

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4328-I

Appeal MA21-00436

City of Thorold

February 16, 2023

Summary: The sole issue in this appeal is whether the City of Thorold (the city) conducted a reasonable search for records responsive to the appellant's request under the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the city did not conduct a reasonable search, and orders it to conduct a further search.

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

Order: Interim Order MO-2721-I and Order M-493.

OVERVIEW:

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

1. Print copy and/or original image file of S_Email Send window-Image of the screen for Tax Arrear -2019 05, March; Tax Arrear 2019 03,July ; Tax Arrear - 2019 09,Sept 2019 - Print copy Email Send Report for Tax Notice 2019 Interim 07,Feb; Tax Notice 2019 Final 03,June,2019
2. Print copy and/or original image file of S_Email History Inquiry window for module for all emails sent to address: [appellant's email address] Emails

Requested to be Resend for Tax Notice 2019 Interim 07, Feb; Tax Notice 2019 Final 03, June, 2019

IT Manager to help with following requests:

3. Please Confirm or Deny the comments /explanations on Appendix A (August 24, 200) and /or make you own comments /explanations
4. Print copy and/or original image of the SMTP log files for the emails to [appellant's email address] Thank you

[2] The city issued a decision, granting full access to the requested records.

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

[4] During mediation, the appellant confirmed that he was not satisfied with the records that the city disclosed and believed that additional records should exist. The city advised that no further records relating to this request exist and no further searches could be conducted. The appellant maintained his position and requested that the appeal move to adjudication on the basis of reasonable search.

[5] As no further mediation was possible, this file was transferred to the adjudication stage.

[6] The adjudicator originally assigned to this appeal invited the city to submit representations in response to a Notice of Inquiry, which summarized the facts and issues in the appeal. The city requested and was granted an extension, however, it did not submit representations. The appellant was then invited to submit representations and did so.

[7] The file was assigned to me to continue the adjudication of the appeal.

[8] For the reasons that follow, I find that the city did not conduct a reasonable search for records responsive to the appellant's request and order it to conduct a further search.

DISCUSSION:

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

[10] 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.

[11] 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.²

[12] 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

[13] 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 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

[14] 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.⁷

Representations, analysis and findings

[15] In the absence of representations from the city, I find that the city did not conduct a reasonable search.

[16] The city was sent a Notice of Inquiry inviting its representations on whether its search for responsive records was reasonable. It was asked to provide its explanation of all the steps it took in response to the request including: whether or not the request was clarified, whether responsive records once existed but no longer do, and details of its search efforts including who searched, in what places and for which types of files. As noted above, the city did not provide representations in response to the Notice of Inquiry, despite requesting and receiving an extension.

[17] In his representations, the appellant reiterates his belief that additional records related to his request exist and notes that the city did not provide an explanation of the steps it took in response to the request, as instructed in the Notice of Inquiry. The

¹ Orders P-85, P-221 and PO-1954-I.

² Order MO-2246.

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 Order MO-2213.

appellant's other representations do not address the reasonableness of the city's search.

[18] As noted above, the city advised during mediation that no further records relating to his request exist and no further searches could be conducted. As the city did not submit representations, there is no evidence before me with respect to the reasons no responsive records exist. Likewise, there are no details before me regarding who searched, for which types of files, in what manner and in what places. The institution in Interim Order MO-2721-I also did not submit representations outlining its search efforts. The adjudicator made the following comments which I find helpful here:

It may well be that the municipality has conducted a reasonable search; however, due to its complete absence of representations I must conclude that it has failed to *demonstrate* that it has conducted a reasonable search for records responsive to the appellant's request. [emphasis in the original]

[19] Without the city's representations in response to the Notice of Inquiry, I am unable to conclude that the city conducted a reasonable search. Accordingly, I find that the city has not met its search obligations under section 17 the *Act* and order it to conduct a further search for records responsive to the appellant's request.

[20] Lastly, I note that under item 3, the appellant requests a response from the city's IT manager to a document he included with his request. In particular, he asks that the IT manager confirm or deny certain portions of this document, and provide comments or explanations. In Order M-493, the adjudicator offered the following guidance with regard to requests formulated as questions:

In my view, when such a request is received, the [institution] is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked.

[21] I agree with and adopt this reasoning. The city is to search for records that may contain the information the appellant seeks under item 3. I note however, that if no responsive records exist, the city is not required to create a new record in response to the appellant's request,⁸ nor to answer the questions posed in his request. As well, though the appellant requests information from the IT manager, it need not be this person who conducts the search. Any experienced employee knowledgeable in the subject matter of the request may conduct the city's further search.

⁸ See Order MO-1989 upheld in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

ORDER:

1. I order the city to conduct a further search for records responsive to the appellant's request.
2. I order the city to provide me with affidavit evidence describing its search efforts, **by March 17, 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.

The city's representations will be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in *Practice Direction Number 7*, which is available on the IPC's website. The city should indicate whether it consents to the sharing of its representations with the appellant.

3. I remain seized of this appeal to deal with issues arising from order provisions 1 and 2.

Original Signed by: _____
Hannah Wizman-Cartier
Adjudicator

February 16, 2023 _____