received a request for access to all building documents, including plans, surveys, and inspection reports created during a specified timeframe and relating to a specified property. Through a series of decision letters, the city granted partial access to the responsive records. The city also advised the requester that while it was providing access to the requested building plans, she would need to contact the Toronto Building Division in order to obtain copies of those records. The requester appealed the city's decision on the basis that additional records should exist. The requester also objected to the manner in which the city responded to her request for access to building plans. In this order, the adjudicator upholds the city's search for records as reasonable, and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, sections 15(a), 17, and 22(1)(b).

Orders and Investigation Reports Considered: Order MO-3067.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> …the complete file concerning the building inspection of [a specified address] during construction after they received a building permit in July 2015. I would like to see all documents, plans and surveys in this file especially notes.

[2] The specified timeframe was July 28, 2015 to the date of the request (May 11, 2017).

[3] The city identified responsive records and issued its initial decision, which granted partial access to the records. Some information was withheld under the personal privacy exemption in section 14(1) of the *Act*.

[4] Following discussions between the requester and the city's Access and Privacy Officer, the city conducted a second search, which resulted in the city issuing a second decision. The second decision granted partial access to the additional records that had been located, with some information withheld under section 14(1).

[5] There were further discussions between the appellant and the Access and Privacy Officer, and the city conducted a third search for "any building records concerning the … property ... falling within the responsive timeframe." The city issued a third decision, again granting partial access to additional records and withholding portions under section 14(1). Of note, the city's decision stated that:

> The records search did not include building plans as they are not required to be processed as a formal access request by our office. Requests for building plans are processed under the Toronto Building Division's Routine Disclosure Policy.
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> In addition, pages 19-27 are denied in full, as they contain plans which are subject to the routine disclosure procedures outlined above.

[6] The requester, now the appellant, appealed the city's decision to this office and a mediator was appointed to explore the possibility of resolution.

[7] During the mediation stage of the appeal process, the mediator sought to clarify the issues in the appeal. The appellant confirmed that she is not seeking access to information withheld under section 14(1), but expressed concerns regarding the adequacy of the city's search. In particular, the appellant advised the mediator that she believes that there are additional records responsive to her request, consisting of notes of the city's building inspector.

[8] The city conducted another search and advised the mediator that it was not able to locate the records described by the appellant. The city provided the mediator with information regarding the search that it conducted. The mediator conveyed this information to the appellant, who continues to believe that these records should exist. Accordingly, the reasonableness of the city's search remains at issue.

[9] The appellant also took issue with the manner in which the city responded to her request for access to building plans. In particular, she maintained those records had not been provided to her in accordance with the *Act*.

[10] During the course of mediation, the city notified the owner of the specified property under section 21(1) of the *Act* to obtain their views regarding disclosure of the building plans. The property owner did not respond, and the city wrote to the appellant advising of its decision to grant access to the building plans in full. The city advised the property owner that he had the opportunity to appeal the city's decision to this office.

[11] The property owner did not appeal the city's access decision within the required 30-day period, so the city wrote to the appellant instructing her to contact the Toronto Building Division directly in order to obtain copies of the building plans. Following further discussions in mediator, the city wrote to the appellant to further explain its routine disclosure process. The letter stated:

> The Routine Disclosure process also allows property owners to submit a registered letter of objection to the disclosure of their plans. Where a letter of objection has been received with respect to a property, Access and Privacy within Corporate Information Management Services, facilitates the access process on behalf of Toronto Building Division to provide access to requested plans.
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> Since you are not the owner and did not have the owner's consent to access the requested building plans, the 3rd party notification process under FOI was initiated. Following the completion of that process, you have been granted access to the building plans under cover of our July 6, 2018 letter, subject to Toronto Building's Routine Disclosure process.
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> Thus, as you have been granted access in full to the plans, the process now reverts back to Toronto Building Division for disclosure of the plans, as that part of the Routine Disclosure process is solely within their purview.

[12] The appellant advised the mediator that she takes issue with the city's response that "…the process now reverts back to Toronto Building Division for disclosure of the plans, as that part of the Routine Disclosure process is solely within their purview." Accordingly, the adequacy of the city's response to the appellant's access request is another issue for determination in this appeal.

[13] A mediated resolution of the appeal was not achieved and the file was transferred to the adjudication stage of the appeal process, during which an adjudicator conducts an inquiry under the *Act*. The adjudicator began an inquiry by inviting the city to provide written representations responding to the issues set out in a Notice of Inquiry. The adjudicator shared the city's representations with the appellant and invited her representations in response. The file was then transferred to me. Upon receipt of the appellant's representations, I invited and received reply representations from the city.

[14] For the reasons that follow, I uphold the city's search as reasonable. In addition,

as a result of this inquiry, I am satisfied that the city has now fulfilled its notice obligations regarding the refusal to give access to records that are publicly available.

ISSUES:

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

B. Did the city respond adequately to the appellant's request for building plans?

DISCUSSION:

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

[15] 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.[1] 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.

[16] 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.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[17] 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] 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]

[18] 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.[6] In the context of this appeal, the appellant raised the issue of reasonable search because she believes that there are additional records responsive to her request, consisting of notes of the city's building inspector.

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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.
[6] Order MO-2246.

Representations

[19] The city maintains that although the appellant has identified which records she believes the city has failed to locate, she has not provided a reasonable basis for concluding that such records exist.

[20] The city's representations review the numerous searches that its staff, namely, its Manager, Inspection Services (the manager), a building inspector, and two support assistants, carried out in response to the appellant's request.

[21] The city submits that the manager searched all current sent, received, junk, deleted, and archived email correspondence within the given timeframe and relating to the specified property. The manager conducted the search using keywords related to the property and individuals that he knew were involved in a complaint relating to the property. The manager also reviewed building inspection notes provided to him by the city's records clerk and "is confident" that the production was complete. In total, the manager provided 335 pages of records to the city's Access and Privacy Officer for review.

[22] The city submits that a building inspector also searched and provided all sent, received, and deleted email correspondence using a number of keywords relating to the property. In total, the building inspector provided 205 pages of email correspondence to the city's Access and Privacy Officer for review.

[23] The city submits that a support assistant conducted a search of the Integrated Business Management System (IBMS) for all inspection records related to "the relevant permit number." As a result of this search, 75 pages of records were provided to the city's Access and Privacy Officer for review. In addition, the city submits that the support assistant mentioned above, and another support assistant, conducted follow-up searches of the IBMS to confirm that all inspection-related records and "any other records" had been provided. As a result of these searches, a copy of the property survey and an electronic copy of the permit documents were provided to the city's Access and Privacy Officer for review.

[24] The city provided affidavit evidence from each of these employees attesting to the searches that were conducted.

[25] The city explains that the IBMS is the system that holds all information, including notes, reports, violations, permits, and correspondence, related to properties. The city submits that in order to access information relating to a specific property, staff simply enter the subject address into the system and then download an electronic copy of all

of the information, except email correspondence.[7] The city maintains that given the number of searches that it conducted, as outlined above, it is "highly improbable" that additional responsive information exists.

[26] The city explains that, as a result of its record retention schedule,[8] it is not possible that information once existed but no longer exists.

[27] The appellant explains that her belief that additional records exist stems from a meeting that she had with the Acting Director of Buildings and a number of other city staff on January 10, 2018. The appellant maintains that during that meeting, the Acting Director stated that "there were other notes made by [a named building inspector] on file to confirm the reason why a revised building permit was not required." The appellant explains that the notes were not reproduced at the meeting, because the Acting Director believed that the appellant already had access to them. The appellant maintains that she has not yet received notes to explain why a revised building permit was not required. The appellant states that it "is troubling to [her] that the Acting Director can make representations to [her] in front of her senior staff that notes exist to support their actions when they fail to disclose those notes."

[28] The appellant submits that she has been negatively impacted by this matter. She explains that the city's failure to follow through with its "own written instructions for a revised building permit has resulted in ongoing and time consuming litigation as [the specified property] has built beyond the scope of the building permit issued to them."

[29] In response to the appellant's submissions, the city advises that the named Acting Director and two of the other staff members that attended that meeting are no longer employed with the city. The city maintains that it has conducted searches for meeting notes and the building inspector's notes, but that none of the searches have located records fitting the description provided by the appellant.

[30] The city asked the manager and the named building inspector to respond to the appellant's submissions regarding what was said at the meeting in January 2018. In doing so, the manager stated:

> I do remember [the named Acting Director] making that statement during the meeting […] and was puzzled by it. A comprehensive search of all emails and all inspection notes respecting this matter had been performed by both myself and [the named building inspector].

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[7] The city explains that if email correspondence is specifically requested, then a separate search for email records is conducted outside of IBMS. This would include, for example, the sent and received folders of an individual's email account.

[8] Toronto Municipal Code Chapter 217, Records Retention Schedule.

> The only reasonable explanation I can offer is that [the named Acting Director] may have understood the note made by [the named building inspector] on December 17, 2015 as the literal reasoning for not requesting a permit application. The note required the owner to either apply for a revision to the permit OR submit an engineer's report for the deficiencies [the named building inspector] noted. This approach, providing options for compliance, when addressing deficiencies on projects under construction is reasonable, and is consistent with Toronto Building inspection practices.
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> It is my firm and only stance that the statement made by [the named Acting Director] was not a correct understanding of the note or an explanation of why a revision was not sought. The only explanation as to why a revision was not applied for is that the property owner opted to follow the latter, and provided an engineer's report. If any notes/documents/ communications had existed to this point, they would have formed part of the complete package of information contained in the records [disclosed].

[31] The named building inspector confirmed that he had nothing further to add.

Analysis and findings

[32] The appellant claims that additional records exist in the form of notes taken by a building inspector relating to the property in question. The basis for her belief that these notes exist is that the city's former Acting Director of Buildings referred to the notes during a meeting between the appellant and a number of city employees on January 10, 2018.

[33] As mentioned above, although a requester will rarely be in a position to indicate precisely which records an institution has failed to identify, the requester must still provide a reasonable basis for concluding that such records exist.[9] In my view, upon receipt of the records that were disclosed to her, the complainant would have had reasonable grounds to believe that the city failed to locate some responsive records, given the information presented to her by the city's former Acting Director of Buildings. I accept that she was justified in questioning why the building inspector's notes that may have confirmed the reason why a revised building permit was not required were not provided in response to her request.

[34] However, based on the totality of the evidence before me, I am also satisfied, and I find, that the city has conducted a reasonable search for records responsive to

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[9] Order MO-2246.

the appellant's request, including any records that would match the description of those mentioned above. In making this finding, I am satisfied that the city has provided sufficient evidence to demonstrate that experienced employees knowledgeable in the subject matter of the request, including the named building inspector and the city's Manager, Inspection Services, expended a reasonable effort to locate records that are reasonably related to the request. This effort includes multiple searches of various email accounts and folders, including deleted and archived emails, as well as three separate searches of the city's IBMS database, which contains information relating to properties throughout the city.

[35] In addition, I note that the city's record retention schedule requires that records relating to building permits and inspections be maintained for a period of 30 years after the completion of the final inspection. It is reasonable to conclude that there would not be any responsive records from 2015 to 2017 that once existed but that no longer exist.

[36] Finally, I am satisfied that while there may be some confusion about whether additional building inspector notes exist, the fact that these records, if they exist, have not yet been located, does not undermine the reasonableness of the city's search efforts. As I found above, the city has met its obligation of requiring an experienced employee knowledgeable in the subject matter of the request to expend a reasonable effort to locate records that are reasonably related to the request.

[37] Therefore, for the reasons outlined above, I am satisfied that the city has demonstrated that a reasonable search for records responsive to the appellant's request was conducted in compliance with the city's obligations under the *Act,* and I uphold the search.

Issue B: Did the city respond adequately to the appellant's request for building plans?

[38] My review of the file indicates that during the processing of the appellant's request and this appeal, the city sent the appellant six separate decision and/or clarification letters. While the city explained its rationale and process for the routine disclosure of building plans, none of the six letters cited an exemption under the *Act* as the basis for declining to provide the building plans to the appellant through the city's Access and Privacy unit.

[39] Section 22(1) outlines an institution's obligations when it decides that it will not provide access under the *Act*. The purpose of section 22(1) is to provide "sufficient detail to allow a requester to make a reasonably informed decision on whether to

review an institution's decision."[10] In particular, this section states:

> 22(1) Notice of refusal to give access to a record or part under section 19 shall set out,
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> (b) where there is such a record,
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> (i) the specific provision of this Act under which access is refused,
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> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
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> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision. (emphasis added)

[40] Accordingly, the city bears the onus of establishing the basis upon which it refuses to disclose records that exist and which have been requested under the *Act*.

[41] Relevant to this appeal is the exemption at section 15(a), in particular, which reads:

> A head may refuse to disclose a record if,
>
> (a) the record or the information contained in the record has been published or is currently available to the public

[42] The city's letters to the appellant did not refer to a specific provision under the *Act* pursuant to which access to the building plans was being denied under the *Act*. The appellant challenged the manner in which the city responded to her request for access to the building plans. Accordingly, I must determine whether the city has adequately responded to the appellant's request.

Representations

[43] The city maintains that it has provided access to building plans through the Toronto Building Division exclusively for more than a decade. The city submits that its Routine Disclosure Policy "allows anyone access to residential building plans associated with permit applications submitted after December 31, 2006. Copies of said plans are

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[10] Order M-457, *Toronto (City) (Re)*, 1995 CanLII 6586 (ON IPC). See also Orders M-913, M-1057, MO-1209, MO-1731, MO-2190 and MO-2226.

subject to fees specified by Toronto Building Division." The city notes that its process allows property owners to submit a registered letter of objection to the disclosure of their plans. When this occurs, the city's Access and Privacy Unit will facilitate the access process on behalf of Toronto Building Division. The city explains that once the Access and Privacy Unit's work is complete, the process "reverts back to Toronto Building Division to provide access to the plans."

[44] With regard to the request at issue, the city submits that because the appellant was not the property owner and was not able to obtain consent from the property owner to access the building plans through routine disclosure, the city commenced its third party notification process. Once the city was satisfied that the property owner would not appeal a decision to grant the appellant access to the requested building plans, the city directed the appellant to its Building Division. The city advised the appellant that she could make arrangements with its Building Division to access the plans using the city's Routine Disclosure Policy.

[45] The city submits that it clearly communicated that the requested records "were not being provided in response to [a request under the Act], as [they are] currently available to the public through a regularized system of access." The city submits that its decision letters were sufficient to provide the appellant with the opportunity to identify that "access was being denied on the basis of the 'information available to the public'" exemption at section 15(a) of the *Act*.

[46] The city maintains that section 22(1)(b) of the *Act* does not require an institution to provide a direct citation to the section number relied upon to deny access. However, the city "agrees that it would be best practice moving forward" to identify the section number when it relies upon the "information available to the public" exemption, in order to eliminate any possible confusion.

[47] The appellant maintains that during the meeting she had with the city's former Acting Director of Buildings and other city staff, reference was made to building plans and surveys. She states that one of the staff offered to make copies of those documents during the meeting, but was prevented from doing so by another staff member. She says that she "does not understand why [she] did not receive a copy of [the] plans and survey if they were already in the file and no effort or extra work had to be incurred by the City of Toronto to release them to me."

[48] In response, the city says that despite any confusion, access to the requested plans has not been denied; the appellant can access the plans at any point by contacting Toronto Building Division staff as outlined in the city's decision letters.

Analysis and findings

[49] This office has acknowledged the city's practice of routine access and disclosure of building plans by the Building Division numerous times.[11] However, none of those orders have addressed the city's obligation to specifically cite or rely on an exemption under the *Act*, specifically the section 15(a) exemption for publicly available information, in referring requesters to the Building Division to obtain building plans.[12] Section 15(a) states:

> A head may refuse to disclose a record if,
>
> > The record or the information contained in the record has been published or is currently available to the public.

[50] In this appeal, the effect of the city's reliance on the Building Division to process this request for building plans is that the city is refusing to provide access to the building plans under the *Act.*

[51] Order MO-3067 addressed the issue of access to a different kind of record, but I note that the institution in that appeal refused to provide access to city by-laws and *Building Code* provisions under the *Act* on the basis that "[t]he discretionary exemption at section 15(a) was raised implicitly" in its initial decision letter.

[52] In that appeal, the adjudicator noted that according to the city, its "conduct reflects its intention to exempt the records by providing the requester with an alternative form of access and not proceed further with providing a fee estimate for those records which were publicly available."[13] The adjudicator was satisfied that there was basis for finding that the city had a regularized system of access for the public to obtain the sought-after records; however, she cautioned, "that when [the city] also intends to rely on the public availability of a source of information to answer a request, section 15(a) should be expressly cited in its written access decision."[14] I agree.

[53] As a result of having implemented a policy of routine access and disclosure for building plans, the city has determined that access will be provided through its Building Division, subject to an objection by the property owner and certain other considerations. Although the city submits that it has exempted the building plans from disclosure on the basis that they are already publicly available through its routine disclosure process, it does not follow that the city has no obligation to expressly state

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[11] See Orders MO-2635, MO-2630, MO-2277, and MO-2246, for example.
[12] The decision letters sent to those requesters are not available to me and the technicality of citing an exemption appears not to have been a point of contention.
[13] Paragraph 28 of Order MO-3067.
[14] At paragraph 34.

the basis of this decision in its decision letter to a requester. Rather, section 22(1)(b) of the *Act* requires the city to specifically state the basis of its decision to deny a requester access to a requested record under the *Act*. This is the case regardless of whether the city believes the basis is obvious or easily implied from its practices.

[54] While the city's decision in this case may not have met the requirements of a proper notice of a refusal to provide access to a record under section 22(1)(b) of the *Act*, I am satisfied that as a result of my inquiry, this deficiency has been remedied. The city has now confirmed the provision of the *Act* upon which it denied access to the building plans; that is, pursuant to the "information published or available to the public" exemption at section 15(a) of the *Act*. Therefore, I find that there is no useful purpose to be served by ordering the city to issue a decision to that effect at this point.

ORDER:

I uphold the city's search for records, and I dismiss the appeal.

Original Signed By
Jaime Cardy
Adjudicator

September 11, 2019