Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4296

Appeal MA20-00577

City of Toronto

December 13, 2022

Summary: The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for 2019 records relating to natural garden exemptions in the city. The city identified two responsive records and disclosed them to the appellant. The appellant challenges the reasonableness of the city's search. In this order, the adjudicator finds that the city has provided insufficient evidence that it conducted a reasonable search, and she orders the city to conduct another search.

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

OVERVIEW:

[1] The City of Toronto (the city), received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), as follows:

> My previous FOI [number] asked for Natural Garden Exemption letters from Parks, Forestry and Recreation (PFR) to Municipal Licencing and Services (MLS) that refused an exemption. This is to extend that request to ALL letters from Parks, Forestry and Recreation to MLS related to Natural Garden Exemptions in 2019 whether rejections, acceptances or other. Records search from January 1, 2019 to December 31, 2019.

[2] In response to the request, the city issued three decisions. The first one

indicated that no responsive records were found. Through the second and third decisions, the city disclosed responsive records to the appellant, each regarding his property.

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

[4] The IPC appointed a mediator to explore resolution. During mediation, the appellant provided reasons that he believed additional responsive records exist. The mediator conveyed this to the city, and the city advised that no further records exist. No further mediation was possible, so the file proceeded to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[5] I conducted a written inquiry under the *Act* by seeking written representations from the parties on the issue of reasonable search, first from the city, and then from the appellant (sharing the city's representations with the appellant, in full). The parties provided responses,[1] though the city did not provide affidavit evidence about its search efforts as requested. Having considered the parties' representations, and in particular the city's, I determined that I could close the inquiry without seeking a reply from the city on the points raised by the appellant (and his supporting evidence, which essentially consisted of correspondence that he had with the city).

[6] In this order, I do not uphold the reasonableness of the city's search and I order it to conduct a further search.

DISCUSSION:

[7] The appellant's request relates to 2019 records regarding natural garden exemptions; it did not specify a particular address in the city, but the records he received in response to his request both relate to his own property. He believes that additional responsive records exist. Both the city and the appellant provided me with information and/or views about how the city deals with (or has dealt with) natural garden exemptions. However, the only issue in this appeal is whether the city conducted a reasonable search for records responsive to the appellant's request, as required by section 17 of the *Act*.[2] For the reasons that follow, I am not satisfied that

[1] The appellant raised the application of sections 5(1) (head's obligation to disclose), and other matters not directly related to the issue of reasonable search. Section 5(1) of the *Act* is a mandatory provision that requires the head to disclose records in certain circumstances (see, for example, Orders MO-2205 and MO- 3766). Section 5(1) of the *Act* says: "Despite any other provision of this *Act*, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public." It is well established that the duties and responsibilities set out in section 5(1) belong to the head alone. As a result, the IPC cannot order disclosure under section 5(1) (see Order 65), and I will not address section 5(1) in this order.

[2] Orders P-85, P-221 and PO-1954-I.

the city provided sufficient evidence that its search efforts were reasonable in the circumstances, and I will order the city to conduct another search for records.

[8] 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;[3] that is, records that are "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 makes a reasonable effort to locate records that are reasonably related to the request.[5]

[10] 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.[6] The institution *must provide a written explanation of all steps taken in response to the request*, including:

- whether the institution contacted the requester to clarify the request, and if so, the institution is asked to provide details including a summary of any further information the requester provided;
- if the institution did not contact the requester to clarify the request, whether it chose to respond literally to the request or chose to define the scope of the request unilaterally;[7]
- details of any searches the institution carried out including: who conducted the search, the places searched, who was contacted in the course of the search, the types of files searched, and the results of the search;
- whether it is possible that responsive records existed but no longer exist, and if so, details related to this.[8]

[11] The IPC advises institutions that they should provide this information in an affidavit from the person or people who conducted the search.

[12] 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

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[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.
[7] And if so, the institution is to explain why the scope of the request was defined this way, when and how the institution informed the requester of this decision, and whether the institution explained to the requester why it was defining the scope of the request in a particular way.
[8] The institution is to provide details of when such records were destroyed including information about the institution's record maintenance policies and practices, such as retention schedules.

concluding that such records exist.[9]

[13] Below, I will summarize the parties' representations that are relevant to the issue of reasonable search. As a result, I do not include background information such as general information and history regarding natural garden exemptions, and role and goals of the city's Parks, Forestry and Recreation staff in bringing homeowners' gardens into compliance.

The city's evidence

[14] The city "does not agree that the initial onus is on [it] to disprove allegations of the requester on this issue," the issue being the reasonableness of its search. The city says that the *Act* does not address the burden of proof with respect to reasonable searches. It says that the *Act* does not does not require it to prove with absolute certainty that additional records do not exist. It also says that the IPC has found that reasonable search inquiries are inquiries concerning an institution's failure to comply with its statutory obligations, and not inquiries as described in section 42 of the *Act.* (Section 42 says that an institution withholding information in a record based on an exemption in the *Act* has the onus of proving the exemption applies.)[10]

[15] The city states that it did not prepare an affidavit because "the record the Requester is seeking is not part of the official process of Parks, Forestry and Recreation." It describes the joint process undertaken by its staff from Parks, Forestry and Recreation and Municipal Licensing and Standards in visiting homeowners and discussing steps needed to bring gardens into compliance, and the differing roles of those two departments. The city states that there is no formal process by which staff from Parks, Forestry and Recreation send memos to staff from Municipal Licencing and Standards regarding compliance with the by-law, except in the rarest of circumstances.

[16] The city states that three separate searches failed to locate any records other than those relating to the appellant's own property.

[17] The city characterizes its task this way: that it "must provide sufficient evidence to show that it has made a reasonable effort to identify and locate the responsive records that the requester has provided a reasonable basis to assume may exist."[11] The city submits that the appellant has not provided a reasonable basis for concluding that additional records exist. Its position is that a reasonable search for responsive records was conducted.

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[9] Order MO-2246.

[10] Section 42 of the *Act* says: "If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this *Act* lies upon the head."

[11] The city relies on Orders M-624 and PO-2559.

The appellant's position

[18] The appellant objects to the city's position that it conducted a reasonable search. He addresses a variety of matters in responding to the city's representations, including matters that do not relate to the issue of whether an experienced city employee knowledgeable in the subject matter of his request made a reasonable effort to locate records that are reasonably related to his request.[12] Given my findings about the insufficiency of the city's evidence, it is not necessary for me to set out or further summarize any relevant points in the appellant's representations.

Analysis/findings

[19] I find that the city has not provided sufficient evidence that it conducted a reasonable search in response to the appellant's request.

[20] To begin, I do not accept the city's position that the *Act* does not address the burden of proof regarding reasonable search, or that the city ought not be asked for evidence initially in a reasonable search inquiry.

[21] While, as the city states, the *Act* does not require the institution to prove with certainty that further records do not exist, this fact does not persuade me to accept that the city does not have the initial burden of sufficiently explaining its search efforts.

[22] The *Act* obliges an institution to tell a requester that they may appeal to the Commissioner on the question of whether a record exists, when the institution has claimed that no record exists.[13] In turn, if an appeal reaches adjudication,[14] the IPC requires that institutions provide sufficient evidence of their search efforts. In seeking this evidence, the IPC summarizes the long-standing jurisprudence on the issue of reasonable search, and the general questions that the institution should turn its mind to. It is well-established that the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records (that is, records that are "reasonably related" to the request). The IPC tells institutions this in the Notice of Inquiry, and that it 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.

[23] Thus, in my view, by characterizing its task as having "to show that it has made a reasonable effort to identify and locate the responsive records *that the requester has*

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[12] For example, the appellant provides background information about the garden exemption and its importance.

[13] Section 22(1) of the *Act* says, in part: "Notice of refusal to give access to a record or part under section 19 shall set out, (a) where there is no such record, (i) that there is no such record, and (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists."

[14] Many appeals do not reach adjudication, and are, in fact, screened out of processing at the IPC for lack of reasonable basis for believing the additional records exist.

provided a reasonable basis to assume may exist" (emphasis mine), the city has unilaterally departed from both the evidentiary requirements of the Commissioner, and the long-standing definition of a reasonable search. For ease of reference, that definition is as follows:

> 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.

[24] A requester would rarely, if ever, be in a position to provide such information about who and what was involved in a search before the institution did. An appellant's basis for believing additional records exist is assessed in light of an institution's evidence of the steps that it took to search for responsive records.

[25] Since I began the inquiry by seeking representations from the city, there had been nothing before me at adjudication from the appellant yet, such that the city could reasonably and persuasively take the position that it did (that the appellant had provided no reasonable basis for believing that additional responsive records exist).

[26] Reviewing the city's evidence, I am unable to determine which employee(s) conducted a search, their knowledgeability (if any) in the subject matter of the request, and the locations they searched in order to assess whether they made a reasonable effort in locating records that are reasonably related to the appellant's request. This alone is enough to order the city to conduct a further search.

[27] While I accept the city's statement that staff from Parks, Forestry and Recreation send memos to staff from Municipal Licencing and Standards "in the rarest of circumstances," the fact that there may not be many (or any records) does not mean that the city did not have to explain the steps that it took to determine whether records were in fact generated, in order to respond to the appellant's request.

[28] Furthermore, it is noteworthy that the request was not for records relating to a specific address, and yet only records relating to the appellant's address were found. It is not clear from the limited evidence before me if this is because the appellant's garden involved that "rarest of circumstances" where staff from Parks, Forestry and Recreation sent memos to staff from Municipal Licencing and Standards – or whether the city unilaterally narrowed the scope of his request. If no other records were located and identified because responsive records were only generated in relation to the appellant's garden, the city ought to have said so and provided supporting evidence of that.

[29] For these reasons, I find that there is insufficient evidence before me to uphold the city's search efforts as reasonable in the circumstances, and I will order the city to conduct another search.

ORDER:

I do not uphold the reasonableness of the city's search. I order the city to conduct a further search for responsive records, treating the date of this order as the date of the request for the purposes of the procedural requirements of the *Act*. The city is not permitted to rely on the time extension provision in section 20 of the *Act*.

Original Signed by: December 13, 2022

Marian Sami
Adjudicator