

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER MO-4334-F

Appeal MA21-00016

City of Hamilton

February 22, 2023

**Summary:** This final order resolves the remaining search issue arising out of Interim Order MO- 4290-I. The City of Hamilton (the city) conducted additional searches for records responsive to certain parts of the appellant's request, further to the interim order. It provided details of its search efforts, and issued a supplementary decision in relation to additional records it located. In this final order, the adjudicator finds that the city conducted a reasonable 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.

**Order Considered:** Interim Order MO-4290-I.

### OVERVIEW:

[1] This final order addresses the remaining issue in Appeal MA21-00016: whether the City of Hamilton (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-4290-I.

[2] The appellant submitted a six-part request to the city, and the latter issued a number of decisions in response including a revised final access decision (revised decision). The appellant appealed this decision to the Information and Privacy Commissioner of Ontario (IPC). Among other things, the appellant took issue with 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. During mediation, the city conducted further searches, located a record in response to item 6 and issued a second revised decision. The appellant advised that he believed additional records should exist in response to items 3, 4, 5 and 6.

[3] In Interim Order MO-4290-I, I upheld the city's search with respect to item 6, and ordered it to conduct further searches for records responsive to items 3, 4, and 5 of the appellant's request. <sup>1</sup>The city conducted further searches, located additional records and issued a supplementary decision advising the appellant of publicly available information on the city's website, and denying him access to a record. The appellant indicated his intention to appeal this decision. In this final order, I will only determine whether the city conducted a reasonable search in response to my interim order. The city's most recent access decision is not at issue in this appeal.

[4] The city provided the IPC with an affidavit and submissions describing its search efforts, which I shared with the appellant in accordance with the IPC's *Code of Procedure and Practice Direction Number 7*. The appellant provided representations in response.

[5] In this final order, I find that the city has now conducted a reasonable search for responsive records and dismiss the appeal.

## **DISCUSSION:**

[6] The sole issue to be determined is whether the city conducted a reasonable search in response to items 3, 4, and 5 of the appellant's request.

[7] 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*.<sup>2</sup> 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.

[8] 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.<sup>3</sup>

[9] The *Act* does not require the institution to prove with certainty that further

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<sup>1</sup> Under order provision 1, I also ordered the city to address a matter relating to item 6 of the request. This is not addressed in this final order. As noted in order provision 5, I do not remain seized to deal with issues arising from order provision 1.

<sup>2</sup> Orders P-85, P-221 and PO-1954-I.

<sup>3</sup> Order MO-2246.

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;<sup>4</sup> that is, records that are "reasonably related" to the request.<sup>5</sup>

[10] 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.<sup>6</sup> 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.<sup>7</sup>

### **The city's search**

[11] In response to Interim Order MO-4290-I, the city provides an affidavit sworn by its Manager of Corporate Records & Freedom of Information. In submissions that followed her affidavit, the manager notes that she has been in this role for 12 years.

[12] In her affidavit, the manager provides details of searches she carried out in relation to items 3 and 4 of the request, and affirms that no further records exist. Items 3 and 4 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.

[13] The manager attests that she conducted both manual and electronic searches using keywords, including the relevant IPC and city file and order numbers, as well as the appellant's name. She enumerates several places that were searched, including her retired predecessor's electronic records, which she states had been left in her carriage. The manager specifies that she also conducted a search in relation to a previously disclosed record, which the appellant referred to in his representations during the inquiry stage for the interim order. The appellant referred to this record in support of his position that additional records related to items 3 and 4 of his request exist, which I accepted.<sup>8</sup>

[14] After comparing the records located as a result of her searches to those already disclosed to the appellant, the manager attests that she did not locate additional records in relation to items 3 and 4 of the request. She states that the reasons for the delays related to the late submission of representations in this appeal and the reasons

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<sup>4</sup> Orders P-624 and PO-2559.

<sup>5</sup> Order PO-2554.

<sup>6</sup> Orders M-909, PO-2469 and PO-2592.

<sup>7</sup> Order MO-2185.

<sup>8</sup> See Interim Order MO-4290-I at para 38.

why the further search ordered in Order MO-3764-I was not begun until after the deadline set in the order, were due to a "combination of limited resources within the FOI team and the volume and complexity of requests being processed at that time." She cites records previously disclosed to the appellant as evidence of this.

[15] The manager also attests that she conducted a search in relation to item 5 of the request, which 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

[16] The manager addresses each part of item 5a. She states that the organizational chart previously disclosed to the appellant is the record responsive to the request for the number of persons staffing the Freedom of Information Section. She indicates that staff hours of work are indicated on the city's website, which states that offices are open Monday to Friday from 8:30 am to 4:30 pm and are closed on all statutory holidays. Lastly, with respect to staff productivity, she states that one record was located. The manager includes a copy of the city's supplemental decision, which provides a link to the city's website displaying their opening hours, and states that a record was located which is excluded under section 52(3)3 (employment or labour relations) of the *Act*.

[17] With respect to item 5b, the manager affirms that "there were two Access & Privacy Officer positions staffed during the time period requested and there continue to be only two." The manager adds that she has direct knowledge of staffing levels to ensure that staff are compensated.

[18] After receiving and reviewing the city's affidavit, I invited the city to provide additional representations with respect to its search for records responsive to item 5. The manager submitted this information in an email, in which she notes the types of files and places searched, including a search of a "Human Resources Administrative Tool" with regards to employee performance accountability and development.

**The appellant's representations**

[19] The appellant maintains that the city's further searches are deficient.

[20] The appellant submits that in her affidavit, the manager did not provide details of her search with respect to item 5. These details were provided in her email (the submissions), which the appellant notes is unsworn.

[21] The appellant does not accept that only two responsive records exist, as indicated in the city's supplementary decision. He submits that the city's buildings' opening hours may be different from the Freedom of Information Section's staff's working hours. The appellant maintains that other records related to an Access & Privacy officer's work exist.

[22] The appellant submits that the city's searches do not include the paper records belonging to the manager's predecessor. The appellant posits that since this individual's electronic records were left in the manager's carriage, it follows that paper records would also be under her care and control, or generally the property of the city.

[23] Additionally, the appellant disputes the city's decision regarding the exclusion of a responsive record under section 52(3)3 and makes representations to this effect. As mentioned above, the city's supplemental decision is not a matter before me in this final order.

### **Analysis and finding**

[24] For the reasons that follow, I am satisfied that the city has now conducted a reasonable search for records responsive to items 3, 4, and 5 of the request, in accordance with Interim Order MO-4290-I.

[25] I am satisfied that an experienced employee knowledgeable in the subject matter of the request made reasonable efforts to locate records that would be responsive to the request. The manager states that she has 12 years of experience overseeing Corporate Records & Freedom of Information. I note that the appellant's request, including items 3, 4, and 5, relate to freedom of information matters. Accordingly, I am satisfied that the manager has experience relevant to the subject matter of the request.

[26] In her affidavit and email, the manager outlines her search efforts, documenting the steps taken in conducting the searches, specifying when the searches took place and detailing the places and types of files searched. In her affidavit, the manager also provides information in response to items 3, 4 and 5b of the request, based on her knowledge and experience as manager of Corporate Records & Freedom of Information. Where additional records were found, the city issued a supplemental decision.

[27] Based on my review of the evidence before me, I find that the city met its search obligations under section 17 of the *Act*, as it was ordered to do. The appellant has not provided sufficient evidence to persuade me otherwise.

[28] The appellant notes that the city provided details of its search for records related to item 5 as an email, which he states is unsworn evidence. As a tribunal, the IPC is not bound by the traditional rules of evidence. It is open to adjudicators to rely on unsworn

evidence, hearsay evidence, and opinions.<sup>9</sup> I therefore accept the city's evidence provided in an affidavit and an email, regardless of whether its contents were sworn under oath.

[29] The appellant raises issues with the city's search. In the appellant's view, since the manager's predecessor's electronic records were searched, there should also be paper ones to search under the city's control. The appellant has not established why a search of these paper records is required in the circumstances, nor the likelihood that they exist.

[30] I appreciate that the appellant may not be satisfied with the results of the city's additional searches. However, I note that the standard the city is held to is reasonableness. The city need not conduct exhaustive searches in order to satisfy its duty under the *Act*.

[31] In conclusion, I find that the city has now conducted a reasonable search for records, as required by section 17 of the *Act*.

**ORDER:**

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

Original signed by: \_\_\_\_\_  
Hannah Wizman-Cartier  
Adjudicator

February 22, 2023 \_\_\_\_\_

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<sup>9</sup> *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854 at p. 894.