Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4341

Appeal MA20-00440

City of Thunder Bay

March 1, 2023

Summary: In Order MO-3926, the IPC did not uphold the City of Thunder Bay's determination that a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) was frivolous or vexatious. The IPC ordered the city to issue the appellant an access decision in response to her request. This appeal arises out of that access decision. The only issue at adjudication is whether the city conducted a reasonable search. The adjudicator upholds the reasonableness of the search that the city conducted, and finds that there would be no useful purpose in ordering a further search. The appeal is dismissed.

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-3877-I, MO-3962, MO-4011-F, and MO-4062-R

OVERVIEW:

[1] This order resolves an appeal relating to a splash pad in the City of Thunder Bay (the city). An individual had requested certain information related to the splash pad under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The city had initially claimed that the request was frivolous or vexatious under the *Act*, but in Order MO-3926, I found that the city had not established this, and I ordered the city to issue the requester an access decision.

[2] Through that access decision, the appellant was granted partial access to the

responsive records.

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

[4] The IPC appointed a mediator to explore resolution. Through mediation, issues were narrowed and the appellant received additional disclosure. As a result, the exemptions initially claimed by the city are no longer at issue. The only issue in this appeal is whether the city conducted a reasonable search, as required by section 17 of the *Act*,[1] for records responsive to four parts of a multi-part request.

[5] The city and the appellant each provided me with written representations on the issue of reasonable search. In seeking written representations from the appellant, I also provided her with a full copy of the city's representations and affidavit, on consent.

[6] For the reasons that follow, I uphold the reasonableness of the search that the city did conduct, and find that there would be no useful purpose in ordering another search, in the particular circumstances of this appeal.

DISCUSSION:

Background

[7] At the outset, I acknowledge that this order comes after years of the appellant attempting to gain access to records through the *Act* regarding a publicly funded splash pad. Orders MO-3877-I, MO-3926, MO-4011-F, and MO-4062-R reflect the appellant's efforts to do so at the adjudication stage; other appeals were resolved for one reason or another at IPC mediation. In my view, this background is important for understanding the appellant's position in this appeal.

[8] In the above orders, I made various findings in relation to requests for information about the splash pad. As mentioned, in Order MO-3926, I did not uphold the city's claim that the request was frivolous or vexatious. In Interim Order MO-3877-I, I found that the city had failed to sufficiently establish that it had conducted a search at all in relation to certain aspects of a (different) request relating to the splash pad. In Final Order MO- 4011-F, I noted that concerns about substantive issues, even if founded, do not diminish from the evidence regarding the city's search efforts, which was reasonable.[2] Furthermore, in Final Order MO-4011-F, I acknowledged the history of gradually increased disclosure (largely through appeals to the IPC), but I was not persuaded that this was relevant to whether the city's latest search efforts were reasonable, or a reasonable basis for believing that additional responsive records exist.

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

[2] See paragraph 26 of Final Order MO-4011-F.

[9] In my view, many similar considerations are relevant here, and I adopt them, below.

Analysis/findings

[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.[3] 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] For the reasons that follow, I uphold the reasonableness of the search that the city did conduct, and find that no useful purpose would be served in ordering a further search of records that have been irretrievably deleted.

[11] In this appeal, the appellant describes being "defeated by the lack of accountability that is ever achieved," and her view that it is very difficult to be heard by government, with the rules essentially designed to work against citizens, making it "virtually impossible to achieve anything." She states: "Transparency is non-existent," and makes other general statements in this vein, which are outside of the scope of the issue before me (whether the city conducted a reasonable search in response to the request that I found was not frivolous or vexatious in Order MO-3962). The appellant points to the initial disclosure of 45 pages of records (in relation to an apparently million-dollar project), and the eventual thousands of pages that she received through various IPC processes, with the city claiming after each effort that it had exhausted its record holdings for responsive records. While I appreciate that the appellant is frustrated by the processes that she has had to go through to eventually receive disclosure, I am not persuaded that the city's past conduct in resisting and/or gradually disclosing information sufficiently establishes that it did not conduct a reasonable search in processing this request, after I issued Order MO-3962.

[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;[5] that is, records that are "reasonably related" to the request.[6]

[13] Here, the city provided an affidavit from its associate archivist, an employee with over a decade of experience, who coordinated the city's search efforts. These efforts were described in detail in her affidavit, which was shared with the appellant, so I will summarize its contents. The affidavit describes the scope of the searches, the employees engaged to search, and the locations searched (in light of the nature of the records sought, largely correspondence). The appellant does not specifically challenge

[3] Orders M-909, PO-2469 and PO-2592.
[4] Order MO-2185.
[5] Orders P-624 and PO-2559.
[6] Order PO-2554.

these details, and I find nothing unreasonable about the scope used, the employees engaged, or the locations searched, in the circumstances.

[14] As mentioned, the appellant's request had many parts, but the appeal proceeded to adjudication on the basis of the reasonableness of the city's search in relation to four of those parts. During the inquiry, the appellant's representations specifically address the following part of the request:

> Unredacted copy of [a specified date and time] email from [a specified ward representative to city employee A], [city employee A to the same specified ward representative, of a specified date and time].

[15] The city's affidavit evidence sets out its discovery of the loss of the ward representative's email correspondence for that time period. The affidavit states that the councillor in question responded to the request, and that his responsive records existed but are no longer in existence. The affidavit states, further:

> Unfortunately, Councillor [last name] was not able to provide any e-mails pursuant to his search as those e-mails were deleted from the system and were no longer accessible despite assistance from the City's IT department. I [the associate archivist] was advised, and do verily believe, that pursuant to City IT policy in place at the time any relevant e-mail exchanges that were received and were not properly archived within the e-mail system would be automatically deleted within one year.
>
> Councillor [last name] advised that this appears to have been the case and therefore, he was not able to produce e-mails in response to this request through his own email.
>
> However, many of Councillor [last name] e-mails for the requested time period were included in those sent by the others as those e-mails were forwarded to City staff, as stated in the access decision letter to the appellant.

[16] The affidavit goes on to say that despite the above, "the majority of those e-mails were forwarded to city staff, preserving their content." As a result, the associate archivist is "confident that the city met its disclosure obligations to the appellant for the provision of all correspondence as per the appellant's request."

[17] In response, the appellant asks, if there was inadequate retention of those records, how I can accept the city's response that it searched for records, as one cannot "search what's been improperly removed from access." She submits that this is another example of the problematic issues that have marked the splash pad project; however, whether or not that is the case is outside the scope of what I can decide under the *Act*.

[18] I agree with the appellant, in this sense: if records were improperly retained, and are irretrievable, they cannot be searched.

[19] However, I accept the city's affidavit evidence of the steps that it took to try to locate those records: it contacted the councillor, and upon learning that no emails were found, it contacted its IT department to attempt to retrieve them. I find that these were reasonable steps to take, in the circumstances. Given the passage of time, in light of the IT department's advice that if such emails were improperly archived at the time, they would be automatically deleted within a year, I find that ordering a search for these emails would serve no useful purpose in the circumstances.

[20] Since I am satisfied by the city's evidence that the search that was carried out was reasonable in the circumstances, I uphold its search as reasonable.

ORDER:

I uphold the city's search and dismiss the appeal.

Original signed by: March 1, 2023

Marian Sami
Adjudicator