Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3462

Appeal MA16-151

Town of Newmarket

June 30, 2017

Summary: The appellant made a request to the Town of Newmarket (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), seeking access to contracts relating to an option to purchase land for the town's bid for a York University campus. The appellant also sought access to records containing information on costs incurred by the town relating to the bid. The town disclosed a cost sharing agreement, but denied access to a draft agreement of purchase and sale and option agreement, citing the exemption at section 6(1)(b) of the *Act* (closed meeting). It also denied access to invoices relating to a consultant's services, citing the exemption for third party information at section 10 of the *Act.* In this order, the adjudicator upholds the town's decision, in part. She finds that the exemption at section 6(1)(b) applies to the draft agreements, but that section 10 does not apply to the consultant's invoices, and orders that the town disclose the invoices to the appellant. The adjudicator also upholds the town's search for records as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 6(2)(b) and 10(1).

Orders and Investigation Reports Considered: Order M-241.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII).

BACKGROUND:

[1] The appellant submitted a request to the Town of Newmarket (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> Copy of any contract relating to any option to purchase land connected to the Town of Newmarket's bid for a York University campus. Also details regarding how much money was paid including lawyers' fees and other ancillary costs relating to this option.

[2] In its decision letter to the appellant, the town advised that it had separated the request into two separate parts: contracts and agreements, and cost-related records. The town explained that it had identified the following records as responsive to the request for contracts and agreements: a Cost Sharing Agreement with the Town of Aurora ("Aurora"), and a draft Agreement of Purchase and Sale. The town stated that it was denying access to the draft Agreement of Purchase and Sale in reliance on the discretionary exemption for closed meetings at section 6(1)(b) of the *Act* and the discretionary exemption for economic and other interests at section 11(e) of the *Act.*

[3] The town further advised that the disclosure of the Cost Sharing Agreement may affect the interests of a third party and that it was therefore giving the third party an opportunity to make representations regarding the release of that record, following which it would make a decision relating to the Cost Sharing Agreement. In later correspondence to the appellant, the town advised that the third party had consented to the disclosure of the Cost Sharing Agreement. As a result, the town disclosed that agreement to the appellant.

[4] With respect to the part of the request relating to the associated costs to the town, the town advised that there were no lawyers' fees related to the negotiations around the options regarding land connected to the York University bid, as the matter was handled by the town's internal legal department.

[5] The town further advised that prior to the opportunity related to York University's expansion into York Region, the town had already identified post-secondary education as a priority and had engaged a consultant to assist in determining options. When the opportunity regarding York University was presented, a consultant became involved to assist in preparing the bid. The town advised that Aurora also became involved at this point as a joint party to the bid and assumed responsibility for part of the consultant's costs. The town indicated that it had identified two of the consultant's invoices; however, the amounts pertaining to the York University bid preparation are difficult to separate from the costs related to the consultant's assistance with overall strategic direction. The town advised that it had attempted to approximate the costs and provided the appellant with a chart setting out the approximate costs. The town advised, however, that it was denying access to the invoices themselves, relying on the

mandatory exemption for third party information at section 10(1)(a) of the *Act.*

[6] The appellant appealed the town's decision to this office.

[7] During the course of mediation, the town advised the mediator that it is no longer relying on the application of section 11(e) of the *Act* to the draft Agreement of Purchase and Sale*.* As a result, section 11(e) is no longer at issue in this appeal. The town indicated that it is however raising the mandatory exemption for third party information at section 10(1) of the *Act* to the draft Agreement. As a result, the application of section 10(1) to the draft Agreement of Purchase and Sale has was added as an issue in this appeal.

[8] Also during the course of mediation, the appellant raised the issue of a public interest in the disclosure of the records at issue. As a result, the potential application of the public interest override at section 16 of the *Act* was added as an issue in this appeal. In addition, the appellant advised the mediator that he believes additional records responsive to his request should exist. Therefore, the issue of whether the town has conducted a reasonable search was also added as an issue.

[9] Further mediation was not possible and the appellant advised the mediator that he would like to proceed to adjudication. The appeal was then moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act.*

[10] I began my inquiry by seeking representations from the town and three affected parties: Aurora, the landowner and the consultant who had issued the invoices. The town and Aurora filed representations. The landowner advised that it agrees with the town's representations and has nothing to add. The consultant did not file representations, and advised that it has no objection to the release of its invoices.

[11] I then sought and received representations from the appellant. I also advised the town that the consultant had no objection to the release of its invoices and provided the town with the opportunity to make additional representations on the application of the section 10 exemption to the invoices in the circumstances. The town did not make further representations.

[12] In accordance with this office's *Practice Direction 7: Sharing of Representations*, copies of the parties' representations were shared with the other parties, with some severances made in accordance with the sharing criteria found in section 5 of the practice direction.

[13] In this order, I uphold the town's decision to withhold the draft Agreement of Purchase and Sale and Option Agreement, and attached emails, pursuant to section 6(1)(b) of the *Act*. I do not uphold its decision to withhold two consultant's invoices pursuant to section 10 of the *Act,* and I order it to disclose the invoices to the appellant. I uphold the town's search as reasonable.

RECORDS:

[14] The records at issue are set out as follows in the town's index of records:

1. Drafts of an Option Agreement and an Agreement of Purchase and sale, and attached emails, collectively referred to by the town in its index of records as record 1; and

2. Two invoices from the consultant, collectively referred to by the town as record 2.

ISSUES:

A. Does the discretionary exemption at section 6(1)(b) apply to record 1?

B. Does the mandatory exemption at section 10 apply to record 2?

C. Did the town conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the discretionary exemption at section 6(1)(b) apply to record 1?

[15] Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[16] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[1]

Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[2] and
- "substance" generally means more than just the subject of the meeting.[3]

[17] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held and that it was properly held *in camera*.[4]

[18] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[5]

Parts 1 and 2 of the section 6(1)(b) test: in-camera meeting

The town's representations

[19] The town submits that its council held meetings on March 17, March 24 and April 7 to discuss its negotiation strategy and preparation of the Option Agreement and Agreement of Purchase and Sale, and that each meeting was held in the absence of the public. It submits that the meetings were held in closed session in accordance with section 239(2)(c) of the *Municipal Act*, which states as follows:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

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[1] Orders M-64, M-102 and MO-1248.

[2] Order M-184.

[3] Orders M-703 and MO-1344.

[4] Order M-102.

[5] Orders MO-1344, MO-2389 and MO-2499-I.

> A proposed or pending acquisition or disposition of land by the municipality or local board;

[20] The town submits that the meetings were also properly closed pursuant to section 239(2)(f) of the *Municipal Act*, which allows a meeting to be closed to the public if the subject matter being considered is advice that is subject to solicitor-client privilege, including communications necessary for that purpose. It submits that the contents of the draft Option Agreement and Agreement of Purchase and Sale were discussed at each of the meetings, and that their disclosure would reveal the town's position and approach to the negotiations regarding a proposed purchase of land. The town advises that in each case, a resolution was passed closing the meeting to the public, and has provided copies of the minutes reflecting the motions.

[21] The town submits, further, that all required conditions for holding a closed meeting were met. The town refers to its procedural by-law, which allows the town to close a meeting to the public for consideration of a proposed or pending acquisition or disposition of land, and sets out requirements with respect to motions to be passed prior to closing the meetings, voting during closed sessions, and notice requirements. The town provided copies of the notices it gave on its website and in the local newspaper.

[22] The town advises that a vote was taken during each meeting, in accordance with the requirements of its procedural bylaw.

Aurora's representations

[23] Aurora submits that its council, too, held three meetings with respect to the proposed or pending acquisition of disposition of land, on March 18, April 1 and April 8, 2014. Aurora submits that the meetings were held in the absence of the public pursuant to sections 239(2)(c) and (f) of the *Municipal Act.* Aurora submits that the subject matter of the draft Option Agreement, draft Agreement of Purchase and Sale and related emails is the joint acquisition of land by the towns of Aurora and Newmarket. Aurora's Town Solicitor was in attendance at the meetings and provided legal advice to council in regard to the proposed acquisition of the land.

[24] Aurora submits that all requirements for holding a closed meeting, as set out in Aurora's Bylaw 5330-11 were met. In particular, notice was provided in accordance with the bylaw and resolutions were passed in a public meeting prior to the meeting being closed. Aurora submits that votes were taken in the closed meetings and that this was authorized by section 2.23 of the bylaw and section 239(6) of the *Municipal Act.*

The appellant's representations

[25] The appellant's representations focus on the public interest in disclosure of the town's land transactions. The appellant has not addressed whether *in-camera* meetings were properly held.

Analysis and findings

[26] Having reviewed the representations of the town and of Aurora, together with their respective relevant bylaws and resolutions, I am satisfied that closed meetings of the town's council took place on March 17, March 24 and April 7, 2014, and that closed meetings of Aurora's council took place on March 18, April 1 and April 8, 2014.

[27] I find, further, that the meetings held by the town and Aurora were authorized to be held in the absence of the public, pursuant to section 239(2)(c) of the *Municipal Act.* I have reviewed the town's closed session minutes from each of its three meetings, and they all reflect discussions about the town's proposed acquisition of land. The open meeting minutes provided by Aurora indicate that Aurora also went into closed session to discuss a proposed acquisition of land.

Part 3: substance of the deliberations

The town's representations

[28] The town submits that the draft Option Agreement, draft Agreement of Purchase and sale, and related emails are a culmination of all the discussion which took place during the closed meetings. It submits that the content of the records goes far beyond simply the subject of a land purchase, and sets out in detail the compensation that was under negotiation between the parties, the specific lands under consideration, and other aspects of the proposed deal. It submits that all of these items were properly discussed in closed session, and the disclosure of these records would reveal the substance of those deliberations.

Aurora's representations

[29] Aurora submits that the terms and conditions of the draft Option Agreement and the draft Agreement of Purchase and Sale are a result of negotiations between it, the town and the property owner. It submits that disclosure of these documents would reveal the deliberations that took place at the closed meetings, including the compensation that was negotiated between the parties, the specific lands under consideration, and other negotiated terms and conditions.

[30] Aurora also submits that ultimately, the agreements were not finalized and, as a result, may not reflect the true intentions of the parties.

The appellant's representations

[31] As noted above, the appellant's representations focus on the public interest in disclosure of the town's land transactions. He has not addressed whether disclosure of the records would reveal the substance of meetings held *in camera.*

Analysis and findings

[32] Having reviewed the records at issue – the draft Option Agreement, the draft Agreement and Purchase and Sale and attached emails -- and having compared them to the closed meeting minutes provided by the town, I find that the disclosure of the records at issue would reveal the substance of the deliberations at the closed meetings. It is clear from my review of the minutes that the terms that are set out in the draft Option Agreement and draft Agreement of Purchase and Sale (and referred to in the attached emails), such as the specific lands under consideration, the intended use of the property and other terms, were deliberated on at the closed meetings.

Conclusion on the application of section 6(1)(b)

[33] I conclude, therefore, that section 6(1)(b) applies to the draft Option Agreement, draft Agreement of Purchase and Sale and attached emails.

[34] I have also considered whether any of the information in these records can reasonably be severed and disclosed, as contemplated by section 4(2) of the *Act.*[6] For example, some information in the cover emails would not, if disclosed on its own, reveal the substance of the *in-camera* meetings. I find, however, that ordering the disclosure of this information would result in the disclosure of meaningless or disconnected snippets of information. In my view, severing and disclosing such meaningless information would not, in the circumstances, constitute a reasonable severance. Therefore, I will not order that any information in these records be severed and disclosed.[7]

Section 6(2)(b)

Section 6(2)(b) of the *Act* sets out an exception to section 6(1)(b). It reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

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[6] Section 4(2) of the *Act* states:

> If an institution receives a request for access to a records that contains information that falls within one of the exemptions under sections 6 to 15 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[7] See *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, [2012] 1 SCR 23.

> (b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public; or

[35] The town submits that the confidential terms of the draft agreement have not been considered in a meeting that was open to the public, and that no votes were taken in a public meeting concerning the subject matter of the deliberations. Aurora submits that the recommendations were reported on and ratified in an open session, without divulging confidential information, in accordance with section 2.19 of its Bylaw 5330-11. The appellant did not make representations on this issue.

[36] I have reviewed the minutes of the open meetings held by Aurora on March 18, April 1 and April 18. On each occasion, a motion carried that council adopt the confidential recommendations of the General Committee Closed Session of that date.

[37] In Order M-241, Adjudicator Donald Hale found that an Executive Committee Report was exempt from disclosure under section 6(1)(b) as its disclosure would reveal the substance of deliberations at a closed meeting. The report had subsequently been adopted by a vote of council in a public meeting.

[38] Adjudicator Hale then went on to consider whether the subject matter of the deliberations at the closed meeting had been considered in an open meeting for the purposes of section 6(2)(b). In finding that it had not, Adjudicator Hale stated:

> On May 29, 1991, in a public meeting, a recorded vote was taken in which the City Council adopted the Executive Committee Report, as amended, without further discussion. In my view, the Council's *adoption* of a report, without discussion in a public meeting, cannot be characterized as the consideration of the subject matter of the in camera deliberations as contemplated by section 6(2)(b) of the Act. (emphasis in original)

[39] I agree with Adjudicator Hale's reasoning and adopt it for the purposes of this appeal. In my view, council's passing of a resolution to approve the confidential recommendations made during an *in-camera* meeting does not amount to "consideration" of the subject matter of council's deliberations for the purposes of section 6(2)(b). I find, therefore, that section 6(2)(b) does not apply.

The town's exercise of discretion

[40] I have found above that the draft Option Agreement, draft Agreement of Purchase and Sale and attached emails are exempt from disclosure pursuant to section 6(1)(b). However, the section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or

for an improper purpose, takes into account irrelevant considerations, or fails to take into account relevant considerations. In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[8] This office may not, however, substitute its own discretion for that of the institution.[9]

[41] The town submits that while the public's right to access information is important, so too is it important for the town to be able to carry on business. The town submits that withholding the terms of a potential land purchase which was never finalized strikes the appropriate balance between the objects of the *Act* because there is potential, real harm to both the land owner and the town resulting from disclosure and there is not a compelling need for the information to be disclosed. The town submits that in exercising its discretion to withhold the records, it considered all relevant factors, including the purposes of the *Act*, the wording of the specific exemption in the *Act* and the interests it seeks to protect, the fact that there is not a compelling need to disclose the information, the fact that disclosure will harm the town's ability to carry on business and will decrease public confidence in the operation of the town (specifically its ability to keep negotiations confidential), and the negative impact on the land owner's future negotiations for the sale of the property in question. Finally, the town submits that it did not exercise its discretion in bad faith or for an improper purpose, and did not take into account any irrelevant factors.

[42] The appellant provided representations on the public interest override at section 16 of the *Act*, which states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[43] Since section 6 is not one of the sections listed in section 16 for which the public interest override is available, I cannot consider whether the records should be disclosed in the public interest. However, any public interest in disclosure of the records is a relevant factor in an institution's exercise of discretion.[10] I find that the town considered whether there was a public interest in disclosure when it found that there was no compelling need for the records to be disclosed. Although the appellant argues strenuously that there is a public interest in disclosure,[11] the town submits otherwise. It

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[8] Order MO-1573.

[9] Section 43(2).

[10] See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII) at para 46.

[11] The appellant did not consent to sharing his representations with the other parties. Therefore, while I have considered his representations, I have not referred to their content in this order.

submits that there is no compelling public interest in disclosure because the land transfer never came to fruition and no public money was spent to purchase the lands.

[44] I find, further, that the other factors that the town considered were relevant considerations. In particular, I accept that there is some sensitivity to the terms of the draft Option Agreement and draft Agreement of Purchase and Sale given that they were never finalized. There is also no evidence that the town exercised its discretion in bad faith or for an improper purpose, that it took into account irrelevant considerations or that it failed to take into account relevant considerations.

[45] Therefore, I uphold the town's exercise of discretion in withholding these records pursuant to section 6(1)(b).

Conclusion

[46] I find that the drafts of the Option Agreement and Agreement of Purchase and sale, and attached emails, collectively referred to by the town as record 1, are exempt from disclosure pursuant to section 6(1)(b) of the *Act.* In light of my finding, I do not need to determine whether they are also exempt under section 10 of the *Act.*

Issue B. Does the mandatory exemption at section 10 apply to record 2?

[47] A consultant assisted the town in preparing the bid in question, and two invoices from the consultant are at issue in this appeal. The town withheld both of the invoices on the basis that they are exempt from disclosure pursuant to section 10 of the *Act.*

Section 10(1) states in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[48] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[12] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[13]

[49] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[50] As noted in the background section of this order, the consultant did not provide representations, but advised this office that it does not object to the disclosure of its invoices. For the following reasons, I find that the section 10(1) exemption does not apply to the consultant's invoices.

Part 1: type of information

The types of information listed in section 10(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[14] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[15]

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[12] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

[13] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[14] Order PO-2010.

[15] Order P-1621.

> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[16]

[51] The invoices relate solely to the selling of services and as such, contain commercial information. They also contain the amounts billed for those services, which is financial information. I find, therefore, that part 1 of the test is satisfied.

Part 2: supplied in confidence

[52] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[17]

[53] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[18]

[54] Whether or not the information in invoices is considered to have been "supplied" to an institution depends on whether the information was mutually agreed upon and arises from a contract negotiated between the parties. Where invoices merely reflect the terms of an agreement between an institution and a third party, it has been found that such invoices are not "supplied" to the institution.[19] However, I do not have specific information before me about any contract between the town and the consultant.

[55] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[20]

[56] The town submits that while it has disclosed the approximate total amounts paid to the consultant related to the York University bid preparation, the town's consultant would have had a reasonable expectation that the hourly rates for the work provided and other more specific details on the invoices would be kept confidential.

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[16] Order PO-2010.

[17] Order MO-1706.

[18] Orders PO-2020 and PO-2043.

[19] See, for example, Orders MO-3258 and MO-3372.

[20] Order PO-2020.

[57] Since the consultant did not provide any representations, I have no direct information regarding whether it held any expectation of confidentiality over the invoices.

[58] I do not need to decide whether the invoices were "supplied in confidence", however, because I find below that part 3 of the test is not satisfied.

Part 3: harms

[59] The party or parties resisting disclosure must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[21]

[60] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[22]

[61] In applying section 10(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1).[23]

[62] The town argues the application of sections 10(1)(a) (prejudice to competitive position) and (c) (undue loss or gain) to the consultant's invoices. It submits that the consultant may not give the same rate to all of its clients and that disclosure of the invoices could negatively impact the consultant's future bids, and give its competitors insight into their pricing, which could give them an unfair advantage in the marketplace.

[63] As noted above, I provided notice of this appeal to the consultant, who advised that it does not object to the disclosure of the invoices. The town did not submit further representations when invited to do so.

[64] In order for the harms at either section 10(1)(a) nor (c) to be made out, the party or parties resisting disclosure must establish that the prospect of disclosure of the record gives rise to a reasonable expectation that the harms will result. In this case, the town submits that certain harms could befall the consultant as a result of disclosure of

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[21] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[22] Order PO-2435.

[23] Order PO-2435.

its invoices. In my view, this submission, without more, amounts to speculation about possible harms. I find, moreover, that the fact that the consultant did not provide representations on section 10(1) - and instead indicated that it had no objection to the release of the invoices - is some evidence that there is not a reasonable expectation of either of the harms at sections 10(1)(a) or (c) occurring as a result of disclosure.

Conclusion on the application of section 10(1) to the invoices

[65] I conclude that neither section 10(1)(a) nor (c) applies to the consultant's invoices. Since the section 10(1) exemption does not apply, I do not need to consider the application of the exception to the exemption found at section 10(2). I also do not need to consider the appellant's argument that the public interest override at section 16 applies to this information.

[66] Since the town did not argue the application of any other exemption to the invoices, I will order that they be disclosed to the appellant.

Issue C: Did the town conduct a reasonable search for records?

[67] 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.[24] Where an adjudicator is satisfied that the search carried out was reasonable in the circumstances, the institution's decision will be upheld. If the adjudicator is not satisfied, further searches may be ordered.

Representations

[68] I asked the town to provide a written summary of all steps taken in response to the request. The town responded in its representations as follows:

> The Town did not contact the requester for additional clarification of the request as the request was quite specific. The requester filed the request in person at the municipal offices and a discussion was held between the requester and the Records and Projects Coordinator at that time regarding the wording and intent of the request. At that time, the requester clarified that (i) "contract" meant "any contract and agreement related specifically to the land negotiations", and (ii) that the requester was looking for details regarding any moneys spent by the Town regarding these negotiations and the York University bid in general…

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

> Given that the Economic Development Office was the lead in developing the bid for the York University campus, the Records and Projects Coordinator initially contacted the Economic Development Officer to conduct an initial search for records. The Economic Development Officer provided some financial details regarding the consultant hired to assist with the development of the bid, the costs of preparing their bid presentation, and directed the search for copies of any invoices to the Finance Department as the invoices had been submitted for payment. The Finance Department, specifically the Accounts Payable Clerk directed the Records and Projects Coordinator to the file containing the Consultant's invoices in storage. The Records and Projects Coordinator retrieved the file and located the two invoices pertaining to the York University Bid.
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> The Economic Development Department also directed the search to the CAO's office as the CAO was the lead for the land negotiations. The CAO's office conducted a search for records and indicated that although they had been involved they had not retained any records related to the negotiations or the bid. Any records created by the CAO's office were considered transitory and were destroyed once the matter was concluded. The CAO's office directed the search to the Legal Department. The Legal department conducted a search of their records and located the two agreements, but at that time did not locate any financial records….
>
> The Town previously indicated that there were no lawyer's fees related to the negotiations around the options regarding land connected to the York University Bid as the matter was handled by the Town's Legal Department. That was the result of the search that was properly conducted by the Records and Project Coordinator at the time of the initial request. However, that information needs to be updated. The Town did retain external counsel and spent $8,350.85 on external legal fees. The reason this record was not discovered during the initial search was due to an administrative filing error. The error was not caught because the Town's internal lawyer that handled the file was on … leave at the time the request initially came in. Now that the Town's internal lawyer has returned to work, the files have been updated and the Town does not have an objection to sharing this total cost information, but, puts forward the same arguments as apply above to Record Two with respect to withholding the legal invoices themselves. In addition to the arguments above, the legal invoices also contain solicitor-client privileged information within the description of the work listed on the invoice. The Town apologizes for the confusion with respect to the initial search for legal invoices.

[69] The appellant was given the opportunity to respond to the town's representations on the reasonableness of its searches, but he did not do so.

Analysis and findings

[70] The *Act* does not require an 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.[25] To be responsive, a record must be "reasonably related" to the request.[26]

[71] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[27] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[28]

[72] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[29]

[73] I have reviewed the request, the records located by the town and the town's representations. The appellant's request was for two types of records relating to the town's bid for a York University campus:

- Any contract relating to any option to purchase land connected to such a bid; and

- Records relating to ancillary costs including lawyers' fees and other ancillary costs relating to the bid.

[74] The town has identified records relating to both of these matters. It identified a Cost Sharing Agreement with Aurora, a draft Agreement of Purchase and Sale, draft Option Agreement, invoices from the consultant, and legal invoices. The appellant has not provided representations and has not raised any reasonable basis for me to conclude that further responsive records exist.

[75] Moreover, I have reviewed the information provided by the town with respect to the searches it undertook and I am satisfied that it made a reasonable effort to identify

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[25] Orders P-624 and PO-2559.

[26] Order PO-2554.

[27] Orders M-909, PO-2469 and PO-2592.

[28] Order MO-2185.

[29] Order MO-2246.

and locate all of the responsive records within its custody or control. I find that it was reasonable for the town to ask the Economic Development Office to conduct the initial search, given that that office was the lead in developing the bid for the York University campus. I am satisfied that the searches conducted by that office were reasonable. I am also satisfied that it was reasonable and appropriate for the town to ask its legal department and financial departments to search their records, given that part of the request was for lawyer and other consultants' fees. While it is unfortunate that the legal billing information was not located in the first search, I am satisfied from the information provided by the town in its representations that the relevant information has now been located.

[76] I uphold the town's search for records as reasonable.

ORDER:

1. The appeal is allowed, in part.

2. I uphold the town's decision to withhold the drafts of the Agreement of Purchase and Sale and Option Agreement, and attached emails (the records referred to in the town's index as record 1), pursuant to section 6(1)(b) of the *Act.*

3. I do not uphold the town's decision to withhold the consultant's invoices (the records referred to in the town's index as record 2), and I order the town to disclose the invoices to the appellant by **August 4, 2017** but not before **July 28, 2017**.

4. In order to verify compliance with order provision 3, I reserve the right to require the town to provide me with a copy of the records disclosed to the appellant.

5. I uphold the town's searches as reasonable.

Original Signed by: June 30, 2017

Gillian Shaw
Adjudicator