

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3921

Appeal MA18-493

City of Toronto

April 27, 2020

**Summary:** The appellant made a request to the City of Toronto under the *Act* for records relating to her from 2015. The city issued an access decision disclosing records identified as responsive, in part. Initially, the city maintained that certain records were not within its custody or control, but later decided that they were, and disclosed them. The appellant appealed to this office claiming that additional responsive records should exist. The appellant also took issue with the city's position on custody or control. In this order, the adjudicator finds that it is not necessary to decide the custody or control issue and upholds the city's search as reasonable. She 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) and 17.

### 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 the following information:

Copy of ALL on file with City of Toronto regarding [the requester] from 2015. Information must include communication, documents, images, emails from and to all third parties including [five named individuals and organizations], [...] ODSP [...] Communication must also include internal communication of City of Toronto employees regarding [the requester] plus third parties.

[2] The city issued a decision granting partial access to the requested records. The

decision stated the following, in part:

Please be advised that portions of the records have been removed as they pertain to another service provider or client and therefore are non-responsive to the request.

Certain non-responsive records have been removed from the file as they originated from another Government provider, and as such are outside the City of Toronto's custody or control.

Please be advised that there may be records regarding yourself with the Ontario Disability Support Program with the Ministry of Community and Social Services. You may wish to contact them...

[3] The city provided the relevant contact information for the Ministry of Community and Social Services to the requester.

[4] The requester, now the appellant, appealed the city's decision to this office.

[5] During the mediation stage of the appeal process, the city issued a supplementary decision, which stated:

We had previously informed [you] that a decision to remove records was due to the City of Toronto not having custody or control over certain records. This decision was made in error and the records are now enclosed.

[6] The city disclosed the records that it had previously withheld on this basis, and confirmed that it was not withholding any other records on the basis of a lack of custody or control.

[7] The mediator discussed the city's supplementary decision with the appellant. The appellant advised the mediator that despite the city's statements, she believes that the issue of custody or control should be addressed at adjudication. The appellant also advised the mediator that she is not seeking access to information that was withheld as not responsive to her request. As a result, information that was withheld on the basis that it is not responsive to the appellant's request is not at issue in this appeal.

[8] Lastly, the appellant informed the mediator that she believes that there are additional records responsive to her request. The city provided the mediator with the details of its search efforts and maintained that there are no additional responsive records. The mediator conveyed this information to the appellant. The appellant continued to believe that there are additional responsive records, which have not yet been identified and located by the city.

[9] A mediated resolution was not achieved and the file was transferred to the adjudication stage of the appeal process. I conducted an inquiry under the *Act* by

inviting representations from the city and the appellant. I received representations from the city, which were shared with the appellant in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*. The appellant did not provide representations for my consideration.

[10] For the reasons that follow, I find that it is not necessary to consider the issue of custody or control. I dismiss the appeal after concluding that the city has satisfied its obligation under the *Act* to conduct a reasonable search for records responsive to the appellant's request.

### **PRELIMINARY ISSUE: CUSTODY OR CONTROL**

[11] As mentioned above, the city initially withheld records on the basis that they were not in the city's custody or control for the purpose of section 4(1) of the *Act*. During the mediation stage of the appeal process, however, the city revised its position with respect to these records. The city issued a supplementary decision letter advising the appellant that it was no longer withholding any records based on them not being in its custody or control and it granted the appellant full access to the information previously withheld on this basis.

[12] Despite the city's supplementary decision, the appellant requested that the issue of custody or control be addressed at the adjudication stage, so I invited submissions from the parties with respect to this issue.

[13] The city explains that although it originally withheld certain records on the basis that they were not within its custody or control, it subsequently determined that this part of its decision was made in error. The city notes that its supplementary decision released the previously withheld records to the appellant. According to the city, it has no other responsive records that relate to the appellant.

[14] The appellant did not provide representations addressing this issue, or explaining why she believes it should be addressed at adjudication.

[15] Section 4(1) of the *Act* is relevant to the question of custody or control. It reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[16] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. However, a finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be

provided access to it.<sup>1</sup> A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[17] In my view, however, the circumstances of this appeal do not require me to make a determination on the issue of the city's custody or control of records. I accept the city's evidence that it disclosed to the appellant all of the responsive records previously withheld on the basis they were not within its custody or under its control. Accordingly, I am satisfied that no determination of this issue is necessary. However, I will address the appellant's belief that there are *additional* responsive records that have not yet been identified and located by the city under the issue of reasonable search, below.

## **DISCUSSION:**

### **Did the city conduct a reasonable search for records?**

[18] 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>2</sup> 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.

[19] 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>3</sup> To be responsive, a record must be "reasonably related" to the request.<sup>4</sup>

[20] 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>5</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>6</sup>

[21] Although a requester will rarely be in a position to indicate precisely which

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<sup>1</sup> Order PO-2836.

<sup>2</sup> Orders P-85, P-221, and PO-1954-I.

<sup>3</sup> Orders P-624 and PO-2559.

<sup>4</sup> Order PO-2554.

<sup>5</sup> Orders M-909, PO-2469, and PO-2592.

<sup>6</sup> Order MO-2185.

records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>7</sup> A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.<sup>8</sup>

### ***Representations***

[22] According to the city, the appellant's request was clear and did not require any clarification. The city explains that it deals with similar requests on a frequent basis.

[23] The city provided affidavit evidence from the Access and Privacy Officer (APO) who was responsible for processing the appellant's access request. The APO advises that because of her involvement with the request at issue, and as a result of her daily responsibilities, she is experienced and familiar with the matters involved in this appeal.

[24] According to the APO, it was evident, based on the nature of the appellant's request, that the city's Employment and Social Services, and Shelter, Support, and Housing Administration divisions should be included in the search for responsive records. The APO explains that upon receiving the appellant's request, she sent an email to the staff contact at each division, requesting that they search for records responsive to the request.

[25] The APO attests that staff at both divisions conducted a search of their physical and electronic files. Their searches included various email accounts and archived files, and the Social Assistance Management System (SAMS) database that is used by the Employment and Social Services division. The APO explains that the SAMS database has been used for several years, and stores large amounts of information relating to the Employment and Social Services division's functions, including all file notes and payment information.

[26] The city's submissions elaborate on the APO's affidavit evidence. The city submits that since searches were conducted using the appellant's name, identification number, and date of birth, it is "highly improbable" that responsive information would not have been located during its search efforts. The city explains that both divisions have a seven- year retention period for inactive files. Therefore, records are available for seven years after a file is closed. The city maintains that because the appellant's file has not been inactive for a period of more than seven years, all responsive records would have been located by its searches.

[27] The city also notes that the APO was asked to conduct a second search, and to

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<sup>7</sup> Order MO-2246.

<sup>8</sup> Order MO-2213.

review all information from the request, during the mediation stage of this appeal. Based on the above, the city maintains that it has conducted a reasonable search for responsive records, in accordance with its obligations under the *Act*. The city also submits that the appellant has provided “no basis to conclude that additional records exist,” nor has she made it clear which records she believes may exist.

[28] Although the appellant did not provide representations for my consideration, in a conversation with an IPC staff member, she expressed her opinion that the city's affidavit evidence is “extremely defective.” The appellant did not elaborate on her reasons for viewing the affidavit evidence as defective, but reiterated her belief that additional responsive records exist.

### ***Analysis and findings***

[29] Based on the city's representations, I accept that the request at issue in this appeal was clear, and that the city did not require clarification from the appellant before it began its search for responsive records. I also accept that the request was sufficiently clear to allow the city to identify both the locations and employees that should be included in its search for responsive records.

[30] Considering the affidavit evidence before me, I am satisfied that the city's search was coordinated and carried out by employees who were knowledgeable in the subject matter of the request, including staff at the city's access and privacy office, as well as staff in each of the relevant divisions: Employment and Social Services, and Shelter, Support, and Housing Administration. I am also satisfied that in searching both of the divisions' physical and electronic files, including email records and the SAMS database, the employees expended reasonable efforts to locate records that are reasonably related to the appellant's request.

[31] Accordingly, I find that experienced city employees, who were knowledgeable in the subject matter of the request, expended a reasonable effort to locate records that are reasonably related to the appellant's request.<sup>9</sup>

[32] Since the appellant objects to the adequacy of the city's search, she was required to provide a reasonable basis for concluding that other responsive records exist beyond those that have already been identified and located by the city.<sup>10</sup> In this case, I find that the appellant has not done so. Because the appellant did not provide representations in response to the Notice of Inquiry, the only information before me from the appellant is that she believes the city's affidavit evidence is deficient, and that additional responsive records should exist. Without more information about what

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<sup>9</sup> Orders M-909, PO-2469, and PO-2592.

<sup>10</sup> Order MO-2246.

additional responsive records might reasonably be thought to exist or where such records may be located, I find that there is no reasonable basis for concluding that additional records exist but have not yet been identified and located by the city.

[33] Therefore, I find that the city has conducted a reasonable search for records responsive to the appellant's request, as required by section 17 of the *Act*, and I dismiss the appeal.

**ORDER:**

I uphold the city's decision and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Jaime Cardy  
Adjudicator

\_\_\_\_\_ April 27, 2020