

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4290-I

Appeal MA21-00016

City of Hamilton

November 29, 2022

Summary: The sole issue in this appeal is whether the City of Hamilton (the city) conducted a reasonable search in response to the appellant's multi-part access request. In this order, the adjudicator finds that the city has not conducted a reasonable search in relation to certain parts of the request, and orders it to conduct further searches for records responsive to those parts.

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

Order Considered: Interim Order MO-2196-I.

OVERVIEW:

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

1. All records within the Office of the City Clerk relating to [a specified] Freedom of Information Request
 - a. This includes handwritten notes, memos, transcripts/notes from telephone conversations, etc.
 - b. Internal and external communications originating within or coming to the Freedom of Information Section

- c. Any other record of any kind with the exception of the records that were responsive to Freedom of Information Request #18-030.
2. All records relating to the appeal of [a specified] Freedom of Information Request (Information and Privacy Commissioner [IPC] of Ontario Appeal # MA18-328, Interim Order MO-3764-1, Order MO-3843-F)
 - a. Including all representations made to the IPC
 - b. All non-representation communications/records (emails, phone call records/logs), etc.
 - c. Drafts of any documents that may or may not have been submitted to the IPC
 - d. Directives on how to proceed/instructions to staff, etc.
3. Reasons and records related to the late submission of representations in this IPC appeal
4. Reasons and records related to why the further search ordered by Order MO-3764-I were not begun until after the deadline set in the order.
5. Current Staffing of the Freedom of Information Section
 - a. Number of persons, and their hours of work, expected productivity goals, etc
 - b. If different from current staffing, the staffing in place from March 1, 2018 until October 1, 2019
6. Organization Chart for the Freedom of Information Section that includes all employees

[2] The city issued a number of decisions in response to this request, including an interim decision with a fee estimate, followed by a final access decision and a revised final access decision (revised decision).

[3] In its revised decision, the city granted partial access to records responsive to items 1 and 2 of the request, withholding information under section 7(1) (advice or recommendations) and section 9(1)(d) (relations with governments) of the *Act*. The city also withheld information on the basis that it is not responsive to the request.

[4] With respect to item 5, the city advised that its Freedom of Information Section is staffed by two full-time access and privacy officers, and that there have been no changes in staffing for the period in question.

[5] The requester, now the appellant, appealed the city's revised decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution. In his appeal form, the appellant advised that he was appealing the exemptions claimed by the city, the reasonableness of the city's search with respect to item 5, and the city's lack of response to items 3, 4 and 6 of his request.

[6] During mediation, the appellant confirmed that he is not pursuing access to non-responsive information. Further to discussions between the mediator and the parties, the city issued a second revised decision granting the appellant access to the records previously withheld under sections 7(1) and 9(1)(d). As a result, the information severed under these sections is no longer at issue.

[7] In its second revised decision, the city confirmed that a further search for items 3 and 4 did not result in any responsive records.¹ With respect to item 5, the city advised that no responsive records exist, aside from the information it provided in its revised decision. The appellant advised the mediator that he believes that records responsive to items 3, 4 and 5 of the request exist.

[8] With its second revised decision, the city provided the appellant with an organization chart in response to item 6 of his request. The city advised that the chart contains position ID numbers that were withheld pursuant to section 14 of the *Act*. The appellant advised the mediator that he is not pursuing access to the position ID numbers. Accordingly, section 14(1) is not an issue in this appeal.

[9] However, the appellant questioned the completeness of item 6, noting that the chart appeared to be cut off. The mediator followed up with the city and the city shared the following explanation:

Copy of Organization chart – cut off: The appellant's copy responds to what he asked for "Organization Chart for the Freedom of Information section that includes all employees". To obtain this record, I had to extract the FOI section from a large electronic file that encompasses every position in every section/division/department in the City. No information was "cut-off" that relates to the request.

[10] The appellant advised the mediator that he does not accept the city's explanation. He noted that it appears other positions report to the position of "Mgr Corp Record/FOI," which, in his view, should be included as part of the Freedom of Information Section. The appellant therefore advised the mediator that he believes additional records should exist in response to item 6.

[11] As no further mediation was possible, this file was transferred to the adjudication

¹ In its second revised decision, the city advised that a further search for items 4 and 5 did not result in any responsive records. The mediator confirmed with the city that this was a typo that should be corrected to items 3 and 4.

stage of the appeals process where an adjudicator may conduct an inquiry.

[12] The adjudicator originally assigned to this appeal decided to conduct an inquiry and sought representations from the city and the appellant. The city did not provide representations, and the appellant did. After the file was assigned to me to continue the adjudication of the appeal, the city requested the opportunity to make representations. The city was granted this opportunity and provided a copy of the appellant's representations. The city submitted an affidavit in response. The city's affidavit was shared with the appellant, who submitted representations in response. The parties' representations were shared in accordance with Practice Direction Number 7 from the IPC's *Code of Procedure*.

[13] For the reasons that follow, I uphold the city's search with respect to item 6 but find that the city did not conduct a reasonable search for records responsive to items 3, 4, and 5 of the request, as required by section 17 of the *Act*. I order the city to conduct additional searches and to issue an access decision following those searches, as well as to address information in the organization chart that appears may have been severed and not previously addressed.

DISCUSSION:

[14] The sole issue to be determined is whether the city conducted a reasonable search for responsive records.

[15] 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*.² 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.

[16] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.³

[17] 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;⁴ that is, records that are "reasonably related" to the request.⁵

[18] A reasonable search is one in which an experienced employee knowledgeable in

² Orders P-85, P-221 and PO-1954-I.

³ Order MO-2246.

⁴ Orders P-624 and PO-2559.

⁵ Order PO-2554.

the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁶ 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.⁷

[19] If the requester failed to respond to the institution's attempts to clarify the access request, the IPC may decide that all steps taken by the institution to respond to the request were reasonable.⁸

Parties' positions

[20] The city's position is that no additional responsive records exist, and that certain information responsive to item 5 would be excluded from the scope of the *Act* under the employment or labour relations exclusion at section 52(3)3. The appellant submits that the city has not conducted a reasonable search, that additional responsive records ought to exist, and that information responsive to item 5 would not be excluded under section 52(3)3.

Appellant's initial representations

[21] In his initial representations the appellant submits that since the city did not submit any representations, it must be assumed that its search was inadequate.

[22] The appellant disagrees with the city's position that no records responsive to items 3 and 4 exist. He refers to a record he received from the city in response to a different part of the request, as an example of a responsive record and as a basis for his belief that additional records exist.

[23] He submits that the city did not respond to item 5a in its entirety. He notes that it provided the number of current staff in the Freedom of Information Section, and claimed no further responsive records exist. He points out that item 5a specifies that he is also seeking the hours of work and expected productivity goals for current staff. The appellant suggests that a "basic job description or blank performance evaluation" might satisfy this aspect of the request.

[24] With regards to the city's response to item 6, the appellant submits that the complete organization chart must be reviewed and relevant portion disclosed, including others that report to the manager of the Freedom of Information Section⁹ and who the manager reports to. He further submits that the city has not cited authorities for severing part of the record as non-responsive.

⁶ Orders M-909, PO-2469 and PO-2592.

⁷ Order MO-2185.

⁸ Order MO-2213.

⁹ The manager appears as "Mgr Corp Record/FOI" in the organization chart.

[25] The appellant also notes that, in addition to the position ID numbers, there appears to be more information redacted from the organization chart. He indicates that these redactions appear at the bottom of the bubbles featured in the chart. The appellant submits that the city has not indicated what was withheld and under which exemption.

City's affidavit

[26] In response, the city submits an affidavit sworn by its Manager of Corporate Records and Freedom of Information who attests that she has reviewed the file associated with this appeal.

[27] In relation to items 3 and 4 of the request, the manager states that "the reason for delays were due to the limited resources within the FOI team in combination with the volume of requests received." She adds that there are no responsive records associated to these items.

[28] In relation to item 5a of the request, the manager attests that there were two access and privacy officers and submits that staff hours of work and expected productivity are considered employment related matters pursuant to section 52(3)3 and fall outside the scope of the *Act*. In response to item 5b, the manager specifies the following:

[f]rom March 1, 2018 to June 29, 2018, there was one (1) Full Time Access & Privacy Officer and one (1) temporary Part-time Access & Privacy Officer. From July 2, 2018, to October 1, 2019, there were two (2) full-time Access & Privacy Officers.

[29] In relation to item 6, the manager attests that she is responsible for four sections, one of which is the Freedom of Information Section, which is staffed by two employees. She confirms that the organization chart provided was reflective of the Freedom of Information Section and that no additional record exists.

Appellant's reply

[30] The appellant submits that as the city has not provided the required information in its affidavit, it is not possible to assess the reasonableness of its search. He notes that affidavits addressing reasonable search should contain the name(s) and position(s) of the individuals(s) conducting the search, the steps taken in conducting the search, the results, and if no records are located, a detailed explanation for why none were located.¹⁰ The appellant submits that the city has failed to provide this information.

[31] The appellant notes that the city did not provide a copy of representations it submitted in the course of Appeal MA18-328, which he submits would be responsive to

¹⁰ The appellant cites order MO-3764-I.

item 2a of the request.

[32] The appellant submits that staff hours and expected productivity goals, requested under item 5a, are not excluded from the *Act* under section 52(3). He asserts that this information could be found in administrative and policy records, and does not qualify as "meetings, consultations, discussions or communications about labour relations or employment-related matters" as described under section 52(3)3 of the *Act*. He specifies that he is not seeking access to performance reviews or timesheets for specific employees, but rather weekly work hours and general productivity expectations of an individual in such a position. He suggests that such records might be found in the city's or department's policy manual.

[33] The appellant maintains that the city improperly severed the organization chart it provided in response to item 6 without citing an exemption. The appellant submits that the record is incomplete.

Preliminary matter

[34] The appellant submits that the city has not provided him with the representations it made during Appeal MA18-328, as requested under item 2a. I appreciate that the appellant would like access to this information, however, item 2a is not before me. As confirmed in the Mediator's Report, the only issue for adjudication is reasonable search as it relates to items 3, 4, 5 and 6. Accordingly, the reasonableness of the city's search for items 3, 4, 5 and 6 were the only issues canvassed during the inquiry.

Analysis and finding

Items 3 and 4

[35] Items 3 and 4 of the request read as follows:

3. Reasons and records related to the late submission of representations in this IPC appeal
4. Reasons and records related to why the further search ordered by Order MO-3764-I were not begun until after the deadline set in the order.

[36] In its second revised decision, the city noted that a further search did not identify any responsive records in relation to these items. Subsequently, in the city's affidavit, the manager also attests that there are no responsive records in relation to these items. Based on my review of the file materials, the city provided no further evidence in support of its assertion. This despite the fact that it was invited to provide details of any searches it conducted, including who conducted the search, the places and types of files searched, the individuals contacted, and the results. Nor did the city address whether responsive records once existed and were later destroyed.

[37] I note that in the city's affidavit, the manager addresses the delays mentioned in items 3 and 4, and attributes them to limited resources and the volume of requests received by the city. However, I find that this explanation in response to the substance of items 3 and 4 does not satisfy the city's obligation to conduct a reasonable search for responsive records under section 17 of the *Act*.

[38] The appellant submits that one of the records disclosed to him as responsive to a different part of the request is responsive to these parts of the request, and that this indicates there may be more responsive records. The record the appellant refers to is an email in which a staff person at the city confirms a phone call with a staff person at the IPC about the city's forthcoming response to Interim Order MO-3764-I. I have reviewed the record the appellant refers to and find that it relates to item 4, as it addresses the timing of the city's response to Interim Order MO-3764-I. As a result, I find that the appellant has provided a reasonable basis for concluding that records responsive to items 3 and 4 may exist.

[39] Given this and given that the city did not provide sufficient evidence to establish that it made reasonable efforts to search for responsive records, I find that the city has not met its search obligations under the *Act*. Accordingly, I will order it to conduct a further search for records responsive to items 3 and 4 of the request.

Item 5

[40] Item 5 of the request reads as follows:

5. Current Staffing of the Freedom of Information Section

- a. Number of persons, and their hours of work, expected productivity goals, etc
- b. If different from current staffing, the staffing in place from March 1, 2018 until October 1, 2019

[41] The city provided information in response to certain parts of item 5. In its revised decision, it noted that the Freedom of Information Section is staffed by two full-time access and privacy officers. In its affidavit, it addressed staffing for the specified time period, as noted above. With respect to the appellant's request for the Freedom of Information Section staff's hours of work and expected productivity goals, the city takes the position that this information is excluded from the *Act* under the employment or labour relations exclusions at section 52(3)3 of the *Act*.

[42] Though the city has provided some information in response to item 5, and takes the position that other responsive information is excluded, it has not provided any evidence addressing searches it may have conducted in an attempt to locate responsive records, nor issued a decision in relation to records that may be excluded or exempt.

[43] In Order MO-2196-I, Adjudicator Frank DeVries addressed a similar situation. In that case, the institution responded to an interim order to search for additional responsive records by stating that "no further releasable records exist," implying that responsive records exist that should not be disclosed. I find Adjudicator DeVries's analysis helpful in the present case:

It may well be that certain records responsive to the appellant's request would not be released to the appellant for any number of reasons . . . this does not negate the obligation on the Police to conduct an adequate search for those records.

The obligations on an institution to search for records and provide them to this office, even though the records may be exempt or even fall outside the scope of the *Act*, was reviewed in Order P-623. In that order, the Ministry of Health took the position that it was not required to provide certain records to this office, as it had determined that those records fell outside the scope of the *Freedom of Information and Protection of Privacy Act* on the basis of section 65(6) of that Act (the equivalent of section 52(3) of the *Act*). Adjudicator Holly Big Canoe determined that this office has the mandate and responsibility to review records to determine whether or not the *Act* applies to them.

. . . Order P-623 was upheld by both the Ontario Division Court and the Ontario Court of Appeal (*Minister of Health v. Big Canoe* [1995] O.J. No. 1277 (C.A), affirming (June 29, 1994), Toronto Doc. 111/94 (Div. Ct.).

Accordingly, the position of the Police that they conducted a search for all *releasable* records does not satisfy the requirements to respond to access requests in accordance with the requirements of the *Act*. In this case, it does not satisfy the obligation of the Police to provide this office with sufficient evidence to support a finding that a reasonable search for responsive records has been conducted.

[44] I agree with the approach taken in MO-2196-I and adopt it in the circumstances of this appeal.

[45] In the present case, I find that the city has failed to provide any evidence of searches conducted to identify and locate records responsive to item 5. It states that some information responsive to item 5 is excluded, thereby implying that such information exists. While the city may ultimately decide that the records it locates should be excluded or exempt, it must first conduct a reasonable search, as required under section 17, then issue a decision in relation to any records it finds.

[46] Based on the foregoing, I order the city to conduct a further search for records responsive to item 5 of the request.

Item 6

[47] Item 6 reads as follows:

6. Organization Chart for the Freedom of Information Section that includes all employees

[48] The appellant submits that the organization chart the city disclosed in response to item 6 is incomplete. He notes that the chart has been cut off, as it does not indicate who the manager reports to or other positions that report to the manager. As noted, the city confirmed that the organization chart disclosed is part of a larger chart that contains all city positions. The chart was disclosed with the city's second revised decision, in which the city provided the following background information:

The record shows two Access and Privacy Officer positions which are staffed, and an Access and Privacy Officer "SPRT" which is a support position, and which was unstaffed at the time of the request and remains unstaffed. The Access and Privacy Officers report to the Manager Corporate Record/FOI.

[49] In the city's affidavit, the manager provides additional context, attesting that she is responsible for four sections including the Freedom of Information Section, which is staffed with two employees. She confirms that the chart reflected the Freedom of Information Section and that no additional records exist.

[50] Based on my review of the city's decisions and the parties' representations, I find that the city identified and disclosed a record in response to item 6 of the appellant's request. The issue in this appeal is reasonable search and the appellant has not established that the city failed to conduct one. To the extent that the appellant is arguing that the city restricted the scope of his request, I find that item 6 is specific, and based on the foregoing, the appellant received all of the information responsive to his request.

[51] In addition to the above, the appellant submits that there appears to be information severed in the bubbles featured in the chart, aside from the position ID numbers the city previously addressed. He argues that the city should either claim an exemption in order to withhold this information, or disclose it to him. I have reviewed the record and find that it appears there may be information severed within the bubbles referred to by the appellant. As a result, I order the city to address this, as described in order provision 1 below.

[52] In light of the above, I find that the city did not conduct a reasonable search with respect to items 3, 4 and 5 of the request and order it to respond to these items in accordance with its obligations under the *Act*. I further order the city to address the possible severances in the organization chart it provided in response to item 6.

ORDER:

1. I order the city to address information that may be severed in the bubbles in the organization chart provided in response to item 6 by either: confirming that there is nothing at the bottom of the bubbles but blank space, disclosing the information, or issuing a decision providing a basis for withholding it.
2. I order the city to conduct further searches for records responsive to items 3, 4, and 5 of the request.
3. I order the city to provide me with affidavit evidence describing its search efforts, **by January 6, 2023**. At a minimum, the affidavit(s) should include the following:
 - i. The name(s) and position(s) of the individual(s) who conducted the search(es) and their knowledge and understanding of the subject matter and the scope of the request;
 - ii. The date(s) the search(es) took place and the steps taken in conducting the search(es), including information about the type of files searched, the nature and location of the search(es), and the steps taken in conducting the search(es);
 - iii. Whether it is possible that responsive records existed but no longer exist. If so, the city must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and
 - iv. If it appears that no further responsive records exist after further searches, a reasonable explanation for why further records do not exist.
4. If the city locates additional records as a result of its further search(es), I order it to issue an access decision to the appellant, in accordance with the requirements of the *Act*, treating the date of this interim order as the date of the request for the purpose of the procedural requirements of the *Act*.
5. I remain seized of this appeal to deal with issues arising from order provisions 2, 3, and 4.
6. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the access decision referred to in order provision 4, as well as any records disclosed with this access decision.

Original Signed By: _____
Hannah Wizman-Cartier
Adjudicator

November 29, 2022 _____