

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-4143-F

Appeal MA16-83

The Corporation of the City of Oshawa

December 22, 2021

Summary: The appellant made an access 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 for the use of a named investigator retained by the city. The city did not locate records and the appellant appealed, resulting in a number of inquiries and orders under the *Act*. In the most recent order, Interim Order MO-3860-I, the adjudicator ordered the city to conduct two specific searches and to provide the IPC with affidavits, which it did. On review of the city's representations and affidavits and the appellant's response, the adjudicator upholds 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.

Orders Considered: Interim Order MO-3493-I, Final Order MO-3532-F, Reconsideration Order MO-3751-R, and Interim Order MO-3860-I.

BACKGROUND:

[1] This final order disposes of the issue of whether the city has conducted a reasonable search for records requested by the appellant.

[2] The background to this appeal is set out in detail in my previous orders relating to the appeal: Interim Order MO-3493-I, Final Order MO-3532-F, Reconsideration Order MO-3751-R, and, most recently, Interim Order MO-3860-I. Briefly, in 2013, the City of

Oshawa (the city) approved the purchase of property to house its Consolidated Operations Depot (COD or operations depot). The city's Auditor General subsequently issued a report, Report AG-13-09, in which he was critical of the purchase.

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

[4] 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 investigator] during his investigation of AG-13-09.

[5] The city issued a decision stating that it has no records that respond to the request. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC).

[6] 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. The city then provided me with two affidavits outlining its additional search. In Final Order MO-3532-F, and based on those affidavits, I upheld the city's further search and dismissed the appeal.

[7] The appellant submitted a request for reconsideration of Final Order MO-3532-F. After looking into the matter, I issued Reconsideration Order MO-3751-R in which 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 leading to Final Order MO-3532-F. On that basis, I allowed the reconsideration request and invited further representations from the parties on what additional areas the city ought to search for the contents of the investigator's F: drive.

[8] Specifically, in Reconsideration Order MO-3751-R, I stated:

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 have been 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 appeal¹ 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.

[9] Some further background is helpful in order to place the issue and the parties' representations in context. In July 2018, while this appeal was in progress, 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 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*.

[10] The city then proactively disclosed a number of records by posting them on its website. According to the city, the records released included all available electronic records from 2001 to 2014 on the City Clerk Services' corporate file server relating to the land purchase and the subsequent investigation undertaken by the investigator. The city says that these records include the records on the former F: drive of the investigator (which has now been deleted). However, as I state above, the city maintained that it is not possible to ascertain which of the records on its corporate file server are those once contained on the investigator's F: drive. It also stated, as mentioned elsewhere in this order, that the USB key used to transfer the investigator's F: drive contents to the city's corporate server had likely been overwritten.

[11] After consideration of the parties' extensive representations on what further areas the city ought to search, in Interim Order MO-3860-I, I concluded as follows:

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

¹ Here, I referred to Interim Order MO-3493-I and Final Order MO-3532-F at para. 31.

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.

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.

[12] As a result, I ordered the city to conduct specific additional searches for the contents of the investigator's F: drive. The order provisions of Interim Order MO-3860-I were the following:

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.

[13] The city conducted the additional searches and provided affidavits.² I shared the city's materials with the appellant and invited him to make representations on the reasonableness of the city's further search for records, and he did so.

[14] For the reasons set out below, I find that the city's cumulative searches for responsive records, including the searches ordered in Interim Order MO-3860-I, were reasonable and dismiss the appeal.

DISCUSSION:

[15] The only issue before me is whether the city has conducted the additional searches that I ordered it to conduct and whether, as a result, it has now conducted a reasonable search for the investigator's F: drive.

[16] 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. 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.

[17] In this case, for the following reasons, I am satisfied that the city has complied with the Interim Order MO-3860-I and has now conducted a reasonable search.

[18] As I stated above, in Interim Order MO-3860-I, I required the city to provide me with additional information about whether it is possible to ascertain which records on its corporate server came from the investigator's F: drive. I also ordered the city to search the contents of all its USB keys to see if the investigator's F: drive contents are on any of them.

[19] I will set out my findings on each of these additional searches in turn.

The city's attempts to ascertain which records on the city's corporate server came from the investigator's F: drive

[20] With respect to the first item, which corresponds with order provision 1 of Interim Order MO-3860-I, the city provided me with an affidavit sworn by its Manager, Systems and Security Operation (the systems manager). The systems manager attests that he has personal knowledge of the facts set out in his affidavit. Because the affidavit is relatively brief, I set out all the relevant portions here:

² A small portion of one of the city's affidavits (relating to the residence of a staff member) was withheld from the appellant in accordance with the criteria for withholding representations found in IPC *Practice Direction 7*.

3. [The] Director, Information Technology Services and [I] were contacted by [the] Information, Access and Privacy Officer in order to conduct a thorough search of the corporate servers for the "investigator's F: drive," or variants thereof[.]
 4. I conducted a search in the presence of five witnesses, including: [the] Network Administrator; [two] Records and Information Analysts; [the] Interim City Clerk; and [the] Commissioner, Corporate Services.
 5. The search was completed in two parts, and included the following server locations: the file share specifically assigned to the Clerks branch on the Branch Drive File Server, all shared drives on the Branch Drive File Server, and the Corporate-wide Shared Drive File Server.
 6. Initially, I reviewed the contents of the Clerk's file share. A directory was located with records, which the Interim City Clerk indicated were previously released to the appellant as part of the City's routine disclosure. I reviewed the contents of this folder and did not find any technical information to identify if these came from the investigator's F: drive.
 7. While conducting the search of the two corporate servers listed above, I further did an output of the file and directory structure, while logged in with an administrative account, of each file share drive of both servers to text files to allow for a keyword search of all corporate branch drives, and shared drives provided to the Robert McLaughlin Gallery and the Oshawa Senior Community Centre.
 8. In order to facilitate an accurate and exhaustive search, the following keyword search criteria was used in searching the above results:
 - a. "[investigator's first name]"
 - b. "_[investigator's initials] Audit"
 - c. "Drive"
 - d. "F Drive"
 - e. ".pst"
 9. As a result of the search, records which the Interim City Clerk indicated were previously released to the appellant as part of the City's routine disclosure were located on the Clerk's folder on the Branch file server, noted above, and the Corporate-wide Shared Drive file server. I did not find any technical information to identify if these came from the investigator's F: drive.
- [21] The appellant argues that the city's systems manager provides no information on

what type of technical information he searched for or ought to have searched for in his attempt to determine if any records on the server came from the investigator's F: drive. The appellant argues, for example, that the city could have checked the metadata for each record.

[22] The appellant also takes issue with the city's having searched only two corporate servers, and not identifying the initial (for example, F: or L:) relating to the server. He suggests this omission raises questions about the integrity of the city's search. He says the city should have searched all of its servers. He also thinks that the servers should have been searched by date to find records that came from the investigator's F: drive.

[23] The appellant says that according to other records he has received, he understands that when the investigator was retained, various city staff created their own file folders and placed materials for the investigator on them. The appellant says that the known folder names of these individuals' files should have been searched for on the city's corporate servers and were not. The appellant suggests a number of ways in which the contents of the investigator's F: drive might be ascertained, including by searching for staff's individual file folders, or backups thereof.

[24] The appellant also asserts, as he has done at earlier stages of this appeal, that the city should be ordered to search its backup tapes. He provided an affidavit from an individual who identifies himself as an IT professional, and who states in his affidavit that city records "could be recovered from the City's backup storage media and archives" and that the use of city computer resources "could have been captured by the logs for the City's proxy server and/or internet gateway if they had been properly configured at the time. These logs could be recovered from the City's backup storage media and archives."

Analysis and findings

[25] As I stated above, the city was ordered to do the following with respect to searching its corporate server:

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.

[26] In response, the city provided an affidavit from its systems manager, which I have reproduced above. I am satisfied from my review of the affidavit that the city has complied with my order. In particular, the systems manager attests that he located the directory containing the record that the city released as part of its routine disclosure. He

reviewed the contents of this folder and did not find any technical information to identify if these came from the investigator's F: drive.

[27] I am satisfied that the systems manager is a senior member of the city's Information Technology Services and that he examined the correct areas of the city's servers. Specifically, he checked the records relating to the investigation that were proactively disclosed. As noted above, the city says, and I accept, this proactive disclosure includes all records that were on the investigator's F: drive. It therefore stands to reason that these are the records the systems manager checked to see if there was any technical information that would identify them as having come from the investigator's F: drive.

[28] I do not agree with the appellant that my order included a requirement that the city search for metadata in order to ascertain the origins of each record. Given the large volume of records at issue, such an undertaking would be labour intensive and time consuming. It is open to the appellant to make a fresh access request for the metadata associated with those records, and the city may respond with the appropriate fee estimate for processing such a request.

[29] The appellant also believes the city should have searched its servers for file names of individual staff who created their own folders to put on the investigator's F: drive. However, I did not order the city to conduct this search in any particular way and I am satisfied that the systems manager used their own skill and judgment in attempting to make a determination as to which of the proactively disclosed records came from the investigator's F: drive.

[30] With respect to the appellant's renewed request that I order the city to search its backup tapes, I did not order such a search in Order MO-3860-I. In fact, I stated:

If the appellant wants the city to search its backup tapes, or any other areas over and above those I order the city to search, below, he should make a fresh access request and the city may respond with the appropriate fee estimate.

[31] I am satisfied that the city has complied with order provision 1 of Interim Order MO-3860-I and made reasonable efforts to ascertain which records came from the investigator's F: drive.

The city's search of all city USB keys for a backup of the investigator's F: drive

[32] With respect to order provision 2 of Interim Order MO-3860-I and the searches of its USB keys for a backup of the investigator's F: drive, the city states that staff in its City Clerks Services department conducted a survey of all city departments and branches, and concluded that the city has approximately 434 USB keys across the entire institution.

[33] City staff then undertook searches of each of the USB keys and provided 24 affidavits for my consideration, each sworn by a city staff member. Most of the affidavits state that the staff members searched for the "backup of investigator's F: drive, or any variant thereof." Two staff members attested that they found no USB keys in their respective departments.

[34] Each of the remaining affidavits was sworn by the city staff member who searched the USB keys in their respective department for a backup of the F: drive in question. The contents of all the USB keys were searched and the investigator's F: drive backup was not located. In its letter accompanying the most recent affidavits,³ the city confirms that it has not located the backup of the investigator's F: drive.

[35] The appellant takes issue with the instructions given to staff for the searches of the USB keys, stating that in most cases, it is not clear what instructions were given to staff on how to look for any USB keys that might exist in their departments. He says that the affidavits demonstrate only that city staff conducted futile searches with no reasonable prospect of finding the investigator's F: drive backup. He again asserts that the search terms used by the staff conducting the searches should have included the various files names that were created upon the initial transfer of files to the investigator's F: drive.

Analysis and findings

[36] The second item I ordered in Interim Order MO-3860-I was the following:

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.

[37] The city provided affidavits from its staff across multiple departments at the city. It located 434 USB keys and none of them contained a backup of the investigator's F: drive, or any variant thereof.

[38] The appellant argues that the individuals conducting these searches should have been directed to also search for file names of the staff who created folders to be put on the investigator's F: drive. These folders typically bore the names "[investigator's initials] Audit". I disagree with the appellant. Given the wide publicity of the investigation in question and the identity of the investigator, I am satisfied that any of the staff searching the F: drives would have understood that the staff folders should be identified as responsive to my order, if any had been found.

³ Given the number of USB keys searches, the city conducted its searches, and provided its affidavits, in stages.

[39] I am satisfied that the city has made reasonable efforts to inspect the USB keys in its possession for any backup of the investigator's F: drive.

Conclusion

[40] For the above reasons, I am satisfied that the city has complied with Interim Order MO-3860-I. I uphold as reasonable its cumulative searches during the course of this appeal.

[41] I again disagree (as I did in Interim Order MO-3860-I) with the appellant's assertion that the city must perform an "exhaustive" search for the investigator's F: drive contents. The standard for a search under the *Act* is reasonableness, not perfection. In my view, the city has now conducted a reasonable search for the contents of the F: drive.

ORDER:

I uphold the city's searches as reasonable and dismiss the appeal.

Original Signed by: _____
Gillian Shaw
Senior Adjudicator

December 22, 2021 _____