Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4556

Appeal MA21-00611

City of Greater Sudbury

August 21, 2024

Summary: An individual requested a consultant's report, the scope of work relating to that report that was provided to the consultant, and their transmittal correspondence. The city provided documents responsive to the request. The appellant appealed the decision, stating that the city should have provided him with additional information, specifically all documents that affected the eventual scope of work. In this order, the adjudicator upholds both the city's interpretation of the scope of the request and the city's search for these records.

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

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records held by the city's transportation department. The request was for:

> Reports titled - Montrose Avenue Transportation Analysis - Travel Demand Analysis Based on Transcad Modelling, Dated November 19, 2020.
>
> All associated records such as and not limited to (which may be known differently from the name mentioned herein, but generally refers to records also known as) the Engagement letter(s), the Scope of the report, covering letter(s), all the pages of the report named above, including covering letter,

> signatory, qualification pages, plus all correspondence either hard copy or electronic which address any matters found in the previously mentioned records… from or sent between the [city] and the consultant.

[2] The appellant later agreed to the following clarification of the request (the clarified request):

> Please provide a copy of the Montrose Avenue Transportation Analysis - Travel Demand Analysis Based on Transcad Modeling complete with letter of conveyance and signatory pages. Please also provide a copy of the letter of transmittal and the engagement letter/scope of the report provided to the consultant.

[3] By way of background, the city engaged a consultant to produce a report related to the relevant project. The city provided instructions to the consultant on what the report was to include, and correspondence was exchanged between the city and the consultant to refine those instructions. Both the appellant and the city use the term "scope of work" when referring to the "engagement letter/scope of the report" provided to the consultant. For clarity, I will also use that terminology.

[4] The city issued a decision in which it identified three records responsive to the request. Among them were the Montrose Avenue Extension Transportation Analysis (the Consultant's Report), a June 27, 2019, email from the city to the consultant, and a December 13, 2016, Resolution of the City Council, which had been attached to that email.

[5] The city also located a Montrose Avenue Transportation Planning Work proposal dated August 6, 2019, together with its covering email. This proposal was sent from the consultant to the city and related to the parameters of the Consultant's Report. I will refer to this August 6, 2019, proposal as the August Scope of Work.

[6] The city granted full access to the Consultant's Report, the email, and the council resolution. It withheld portions of the August Scope of Work pursuant to section 7(1) (advice or recommendations) of the *Act*. The appellant appealed the decision to the Information and Privacy Commissioner of Ontario (IPC).

[7] During mediation, the appellant stated that he was not seeking the portions of the August Scope of Work withheld under section 7(1), so those are not at issue in this appeal. However, the appellant expressed concerns that the Consultant's Report had not been disclosed to him in full, as it did not contain a signatory page. The appellant stated that the city either should have a copy of the Consultant's Report including the signatory page in its record holdings or should be able to obtain a signed copy to disclose to him.

[8] The city stated that the copy of the Consultant's Report that it disclosed, without a signature, was a complete copy.

[9] During the mediation process, the city states that it also located three additional documents relating to the relevant project, which were:

- the email to which the Consultant's Report had been attached,
- a scope of work dating from November 20, 2019 (the November Scope of Work), and
- the covering letter to the November Scope of Work.

[10] The city states that it offered to provide these three additional documents to the appellant during the mediation process. The appellant states that either no offer was made or that the city was not clear about the documents that it was offering to provide. Regardless of any disagreement on whether these were offered, it is clear that the city did not issue an access decision regarding these documents, and that the appellant did not receive these documents at the mediation stage.

[11] No further mediation was possible and the appeal was moved to the adjudication stage of the appeal process to address whether the city conducted a reasonable search for responsive records, and whether the city has custody of or control over a signed copy of the Consultant's Report. The adjudicator decided to conduct an inquiry and sought and received representations from the city and the appellant.[1]

[12] In his representations, the appellant asserted that the city had improperly narrowed his request, and that he continues to seek access to records responsive to his request for "the Scope and letter of Transmittal." As such, the scope of the appellant's request was added as an issue to this appeal.

[13] Also in his representations, the appellant stated that he was no longer pursuing access to a signed copy of the Consultant's Report. As such, the issue of whether a signed Consultant's Report or the signatory page of that report is within the custody or control of the city was removed as an issue in this appeal.

[14] The appeal was then transferred to me to complete the inquiry and issue an order. I reviewed all of the parties' representations and determined I did not need to hear from them further before making a decision.

[15] In the discussion that follows, I uphold the city's interpretation of the scope of the appellant's request and find the city's search for responsive records to be reasonable.

[1] These representations were shared with the parties in accordance with the IPC's *Code of Procedure*.

ISSUES:

A. What is the scope of the request?

B. Did the city conduct a reasonable search for responsive records?

DISCUSSION:

Issue A: What is the scope of the request?

[16] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record, and specify that the request is being made under this Act;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
> >
> > . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[17] To be considered responsive to the request, records must "reasonably relate" to the request.[2] Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester's favour.[3] Determining the scope of the request requires first determining what the request is.

Was the request narrowed?

[18] In my view it is clear that the request at issue is the clarified request, and not the request that the appellant initially sent to the city. The city stated that following receipt of the original request they contacted the requester to better understand the request, as is required by section 17(1)(b) of the *Act*. The city states that after a discussion with the appellant, they provided him with an email setting out its understanding of the scope of

[2] Orders P-880 and PO-2661.
[3] Orders P-134 and P-880.

his request. The city proposed that the request be reworded as follows:

> Please provide a copy of the Montrose Avenue Transportation Analysis - Travel Demand Analysis Based on Transcad Modeling complete with letter of conveyance and signatory pages. Please also provide a copy of the letter of transmittal and the engagement letter/scope of the report provided to the consultant.

[19] The city states that the appellant agreed to this wording. The city provided an email exchange as evidence of the appellant's agreement to the modified scope, in which the appellant stated that the city's proposed wording of the clarified request was acceptable.

[20] The appellant states in his representations that he "foolishly agreed" to this wording. While the appellant may regret agreeing to narrow his request, it is clear from the evidence before me that he agreed the city was to respond to the clarified request when issuing its access decision. This is the request that was considered at mediation of the appeal before the IPC.

[21] The appellant submits that the clarified request was mistakenly narrowed at the mediation stage to exclude all documents other than the signatory page of the Consultant's Report, without his understanding that this was the case. He states that throughout his IPC appeal, he has continued to seek access to the letter of transmittal and the engagement letter/scope of the report provided to the consultant.

[22] The city's position is that any narrowing of the request that may have occurred at the end of the mediation stage (as set out in the Mediator's Report and reflected in the Notice of Inquiry) did not affect its searches, which had all been conducted before that time. Therefore, I find that the request at issue in this appeal is the clarified request.

Documents provided to the appellant during adjudication

[23] As noted above, the city located three additional documents during mediation. These are the email that the Consultant's Report had been attached to, the November Scope of Work, and the cover letter to the November Scope of Work.

[24] The appellant did not obtain these documents during mediation. During the adjudication process, the appellant stated that he wanted the city to provide these to him. The city later included these documents as exhibits to its reply representations, which were subsequently shared with the appellant. As such, the appellant eventually received these documents, and states that he is not pursuing access to them.

[25] The city did not issue an access decision regarding these documents. It has maintained throughout that emails between the city and the consultant are not responsive to the request, stating that it provided the covering email to the Consultant's Report "in absence of a letter of transmittal."

[26] It is not clear why the city did not issue an access decision regarding the November Scope of Work, as it confirmed that this was the final scope of work provided to the consultant for the relevant project (the August Scope of Work was from earlier in the proposal process but was the only scope of work that the city located during its initial search). The city stated in its representations that this "final scope" was responsive to the request. The appropriate course for the city would have been to issue an access decision regarding a record that it views as responsive to the request. However, given that the appellant has already received the November Scope of Work, no purpose would be served by the ordering the city to do so at this time.

Representations

[27] In the appellant's view, his request for "the engagement letter/scope of the report provided to the consultant" encompasses the initial scope of work plus any subsequent amendments to this, the entirety of which becomes the scope of work. In this case, city council provided the initial direction via the council resolution, and the scope of work evolved following that. The appellant states that the complete scope of work includes any communications or other documents that contributed to the scope of work changing, which he calls "pieces of amendments." The appellant is seeking "the combination of all the 'pieces of amendments' plus what's left of Council's Resolution." Essentially, the appellant is seeking not just the final instructions, but everything that went into changing the initial direction into the final instructions.

[28] An email exchange that the appellant raised in his representations illustrates what he views as "pieces of amendments" to the scope of work. The email is from a city councillor to staff in the city's transportation department. She is inquiring about the type of report that the city received, asking if it was a traffic impact study or a traffic demand analysis. The answer she receives from city staff is that "[there] is no difference between a traffic impact study or a traffic demand analysis" and that it was just different terminology used to describe the report.

[29] The appellant's view is that this change in terms is indeed a change in the type of report, and therefore, an amendment to the scope of work. His position is that this email is not only responsive to his request but also evidence that there are other responsive documents that have not been located. This is because he thinks there should be other correspondence between city staff and the consultant which reflect other changes made to the originating council resolution, such as the change in the type of report discussed in the councillor's email exchange. From his representations, it is clear that the appellant is seeking all correspondence that touched on or in any way contributed to the final instructions to the consultant.

[30] The appellant also submits that he was not provided with at least one other project proposal sent between the consultant and the city. The covering email to the August Scope of Work mentions a July proposal (the July Scope of Work), which the appellant did not receive from the city. He states that as he was provided with the August and

November Scopes of Work, and should also be provided with this version, noting that "these records are integral to completing the Scope." He also states that he was not provided with the email that the July Scope of Work was attached to, which acted as its transmittal document. The appellant states that any document sent via attachment should include its covering document, noting that "oftentimes the email will leave a comment, remark or a reference to its attachment."

[31] The appellant acknowledges the city provided the covering email to the Consultant's Report to him in the absence of a letter of transmittal. He states that "[the] very same reasoning should apply to documents or e-mails that can help address the missing information in the Scope, due to a change in that Scope."

[32] The city states that the appellant's request sets out specific documents that he is seeking and that "[any] additional records, [including] draft documents or emails between staff and [the consultant], are not responsive to the request." The city submits that the scope of work agreed upon between the city and the consultant, or "final scope," is responsive to the request, but that prior rejected versions are not. The city states that the final scope is the November Scope of Work, which they have provided to the appellant, together with its covering letter. The city describes the process to get to that final scope as follows:

> The City agrees with the Appellant that all changes to the scope combine to create the "Final Scope". The City submits that a scope of work, much like the Report, is a complete document. The consultant was provided with the resolution passed by Council and was asked to develop a scope of work for consideration. Staff reviewed the scope of work and provided feedback. The consultant adjusted the scope of work accordingly and provided a new scope of work. Again, staff reviewed the scope of work and provided additional feedback. The scope of work was revised, and a third and final scope of work was presented which staff accepted.
>
> Each scope of work begins with a letter signed by the consultant which introduces the scope of work that [follows] the letter. The "Final Scope" includes its own letter.

[33] The city notes that it also provided the appellant with the Consultant's Report, and its covering email, in the absence of a cover letter to that report.

[34] Regarding the email from the councillor, the city states that this falls outside of the scope of the request for two reasons. First, it was sent after the appellant submitted his request. Second, the city states that this is a councillor requesting clarity regarding the use of terminology, and not part the scope of work sought by the appellant.

Analysis

[35] There is no dispute between the parties that the Consultant's Report and its

transmitting correspondence has been provided to the appellant. Therefore, the remaining question is what is included in the appellant's request for "a copy of the letter of transmittal and the engagement letter/scope of the report provided to the consultant."

[36] Despite the city providing the email attaching the November Scope of Work, there is disagreement between the parties over whether an email attaching a document is considered a letter of transmittal. On that point, I agree with the appellant that an email that attaches a "scope of work" is responsive to his request. In my view, "letter of transmittal" includes any correspondence that functions similarly to a cover letter. To read this request as only applying to correspondence in the format of a letter artificially limits the request.

[37] However, the main difference between the parties' positions is what the "engagement letter/scope of the report" encompasses. The city's position is that this includes only the final scope of work used to instruct the consultant – in this case, the November Scope of Work. The city states that the final scope of work already incorporates the changes that have occurred through the evolution of the scope of work. The city states that other documents that may have contributed to those changes, such as prior versions of this scope or emails between the staff and the consultant, are not responsive to the request.

[38] The appellant has argued that his request is for the "complete" scope of work. In the appellant's view, this includes not just the earlier iterations of the scope of work and their covering correspondence, but also any and all correspondence or other documents that contributed to the changes to the scope of work throughout its various iterations.

[39] The practice of this office is to give an expansive interpretation to access requests and resolve ambiguities in favour of the requester[4]. However, on its face, the request at issue in this case does not include the broad swath of documents that the appellant is seeking. While I understand that the appellant's position is that all changes are relevant to the final version of the scope of the work, the appellant did not ask for these within his request. Instead, the agreed-upon wording was for the "engagement letter/scope of the report provided to the consultant." The request specifies the type of document sought and does not specify that he is seeking all changes made as the scope evolved into its final version, which is a much broader category of documents.

[40] This leaves the question of whether the previous iterations of the scope of the work are responsive to the request. The city first provided the appellant with the August Scope of Work, as it had not located the November Scope of Work in its initial search. The appellant has argued that there is no reason that the one scope of work that he has yet to receive – the July Scope of Work – should not also be provided to him. However, I do not find this reasoning persuasive regarding the question of whether draft scopes of work are responsive to the request. At the time that the city granted access to the August

[4] Orders P-134 and P-880.

Scope of Work, it had not yet discovered the November Scope of Work. From the information before me, it appears that at the time the city made its access decision, it thought it was providing access to the final scope of work.

[41] The request only refers to the "engagement letter/scope of the report provided to the consultant" and its accompanying transmittal correspondence. It does not specify whether the appellant is seeking the draft versions or the final version. However, this request was made in conjunction with a request for the Consultant's Report itself. When read with the first part of the request, the logical interpretation is that the request is for the document used to instruct the consultant in its preparation of that report – namely, the final scope, which in this case is the November Scope of Work.

[42] Based on my review, I uphold the city's interpretation of the appellant's request and find that the scope of the request includes the Consultant's Report, the November Scope of the Work, and both of their transmittal correspondence.

Issue B: Did the city conduct a reasonable search for responsive records?

[43] 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*.[5]

[44] 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.[6]

[45] 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;[7] that is, records that are "reasonably related" to the request.[8]

[46] 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.[9] 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.[10]

Representations

[47] At the time the Notice of Inquiry was provided to the city, it appeared that the

[5] Orders P-85, P-221 and PO-1954-I.
[6] Order MO-2246.
[7] Orders P-624 and PO-2559.
[8] Order PO-2554.
[9] Orders M-909, PO-2469 and PO-2592.
[10] Order MO-2185.

issues in this appeal included whether the city had conducted a reasonable search for a version of the Consultant's Report that included a signatory page. Given this, the city's initial description of the search was also focussed on the signatory page.

[48] To support its position that its search for the signatory page was reasonable, the city provided an affidavit sworn by its senior planner. In that affidavit, he stated that he conducted a search of his records and found an email from the consultant with the Consultant's Report attached, but that this report did not contain a signatory page.

[49] In its representations, the city states that the Legislative Compliance Coordinator sent the clarified request to the Directors of Infrastructure Capital Planning and Planning Services and directed them to search their record holdings. The city also provided an affidavit sworn by its Director of Planning Services who stated that he found a copy of the Consultant's Report, likewise with no signatory page. In that affidavit, he also stated that "the City's Official Plan Review falls under [his] direction and Planning Services is responsible for maintaining records related to this portfolio." The city states in their representations that the Montrose Avenue Extension was part of the city's Official Plan Review.

[50] The city states that the Director of Infrastructure Capital Planning did not provide any records responsive to the request as his department was not responsible for the analysis of the relevant project.

[51] The city also addressed how the additional documents provided at adjudication were located. The city noted that some time after those initial searches, the same senior planner was reviewing the Montrose Avenue documentation as part of his regular duties and found an additional scope of work not originally discovered during the initial search of records. This was the November Scope of Work that was later provided to the appellant.[11]

[52] As noted above, after receiving the city's initial representations, the appellant was no longer interested in proceeding with the matter of the signatory page. Rather, his focus was on pursuing access to the correspondence and other documents that led to changes to the scope of work. To that end, the appellant raised two main issues regarding the city's searches. First, he believes that the city holds other responsive records, noting that he had identified records within city holdings that were not provided to him in response to his request. Second, he stated that it was not clear whether the city had conducted a search of records within its transportation department.

[53] The missing records identified by the appellant are the email from a city councillor (described at paragraph 28), the July Scope of Work, and a Planning Committee Meeting

[11] The senior planner subsequently performed an additional search of the record holdings during the mediation stage. However, it appears that the focus of this search may have been the signatory page, as the city noted this planner did not find a copy of the Report with the signatory page. The city states that it later inquired with the consultant, who confirmed that it did not produce a signature page with the Report.

Resolution that directs staff to make a design aspect "be more in line with the direction provided by Council." The appellant states that all of these records evidence changes to the scope of work yet were not provided to him in response to his request. The appellant also notes his view that the consultant documented his work professionally, leading the appellant to expect that there would be similar documentation for other changes to the scope of the work.

[54] The appellant states that the city has not been clear as to whether the transportation department records were searched. The appellant notes that the city stated "[the Director of Infrastructure Capital Planning] did not provide any records as his department was not responsible for the Montrose Avenue analysis or the Official Plan review." The appellant states that the Consultant's Report was sent to the Director of Infrastructure Capital Planning and his predecessor, but that no records were produced by the transportation department. The appellant also notes that he was asking for a report based on TransCAD modeling, which is a tool designed for the use of transportation professionals and that he had initially directed his request to the city's transportation department.

Analysis and finding

[55] For the reasons that follow, I find that the city has conducted a reasonable search for records related to the appellant's clarified request which is the request before me in this appeal.

[56] I agree with the appellant that it is not clear from the city's representations whether there was a search of transportation department records, or whether the city deemed such a search unnecessary, as another department was responsible for the underlying project. I do not know if a search of the transportation department's records would have resulted in the types of records that the appellant has stated he is seeking, the "pieces of amendments" that show the evolution of the scope of work. However, this is immaterial to the question of whether the city has conducted a reasonable search for records responsive to the appellant's request. I have already found that the request at issue in this appeal is limited to the Consultant's Report and the final scope of work, together with both of their covering correspondence. That more limited scope provides the lens by which to examine the reasonableness of the city's search.

[57] In searching for those documents, the city states that it reached out to two departments with the request. Of these, the Director of Planning Services stated in his affidavit that his office was responsible for the city's Official Plan Review, which the city states the relevant project was part of. Both this director and a senior planner in his department conducted searches of the records, and both located the Consultant's Report and covering email. They also found the August Scope of Work. The November Scope of Work was eventually located by the same senior planner, in the course of his other duties regarding the project that the request relates to.

[58] As noted above, the *Act* does not require the institution to prove with certainty that additional records do not exist. Rather, the institution must provide evidence to show that it has made a reasonable effort to identify and locate records reasonably related to the request. In this case, there is affidavit evidence of searches by two members of the department that the city has identified as being responsible for the project that the appellant was seeking information about. I accept that these individuals are experienced employees knowledgeable in the subject matter of the request and, based on their affidavit evidence, they made reasonable efforts to locate records reasonably related to the request.

[59] The city found the Consultant's Report and its covering correspondence through these searches, and later found the final scope of work provided to the consultant – the November Scope of Work – within that same department's records. All the documents specified in the appellant's clarified request, which I determined is the request before me in this appeal, have been identified by the city and provided to the appellant. Based on my review of the city's affidavit and representations, I am satisfied that it has submitted sufficient evidence to demonstrate that it conducted a reasonable search for records responsive to the appellant's request.

[60] Additionally, keeping in mind the scope of the clarified request that is before me, I find that the appellant has not provided a reasonable basis for concluding that additional records responsive to that clarified request exist.

[61] I find that the city has conducted a reasonable search for responsive records.

ORDER:

I uphold the reasonableness of the city's search for responsive records and dismiss the appeal.

Original signed by: August 21, 2024

Jennifer Olijnyk
Adjudicator