

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3860-I

Appeal MA16-83

Final Order MO-3532-F

Reconsideration Order MO-3751-R

The Corporation of the City of Oshawa

November 12, 2019

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 Interim Order MO-3493-I, the adjudicator ordered the city to conduct a further search for records. In Final Order MO-3532-F, based on information provided by the city, the adjudicator found that no further search should be ordered because the F: drive had been deleted and no backup had been made.

The appellant then made a request for reconsideration of Final Order MO-3532-F on the basis that the city had provided incorrect information about the existence of a backup of the F: drive. In Reconsideration Order MO-3751-R, the adjudicator found that in the inquiry leading to Final Order MO-3532-F, the city failed to provide information central to the issue to be decided, and that this constituted a fundamental defect in the adjudication process. She allowed the reconsideration request and invited further submissions on what further searches the city should undertake.

In this order, the adjudicator orders the city to conduct further searches.

BACKGROUND:

[1] In 2013, the City of Oshawa (the city) approved the purchase of property to house its Consolidated Operations Depot. The city's Auditor General subsequently issued a report, Report AG-13-09, in which he was critical of the purchase.

[2] The city then appointed an investigator to investigate the allegations contained in the Auditor General's report. The investigator conducted an investigation and issued a public report.

[3] The appellant then submitted a request to the city pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All materials contained on the F drive of the city owned computer provided

to [the named investigator] during his investigation of AG-13-09.

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

[5] In Interim Order MO-3493-I, I found that the city had not conducted a reasonable search for records and I ordered it to conduct a further search. Specifically, I stated the following:

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.

According to the [city's Records and Information 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.

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 it had no responsive records.

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 [the] 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.

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.

[6] As a result of these findings, I ordered in part as follows:

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.

[7] The city then provided me with two affidavits outlining the additional search: one sworn by the city's Records Information System Manager for City Clerk Services, and one sworn by the Systems and Security Operations Manager for Information Technology Services (the IT manager).

[8] The affidavits were brief. The IT manager stated as follows:

Regarding [the investigator's] account at the City of Oshawa, the account, mailbox, and (F:) drive were terminated upon completion of his work for the City.

There are no tapes which have a copy of his (F:) drive.

[9] The Records Information System Manager's affidavit stated:

The records provided to City Clerks Services by the Information Technology Services Department have been reviewed, and there is no way to determine which records were stored on [the investigator's] drive or elsewhere on his City issued computer or drives.

[10] In Final Order MO-3532-F, I upheld the city's further search, stating:

The affidavit provided by the IT manager states that the investigator's F: drive was "terminated" upon completion of the investigator's work for the city, and that no tapes exist that contain a copy of the F: drive. I understand this to mean that the F: drive was deleted and that no backup exists. I also understand the affidavit of the Records Information System Manager to mean that there is no other way to determine what the contents of the F: drive were before the F: drive was deleted.

Given this latest information, and without commenting on the propriety of the city having deleted the F: drive with no backup, I am satisfied that the city has made a reasonable effort to identify and locate responsive records. In light of the recent information, I am not satisfied that there is any reasonable basis for concluding that any responsive records exist. While the appellant submits that there is no evidence that the city searched the F: drive, I accept that the city cannot search the F: drive because it no longer exists [footnote omitted].

[11] The appellant then submitted a request for reconsideration of Final Order MO-3532-F. The appellant explained that as a result of the city's response to a more recent access request, he had become aware that a backup of the investigator's F: drive was

in fact made before the F: drive was deleted. Included in the records the city provided to the appellant in response to that access request was an internal email sent by the Records Information Systems Manager on October 1, 2013. That email states as follows:

I have backed up the electronic content (email and F Drive) to external media.

You may proceed with whatever steps are necessary to terminate the account.

[12] In Reconsideration Order MO-3751-R, I found that the city had failed to disclose relevant information during my inquiry and that this constituted a fundamental defect in the adjudication process. On that basis, I allowed the reconsideration request and invited further representations from the parties on what areas the city ought to search for the contents of the investigator's F: drive.

[13] In this order, I order the city to conduct certain further searches for the contents of the investigator's F: drive.

DISCUSSION:

[14] Some additional background is helpful in order to place the issue and the parties' representations in context. In July 2018, the city, in a public news release, acknowledged its lack of transparency in responding to freedom of information requests for records related to the purchase of the Consolidated Operations Depot (COD). The city stated that it would release all records related to the city's purchase of the COD, subject to any mandatory exceptions set out in the *Act*.

[15] The city then proactively disclosed a number of records related to the matter.¹ According to the city, the records released include all available electronic records from 2001 to 2014 on the City Clerk Services corporate file server, including records on the former computer F: drive of the investigator, related to the land purchase and the subsequent investigation undertaken by the investigator. However, as will be seen below, the city maintains that it is not possible to ascertain which of these records are those once contained on the investigator's F: drive. It also states, as mentioned below, that the USB key used to transfer the investigator's F: drive contents to the city's corporate server has likely been overwritten.

¹<https://www.oshawa.ca/Modules/News/index.aspx?keyword=&date=07/01/2018&page=2&newsId=90915619-1880-4fd5-8881-0d8e250b93a4>
<https://www.oshawa.ca/city-hall/foi-activities.asp>

The basis for my decision to reconsider Final Order MO-3532-F

[16] This office's reconsideration process is set out in section 18 of the *Code of Procedure*. Section 18 reads in part as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

18.08 The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

[17] In Reconsideration Order MO-3751-R, I concluded that there was a fundamental defect in the adjudication process, because the city had not disclosed during my inquiry that a) the records in the investigator's F: drive were backed up and that b) they were then copied to the city's corporate file server, and these were facts that were central to the issue I had to decide -- that is, whether it was reasonable to believe that responsive records exist such that a further search should be ordered.

[18] In that order, I concluded:

I acknowledge that the city states that 1) the backup of the F: drive on removable media has been overwritten, or has likely been overwritten, and that 2) it is impossible to determine, from examining the records relating to the investigation on the city's corporate server, which records originally resided on the investigator's F: drive. However, these are statements that could be made in the affidavit initially provided to me during my inquiry. They are instead unsworn statements made in the context of a response to a request for reconsideration. In many circumstances, statements such as these, even unsworn, would be enough to establish that no further search is warranted. In this case, however, given the particular circumstances before me, including the

history of this appeal² and the information previously provided by the city, I am not satisfied that no further search is warranted.

I also acknowledge that the city has now proactively disclosed records found on its corporate server, and that the city says this disclosure includes all records that were on the investigator's F: drive. Assuming that all documents on the F: drive are indeed included in the proactive disclosure, this still does not fully answer the issues in this appeal, because the proactive disclosure does not indicate which records came from the F: drive. My understanding of the appellant's request is that he wants to know what materials were placed on the F: drive for the investigator.

As a result, I allow the reconsideration request. I will order the city to conduct a further search for records, and to provide an affidavit or affidavits regarding its search efforts. However, before doing so, I will invite representations from the appellant on what the further search should entail. The city will be provided with the opportunity to respond to the appellant's representations.

[19] Following the issuance of Reconsideration Order MO-3751-R, I invited representations from the appellant on the areas the city should search for the materials contained on the investigator's F: drive, and who should conduct the searches. The appellant provided representations. The city then provided responding representations and the appellant provided representations in reply. Representations were shared in accordance with *Practice Direction 7: Sharing of Representations*.

Representations on what areas should be searched

[20] The sole question to be decided in this order is what further search or searches the city must conduct for the contents of the F: drive. The parties filed extensive representations. While I have reviewed them in their entirety, I will summarize the highlights here.

Appellant's representations

[21] The appellant points out that, according to records he received from the Durham Regional Police, the city told the police that it could make the F: drive available as it is in the city's archives. The appellant submits that the city must search its archives for the F: drive contents. He also submits that the following searches need to be conducted:

² Here, I referred to Interim Order MO-3493-I and Final Order MO-3532-F at para. 31.

- All records related to the transfer of documents to the F: drive must be searched
- The investigator's email must be searched for any references to materials transferred to the F: drive. The appellant refers to specific emails in the proactive disclosure that state that various employees' files are ready to be moved or are being moved to the investigator's F: drive
- The email and computer drives of the city solicitor must be searched
- The Auditor General's email address must be searched
- The emails and computer drives of a number of other staff involved in the real estate matter must be searched
- All of the city's servers and storage media should be searched for emails sent by various people
- The email and drives of the City Clerk must be searched
- The emails and drives of all city councillors and the Mayor must be searched for any records relevant to the investigation
- The city's information technology service (IT) should provide records on the methods it used to transfer data to the investigator's F: drive
- IT should be asked if staff's folders created for the transfer to the investigator's F: drive were backed up.

[22] The appellant also makes reference to specific individuals in the city's IT department and elsewhere who should conduct the various searches.

[23] The appellant submits that disclosure of the records relating to the investigation is desirable in the public interest.

City's representations

[24] The city submits that the appellant is increasing the scope of the original request, which was for "all material contained on the F: Drive of the city owned computer provided to [the investigator] during his investigation of AG-13-09."

[25] The city points out that the appellant is incorrect when he states the requested records are "missing." It states that the records from the investigator's F: drive are not "missing"; they have been incorporated into the appropriate records series, but have not been stored in a method that would readily differentiate their point of origin. The city submits that this method of retention is in compliance with the relevant by-law.

[26] The city submits that it is generally accepted that backups are not considered a

“record” of their own accord; rather, they are created as an emergency recovery measure. It states that backups are not currently included in the city’s records retention by-law and are therefore not intended to be retained in perpetuity.

[27] The city points out that it sent the appellant a copy on USB of all the records proactively released on the city’s website, which include records originally contained on the investigator’s F: drive, at no cost to him. The city submits that the appellant now has ready access to substantially more records than were originally requested.

[28] The city explains that various staff deposited documentation into folders created for them on their own F: drives named “[investigator’s name] Audit”. The files were then copied to the investigator’s F: drive by IT staff. The “[investigator’s name] Audit” folders were created expressly for the purpose of populating the investigator’s F: drive and staff were not required to retain the copies of the files that were deposited into the temporary folders. No exclusive backup of the temporary folders on individual F: drives was made. The city’s physical backup tape drives have been upgraded twice since 2013, when the investigator’s F: drive was created. Therefore, the city submits, any existing tapes would be unreadable on the hardware currently owned by the city.

[29] The city explains, however, that on July 24, 2019, the Interim City Clerk became aware of the existence of several boxes of emergency recovery backup tapes from various years, including some labelled 2013, which were intended for disposal but which have not yet been destroyed. The city explains that due to the nature of the backup process, backup tapes are typically cycled and overwritten and that the labels that are left on tapes when they are boxed for destruction may not accurately reflect the contents of the tapes; also, not all tapes are labelled. Therefore, the city is unable to verify whether the investigator’s F: drive was ever contained on the tapes in question. The city also notes that the tapes may have incurred damage over time, and there is no guarantee that the process would be capable of fully recovering the content of the tapes. The city submits, further, that the cost and effort involved to merely attempt to read and recover the file on the tapes would be excessive in view of its obligation to taxpayers.

[30] With respect to the appellant’s claim that the city told the police that the investigator’s F: drive can be made available, the city points out that the police report actually states that the officer was told that the content of the drive was transferred to the city’s archives and can be made available. The city submits that this availability does not include the original structure of the F: drive or any original location identifiers.

[31] With respect to the various areas that the appellant wants searched, the city submits that it cannot reproduce the original digital environment wherein staff copied files for deposit to the investigator’s F: drive, as the vast majority of the staff identified by the appellant are no longer employed by the city. The city submits in any event that the appellant has not explained how searching the email inboxes of various city staff, the vast majority of whom are no longer employed by the city, would assist in identifying the files that may or may not have been on the investigator’s F: drive in

2013.

Appellant's reply representations

[32] The appellant reiterates his request that a senior member of the management team at the city sign off on the city's next search. He points out that the city has yet to provide adequate details of when, how, or by whom the external media containing the backup of the F: drive was deleted. He also disagrees with the city where it submits that backups are not "records."

[33] The appellant also takes issue with the city's records retention policies and their application to "possible record classes" that he submits the city should have been searching.

[34] The appellant notes that the city has now stated that the records in question (the contents of the investigator's F: drive) are in a single repository of investigation-related records. The appellant notes that the city has still failed to identify the records responsive to his request.

[35] With respect to the temporary "[investigator] Audit" folders, the appellant notes that although the city states that its staff would not be required to retain the copies of the files that were deposited into the temporary folders, there is no evidence that staff were instructed to delete them or that a search was conducted to see if any of those temporary folders remained on any department or employee F: drive at the time of the original request for records.

[36] The appellant states that although the city claims that its backup tape drives have been upgraded twice since 2013 and existing tapes would be unreadable on the hardware currently owned by the city, it provides no proof for this statement. He submits in any event that any investment in tape drives since the original request in 2015 does not justify the city's not having conducted a reasonable search at that time. He also provides a link to an industry website suggesting that certain tape drives can read tapes created two generations back, and that the city has not expended any effort to ascertain if it could read currently held backup tapes.

[37] The appellant also points out that while the city states that the vast majority of staff he names are no longer with the city, the city does not say who is in fact still with the city.

[38] The appellant requests that I order the city to conduct a "fulsome search, exhausting every remaining possibility to finally put this issue to rest."

Analysis and findings

[39] The only issue before me is what further searches the city should be required to perform. I am not satisfied that it has yet conducted a reasonable search for records as

required by section 17.³

[40] The *Act* does not require the institution to prove with absolute certainty that further responsive 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 -- that is, records that reasonably relate to the request.⁴ 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 that are reasonably related to the request.⁵

[41] In this case, the city has not provided 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 I will, therefore, order it to conduct further searches.

[42] According to the evidence before me, the investigator's F: drive was backed up to a USB key before his drive was deleted. I do not currently have any sworn evidence from the city about what efforts, if any, have been made to verify whether this information may still exist on a USB key. I will, therefore, order the city to conduct that search and provide an affidavit to me about the results of that search.

[43] I also do not have any sworn evidence from the city about the feasibility of identifying the contents of the investigator's F: drive from reviewing the records on the city's corporate server. Although the city states that it is impossible to "readily" tell which of the records came from the investigator's F: drive, it is not clear what the source of the city's belief is, nor is it clear whether the city has made any efforts in this regard. Therefore, I will also order the city to ask the appropriate staff in its IT department to investigate this possibility and provide an affidavit to me.

[44] The appellant suggests that I ought to order the city to conduct a number of other searches. These include the following:

- Searches of various staff's email accounts
- Searches of backup tapes that the city has in boxes, which may or may not contain the requested information
- Searches of the servers of various staff who placed documents into temporary folders for transfer to the investigator's F: drive

³ Orders P-85, P-221 and PO-1954-I.

⁴ Orders P-624, PO-2554 and PO-2559.

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

- Searches of the emails and drives of all city councillors and the Mayor for any records relevant to the investigation

[45] The appellant's initial request was for the contents of the investigator's F: drive. I agree with the city that many of the appellant's suggested searches are for records outside of the scope of his request. I do not agree with the appellant, for example, that I ought to order the city to search for "all records related to the investigation," or any records other than the contents of the investigator's F: drive. Similarly, I disagree that the city should be ordered to conduct searches for the emails of various staff. The appellant's request was for the contents of the investigator's F: drive, not for all records relating the investigation. If the appellant wants access to any of these records, he should make an access request to the city for them.

[46] Other searches suggested by the appellant, although they are for records responsive to the request, go beyond what is required for a reasonable search.

[47] In my view, a reasonable search does not require the city to examine the computer files of all staff who contributed to the investigator's F: drive in search of documents that may have been placed on his F: drive. I acknowledge that the city has not been precise about what staff still remain with the city and what staff have departed. In my view, however, it was reasonable for the city to interpret the request as being for a single repository of the documents on the investigator's F: drive. In the circumstances, I am not satisfied that I should order the city to search the computers of the various named staff members in the hopes of re-creating some of the probable contents of the investigator's F: drive.

[48] I am also not satisfied that a reasonable search in these circumstances requires the city to go through all of its backup tapes in case one of them contains a backup of the investigator's F: drive. I do note that the city has acknowledged that some of the tapes are labelled 2013; it is possible that one of the tapes contains a backup of the investigator's F: drive. However, while searching backup tapes may be required for a reasonable search in some circumstances,⁷ it is not required here, where the evidence about how readily these tapes can be read is not clear and, more importantly, the appellant already has already received significant disclosure of records relating to the real estate matter and resulting investigation, including records that were placed on the investigator's F: drive. If the appellant wants the city to search its backup tapes, or any other areas over and above those I order to city to search, below, he should make a fresh access request and the city may respond with the appropriate fee estimate.

[49] I disagree with the appellant that the city must "exhaust every remaining possibility" in its search for the investigator's F: drive contents. The standard for a

⁷ See Orders PO-3050 and MO-3768-F.

search under the *Act* is reasonableness, not perfection. In my view, the searches I order below are sufficient to complete a reasonable search for the contents of the F: drive.

[50] In conclusion, I will order the city to search for a USB key containing a copy of the investigator's F: drive, since the city has stated that one existed at some point. In addition, since the city has stated that all of the F: drive's contents were imported to its corporate server, I will also order the city, through its IT department, to determine whether it is possible to identify the investigator's F: drive's contents based on a review of the records on the corporate server.

ORDER:

1. I order the city to ask a senior member or members of its Information Technology Services to examine the repository of documents on the city's corporate server relating to the investigation and to determine if it is possible to ascertain which records came from the investigator's F: drive. To be clear, it is not sufficient for the city to state that it is not possible to so ascertain, without senior member/s of the ITS first making the efforts to do so.
2. I order the city to search the contents of its USB keys to see if the investigator's F: drive contents are on any of the USB keys. To be clear, it is not sufficient for the city to state that the USB key containing the F: drive has been overwritten. The city is to coordinate a search of all city USB keys to see if a backup of the investigator's F: drive is on one of them.
3. If the city locates responsive records arising out of the above searches, it is to issue an access decision to the appellant, treating the date of this Order as the date of the request for the purposes of its access decision.
4. I order the city to provide me with a detailed affidavit or affidavits from the individual or individuals who conduct the search described in order provision 1. An affidavit based on second hand knowledge of the search will not suffice.
5. I order the city to provide me with an affidavit or affidavits respecting the search described in order provision 2. The affidavit may be from the person coordinating the search, but it must be detailed.
6. The affidavits referred to above are to be provided to me by **December 12, 2019**.
7. I remain seized to address matters arising out of order provisions 1, 2, 4, 5, and 6 of this Order.

Original signed by: _____

November 12, 2019 _____

Gillian Shaw
Senior Adjudicator