

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-4011-F

Appeal MA18-00751

City of Thunder Bay

February 11, 2021

Summary: This final order disposes of the only remaining issue in this appeal: whether the City of Thunder Bay (the city) conducted a reasonable search in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In Interim Order MO-3877-I, the adjudicator found that the city had provided insufficient evidence that it had conducted a reasonable search, and she ordered the city to conduct a further search for responsive records. In compliance with Order MO-3877-I, the city conducted another search for responsive records, and provided further evidence of its search evidence to the IPC. In this order, the adjudicator upholds the reasonableness of the city's search, and dismisses the appeal.

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

OVERVIEW:

[1] This final order disposes of the only issue remaining in this appeal: whether the City of Thunder Bay (the city) conducted a reasonable search for records responsive to two items of a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In Interim Order MO-3877-I, I ordered the city to conduct a further search for records because I found that it had not conducted a reasonable search. In this order, I will explain why there is sufficient evidence before me to uphold the city's search and dismiss the appeal.

[2] The relevant parts of the original request, items 2 and 5, were for the following:

2 - All invoices/[purchase orders] [for the specified splash pad] for fixtures, mechanical, electrical for pad [specified company]

5 - All invoices/[purchase orders] any extras from [the specified company named in item 2]

[3] After I issued Interim Order MO-3877-I, the city conducted a further search for records responsive to items 2 and 5 of the request. The city located additional responsive records and disclosed them to the appellant.¹ The city provided this office and the appellant with further representations and affidavits reflecting its search efforts.

[4] The appellant provided representations in response to the city's representations and affidavits, and the city provided representations in response. The appellant provided representations in response.

[5] For the reasons that follow, I uphold the reasonableness of the city's search, and dismiss the appeal.

DISCUSSION:

[6] The only issue outstanding from Interim Order MO-3877-I is whether the city has conducted a reasonable search for records responsive to items 2 and 5 of the request.

[7] 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 17.² 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.

[8] 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.³ To be responsive, a record must be "reasonably related" to the request.⁴

[9] 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

¹ In addition, the city created a new record and disclosed it to the appellant, though the *Act* does not require the city to create records to respond to requests.

² Orders P-85, P-221 and PO-1954-I.

³ Orders P-624 and PO-2559.

⁴ Order PO-2554.

are reasonably related to the request.⁵

[10] 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.⁶ The institution is required to provide a written summary of all steps taken in response to the request.

Interim Order MO-3877-I

[11] In Interim Order MO-3877-I, I noted that the city's initial representations did not indicate that it had conducted a search for responsive records to items 2 and 5 of the request, at all.

[12] In addition, I found that the appellant had provided a reasonable basis for concluding the additional records exist relating to the city's expenditure of \$185,390 expenditure and the company named in her request. She had flagged the significant cost relating to the splash pad, and the overall money paid to the company that installed it , and explained, with supporting documentation, that the city provided similar records for the other companies involved and for the other equipment or products purchased. I found that this was sufficient to establish a reasonable basis for the appellant's belief that additional responsive records exist in relation to items 2 and 5 of her request.

[13] However, I also noted the following:

. . . it should be stated that the mere fact that something could reasonably be expected to exist does not necessarily mean that it exists, regardless of other considerations such as what "good business practice" (the appellant's words) may be. What I am tasked to determine in this appeal is whether the city's search efforts were reasonable in the circumstances and whether the appellant has provided a reasonable basis for believing additional responsive records exist.

[14] In response to the appellant's representations, the city provided additional evidence, which I found to be insufficient to uphold the city's search as reasonable in Interim Order MO-3877-I. The city had listed the staff contacted for searches for the appellant's previous six requests made under the *Act*, but this information was not relevant to this appeal because the evidence before me did not establish that the appellant sought identical records through her previous requests. Furthermore, the city had not provided further details about its search that had been requested in the Notice of Inquiry, such as information about the locations searched. Therefore, I ordered the

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

city to conduct a further search.

The city's evidence about its search efforts, after Interim Order MO-3877-I

[15] After conducting a search to comply with Interim Order MO-3877-I, the city provided two affidavits in support of its position that its search was reasonable. All of the city's representations and affidavits were shared with the appellant, so I will only summarize them, below.

Affidavit of Corporate Records Manager and City Archivist

[16] One affidavit was prepared by the city's Corporate Records Manager & City Archivist ("the records manager"). He held that position for about twelve years at the time that he prepared his affidavit. His responsibilities include the coordination of requests under the *Act*, the development and implementation of corporate training for all records management and freedom of information issues. A job description was attached to his affidavit to provide further details of his role. Based on the evidence before me, I am satisfied that it was reasonable for the city to have this employee direct the city's search.

[17] The records manager identified four subject matter experts (named in his affidavit) from the city's Parks & Open Spaces Section of the Engineering and Operations Division of the Infrastructure and Operations Department to search for responsive records. These employees were:

- the Manager Parks & Open Spaces Section,
- the Supervisor Parks & Open Space Planning,
- the Coordinator of Parks Services, and
- the Capital Projects Analyst.

[18] Based on the subject matter of the request (invoices and purchase orders relating to a specified company and splash pad) and the respective roles that these employees had in the departments identified as relating to the request, I am satisfied that these employees were experienced employees in the subject matter of the request.

[19] The records manager also attests that the process these employees undertook to search for records was described in the other affidavit provided by the city, that of the Supervisor of Parks & Open Space Planning ("the parks supervisor"), and that he found this to be thorough and satisfactory. I will discuss these searches when I turn to the park supervisor's affidavit.

[20] Furthermore, the records manager describes the results of the search. The records located were the same as those initially disclosed to the appellant. In addition, the records manager attests that city staff created an additional record, in order to help

the appellant understand the records she had received; this was a summary of all the invoices and purchase orders. On his review of this record, the records manager noticed that there were a number of purchase orders identified that had not been provided to the appellant. He attests to making some inquiries about this and discovering that they were missed because they were expenses that occurred through internal resources, such as Sewer and Water, and the Parks & Open Spaces Division never received these invoices. The records manager then requested that Sewer and Water send him the invoices identified in the spreadsheet that were missing. He reviewed them and determined that they were responsive records that had not been found in the prior searches conducted. I find that the records manager took reasonable steps to locate and identify these additional responsive records. As a result of the city's efforts to summarize the invoices and purchase orders, and the subsequent steps taken, the city was able to disclose additional responsive records to the appellant.

Affidavit of Supervisor for Parks and Open Space Planning

[21] The other affidavit was prepared by the city's Supervisor for Parks & Open Space Planning. He held this position for about ten years at the time of the affidavit. He attests that his responsibilities include directing the supervision of short and long-term planning, asset management and overall administration of the department. This includes preparing project budget estimates, drafting the text for procurement documents, monitoring project budgets to ensure cost containment, selecting and supervising the work of contractors/consultants and evaluating the quality of the final product. He too provided a job description with his affidavit. Based on the evidence before me, I am satisfied that the parks supervisor is an experienced employee in the subject matter of the request.

[22] The parks supervisor's affidavit also provides details about the steps taken to conduct the search, and why they were taken. He attests to being directly involved with the search for responsive records. He was one of the four identified by the records manager as having conducted a search, and he attests to the other three conducting searches as well. As these details were shared with the appellant, it is not necessary to set them out here. It is sufficient for me to note that:

- both hard copy and digital files were searched,
- the personnel responsible for these files were identified (and searched them manually or electronically, as applicable),
- the reason that certain locations were searched was explained (including a specified accounting software program used by the city to track all invoices and expenditures),
- the search covered the years applicable to the project,

- the city took the extra step of summarizing the invoices and purchase orders relating to the splash pad in question, and created a new record with that information, and
- all copies of responsive records located were forwarded to the city's Corporate Records Department, and all records were disclosed to the appellant.

[23] I find that the description of these steps sufficiently describes the people, time frame, and locations involved in the city's efforts comply with Interim Order MO-3788-I, and that these steps were reasonable, given the roles of the employees involved, and rationales of the locations searched provided by the city.

[24] In addition, the park supervisor's affidavit addresses the city's various procurement processes, in order to "provide some information in regards to the different records that are created by these procurement processes and to clarify what the [a]ppellant is concerned means documents or information is missing." I find that providing this information was helpful. In Interim Order MO-3877-I, I noted that while "the *Act* does not require the city to explain or justify its public procurement process, the form of contract may be relevant to the question of whether a reasonable search was conducted because it would go to what records could reasonably be expected to exist." I gave an example of why this might be relevant and accepted that without clear evidence from the city about the form of contract, the appellant had provided a further a basis for believing additional responsive records may exist by raising this issue in her submissions. Now, with this additional evidence, I am satisfied that the city has sufficiently addressed this concern. I appreciate that this may not reflect what the appellant believes should have transpired substantively, but that is outside the scope of an appeal to this office.

The appellant's position

[25] 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.⁷

[26] In response to the city's representations and affidavits, the appellant raises an issue related to the timing and awarding of the splash pad project to a named company, which appears to relate to concerns about the bidding process itself, and the basis of the appellant's belief that the city does not want to disclose the record she is seeking. However, concerns about the propriety of city's bidding process cannot be addressed by this office, and do not relate to the reasonableness of the city's search efforts described above. Even if the appellant's interpretation of the documentary

⁷ Order MO-2246.

evidence relating to this issue is correct, that would not diminish from the weight of the evidence regarding the experience level of the employees who conducted the search for responsive records, or the reasonableness of the steps taken to conduct the search, including the search of the software that tracks invoices and expenditures, given the scope of the request.

[27] In addition, the appellant's representations state that she seeks the details of how the budget was increased to a certain amount of money. However, that is clearly outside the scope of the request (for invoices and purchase orders), and I will not order the city to conduct a further search for records that are not reasonably related to the request. Similarly, she also raises other issues that fall outside of the scope of the request, such as information she believes other employees hold regarding the splash pad, but those issues are not relevant to the question of whether the city conducted a reasonable search for the invoices and purchase orders that are the subject matter of the only remaining issue in this appeal.

[28] The appellant also used the fact that the city found additional records as a reason to challenge the city's previous statements about the thoroughness of its search. I acknowledge the history of gradually increased disclosure, largely through appeals to the IPC, that appellant refers to. However, I am not persuaded that this is relevant to whether the city's latest search efforts were reasonable, or a reasonable basis for believing that additional responsive records exist.

[29] Furthermore, the appellant raised several points that can be characterized as questioning why certain other city employees were also not asked to conduct searches, and why the city did not provide an affidavit from each employee who did search. In response to this, the city submits that the two sworn affidavits, based on knowledge and belief, sufficiently comply with Interim Order MO-3877-I. The city notes that affidavits can be sworn based on information and belief, and that the two sworn affidavits encompassed the evidence of all those individuals who undertook or participated in the directing the search providing sufficient evidence for a finding that the search was reasonable in accordance with the order. With respect to the specific individuals who were not called on to participate in the search, the city states that there is "no indication or evidence that either [of the individuals specified by the appellant] had any extra level of expertise or knowledge as it relates to the subject matter of this search that [the two affiants] did not possess."

[30] In response to this point, the appellant provided submissions about the extent of the involvement of the two individuals she had flagged, and their high position within their respective departments, asserting that access to their record holdings must be limited as a result. However, I find that the degree of involvement of these employees in the actual splash pad project itself is not determinative of whether they could reasonably be expected to have records responsive to items 2 and 5 of the request. I am not persuaded that their level of involvement in the project overall means that they would reasonably be expected to hold the records responsive specifically to items 2 and

5 of the request. I also find that it does not necessarily follow that employees at managerial levels would reasonably be expected to have records containing more granular details of their projects, such as invoices or purchase orders that are at issue in this appeal. It appears that the appellant is interested in the record holdings of these employees as it relates to the splash pad. She is entitled to file a new request under the *Act* for such records, but the scope of what is before me is limited to items 2 and 5 of the request under appeal.

[31] Therefore, having reviewed the representations of both parties, I agree with the city's position regarding the experience level of the employees called upon to conduct searches in response to Interim Order MO-3877-I. I also agree that the city is in the best position to assess who is knowledgeable about the subject matter of the request such that they should participate in conducting a search for responsive records. I accept the affidavit evidence that the employees knowledgeable in the subject matter of the request were chosen to undertake a search.

[32] With respect to the appellant's questioning of the how there could be no detailed invoice for the components of the splash pad, the city submits that the appellant has not provided a reasonable basis or any supporting evidence for concluding that a detailed invoice for the components of the splash pad structure exists. The city notes that it provided an explanation of its procurement policies and the reason that the record which the appellant seeks has not been provided. I accept that the city has provided an explanation for the absence of the record that the appellant believes should exist. I find that the appellant's disagreement with the city's record-keeping practices, or disbelief that they could be as described, does not provide a reasonable basis for concluding that the city did not conduct a reasonable search in the circumstances.

[33] Finally, the appellant submits that the city, in conducting its search for the responsive invoice, should request that record from the company that installed the splash pad. However, I find that a reasonable search for records does not require the city to do so, as the *Act* only requires it to search its own record holdings and for records within its custody or control.

[34] Having reviewed the parties' representations and the city's affidavits, I am satisfied that the city has provided sufficient evidence of the steps that it took to conduct a search, such that I can uphold its search as reasonable. Accordingly, I will not order the city to conduct a further search.

ORDER:

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

Original signed by _____

Marian Sami
Adjudicator

February 11, 2021 _____

