Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3973-I

Appeal MA18-386-3

The Corporation of the City of Oshawa

November 13, 2020

Summary: The Corporation of the City of Oshawa (the city) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified city-owned surplus piece of land. The city located responsive records and granted partial access to the records. Some records were fully or partially withheld on the basis of a number of exemptions, or because the information was not responsive to the request. The appellant appealed the city's decision. At adjudication, the remaining issues concerned access to the information identified as non-responsive to the request, as well as the application of the discretionary exemptions at sections 12 (solicitor-client privilege) and 13 (danger to safety or health), and the reasonableness of the city's search. In this order, the adjudicator upholds the city's access decision. She also upholds the reasonableness of the city's search in part, and orders the city to conduct a further search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 13, and 17.

Order Considered: Order PO-1887-I.

OVERVIEW:

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

> ...information since 2008 of the City Property known as "[name of] Road Allowance North of [name of] Boulevard" (as so referenced in DSC report DS-[number]):
>
> 1. Any request for report/recommendation(s) in Declaring the Property as Surplus and resulting memorandum(s)/report(s) and public comments
>
> 2. Any request/inquiry as to availability/purchase of Property and response
>
> 3. List of Articles/Document Manifest (or digital equivalent) of the Property file
>
> 4. Report/memorandum as to how the Sale of the Property would be conducted (limitations, restrictions, etc)

[2] The city located responsive records and issued a decision in which it made references to sections 14(1) (personal privacy) and 6(1)(b) (closed meeting) of the *Act* and indicated that it would release records upon the conclusion of third party notification. The city issued a subsequent decision granting partial access to the responsive records with severances pursuant to sections 12 (solicitor-client privilege) and 14(1) of the *Act*. The city produced an index of records containing a description of the responsive records and exemptions relied upon to withhold records in full or in part.

[3] The requester, now the appellant, appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC, or this office).

[4] During the course of mediation, the following developments occurred:

- the issue of reasonable search was added to the scope of the appeal;
- the city confirmed that it was withholding some responsive information on the basis of sections 12, 13 (danger to safety or health);
- the city confirmed that a more legible copy of certain records could not be obtained;
- the appellant confirmed that he continued to seek access to the information withheld under sections 12 and 13, and identified as non-responsive.

[5] Since further mediation was not possible, the file moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[6] As the adjudicator of this case, I began my inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the city. The city

provided written representations in response. I then sought and received representations from the appellant in response, and the parties exchanged further representations after that.

[7] For the reasons that follow, I uphold the city's access decision. I also uphold the reasonableness of the city's search in part, and I order the city to conduct a further search.

RECORDS:

[8] The records remaining at issue are emails and/or attachments, withheld in full or in part, as follows:

- all non-responsive portions of records 14, 79, 80, 83, 89, 98, 107, 112, 113, 115, 116, 137, 138, 162, 163, 165, 166, 167, 171, 172, 187, 189 and 191;
- records 14, 79, 80, 163, 167, 171, 187 – under section 12; and
- Record 89 – under section 13.

ISSUES:

Preliminary issue: Is the city claiming that the appellant's request is frivolous and vexatious under the *Act*?

A. What is the scope of the request? Are records 83, 98, 107, 112, 113, 115, 116, 137, 138, 162, 163, 165, 166, 167, 172, 187, 189 and 191 responsive to the request?

B. Does the discretionary exemption at section 12 apply to records 14, 79, 80, 163, 167, 171, 187?

C. Does the discretionary exemption at section 13 apply to Record 89?

D. Did the institution exercise its discretion under sections 12 and 13? If so, should this office uphold the exercise of discretion?

E. Did the city conduct a reasonable search?

DISCUSSION:

Preliminary issue: Is the city claiming that the appellant's request is frivolous and vexatious under the *Act*?

[9] In addressing the issue of responsiveness of parts of some records, the city set out section 4(1) of the *Act*, in its entirety, which includes the portion of section 4(1) that addresses frivolous and vexatious requests [section 4(1)(b)]. This has led to an apparent misunderstanding regarding the scope of this appeal. As I will explain, section 4(1)(b) has not been claimed and is not at issue in this appeal.

[10] Section 4(1) of the *Act* sets out the general right of access to records, and the two main exceptions to that right.

[11] The city set out section 4(1) in its representations, as follows:

> 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,
>
> > (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. (Emphasis added.)

[12] The appellant takes this to mean that the city is describing "[his] actions [as] "frivolous or vexation," and states that "emphasis added" is insulting. He considers the city's statement to be "defamatory" and argues that he "should not have to endure false statements to [his] character in these proceedings."

[13] If the city's position was that the request was frivolous and vexatious under section 4(1)(b), it would not have processed his request, but it did. Accordingly, I find that section 4(1)(b) is not at issue in this appeal.

Issue A: What is the scope of the request? Are records 83, 98, 107, 112, 113, 115, 116, 137, 138, 162, 163, 165, 166, 167, 172, 187, 189 and 191 responsive to the request?

[14] The parties disagree about whether several records are responsive to the request. For the reasons I will explain below, I uphold the city's decision to withhold the parts of the records withheld for being non-responsive to the request.

[15] To be considered responsive to the request, records must "reasonably relate" to

the request.[1]

[16] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2]

[17] In this case, the request was clearly worded. It was for records relating to a specific property.

[18] Because the request relates to easements or allowances on a specified property, the appellant argues that information about "surrounding properties" to the one named in his request may reasonably relate to his request. I appreciate the appellant's concern. Information about properties surrounding the area specified in the request might well be "reasonably related" to the request. However, I have reviewed the information redacted by the city and can confirm that it does not relate to properties surrounding the one named in the request. The information identified as not responsive does not reasonably relate to the appellant's request.

[19] As a result, I uphold the city's decision to withhold portions of records 83, 98, 107, 112, 113, 115, 116, 137, 138, 162, 163, 165, 166, 167, 172, 187, 189 and 191 on the basis that the information withheld is non-responsive to the request.

Issue B: Does the discretionary exemption at section 12 apply to records 14, 79, 80, 163, 167, 171, 187?

[20] The city relied on the discretionary exemption at section 12 (solicitor-client privilege) to withhold records 14, 79, 80, 163, 167, 171, and 187, and I uphold that decision for the reasons set out below.[3]

[21] Section 12 says:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[22] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or

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[1] Orders P-880 and PO-2661.
[2] Orders P-134 and P-880.
[3] The city notes that the portions of records withheld under section 12 were not denied in full. Rather, the city states that it partially disclosed the records, in an effort to provide the appellant with as much information as possible, consistent with the spirit of the *Act*.

retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[23] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. In this appeal, the city's position is that solicitor-client communication privilege applies, not litigation privilege.

[24] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[4] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[5] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[6]

[25] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[7]

[26] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[8] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[9]

[27] In this case, the request concerns a piece of surplus land owned by the city. The city states that its historical practice has been that property dealings at the municipal level are considered confidential and require the receipt of advice from the city solicitor. Furthermore, the city states that the disposal of city-owned property process covered in these records, and the treatment of the solicitor-client communication therein, is consistent with past practice of the city.

[28] To summarize the appellant's position, he argues that portions of a legal opinion that constitute publicly available information should be disclosed, and that records related to site surveys should be disclosed as well. He also raised points related to substantive notice issues, and two records that are not at issue under section 12.

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[4] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[5] Orders PO-2441, MO-2166 and MO-1925.
[6] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[7] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[8] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[9] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

[29] In addressing the appellant's position, I wish to clarify that whether or not a lawyer and their client were discussing information that is publicly available, or certain type of information (such as site surveys) is not relevant to the question of whether section 12 applies. All that is required for section 12 to apply is that the communications between the lawyer and their client were confidential and made for the purpose of obtaining or giving professional legal advice.

[30] I have reviewed the records at issue under section 12 (records 14, 79, 80, 163, 167, 171, and 187). Based on this review, I accept the city's position that the portions of these records withheld under section 12 are emails between city staff and the then city solicitor. Having reviewed the records, I find that, as the city states, these records contain direct communications between a solicitor and client made for the purpose of obtaining or giving legal advice. Therefore, I also accept the city's position that those communications between city staff and the city's solicitor were confidential in nature. As a result, the city submits, and I find, that the common law solicitor-client privilege applies to the information withheld under section 12.

Loss of privilege

[31] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege and voluntarily demonstrates an intention to waive the privilege.[10]

[32] The city states that the common law privilege in section 12 has not been waived. Since there is no evidence before me that the common law privilege has been waived expressly or by implication, I find that the information at issue is exempt from disclosure under the common law (Branch 1) solicitor-client communication privilege exemption in section 12. I will review the city's exercise of discretion under this discretionary exemption later in this order. Given these findings, it is not necessary for me to consider whether the information at issue is also exempt under Branch 2 of section 12.

Issue C: Does the discretionary exemption at section 13 apply to Record 89?

[33] The city claimed the discretionary exemption at section 13 (danger to safety or health) for Record 89, and for the reasons that follow, I uphold that decision.

[34] Section 13 states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual[.]

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[10] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

[35] The city acknowledges that appellants are not required to provide institutions with the rationale behind their requests, but submits that there are certain cases where motivation should be considered as a factor prior to release, and that this is one of them. However, it is well-established that a requester does not need a reason to request records under the *Act*. Furthermore, the *Act* itself is clear that if an institution refuses access to a record (or part of a record), the institution has the burden of proof to show that the record (or part of the record) falls within a specified exemption in the *Act*.[11]

[36] For the section 13 exemption to apply, an institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[12] The potential for harm to "an individual" (the words used in section 13) is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[13]

[37] The city describes the record at issue as an off-set map created by an energy company, which pertains to the energy company's infrastructure assets. Due to the nature of the information in the record, the city defers to the following online statement on the company's website:

> The energy infrastructure assets depicted on our interactive map are for general information purposes only. They do not purport to provide exact locations of pipelines or facilities in your area. For further information on specific geographical information regarding our assets, please contact [. . .].

[38] Accordingly, the city states that specific gas line location information is not readily available to members of the public. The city also argues that the environmentally and technologically sensitive information contained within the record should not be subject to wide release because it could leave individuals residing or frequenting the area to be subject to potential threats due to tampering, explosions, and/or gas leaks. It notes that disclosure under the *Act* allows an appellant to disseminate the information as they choose.

[39] The appellant argues that because Record 86 was divulged, which he states shows the location of a gas line, "[n]othing further would be divulged" by disclosing

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[11] Section 42 of the *Act*.
[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[13] Order PO-1817-R.

Record 89. Having reviewed records 86 and 89, I find that they are substantially different. Therefore, I cannot agree that "nothing further would be divulged" by disclosing the record withheld.

[40] In addition, the appellant argues that records 88 and 90 show that there were no infrastructure issues relating to the property that is the subject matter of the request. While I cannot speak to substantive infrastructure issues, I find that whether or not there were infrastructure issues relating to the property in question is not relevant to whether Record 89 is exempt under section 13, given the content of Record 89, which is materially different from the contents of records 88 and 90.

[41] Based on my review of Record 89, I accept the city's submission that Record 89 contains environmentally and technologically sensitive information in that it discloses specific gas line locations, which is not readily available to the public. Given the nature of this information, I also accept that its release could reasonably be expected to expose individuals residing or frequenting the area to potential threats due to tampering, explosions, or gas leaks. Therefore, I find that it is reasonable to expect that a person's safety will be endangered by disclosing Record 89 and that the record is, therefore, exempt from disclosure under section 13. Since the record consists of a map identifying detailed gas line/main located within a specific area, I am satisfied that it cannot be severed without revealing information exempt under section 13.

Issue D: Did the institution exercise its discretion under sections 12 and 13? If so, should this office uphold the exercise of discretion?

[42] As I will explain below, the city exercised its discretion under sections 12 and 13, and I uphold the exercise of that discretion.

[43] The sections 12 and 13 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[44] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[45] In either case, this office may send the matter back to the institution for an

exercise of discretion based on proper considerations.[14] This office may not, however, substitute its own discretion for that of the institution.[15]

[46] In denying access to the records, relevant considerations may include those listed below.

Section 12 considerations

[47] The city states that it considered many factors in exercising its discretion under section 12, including:

- the purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interests it seeks to protect;
- whether the appellant has a sympathetic or compelling need to receive the information;
- the relationship between the appellant and any affected persons;
- whether disclosure will increase public confidence in the operation of the city;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the appellant or any affected person;
- the age of the information; and
- the historic practice of the city with respect to similar information.

[48] On the specific consideration of the wording of the exemption and the interests it seeks to protect, the city states that the solicitor-client relationship needs to be maintained to preserve the "continuum of communications" and to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[16]

[49] In addition, the city specifically noted that it has consistently retained the confidentiality and privilege of solicitor-client communications under section 12.

[50] The appellant states that he seeks the truth regarding whether the city was aware of his family's interest in the subject property. From his representations on the

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[14] Order MO-1573.
[15] Section 43(2).
[16] Order P-1551.

issue of the exercise of discretion, and overall, it is clear to me that his substantive dispute with the city over the parcel of land in question carries significant consequences to him. He mentions notice requirements that he believes were circumvented and the foundation of a legal claim. I accept that the appellant has a sympathetic or compelling need for as much information as possible that is responsive to his request, and that the city considered this as a relevant factor in the exercise of its discretion, as noted above. To the extent that the appellant's position may be understood as requesting that more weight be given to this factor of his sympathetic or compelling need for the information withheld, it is worth repeating that this office may not substitute its own discretion for the city's.

[51] I am satisfied that the city considered relevant, and not irrelevant, considerations in exercising its discretion under section 12. I also find that the city did not consider irrelevant factors in exercising its discretion.

Section 13 considerations

[52] While exercising its discretion under section 13, the city states that it considered many considerations, including:

- the purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific;
- the nature of the information;
- the wording of the exemption and the interests it seeks to protect;
- whether the appellant has a sympathetic or compelling need to receive the information; and
- whether disclosure will increase public confidence in the operation of the city.

[53] Specifically with respect to a consideration of the nature of the information, the city explained that it considered the extent to which it is significant and/or sensitive to the city, the appellant or any affected person (including the residents of the area). This consideration included the lack of public availability of the record, as per the original creator, and the proprietary nature of the information. Based on my review of Record 89, I accept that it contains information that is not publicly available due to the sensitive nature of its contents, so this was a relevant consideration for the city to take into account.

[54] The city also submits that Record 89 is a one-page map that will not serve to increase public confidence in the operation of the institution. It takes the position that, in fact, the release of this map may make residents of the area involved question their confidence in the operation of the city, especially if their safety is compromised. Having

reviewed Record 89, I accept that this is a reasonable position to take.

[55] The appellant states that he believes that the record withheld under section 13 "may very well constitute" a site survey that was conducted by a third party, which may reveal information in the city's knowledge about the impact on his property, and shed light on notice issues. However, as discussed, I have reviewed the record withheld under section 13 and can confirm that it is a map of the energy company containing detailed gas line/main locations within a specified area. Therefore, what I consider relevant to the issue of the exercise of discretion from the appellant's representations is that the records at issue in this whole appeal relate to an issue of great importance to the appellant. This is a relevant consideration in the exercise of discretion. As noted above, the city considered whether the appellant has a sympathetic or compelling need to receive information. After taking this factor, amongst others, into consideration, the city used its discretion to withhold Record 89. As discussed above, this office may not substitute its own discretion for that of the institution.

[56] I am satisfied that the city considered relevant, and not irrelevant, considerations in exercising its discretion under section 13. I also find that the city did not consider irrelevant factors in exercising its discretion.

The appellant's allegation of bad faith

[57] As discussed, the Commissioner may find that the institution erred in exercising its discretion where it did so in bad faith.

[58] "Bad faith" has been defined as:

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.[17]

[59] To find that an institution acted in bad faith in exercising its discretion, there must be reasonable grounds to conclude it did so.

[60] However, in this case, the appellant provides background information about the nature of his dispute with the city, but ultimately states that he has no way of

[17] Order M-850.

substantiating his claim that "some of the acts may have been performed in bad faith." In these circumstances, and based on the rest of the evidence before me, there is insufficient evidence for me to find that the city acted in bad faith in exercising its discretion to withhold portions of the records withheld under section 12 and the record withheld under section 13.

Conclusion regarding exercise of discretion

[61] In light of the information withheld and the parties' representations, I find that the city considered relevant factors in exercising its discretion under both sections 12 and 13. In addition, I find that the city has not failed to take into consideration other relevant factors.

[62] There is also no evidence before me that the city exercised its discretion in bad faith or for an improper purpose in withholding information under sections 12 or 13.

[63] For these reasons, I uphold the city's exercise of discretion under sections 12 and 13.

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

[64] 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.[18] 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.

[65] 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.[19] To be responsive, a record must be "reasonably related" to the request.[20]

[66] 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.[21]

[67] 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

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[18] Orders P-85, P-221 and PO-1954-I.
[19] Orders P-624 and PO-2559.
[20] Order PO-2554.
[21] Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.[22]

The city's evidence

[68] Initially, the city chose to respond literally to the request. Staff in the city's Legal Services and Planning Services were asked to conduct a search for responsive records, essentially using the wording of the request.

[69] However, after reviewing the original request with staff in departments that were contacted and receiving their feedback on the availability of responsive records, staff in City Clerk Services department then asked the appellant for clarification between specified dates, via email. Based on my review of the email exchange between the parties, I find that the request was clarified to exclude emails sent after a specified date, unless otherwise directed. The city also provided the appellant a list of the types of records identified as responsive thus far, which it stated it would include in the final email about clarification of the scope.

[70] The city states that the search conducted by Legal Services and Planning Services staff resulted in the partial release of 573 pages of records to the appellant. It provided an affidavit with further details from the following city employees:

- the Municipal Prosecutor for Legal Services (the prosecutor), and
- the Principal Planner for Planning Services (the principal planner).

[71] The prosecutor's affidavit states that she has personal knowledge of the matters in her affidavit, and that she searched her hardcopy files, computer drives, and emails for any records relating to the property known as "[street name] Allowance North of [another street name]" from 2008 onwards. She states that this included searching for any requests for reports or recommendations regarding the property, memos, public comments, requests or inquiries regarding its purchase, articles, and documents. More specifically, this included records relating to declaration of the property as surplus, inquiries or requests regarding the availability or purchase of the property, and reports or memos regarding how the sale of the property would be conducted. The prosecutor attests to forwarding the responsive records that she located to the City Clerk Services office for review.

[72] Given the nature of the request, I find that the prosecutor is an experienced employee in the subject matter of the request. I further find that the locations she searched (both hard copy and digital) were reasonable in the circumstances, and that the parameters of her search were also reasonable, as they essentially matched the language of the request.

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[22] Order MO-2185.

[73] The principal planner's affidavit states that she too has personal knowledge of the matters in her affidavit, and that she searched her hardcopy files, computer drives, and emails for any records relating to the property in question, from 2008 onwards. The specifics of her search parameters mirrored those of the prosecutor's, listed above, so I will not re-list them. The principal planner attests to forwarding the responsive records she found to City Clerk Services for review.

[74] Given her position and the frequency with which the appellant referred to her in his representations, I find that the principal planner is an experienced employee in the subject matter of the request. I find that the locations that she searched and the search parameters used were reasonable in the circumstances.

The appellant's position

[75] The appellant does not agree that the city conducted a reasonable search. He states that many of the pages disclosed contained duplicated email chains, and argues the number of pages disclosed to him is not indicative of the reasonableness of the city's search (and he is right that this is not determinative of the issue). The main focus of his position relates to records he believes are "missing." I will address this position by first discussing the searches that were actually conducted, and then the nine categories of records (or types of records) that the appellant believes are "missing" and that "would have been captured in several places" in the city's record holdings, as follows:

1. his letter to the city in opposition of city's previous attempt to the land in question as surplus in 2009/2010;

2. official city documents/reports that refer to the city's previous attempt to declare as surplus the land in question in 2009, involving a process that he states was carried on into 2010;

3. the Planning & Development Services Department's "[street name]" property file;

4. a site survey;

5. correspondence with the two named previous real estate managers;

6. information of the principal planner (her notes, memos, site survey and other work product);

7. a voicemail message referenced in Record 233;

8. further correspondence following a reference in Record 106 to "something goofy" that prompted a written request for an immediate visit from the principal planner; and

9. correspondence about a right-of-way referenced in the subject line of Record 234.

[76] With each of these itemized records or categories of records, the appellant included additional remarks about the records he believes exist. I note that the parties exchanged several representations, and at times they were lengthy, so what follows summarizes the parties' positions and my reasons for upholding some, but not all, aspects of the city's search as reasonable.

The searches conducted and item 6

[77] 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.[23]

[78] Here, in arguing that the city's search was not reasonable, the appellant has not established that the employees who conducted the search (the prosecutor and the principal planner, discussed above) were not sufficiently experienced to do so, or that the locations they searched or the search parameters used were unreasonable in the circumstances. In fact, his representations discuss the principal planner's involvement and search efforts at length, so it is fair to say that he agrees that she is an experienced employee in the subject matter of the request. The fact that the appellant indicates that the principal planner's search did not turn up certain records such as her memos or site visitation logs (item 6, above) does not mean that she did not conduct a reasonable search. In this case, the appellant's position is a reflection of the difference between his expectations of what her record holdings should be and what they are, given the reasonable locations and search parameters involved in her search.

[79] Therefore, I uphold the searches of the prosecutor and the principal planner as reasonable.

Items 5 and 7 – searches that were not conducted

[80] Item 5 is correspondence with the two named previous real estate managers. The appellant provided supporting evidence of their involvement in subject matter of the request, which the city has not disputed. What the city has said is that these individuals are no longer employed with the city. The city also stated what its standard practice was towards past employees' records, but it is not clear that these employees' record holdings were actually searched. I find that their records, if any, about the subject matter of the request are within the scope of the appeal, considering the opening words of the request. I disagree that their records amount to "correspondence" and that "correspondence" is outside the scope of the request, when clearly some of what was disclosed to the appellant was correspondence between other individuals (for example, records 15 and 20, discussed below). Therefore, I will order the city to

[23] Order MO-2246.

conduct searches of the record holdings of those two past employees.

[81] With respect to item 7, the appellant states that Record 233 states that a voice mail was forwarded by email to the city's solicitor from an individual (a purchaser), and that this voicemail was not included on the CD of records disclosed to him. Whether or not the record is subject to solicitor-client privilege cannot be ascertained, but the city has not provided evidence that the solicitor involved conducted a search.

[82] In the circumstances, given the subject matter of the request, I find that it would have been reasonable to do so. Accordingly, I will order the city to provide evidence of its search efforts of this solicitor's record holdings, and those of any other city employee who is (or was) knowledgeable regarding the subject matter of the request. In doing so, I remind the city to observe the opening words of the request and the principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[24]

Item 1

[83] The appellant provided a copy of item 1, which is correspondence between him and the city. The parties appear to disagree about whether this record was removed from the scope of his request at the clarification stage. However, in my view, it is not necessary to address that in relation to this record. The fact that the appellant is in possession of it means that there would be no useful purpose in ordering the city to conduct a further search for it. Therefore, I will not address this record further.

Items 2 and 4

[84] The city has not disclosed records responsive to items 2 and 4 because it states that they are publicly available and/or may be requested outside of the *Act*. The city states that for item 4, no new site survey exists, and that the old surveys that were used can be accessed outside of the *Act*.

[85] Whether or not a new survey should exist is outside the scope of this appeal.

[86] However, what is relevant is that the city states that it is "not obligated to provide publicly available records through a formal access to information request under the Act in accordance with section 15 of [the Act]."

[87] Section 15(a) of the *Act* states:

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[24] Orders P-134 and P-880.

> 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.

[88] Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act*.[25]

[89] In this case, the city neither disclosed the records described by items 2 or 4 that it states are publicly available or otherwise accessible outside the *Act*, nor did it claim section 15(a). In these circumstances, I cannot uphold the city's search efforts regarding items 2 and 4 because it appears that the city did not search for these items and relied on the principle behind section 15(a), without actually claiming the exemption. Accordingly, I will order the city to issue an access decision with respect to those records, in light of its representations.

Item 3

[90] One part of the appellant's request was for the following: "[l]ist of Articles/Document Manifest (or digital equivalent) of the Property file." Given the parties' representations, I will address the request for a "manifest" separately from the request for "the property file."

[91] The appellant believes that there should be a manifest, or digital equivalent, for the property file. However, before issuing an access decision to the appellant, the city stated that it does not have a "manifest" of articles or documents, and explained its system of tracking and storing files, saying:

> With regards to your request for a list of articles or document manifest, the [c]ity tracks its paper files using a records management software. This is essentially just a finding aid that includes a brief description of the file. Those pertaining to the [street name] Road allowance are still "Active" files maintained within the Planning and Legal Services Departments. Our system only tracks if a file is checked out if it is inactive and in our records storage area.
>
> Our digital files are maintained on departmental shared drives, and we have no method of tracking which staff members have viewed the files. As such[,] we have no formal method of tracking what staff member has

[25] Orders P-327, P-1114 and MO-2280.

> viewed/checked out a file unless it is an inactive paper file sent to our storage area.

[92] I find that these details about the city's record keeping practices sufficiently address the appellant's request for a "manifest," or some digital equivalent. The fact that the appellant requested a manifest and one was not located is not a reasonable basis for believing that the record exists in the first place. Rather, it is a reflection of the appellant's expectation that it does, but that can be (and in this case, is) different from the actual record keeping system of the city.

[93] However, I find that the city has not provided sufficient evidence regarding the issue of whether a "property file" exists. It states that no such file exists, but I found its responses to the points raised by the appellant to be vague and insufficiently detailed, in light of the evidence that appears to contradict the city's assertion that no property file exists.

[94] The appellant highlights Record 15, an email enclosing dozens of attachments, written by the city's director of Planning Services in the city's Development Services Department. In Record 15, the director of Planning Services addresses two individuals and says:

> [Name 1, the name of principal planner]:
>
> Print all and file in the [street name] file that [Name 2] will get for you. Then give the file to [Name 3] he has the report already
>
> [Name 2]: pls get the file for [Name 1]

[95] The appellant argues that Record 15 is "clear black-and-white" evidence that a property file exists, that the plain meaning of this exchange means that a property file exists. He rejects the city's submission that this is a "turn of phrase," and argues that the entire body of the email does not make sense if it was. He also points to the role of the writer of the email (as director of Planning Services) and the high degree of familiarity that he is said to have regarding the city's recordkeeping practices and holdings.

[96] In addition, the appellant points to other evidence that is consistent with there being a property file. He provided a copy of Record 20, which is an email with attachments, signed by the same director, which says "[p]rint to file." He also notes the city's representations about its record-keeping practices for departing staff members, specifically, that "all relevant correspondence be saved into relevant folders (either electronically or on paper)." I note that if other properties were being considered as surplus by the city, it would be reasonable to expect that the city kept separate files for these properties.

[97] In my view, if there is an alternate explanation for "print all and file in the [street

name] file . . .[t]hen give the file to [name],” the city did not sufficiently provide it. The city states that reference to the “[street name] file” is “an informal turn of phrase used to describe a collection of records” and that “the use of this phrase is not necessarily a guarantee that the city has a file that actually bears that name.” I find that this response is a vague assertion, and is insufficiently detailed to accept in the circumstances.

[98] Furthermore, I disagree with the city that Order PO-1887-I involved a “similar issue.” In PO-1887-I, a responsive record had been located in an area that would not normally have been expected to hold responsive records and there were questions about that, but the adjudicator still found that there was sufficient evidence that the institution had conducted a reasonable search. The fact that a responsive record was inexplicably found in a location that it was not expected is different, in my view, a record not existing despite evidence that suggests (on a plain reading of that evidence) that the record does. Therefore, I decline to follow the approach taken in the particular circumstances of Order PO-1887-I.

Items 8 and 9

[99] The final two items of “missing” records that the appellant identified were items 8 and 9, but in my view, he did not establish a reasonable basis for believing the city did not conduct a reasonable search for these records, if they exist.

[100] Item 8 is correspondence that the appellant expects to exist in light of Record 106. In Record 106, a city employee emails the principal planner (one of the employees who provided an affidavit about her search) about coming across “[something] goofy.” The writer of the email then asks the principal planner if she can “come down if possible to discuss.” The appellant states that “[c]onspicuously absent is any further email/discussion about what “[s]omething’s goofy” all about that prompted an immediate visit.” He states that he expects further correspondence from the principal planner to senior staff about this, or in her own work notes. In my view, the evidence before me does not establish a reasonable basis for believing that further correspondence exists about the irregularity. The invitation to discuss whatever the irregularity was in person would suggest that it was not further addressed in writing. Furthermore, I have already accepted that the search efforts of the recipient of Record 106 (the principal planner) were reasonable, seeing as she is an experienced employee in the subject matter of the request who checked both her paper and digital record holdings, using the wording of the request as a guide. As a result, I find that there is insufficient basis for me to conclude that additional records exist in relation to item 8.

[101] Regarding item 9, the appellant states that the subject line of Record 234 (an email) references a right-of-way but there is no mention of any right-of-way issue in the email. He says that this leads him to believe that there is missing correspondence about a right-of-way. However, he also states that “[t]his looks like typical email behavior where in an email chain people don’t clean-up the original subject line in later replies to a sender where the conversation has moved on.” In my view, there is insufficient

evidence before me to establish that further correspondence should exist regarding the right-of-way issue referenced in the subject line of Record 234.

[102] In summary, I uphold the reasonableness of the city's search, in part, in that I accept that the two employees who provided an affidavit are experienced employees in the subject matter of the request who searched their paper and electronic files for responsive records. However, I find that the city did not provide sufficient evidence that it searched the record holdings of other experienced employees (past or present) who would reasonably be expected to conduct a search, and I find that the city's evidence regarding the existence of a "property file" was vague and unpersuasive. The city will also be ordered to issue an access decision with respect to items 2 and 4 because it appears to have relied on section 15(a) to deny access to those records without claiming the exemption.

ORDER:

1. I uphold the city's access decision, and dismiss that aspect of this appeal.

2. I order the city to issue an access decision in relation to items 2 and 4 in accordance with the requirements of the *Act*, treating the date of this order as the date of the request for the purposes of the procedural requirements of the access decision. In order to verify compliance with this order, I reserve the right to require a copy of this access decision.

3. I uphold the reasonableness of the city's search, in part. I do not uphold the city's search for responsive records relating to items 3, 5 and 7, above. Accordingly,

    a. I order the city to conduct further searches for responsive records. The searches should be conducted by an experienced individual or individuals employed by the city who would be reasonably knowledgeable in the subject matter of the request. This would include any employees in the city's IT department.

    b. I further order the city to provide me with an affidavit sworn by any employee or employees who have direct knowledge of the search, including the following information:

        i. the questions in relation to which it conducted searches

        ii. the name(s) and position(s) of the individual(s) who conducted the search;

iii. the steps taken in conducting the search, and if a type of search that would normally be expected (such as a paper or electronic search) is not conducted, an explanation as to why that is;

iv. the results of the search; and

v. if no records are located, an explanation for why no records are located.

4. I order the city to provide representations and affidavits to this office in compliance with provision 3 of this order, within 30 days of this order. This information may be shared with the appellant, unless there is an overriding confidentiality concern.

5. If the city locates further records responsive to the request as a result of the search, I order the city to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request for the purposes of the procedural requirements of the access decision. In order to verify compliance with this order, I reserve the right to require a copy of this access decision.

6. I remain seized of this appeal in order to deal with any issues arising from provisions 3 and 4 of this order.

7. The timelines noted in order provisions 2, 4, and 5 may be extended if the city is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting time extension request.

8. I reserve the right to require the city to provide this office with a copy of the records it discloses to the appellant as a result of order provision 3.

Original Signed By | November 13, 2020

Marian Sami
Adjudicator