

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-4171-F

Appeal MA18-386-3

The Corporation of the City of Oshawa

February 25, 2022

Summary: In this final order, the adjudicator finds that the Corporation of the City of Oshawa conducted a reasonable search for records requested under the *Municipal Freedom of Information and Protection of Privacy Act*, 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: Orders MO-3971-I and MO-4083-I

OVERVIEW:

[1] This final order addresses the only remaining issue in this appeal: whether the Corporation of the City of Oshawa (the city) conducted a reasonable search for records requested under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), in accordance with Interim Order MO-4083-I.

[2] This order comes after I issued two interim orders in this appeal, Interim Orders MO-3973-I and MO-4083-I. In the first interim order (Interim Order MO-3973-I), I upheld the city's access decision, and the reasonableness of the city's search, in part. In that order I specifically upheld the reasonableness of the search conducted by the city's Municipal Prosecutor for Legal Services. In the second interim order (Interim Order MO-4083-I), I did not find sufficient evidence that the city had conducted a search for two of the items that remained outstanding from the first interim order, items 3 and 5.

Neither affidavit provided related to a search for these items, and the city had provided what I found to be insufficient evidence regarding which staff had been tasked with searching for records in response to the first interim order, and the locations searched. As a result, I ordered the city to conduct a search in relation to items 3 and 5, again.

[3] In response to Interim Order MO-4083-I, the city conducted a further search. It located and identified 1193 pages of responsive records, and provided representations and affidavits regarding those search efforts. I invited the appellant to respond to the city's representations and affidavit evidence, and he did so. After reviewing the appellant's representations, I decided to give the city an opportunity to provide written representations in response, and it did. I then gave the appellant an opportunity to review the city's reply representations and provide sur-reply representations, and he did. On my review of all four sets of representations, I determined that the inquiry could close.

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

DISCUSSION:

[5] The only issue before me is whether the city conducted a reasonable search in accordance with Interim Order MO-4083-I. For the reasons that follow, I find that it has.

[6] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.¹ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[7] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;² that is, records that are "reasonably related" to the request.³

[8] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁴

[9] In both the first and second interim orders, I found the city's evidence regarding

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Order MO-2185.

its search efforts for records relating to items 3 and 5 of the appellant's list of "missing" records to be insufficient, so in each interim order, I ordered the city to conduct a further search. Item 3 was for a "[street name] file" that was referenced in a couple of records that had been disclosed to the appellant. Item 5 was for emails of two named former city employees. In the second interim order, I found that the city had not provided sufficient evidence regarding its search efforts, if any, in relation to items 3 and 5. In the circumstances, I did not uphold the reasonableness of the city's search and ordered another one. However, as I will explain below, I find that the city has now provided sufficient evidence in relation to its search efforts and I will, therefore, not order it to conduct a further search.

[10] Although I have considered each party's detailed representations, I will be summarizing the parties' relevant positions in this order.

Experienced employees conducted searches in response to Interim Order MO-4083-I

[11] As mentioned, a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁵

[12] The city submits that in the circumstances of this appeal, its Manager of Policy in Planning Services (the planning manager) and Manager of Cybersecurity & Infrastructure Operations (the IT manager) are the subject-matter experts on the records and search methodologies, so it was appropriate to task these managers with conducting a search in response to Interim Order MO-4083-I. In support of this submission, the city explains that the managers have direct access to the records of the original records holders. Therefore, the city considered these managers to be "experienced employee(s) of the institution," under section 17(1)(b) of the *Act*.

[13] The appellant argues that all of the parties identified in records 15 and 20 (emails that the city had previously disclosed to him in response to his request) should have to provide an affidavit with an explanation of the emails they are party to, and with reference to a file bearing the street name in question. The appellant specified who these individuals were (this list included the planning manager), such that the city would be in compliance with order provision 5(e) of Interim Order MO-4083-I. In particular, he notes that one of these employees was given "simple and straightforward directives on how to handle a physical object," that being the "[street name] file". He submits that this employee "would certainly know what actions she took in relation to the very specific directives given to her by her [manager] and what she [had] in her hands." The appellant argues that the affidavit of the planning manager shouldn't serve to preclude "a statement from" this other employee, and that it is not sufficient to replace evidence that a physical file existed in the hands of this other employee.

⁵ Orders M-909, PO-2469 and PO-2592.

[14] In addition, the appellant argues that the planning manager's affidavit does not provide an explanation as to why the "[street name] file" mentioned in records 15 and 20 was not found, although, he submits, this was required by order provision 5(e) of Interim Order MO-4083-I.

Analysis/findings

[15] Before addressing the city's submissions, I would like to address the appellant's submission that each of the employees identified in certain records should have provided affidavits. I addressed a similar argument that he made earlier in the inquiry, in the second interim order, as follows:

At the outset, I wish to address the appellant's submission that if I do not order affidavits from specific individuals, as the adjudicator of Interim Order MO-2055-I had, the entire freedom of information process may as well not exist. The Act requires that institutions provide sufficient evidence to explain the steps taken to conduct a search. There may be many reasons why specific individuals may not be in a position to provide affidavits, including relocation or death, and the absence of affidavits from people possibly in the best position to provide evidence due to such reasons will not render the freedom of information process meaningless. In any event, I am not satisfied that I am in a position to specify who should be required to provide affidavits about the search efforts for records responsive to item 5 because I have minimal evidence in that regard. This does not appear to have been the case for the adjudicator of Interim Order MO-2055-I, and I decline to follow the specificity of the provisions of that order.

[16] That reasoning holds true still. I find that I am not in a position to specify to the city who should be required to provide affidavits in the circumstances of this appeal. The city is not required to provide affidavits from every individual who dealt with the appellant's property matter, or who was listed as a sender or recipient of the emails he references. As such, I do not find the appellant's submission in this regard to be a basis for finding that the city's search efforts were unreasonable, or even a factor weighing towards making such a finding.

[17] Having considered the parties' representations, I find that the city tasked experienced employees knowledgeable in the subject matter of the request to conduct a further search.

[18] The planning manager is one of the employees whom I have already found to be experienced in the subject matter of the request. I did so in the first interim order of this appeal, Interim Order MO-3973-I; at the time, this employee held the position of principal planner. I see no reason for departing from my view that this employee, as the planning manager, is an experienced employee in the subject matter of the request,

which relates to city planning issues. The city states, and I accept, that the planning manager has direct access to the records, and the authority to search for responsive records in various locations. Therefore, I find that the city's decision to ask the planning manager to conduct a further search was reasonable in the circumstances.

[19] In addition, taking into consideration the fact that the appellant is seeking records relating to former employees of the city, I find that it was reasonable for the city to also ask the IT manager to conduct a search. Given this employee's responsibilities managing the city's electronic infrastructure, I accept that he would be knowledgeable in the electronic search locations and methods, to try to locate any responsive records that the city kept after the departure of the former employees in question (and the eventual deletion of their email accounts).

[20] Finally, with respect to the order provision that the appellant repeatedly refers to, order provision 5(e) of Interim Order MO-4083-I, it appears that the appellant may have misinterpreted this provision. For ease of reference, that provision says:

"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: [. . .] if no records are located, an explanation for why no records are located."

[21] Since the city located any responsive records after conducting a search after Interim Order MO-4083-I was issued, provision 5(e) is not relevant. That is the case even if a record that the appellant believes should exist was not located in the format that he expected, whatever the basis of that expectation.

Reasonable search parameters and terms were used in response to Interim Order MO-4083-I

[22] The search ordered in Interim Order MO-4083-I was for: "a further search for records responsive to item 3 of the original request, and item 5, if that is still possible." The wording "of the original request" should have been a reference to a list of records that the appellant believed to be "missing" from the city's initial search, as described in his representations in the earliest stages of the inquiry, and as set out in the first interim order. Items 3 and 5 are:

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

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

[23] In response to Interim Order MO-4083-I, the city explains that it searched for the following:

the entire contents of the Planning and/or Development Services' '[street name] Property File'; and all correspondence to/from all previous Real Estate Managers related to the '[street name] Road Allowance.' Including any requests for report and recommendations in declaring the property as surplus and resulting memos/reports/public comments; any requests or inquiries as to the availability or purchase of the property and responses.

[24] Both the planning and IT managers stated in their respective affidavits that they received supplemental freedom of information branch request forms, asking that a search be conducted using essentially the same wording as above, with the added stipulation to provide responsive records from 2008-2018 only.

[25] In response, the appellant submits that the two managers "should have provided a list of Questions/Terms/Criteria" that they searched on in order to comply with the interim orders.

[26] Turning to the search terms used, the planning manager attests to searching for "[street name] Allowance' or any variant thereof" in both her paper and electronic searches. The IT manager attests that the search parameters "included the text '[street name] Allowance'" for a specified ten-year period. In addition, he attests that the search was not restricted to specific users in order to conduct a thorough search of both active and inactive mailboxes.

[27] In response, the appellant states that record 15 (which he received through previous disclosure) has attachments named as "0 [name] Street." The name of the street is not the same as the name of the street mentioned in his request. The appellant submits that the search conducted by the city failed to use this other property name. In addition, he states that he is not in a position to know about what other terms or internal codes the city may have used to file or store data by, and asks how it is possible to know whether the city really searched for all variant names.

Analysis/findings

[28] Given the search parameters set out above in paragraph 23, I do not accept the premise of the appellant's submission that the two managers "should have provided a list of Questions/Terms/Criteria" that they searched in order to comply with the interim orders. I find that they sufficiently did so by setting out what they were asked to search for. I find that the search parameters set out above are consistent with the wording of the original request, and items 3 and 5 in the appellant's list of records that he believed to be "missing." As a result, I find that these search parameters are reasonable.

[29] While I appreciate that the appellant is not in a position to know internal names that may be used to describe files, I do not agree with his submission that the city failed to search for the variant name "0 [name] Street" because I have affidavit evidence from the planning manager that she searched for "any variant thereof" of the

"[name] Street Allowance" named in the request. I find that this is sufficient evidence that the city searched for variant names.

[30] Furthermore, while the IT manager's affidavit does not state that variants were searched, that was not required for his search to have been reasonable in the circumstances. The IT manager's search parameters, as described above are consistent with the wording of the request, so I find them reasonable in the circumstances. In addition, the fact that the IT manager did not restrict his search to active users is important in the circumstances because the appellant is seeking records relating to two real estate managers who no longer work for the city, and the city has previously explained that other employees would retain any important records before the accounts of the ex-employees were deleted. As a result, I find that these search parameters were reasonable in the circumstances.

[31] With respect to the appellant's question about how it is possible to know whether the city searched for all variant names, I find that it is speculative and does not establish a reasonable basis for believing that further records exist and ordering a further search.

[32] As the city has identified search parameters and terms consistent with the wording of the request and the specific types of records flagged in Interim Order MO-4083-I, I find that the city's evidence about its search parameters and terms is sufficient, and that the parameters and terms themselves are reasonable.

Reasonable locations were searched in response to Interim Order MO-4083-I

The city's evidence

[33] The city states that its staff searched in multiple locations concurrently for responsive records, which included: both active and inactive mailboxes, offsite records storage, physical and digital files. The managers' affidavits also provide details about the locations searched.

[34] In particular, I will set out what the city states about its offsite search, as this is an aspect of the city's search efforts that the city has not previously provided evidence about:

For further clarity, all of the City's physical records that are stored offsite are recorded in the City's file management database system known as Versatile. Using this application, the [planning manager] recalled physical files she determined might have responsive records. Her search of the both the filing cabinets in Planning Services in conjunction with her recall of records from offsite storage, resulted in the partial release of two physical files related to the [street name] Road Allowance:

- Planning Services File [number] Disposition [street name] Road Allowance, 2016-2017; and,
- Planning Services File [number] Disposition [street name] Road Allowance, 2017-2018.

[35] The planning manager attests that she searched all real estate file drawers in the Planning Services department or any hard copies that may have included information on the “[name] Street Allowance” in question, and to confirm that there were no misplaced or misfiled folders within the filing cabinets. In addition, she searched her office drawers, cupboards and desk for any hard copy of materials relating to the “[name] Street Allowance” or any variant of thereof.” Furthermore, the planning manager attests to searching the electronic drive of the Planning Services department for any folders or files containing “[name] Street Allowance” or any variant thereof.” She explains that this search included a review of a specified drive as well as her personal archived email folders, which include emails covering the years 2013-2018.

[36] The planning manager also attests that she confirmed to City Clerk Services that it is her understanding that the “property file” referred to by the appellant is the file that the city has already provided to the appellant. The planning manager attests that, therefore, the supplemental search resulted in the provision of duplicate records related to the street allowance in question.

[37] Turning to the IT manager’s search, he attests that he ran a search of all mailboxes on the city’s Microsoft Exchange (e-mail) server using the built-in eDiscovery tool within the Microsoft Exchange Admin Center. As mentioned, the IT manager attests that he searched both active and inactive mailboxes, and did not restrict his search to specific users. He attests that the search was not restricted to specific users in order to conduct a thorough search of both active and inactive mailboxes. However, the IT manager explains that the final search was restricted to just emails within mailboxes to avoid time-out errors. He further attests to using the built-in eDiscovery PST Export Tool to provide all 537 items that were discovered as a result of the search.

The appellant’s position

[38] In response to the city’s evidence about the locations searched, the appellant submits that the planning manager’s search was “limited” to the Planning department, acknowledging that this is not surprising because she works there, but submits that responsive records may also be found in the Legal Services department and “in an inactive records storage area.”

[39] With respect to email backups being searched, the appellant states that the city’s revised decision states that these locations were searched, but submits that this “is not supported” by the IT manager’s affidavit. He submits that the city’s evidence is misleading as it relates to searching backup files for records relating to the two former

employees whose records he is seeking. He also flags the lack of certain statements in the affidavit regarding the search of the mailboxes, and asks whether the correct backup was loaded.

[40] The appellant also asserts that to his knowledge, neither the Microsoft Exchange Email System nor the PST Explorer tool referenced in the IT manager's affidavit have "any ability to perform sophisticated content indexing searching being alluded to, that would know what and how to match other variant names." He asserts that "[i]n sophisticated Content Indexing Applications/Databases that do have the ability to related terms, the application has data entry screen where relationships can be defined and are entered by users of the system." He gives examples of what terms relating to is request "would all be specified and linked together" in such a sophisticated system.

[41] Furthermore, the appellant does not accept that an "complete" offsite search was conducted, and notes that the planning manager's affidavit does not specifically mention an offsite search. He submits that the city "now recall[ing]" two paper records appears to contradict the city's previous position that there is no "[street name]" physical file. He also poses questions relating to the specifics of the offsite storage, including whether the records were alone "in a file folder or box (or just sitting on the floor)" and whether the "index of the Versatile application become damaged and no longer a complete index to the files stored there."

Analysis/findings

[42] Having considered the parties' representations and the affidavit evidence, I am satisfied that the city has provided sufficient evidence about the locations searched by the experienced employees who were tasked with conducting a search. I accept that these employees searched the physical and/or electronic locations described in the representations and affidavits before me. In my view, there is no basis for me to question the reasonableness of these locations. I also note the variety of locations searched, which weighs towards finding that the city made reasonable efforts to search for responsive records, in the circumstances. The appellant's view that there may be responsive records in an inactive storage area is speculative and unpersuasive in the face of the city's evidence about the locations searched. I acknowledge that the affidavits do not specify all the details mentioned in the city's extensive representations (or in the city's revised decision). However, I am not persuaded that the city's representations, which were quite detailed, ought to be considered of less weight than affidavit evidence. I also find that the city was not required to provide specific statements in the affidavits.

[43] With respect to the appellant's submission that the city did not provide evidence of a search of its Legal department, I find that it was not required to do so. As mentioned, in the first interim order of this appeal, I already upheld the reasonableness of the search conducted by the city's Legal department.

[44] I am also not persuaded of the relevance of appellant's questions about offsite storage or his views about the city's database tools to the question of what I have to decide. The city was not required to give such specific information about its offsite search in order for its evidence to be considered sufficient in the circumstances. I also find that it was reasonable for city to use the software or database that the city described as having. It was sufficient for the purposes of the *Act* for the city to specify that it searched those locations, and that the decision to do so was made by an employee who is experienced in the subject matter.

[45] With respect to the physical files found, while the city has previously stated that no physical file pertaining to this specific street allowance exists, it has now found physical files. This may be due to not having searched offsite storage before. In any event, this new disclosure is not a basis for my not upholding the city's search or finding that its evidence about its search efforts is insufficient.

The standard is reasonableness, not perfection

[46] Under the *Act*, an institution's search is held to the standard of reasonableness, not perfection. As mentioned, the *Act* does not require the institution to prove with certainty that further records do not exist. Here, although the city did not directly provide affidavit evidence regarding some questions that had been outstanding in the second interim order, I am satisfied that the city has now provided sufficient evidence regarding the aspects of its search that I had not initially upheld as reasonable. Therefore, taking into consideration the city's representations, affidavit evidence, and recent access decision (which resulted in locating and identifying over 1000 pages of responsive records, after the search following Interim Order MO-4083-I), I find that the city has provided sufficient evidence that it took reasonable steps to identify and locate the responsive records within its custody or control. More specifically, I now have sufficient evidence before me about which experienced employees searched for the remaining records at issue, the search parameters and terms used, and the locations that they searched.

[47] For these reasons, I uphold the reasonableness of the city's search, and dismiss the appeal.

ORDER:

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

Original Signed by: _____
Marian Sami
Adjudicator

February 25, 2022 _____