



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER MO-1930-I

Appeal MA-040226-1

City of St. Catharines



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This Interim Order disposes of some of the remaining issues in Appeal Number MA-040226-1. It follows from my previously issued Interim Order MO-1904-I in this same appeal, issued on February 24, 2005.

NATURE OF THE APPEAL:

The City of St. Catharines (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of “all records of information, regardless of how it is recorded” relating to construction projects for an identified address from January 1, 1995 to the date of the request. The request specified that it was for:

All correspondence, including without limiting to; Computer entries/electronic records, hand written, unedited reports, meeting minutes, log books, records of inspection, daily diaries. Mileage/traveling log books memoranda, call notes, emails, faxes, photographs, receipts, messages, accounts, (etc.).

The request also referred to two specific permit numbers.

The City located records responsive to the request and granted partial access to some of them, denying access to others. The appellant appealed that decision to this office, and took the position that additional responsive records exist. In the mediation stage of the appeal, issues regarding access to the records were resolved. Two remaining issues were identified: whether the requested appointment books, daily diaries, or inspector’s log books are in the custody or the control of the City, and whether additional photographs responsive to the request exist.

I sent a Notice of Inquiry to the City, initially, and the City provided representations in response.

Upon receipt of the City’s representations, and prior to inviting the appellant to provide representations, I issued Interim Order MO-1904-I, in which I addressed the two remaining issues.

ORDER MO-1904-I

Appointment books, daily diaries or inspector’s logs

With respect to whether the requested appointment books, daily diaries or inspector’s logs were in the custody or control of the City, I reviewed the indicia of custody and control set out in previous orders of this office, and also reviewed the City’s representations on that issue as it related to the request. I then stated:

I have carefully reviewed the City’s representations in support of its position that the City does not have custody or control of records responsive to the request, and I find that the City has not provided me with sufficient information to find that these records, if they exist, would not be in the custody or control of the City.

I went on to note that the City had not conducted a search for or determined whether any appointment books, daily diaries or inspector’s logs actually exist and, if they did exist, where

they might be located, nor had they determined what the understanding of the individuals who created the records may have been. I identified that the City had taken the position that records of this nature are “de facto” records outside the City’s custody or control, and I rejected the City’s position on that point. I then reviewed previous orders and court decisions addressing the issue and, following a review of the factors outlined in Order 120, stated:

I do not accept the City’s position that any appointment books, daily diaries, or log books that may have been kept during the relevant time period by individual building inspectors employed by the City would be “their own personal diaries”, nor do I accept the City’s position that these records “are intended and treated, both by the City and the individual employees, as being for their own personal use”. Instead, I find that any records of this nature relating to the identified properties would rather be used and relied on by the creators of these records in the course of carrying out their duties as City employees.

I also reviewed the City’s reference to Order P-1532 in support of its position that it does not have custody or control of the records, and I specifically rejected the City’s position that it applied directly to the circumstances of this appeal. I then stated:

After reviewing the representations of the City, as well as taking into account the indicia of control outlined by former Commissioner Linden in Order 120 and the previous orders of this office, I find that the City has not provided me with sufficient information to find that these records, if they exist, would not be in the custody or control of the City. Accordingly, I will order the City to conduct searches for any responsive appointment books, daily diaries, or log books that may have been kept, and to issue a decision in accordance with the requirements of the *Act* with respect to any responsive records which may exist.

Accordingly, in Interim Order MO-1904-I, I ordered the City to conduct a search for appointment books, daily diaries, or inspector’s log books responsive to the request, and to issue a decision under the *Act* to the appellant, treating the date of the Interim Order as the date of the request.

Photographs

With respect to the issue of whether additional photographs responsive to the appellant’s request exist, the City identified the searches it conducted for responsive records. I reviewed the City’s representations and found as follows:

... concerning the request for photographs, although the appellant was eventually provided with four photographs, as well as a number of additional photographs which may have been taken by him, I have not been provided with sufficient evidence to convince me that the City has conducted a reasonable search for responsive records.

I accordingly ordered the City to conduct a further search for photographs. The relevant order provision stated:

I order the City to conduct a further search for photographs responsive to the appellant's request, and to provide me with an affidavit sworn by the individual who conducts the search within 30 days of the date of this Interim Order. At a minimum, the affidavit should include information relating to the following:

- (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
- (b) a statement describing the employee's knowledge and understanding of the subject matter of the request;
- (c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
- (d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
- (e) the results of the search.

In response to Interim Order MO-1904-I, the City provided further representations to this office, including an attached affidavit. I then sent a Notice of Inquiry, along with a copy of the City's representations and the affidavit, to the appellant. The appellant provided representations in response.

DISCUSSION:

REASONABLE SEARCH

Photographs

In its representations, the City states that it searched all relevant files for photographs, and that all of the photographs in those files were provided to the appellant. The City also provides a detailed affidavit, sworn by the individual who conducted the search of the City's files for the photographs. This individual identifies the specific files which were searched and the nature of the information contained them. She confirms that, to the best of her knowledge, no other files in any Department in the City would contain responsive photographs. She also identifies that the appellant was provided with copies of four photographs taken by a building inspector on a specified date, and with copies of 15 photographs that the City received from the appellant. She then states that her search of the relevant files revealed that there are no other photographs in these files.

The City's representations and affidavit were shared with the appellant. The appellant maintains that additional photographs responsive to his request should exist. He identifies in detail the nature and history of his dealings with the City relating to the events surrounding the creation of

the records. These events involved inspections under the *Ontario Building Code*, and the appellant indicates that, in his view, it is “highly unlikely” that an inspector would not take more than the four photographs which were provided to him, particularly in light of the building issues which initiated the inspection. The appellant also identifies his concern that additional pictures would support his position regarding certain disputed building issues. The appellant also includes detailed representations regarding those issues, and specific information about what pictures should have been taken in the course of the inspections.

Finding

As identified in Interim Order MO-1904-I, where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution’s decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [P-624].

In this appeal, and in response to Interim Order MO-1904-I, the City has provided a clear and detailed description of the efforts it undertook to locate photographs responsive to the appellant's request. The affidavit provided by the experienced employee who conducted the search identifies specifically where responsive photographs would be located, that the searches in those locations and files were conducted by her, and that those searches did not result in any additional photographs being located.

The appellant provides detailed material in support of his position that additional responsive photographs should have been taken, and the nature of the photographs which, in his view, ought to have been taken. However, as identified above, the issue I must address is not whether additional records ought to exist, but rather whether the City has conducted a reasonable search for photographs, as required by section 17. In this appeal I am satisfied, based primarily on the affidavit material provided to me, that the City has adequately discharged its responsibilities under section 17 of the *Act* to conduct a reasonable search for all responsive photographs.

Appointment Books, Daily Diaries or Inspector’s Logs

As identified above, in Interim Order MO-1904-I, I found that the City had not persuaded me that appointment books, daily diaries or inspector’s logs, if they exist, would not be in the custody or control of the City. Accordingly, I ordered the City to conduct searches for any responsive appointment books, daily diaries, or log books that may have been kept, and to issue a decision in accordance with the requirements of the *Act* with respect to any responsive records which may exist.

The City responded to this part of Interim Order MO-1904-I by stating that it was not in agreement with my finding on the issue of custody or control of appointment books, daily diaries, or log books that may have been kept. The City proceeded to provide information on the searches it conducted for responsive records, and states:

... in accordance with the requirements of the Interim Order, a further search has been conducted for appointment books, daily diaries [and] log books ... responsive to the request.

The City then refers to an affidavit sworn by the individual who searched for responsive records in support of its position.

In the affidavit, the affiant identifies the specific files which were searched and the nature of the information contained in those files. She confirms that, to the best of her knowledge, no other files in any department in the City would contain responsive records. She also identifies that she is advised, and verily believes, that building inspectors are not required to keep appointment books, daily diaries, or log books as part of their employment duties, and that her search of the relevant files revealed that there are no daily diaries or log books of any description in these files.

The City's representations also identify that it has no knowledge of whether any appointment books, daily diaries or log books actually exist, and state:

... the City has conducted a reasonable search in this regard and it would be beyond the requirements of a reasonable search to place the onus on the City to question every employee and former employee that may have at some stage been involved with the building permits relating to the appellant's property for the purpose of enquiring as to whether they ever elected to maintain a 'log book' or 'diary' ... and if so, to seek particulars concerning its creation and maintenance
....

Findings

In light of my decision in Interim Order MO-1904-I, I categorically reject the City's position on the issue of whether its search for appointment books, daily diaries, or log books was reasonable in the circumstances. In Interim Order MO-1904-I I found that any records of this nature relating to the identified properties would be used and relied on by the creators of these records in the course of carrying out their duties as City employees. Furthermore, based on previous orders and court decisions, including the decision by the Federal Court of Appeal in *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242, I specifically rejected the City's position that records of this nature are "de facto" records outside the City's custody or control, and that the City is not required to conduct searches for responsive records or to determine whether any responsive records actually exist and, if they exist, where they might be located, or what the understanding of the creators of the records may have been.

Section 43(3) of the *Act* states that “subject to this *Act*, the Commissioner’s order may contain any conditions the Commissioner considers appropriate.” In Interim Order MO-1904-I, I ordered the City to conduct a search for appointment books, daily diaries, or inspector’s log books responsive to the request, and to issue a decision under the *Act* to the appellant, treating the date of the Interim Order as the date of the request. The City has chosen to conduct further searches, but has unilaterally restricted these searches to the specific City files identified in the affidavit. The City has made no effort to contact individual building inspectors in order to determine whether they may have responsive records. Under the circumstances, I find that the searches conducted by the City for responsive appointment books, daily diaries or log books were not reasonable, and I will order it to conduct further searches.

CONCLUSIONS

As identified above, the *Act* does not require an institution to prove with absolute certainty that further records do not exist. What is required of institutions in reasonable search appeals is to provide sufficient evidence to show that reasonable efforts were made to identify and locate responsive records.

With respect to the issue of whether additional responsive photographs exist, as identified above, I am satisfied that the City has adequately discharged its responsibilities under section 17 of the *Act* to conduct a reasonable search for all responsive photographs.

However, with respect to the issue of whether appointment books, daily diaries, or inspector’s log books responsive to the request exist, I have found that the searches conducted by the City were not reasonable in the circumstances. In conducting a reasonable search inquiry, the *Act* gives me the power, as well as the obligation, to satisfy myself that all reasonable steps have been taken to locate and identify records responsive to a request (Order PO-1954-I). In the circumstances, I find it appropriate to order the City to conduct further searches for responsive records, and also to provide me with a detailed affidavit sworn by the employee(s) who conduct the searches, the contents of which are outlined in the provisions of this order.

As an additional matter, and as noted above, the appellant provided information concerning the issues raised in this appeal, some of which identifies the individuals, dates and places where information relating to the requested records may be. I have attached portions of this information to this Interim Order sent to the City, and require the City to address this information, as it relates to the searches for appointment books, daily diaries, or inspector’s log books responsive to the request, as set out in the order provisions below.

ORDER:

1. I order the City to conduct a further search for records responsive to the appellant's request for responsive appointment books, daily diaries or log books, and to provide me with an affidavit sworn by the individual who conducts the search(es) within 30 days of the date of this Interim Order. At a minimum, the affidavit should include the following:
 - (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
 - (b) a statement describing the employee's knowledge and understanding of the subject matter of the request;
 - (c) the names and positions of any individuals employed by the City who were involved with the building inspections of the identified properties during the relevant periods of time;
 - (d) the efforts made to contact the individuals identified in provision 1(c);
 - (e) information about the searches conducted in response to the information provided by the appellant (attached);
 - (f) the results of the search(es).
2. In relation to the individuals identified in provision 1(c), I order the City to ask and set out the answers to the following questions:
 - did you create any records in appointment books, daily diaries or log books prior to, during, or after your involvement with the identified construction projects for the identified address from January 1, 1995 to the date of the request, that relate to the subject of the request?
 - were any records created by others and provided to you either prior to, during or following any such involvement relating to the subject of the request?
 - what steps did you take to assure yourself that no additional records responsive to the appellant's request were within your custody or under your control?
 - are you aware of the existence of any responsive records that may have been created and/or maintained by other individuals that are responsive to the appellant's request, and if so, who would have custody or control of any such records?

I will accept this information in the form of affidavits from the individuals identified in provision 1(c), or, in the alternative, an affidavit from the Freedom of Information Co-ordinator or designated individual provided that the deponent of the affidavit give his or her evidence based solely on first hand, direct conversations with the individuals identified in provision 1(c).

The affidavits must be submitted to me by **June 30, 2005**.

The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

3. If, as a result of the further searches, the City identifies additional records responsive to the request, I order the City to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*, considering the date of this interim order as the date of the request.
4. The affidavits referred to in Provisions 1 and 2 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor St. East, Suite 1400, Toronto, Ontario, M4W 1A8.
5. I remain seized of these matters with respect to compliance with this interim order or any other outstanding issues arising from this appeal.

Frank DeVries
Adjudicator

May 31, 2005