Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2389

Appeal MA-050410-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> The Transportation Services Staff report on The East District Street Lighting Maintenance Pilot Project. This report, whether in draft or final form, is a follow up to the interim evaluation dated May 17, 2004.
>
> We understand that a copy of the report has been given by Transportation Services to the Chief Administrative Officer or her staff.

The City located a copy of the record that was requested, and sent the requester a decision letter in which it denied access to it pursuant to section 6(1)(b) (closed meeting) of the *Act*, stating that its disclosure "could reveal the substance of deliberations of a meeting that was held in the absence of the public".

The requester, now the appellant appealed the decision of the City to this office. Mediation did not resolve this appeal, and the appeal was transferred to the inquiry stage of the process. A Notice of Inquiry identifying the facts and issues in this appeal was sent to the City, and the City provided representations in response. The Notice of Inquiry, along with a severed copy of the City's representations, was then sent to the appellant, and the appellant also provided representations.

In his representations, the appellant identified a number of issues that he believed ought to be addressed in the context of this appeal. Some of those issues had been identified by the appellant earlier in this appeal. In addition to raising these issues, the appellant also provided representations on the application of the section 6(1)(b) exemption and on the City's exercise of discretion.

The appellant's representations were then provided to the City, along with a Reply Notice of Inquiry which invited the City to respond to the appellant's representations on the application of section 6(1)(b), and also to address the following additional issues raised by the appellant:

1) What was the scope of the request and what records were responsive;

2) Whether the searches for records conducted by the City were reasonable; and

3) Whether the City's decision letter was adequate.

The City provided reply representations in response to the Reply Notice of Inquiry, addressing the items in the appeal. With respect to the issue of whether the searches conducted by the City were reasonable, although it took the position that the initial request did not include earlier drafts of the requested record, the City stated that it would conduct a further search for drafts of the record. Following that search, the City indicated that it had located six additional records, and that access to those records was also denied on the basis of the exemption in section 6(1)(b). The City also provided the appellant with a decision letter confirming this decision.

Upon receiving the decision letter, the appellant contacted this office and identified a number of additional concerns he had regarding the actions of the City. He also advised this office that he wished to incorporate into this appeal the six newly-located records.

A Supplementary Notice of Inquiry was then sent to the City, inviting the City to address the application of section 6(1)(b) to these six additional records. The City did not provide representations in response to the Supplementary Notice of Inquiry.

The file was subsequently transferred to me to complete the adjudication process.

PRELIMINARY MATTERS

Background

The request for information which resulted in this appeal is closely connected to a related request also made by the appellant to the City. That request resulted in Appeals MA-060119-1 and MA-060119-2, both of which are in adjudication and both of which have been transferred to me, as well as Appeal MA-060119-3, which is currently in the mediation stage of the process.

In Appeal MA-060119-1, two of the issues raised were the scope of the request and the reasonableness of the search for responsive records. The previous adjudicator assigned to that appeal (who was also previously assigned to this appeal - MA-050410-1) issued Interim Order MO-2135-I on December 20, 2006, which addressed those two issues, and which ordered the City to conduct further searches and to issue a new access decision.

Appeal MA-060119-2 was opened to address the appellant's appeal of the February 5, 2007 decision letter issued by the City following Interim Order MO-2135-I (issued in Appeal MA-060119-1). During the processing of Appeal MA-060119-2, the City located additional records, but failed to issue an access decision regarding them. On November 13, 2007, the previous adjudicator issued an interim order, by letter, requiring the City to issue a decision and to provide an index for the approximately 12,000 pages of newly discovered records.

The City subsequently issued a decision on December 7, 2007, and Appeals MA-060119-3 and MA-060119-4 were opened to address issues arising from that decision. Appeal MA-060119-4 was resolved by Order MO-2275. Many of the issues that have arisen during the processing of these appeals stem from the inadequacy of the index created by the City and included with its December 7, 2007 decision. In Interim Order MO-2282-I, issued on February 27, 2008, in relation to Appeals MA-060119-2 and MA-060119-3, the previous adjudicator ordered the City to prepare a new index of records.

The appellant has raised similar procedural and process issues in each of the files referred to above, including the current appeal. Given the close connection between all of these appeals, I find that any decision issued relating to these similar issues in one file should be construed as applying to all of the appeal files in this group that are currently in the adjudication stage of the

inquiry process, namely appeals MA-050410-1, MA-060119-1 and MA-060119-2, and will, therefore, be incorporated by reference into the other files, even though the substantive issues in each one will be dealt with separately. One issue that has not been fully addressed in the previous interim orders or in Order MO-2275, is the adequacy of the City's decision letter. The appellant has raised this issue in each of the related appeals. I will address this issue briefly below and my decision will similarly apply in the other appeals in this group.

Adequacy of Decision letter

The appellant raises a number of concerns regarding the decision letter the City provided to him in response to his initial request, and the answers to the questions he asked after receiving the decision letter (specifically answers to questions he asked about the nature of the record, the existence of other records, drafts, authors, etc.).

Many of the appellant's general concerns about the manner in which the City has dealt with his requests were addressed in the interim orders noted above, and I will not revisit them. In particular, I note that although she did not specifically address the adequacy of the decision letter in Appeal MA-060119-2 (and Appeal MA-060119-3), the issue of what ought to be included in a decision letter (including an index) was addressed in detail by the previous adjudicator in both Interim Order MO-2282-I and the letter interim decision issued in that appeal.

As noted in Interim Order MO-2282-I, the City is directed to the IPC Practices Number 1 (Revised September 1998) entitled, *Drafting a Letter Refusing Access to a Record*. The Practices provide guidance to institutions regarding the manner in which they should respond to requesters. The Practices note:

> When access is denied, the decision letter should provide the requester with a sound understanding of why some or all of the information has been denied.
>
> If a thorough explanation is provided, the chances of an appeal may be greatly reduced. An appeal can be a time-consuming process for an institution, involving an investigation, mediation and/or an inquiry. It is therefore in the institutions best interest to ensure the decision letter is drafted with care, in accordance with legislative requirements.
>
> Where the requester proceeds with an appeal, a proper decision letter is essential to the efficient processing of the appeal. If the original decision letter is incomplete, the institution will be required to take time to produce a proper decision letter. Drafting a correct decision letter at the outset not only saves the institution time at the start of the appeal process, but speeds up the process for all parties involved.

In my view, the appellant's grievance with the City raises not only the adequacy of the decision letter, but goes to the City's obligations in responding to his request, and in particular,

identifying the scope of the request. I will address the scope of the request in greater detail below under the heading "Scope of the Appeal/Records at Issue". However, for the purpose of this discussion, I will simply note that had the City communicated with the appellant regarding the scope of his request, much of the ensuing confusion might have been forestalled.

Moreover, the City's decision letter could have been more fulsome in describing the record that was located and identified as responsive to the request. Had this been done, the requester would have been in a better position earlier on to address the scope of his request with the City and/or to have this issue identified and hopefully addressed at the outset of his appeal.

The appeals that fall into the group identified above have required extensive attention and time to enable them to be completed by order. In part, this is a result of some confusion regarding the scope of the request and incomplete information furnished by the City at the outset of the appeals.

However, I also note that some of the questions asked by the appellant in the various correspondence he sent to the City effectively ask the City to explain the records and/or to provide evidence regarding the application of the exemption claimed for the record. Although the provision of detailed information of this nature at an early stage in the request process may very well resolve issues and prevent appeals, there is no obligation on an institution to provide all of the evidence of the application of an exemption at the request stage of an appeal. Moreover, other than providing sufficient information to enable the requester to identify and understand the nature of a record, in my view, the *Act* does not require the institution to subsequently answer additional questions about the record (Order PO-1655), although there may be documents within the institution's custody and/or control that do answer the questions and they may well be responsive to a particular request (see: for example orders MO-2285 and MO-2316-I. In addition, see Alberta Order F2008-006, dated December 23, 2008).

That being said, the *Act* also does not prevent an institution from assisting a requester by answering questions. Acting within the spirit of the legislation and in an effort to resolve issues and prevent appeals, an institution may decide to engage in a dialogue with a requester and would be applauded for doing so.

This appeal, like the others associated with it, has proceeded through the mediation and representations stages and, in my view, the appellant has been provided with sufficient information to enable him to make effective representations on the issues and the records, including the scope of the request and the issue of which records are responsive. For this reason, I will not review this issue further.

Scope of the Appeal/Records at issue in this appeal

An issue that has been raised throughout the course of this appeal is what records are responsive to the request, and what records are at issue in this appeal. In order to address these questions, it

is helpful to review in detail the request itself, and the actions taken by the parties throughout this appeal as they pertain to this issue.

As identified above, the request resulting in this appeal was for:

> The Transportation Services Staff report on The East District Street Lighting Maintenance Pilot Project. This report, *whether in draft or final form*, is a follow up to the interim evaluation dated May 17, 2004.
>
> We understand that a copy of the report has been given by Transportation Services to the Chief Administrative Officer or her staff. [emphasis added]

In its initial decision letter in response to the request, the City denied access to the record it located on the basis of section 6(1)(b). In response to a request from the appellant to identify the responsive record, the City indicated that the record is 5 pages long and is entitled *Transportation Services Staff Report on the East District Street Lighting Maintenance Pilot Project*. When the City later provided this office with a copy of the record in response to the Confirmation of Appeal sent to it, the City provided a 5-page record entitled *Appendix 2: Final Evaluation of Street Lighting Maintenance Pilot Project*.

During mediation, the City sent a letter to the Mediator assigned to this appeal which read:

> Further to our discussions regarding the records at issue in this appeal. As discussed, the department has inadvertently provided only [a] portion of the records at the time of the request. I have since received a copy of the full set of records and I am enclosing a copy for your reference.

Attached to that letter was a 20-page document which consisted of a Toronto Staff Report dated September 15, 2005 from the City Manager, Deputy City Manager, and Chief Financial Officer and addressed to the Policy and Finance Committee. It indicated that it was "In Camera" and the subject line read "Street and Expressway Lighting Asset Sale". The 20-page document included two appendices, the second of which was entitled "*Appendix B Final Evaluation of Street Lighting Maintenance Pilot Project*". It should be noted that although very similar in content, there are some minor content differences between the original record, entitled "Appendix 2" and "Appendix B" as attached to the record that the City subsequently sent to this office.

The Mediator's Report sent to the parties at the end of mediation identified the record at issue as follows:

> The record at issue is a City Staff Report dated September 15, 2005. At the outset of the appeal, the City provided this office with only a portion of the report, which was 5 pages in length. However, during the course of mediation, the City advised that it had inadvertently provided this office with only a portion of the requested

> report. The City then provided this office with a complete copy of the report, which is 20 pages in length.

In the initial Notice of Inquiry sent to the City, the record description read:

> The record at issue is a City "Staff Report", dated September 15, 2005, which is 20 pages in length, and includes two appendices.

Representations on the issue of the application of section 6(1)(b) to the record were received from the City. In its representations, the City identified how the exemption in section 6(1)(b) applied to the 20-page record.

The appellant responded to the City's representations by raising a number of issues. In one of them the appellant states:

> … The City's representations reveal that the document we requested has been subsumed in a much larger record. The exemptions on which the City relies might apply to the rest of the record, but they do not apply to the portion we want.

The appellant then describes the differences between the two reports (based on the descriptions provided by the City, as he did not have access to them). He then states that, based on the descriptions, he is "fairly certain" that the record requested is "Appendix 2" (or more accurately "Appendix B") of the larger report. He then states:

> … it is clear that the City's representations concern the remainder of the large report (sections related to the sale of assets) and have nothing to do with our appendix (related to the evaluation of the pilot project). …
>
> In our representations, we will not address the larger record, the one containing a staff report on negotiations of the sale of assets. We will not address the large report because it is not what we requested. Our representations will deal exclusively with The Transportation Services Staff Report on the East District Street Lighting Maintenance Pilot Project – which we understand to be Appendix 2.

In addition, one of the other preliminary matters raised by the appellant also concerned what records were responsive to the request, as that issue related to the searches conducted by the City. The appellant states that the City never provided him with a proper description of the record at issue, and that he has only recently determined that the requested record is "Appendix 2" of a larger document. He then states:

> Unfortunately, this new information raises new issues related to adequacy of the search and adequacy of the decision letter.

> Since October 28, I have been asking "Am I to understand that there is only one record responsive to my request, that is, a final report and no earlier drafts of same?"
>
> I repeated the question in the November 9 appeal letter: "Is there one responsive record or several?"
>
> The City never answered the question. It has never commented on the existence of earlier drafts - neither denied the existence of drafts, nor confirmed it.
>
> We now know that "the final evaluation of the street lighting maintenance pilot project" is Appendix 2 of a larger report. We believe it is implausible that this evaluation exists only as a final copy, that there exist no earlier drafts. A document of this nature would invariably have gone through several, successive drafts. Significantly, the City has never answered my question about earlier drafts.
>
> Under the circumstances, which include the City's last-minute disclosure concerning Appendix 2, we are entitled to a proper decision letter that confirms this is the only draft in existence. To provide this assurance, the City must first conduct a thorough search for earlier drafts. I would not mention this, except for the City's refusal to comment on whether it has even looked for drafts.

The appellant's representations were shared with the City, and the City responded by stating:

> The City did not find the request ambiguous. It was clear that a copy of the Transportation Services staff report on the East District Lighting Maintenance Pilot Project was being requested in whatever form it existed, draft or final.
>
> The City located a copy of the final report. It formed part of the September 15, 2005 confidential report to the policy and Finance Committee from the City Manager and Deputy City Manager and Chief Financial Officer. Transportation Services falls within the Deputy City Manager and Chief Financial Officer's cluster of divisions reporting to him.…
>
> When the appellant asked in his email of October 28, what the "records" were, the Access and Privacy Officer confirmed that the record located was indeed the record which he sought.… This was confirmed in mediation. The City was not aware that the appellant was seeking any and all drafts of the report and at no time was the scope of the request raised as an issue until receipt of the … Reply Notice of Inquiry.

With regard to the issue of the reasonableness of the City's searches for responsive records, the City stated:

> As indicated above, the appellant did not ask for all drafts of the report. ….
>
> As a result of another related request [the one resulting in appeals MA-060119-1, MA-060119-2 and MA-060119-3], the Corporate Access and Privacy office received additional records from the Manager of Urban Traffic Control Systems [the individual who had searched for and located the initial record] that were also responsive to this request, namely the confidential report to which the report was appended. A copy of the additional report was forwarded to the IPC. …
>
> The City submits therefore, that all records that are responsive to the appellant's original request have been located as a result of searches conducted by a knowledgeable staff member.
>
> Further, although the appellant did not ask for all drafts of the report in his original request, the Corporate Access and Privacy office has again contacted the Manager of Urban Traffic Control Systems to ask him to conduct a search for all copies of the report, draft or otherwise….
>
> It should be noted that if earlier drafts of this report are located, it is more than likely that they will be similar to or be sufficiently connected to the one appended to the in-camera report and therefore the section 6(1)(b) exemption will also apply to these drafts.

As identified above and confirmed in an affidavit sworn by the Manager of Urban Traffic Control Systems, six additional records, identified as drafts of the report, were located and access to them was denied under section 6(1)(b).

The appellant wrote this office confirming that he wanted to incorporate the six new records into the appeal. In addition, the appellant indicated that he had obtained "new information", and stated:

> We have obtained information that among the relevant records there exist two more electronic versions of a draft report ….
>
> This draft report is addressed to City Council from the City Manager, Deputy City Manager and CFO.
>
> Pages 5 through 9 of this report consists of an appendix called "Final Evaluation of Street Lighting Maintenance Pilot Project". We understand that this appendix is directly responsive to our request. In other words, the appendix at pages 5

> through 9 is the document that we seek – more precisely, it is *one version* of the document that we seek …

The appellant subsequently provided this office with a copy of the record he referred to, and states that pages 5-9 are the responsive parts. The appellant also states:

> Pages 1-4 of this document do not respond to our present request. We continue to object to any attempt by the City to cloud the issue or to distract you by referring to information contained on non-responsive pages …

The previous adjudicator then sent a Supplementary Notice of Inquiry to the City. That Notice of Inquiry read, in part:

> … The renewed search carried out by the City during the preparation of reply representations identified six new records as responsive to the appellant's request.
>
> … I have decided to seek new representations from the City on the possible application of section 6(1)(b) of the *Act* to the six records.

As identified above, the City did not provide additional representations in response to this Supplementary Notice of Inquiry.

Additional factors

In addition to the communications and actions which occurred during the processing of this file as set out above, two additional factors are relevant to the determination of the scope and what records are responsive to this request. Both are connected with the other appeals involving the parties and the related request.

First, in Interim Order MO-2135-I, the previous adjudicator examined the records that were requested and at issue in Appeal MA-060119-1, and made certain findings concerning the scope of that request. In reviewing the background to the scope of the request, she stated:

> … The appellant also informed this office that he would not pursue an appeal of the decision to deny access to one of those records because that same record was already the subject of a related matter (MA-050410-1).

The record to which the appellant stated he was not pursuing access in Appeal MA-060119-1 (pp. 252-271 in that appeal) because it was at issue in this appeal is identical to the 20-page record identified as responsive by the City in the current appeal.

In reviewing the scope of the appeal, the previous adjudicator also stated:

> The appellant went on to state:
>
> > Second, in response to another FOI request (05-2642) [Appeal MA-050410-1], you disclosed the existence of a staff report dated September 23, 2005. Our position is that pages 1-4 of that report are not responsive to [Appeal MA-050410-1]. Those pages would seem, however, to be directly relevant to this request, 06-0082. I believe that there should exist at least two different versions of this staff report, perhaps more.

The adjudicator then made the following findings:

> … I find that the scope of the request [in Appeal MA-060119-1] *includes* the following: a Confidentiality and Non-Disclosure Agreement between the City and Toronto Hydro Street Lighting Services Inc. dated August 8, 2005; ***other versions of the September 23, 2005 City staff report (identified as responsive to the request in Appeal MA-050410-1)***; minutes of meetings and conference calls between City officials and Toronto Hydro officials related to the sale of the street and expressway lights; any agendae and/or "action logs" available to participants in those meetings; and email correspondence between City and Toronto Hydro officials with regard to the sale and/or service agreements. I also find that the scope of the appellant's January 3, 2006 request is *broader than the specific listed items* that it is meant to include. [emphasis in bold added]

Regarding the issue of the reasonableness of the searches conducted by the City in Appeal MA-060119-1, the previous adjudicator found that the search for responsive records in that request was not reasonable, and ordered additional searches. She also stated:

> To be clear, I am requiring the City to conduct searches of its record-holdings for: the Confidentiality and Non-Disclosure Agreement between the City and Toronto Hydro Street Lighting Services Inc., dated August 8, 2005; ***other versions of the September 23, 2005 City staff report (identified as responsive to the request in Appeal MA-050410-1)***; minutes of meetings and conference calls between City officials and Toronto Hydro officials related to the sale of the street and expressway lights; any agenda and/or "action logs" available to participants in those meetings; and email correspondence between City and Toronto Hydro officials with regard to the street and expressway sale and/or service agreements. [emphasis added]

Second, in her November 13, 2007 interim decision in letter form referred to above, issued in Appeal MA-060119-2, the Adjudicator stated as follows after reviewing the index for some of the records ultimately at issue in Appeal MA-060119-3:

> It also appears from my review of the nearly 12,100 pages that there are records contained in these boxes which may be responsive to the appellant's request in the related appeal referred to previously in this decision, Appeal MA-050410-1.
>
> However, this is not for me to determine in the first instance.

Analysis and findings

As is clear from the summary set out above that there have been a number of conflicting messages and communications regarding the issue of what records are responsive to the request that is being dealt with in this particular appeal. In my view, this confusion goes to the City's obligations in responding to the request, and in particular, identifying the scope of the request. In this regard, I refer the parties to the IPC Practices Number 15 (Revised March 2000), entitled *Clarifying Access Requests*, which notes:

> Individuals who request access to information under the …[*Act*], do not always know the kinds of records a government institution has, or how it keeps its records. For this reason, clarification is often required.
>
> The purpose of this issue of *IPC Practices* is to remind institutions of the legislative requirements regarding the clarification of requests; and to emphasize that clarification will make things easier for everyone concerned…

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;
>
> (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).

Previous orders of this office have directed institutions to adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*, and have found, generally, that ambiguity in the request should be resolved in the requester's favour (Orders P-134, P-880).

Moreover, to be considered responsive to the request, records must "reasonably relate" to the request (Order P-880).

Although the request at issue in this appeal might reasonably be interpreted as asking for only one copy of the Staff Report, either a draft or final version, this is not entirely clear. Clarification by the City at the outset might have obviated the difficulties that subsequently arose. Certainly, once the requester began to question the record identified by the City in its initial decision, the City should have realized that clarification was required in order to adequately respond to the request. Moreover, had the City carefully reviewed the two versions of the Staff Report that it provided to this office, it would have been abundantly clear that there was more than one version of the record.

That being said, based on the material received from the parties and on my review of the request, the correspondence, and the identified records, I must determine what records are responsive to this request, and what to do with those that are not responsive to this request, but which may be responsive to the request in Appeals MA-060119-1, MA-060119-2 and MA-060119-3.

In the circumstances, and in particular based on the wording of the request, I find that the two 5-page records identified as "Appendix B" and "Appendix 2" and titled "Final Evaluation of Street Lighting Maintenance Pilot Project" are both responsive to the request in the current appeal. To avoid additional confusion, I will refer only to "Appendix B" in the remaining discussions. Moreover, I find that the larger report to which Appendix B was appended is not responsive to the appellant's request. This larger report, dealing with the Street and Expressway Lighting Asset Sale, was clearly not requested by the appellant, and the appellant has maintained throughout the course of this appeal that he did not request this record in this appeal, nor was he interested in obtaining it in this appeal. Although the City eventually chose to identify the larger report as responsive (apparently because the version of the Final Evaluation of Street Lighting Maintenance Pilot Project identified as responsive by the City was appended to this larger document), I have concluded that the Appendix is distinct from the larger document. I also note that the earlier drafts of this report were separate, distinct documents, and were apparently appended to the larger report at a later time. Although a connection between the two reports clearly exists (ie. Appendix B and the larger report), and I will be reviewing the possible application of section 6(1)(b) to Appendix B as a part of the larger report, I find that the larger report (except Appendix B) is not responsive to this request.

During the course of this appeal the City identified six additional records and issued a decision on them. In my view, it is not necessary to determine whether these additional records would have been responsive to the original request. I accept that they became responsive to the request as it evolved over the course of this appeal, but only to the extent that they are earlier drafts of the Final Evaluation of Street Lighting Maintenance Pilot Project as described by the appellant. Some of these six records are, in fact, earlier drafts of the larger report, or contain information qualitatively different from that described by the appellant, notwithstanding they are identified as a final staff report, and I find that any such drafts are not responsive to the request.

Specifically, on my review of the six additional records, I find as follows:

> Newly located Record #2 (dated June 6, 2005 – 15 pages) – page 1 (to the end of the subject line), page 2 (from the heading before the second paragraph) to page 7 (to the end of the first paragraph) of this record comprise a draft of an earlier version of the requested record, and are responsive to the request.
>
> Newly located Record #3 (dated June 8, 2005 – 14 pages) – pages 1 through 6 (to the end of the third paragraph) of this record are an earlier version of the requested record, and are responsive to the request.
>
> Newly located Record #4 (dated September, 2005 – 9 pages) – this record is a draft of the larger report. It does not include Appendix B, and is not responsive to the request.
>
> Newly located Record #5 (dated September, 2005 – 10 pages) – this record is a further draft of the larger report. It does not include Appendix B and is not responsive to the request.
>
> Newly located Record #6 (dated September 12, 2005 – 14 pages) – pages 1 through 6 of this record contain a draft of an earlier version of the requested record, and are responsive to the request.
>
> Newly located Record #7 (dated September 23, 2005 – 9 pages) – this record appears to be a later version of the larger report, including Appendix B. Appendix B comprises pages 5 through 9 of this record, and I find that those pages are responsive to the request, but that pages 1 through 4 are not.

The effect of the existence of the related request and resulting appeals.

Although I have found that records relating to the larger report (dealing with the Street and Expressway Lighting Asset Sale), or which contain information qualitatively different from the five page report identified by the appellant, are not responsive to the request in this appeal, I note that the request resulting in Appeal MA-060119-1 (and the subsequent appeals) was for "All documents related to the purchase of Toronto's street lights and expressway lights by Toronto Hydro Lighting Inc….". The original 20-page document containing the larger report entitled "Street and Expressway Lighting Asset Sale" and the 5-page "Appendix B" in the current appeal was also identified as a responsive record in Appeal MA-060119-1 (pages 252-271). I have made the decision to only consider the 5-page record identified as Appendix B notwithstanding the request by the appellant to remove these pages from Appeal MA-060119-1 and to have them dealt with in the current appeal. The larger report, along with thousands of additional pages of records have been identified as responsive to the request in Appeal MA-060119-1, and they are being processed in Appeal MA-060119-3, which is currently in mediation.

In the circumstances, and given the history of these two requests, any records which I have found to be non-responsive in this appeal are to be included in the scope of the request resulting in Appeal MA-060119-1 (and the subsequent appeals). Appeals MA-060119-1 and MA-060119-2 have proceeded through the representations stages. In my view, to include the outstanding records and portions of records in either of these two appeals would result in undue delay as additional representations would be required. Accordingly, these records and portions of records will be added to the records in Appeal MA-060119-3.

Furthermore, regarding the issue of the reasonableness of the search conducted for responsive records in this appeal, again, the detailed history of this matter set out above confirms the confusion and mixed messages that were sent in the course of responding to this request – and this naturally affects the search issue. I also noted above that the previous adjudicator found that some of the records in the nearly 12,100 pages she reviewed in Appeal MA-060119-2 (which are now being dealt with in Appeal MA-060119-3) appeared to be responsive to the appellant's request in this appeal (Appeal MA-050410-1). Based on the history outlined above, I am satisfied that no useful purpose would be served by further exploration of the search issue in this appeal. Accordingly, in these circumstances, I will not review the issue of the reasonableness of the search for records in this order.

In summary, all outstanding records and issues not being addressed here or in Appeals MA-060119-1 and MA-060119-2 will be dealt with in Appeal MA-060119-3, which is currently in mediation. The only records that I will address in this order comprise the following:

- The 5-page record identified as "Appendix 2" and titled *Final Evaluation of Street Lighting Maintenance Pilot Project*,
- The 5-page record identified as "Appendix B" and titled *Final Evaluation of Street Lighting Maintenance Pilot Project*,
- New Record #2 (dated June 6, 2005 – 15 pages), page 1 (to the end of the subject line), page 2 (from the heading before the second paragraph) to page 7 (to the end of the first paragraph),
- New Record #3 (dated June 8, 2005 – 14 pages), pages 1 through 6 (to the end of the third paragraph),
- New Record #6 (dated September 12, 2005 – 14 pages), pages 1 through 6, and
- New Record #7 (dated September 23, 2005 – 9 pages), pages 5 through 9.

To reiterate, these are various versions of the *Final Evaluation of Street Lighting Maintenance Pilot Project* as identified by the appellant.

DISCUSSION:

CLOSED MEETING

The City relied on the exemption in section 6(1)(b) to deny access to the larger 20-page report, including Appendix B, which is the responsive record in this appeal. The City provided representations on the application of the exemption to the 20-page report.

The City also relied on the section 6(1)(b) exemption to deny access to the other newly-located records, four of which are responsive to the request, in whole or in part. Although the City did not provide representations on the application of the section 6(1)(b) exemption to these records when invited to do so, the City did state in its decision letter that these records were exempt under that section, and provided some explanation for this claim. The City also provided some information about these records to this office.

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.

Previous orders have held that, for this exemption to apply, the City 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.

[Orders M-64, M-102, MO-1248]

The City's arguments focus on the in-camera meetings that were held on September 20, 28, 29 and 30, 2005, and provide representations in support of its position that parts 1 and 2 of the test set out above are met. The appellant acknowledges that part 1 of the test is met, and provides arguments in support of his position that part 2 has not been met. However, in the circumstances, I will begin by addressing the parties' positions regarding part 3 of the test.

Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting

Under Part 3 of the test set out above, previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

In this appeal, the City's representations on Part 3 of the test, as it applies to the larger report, read:

> In Order M-184, former Assistant Commissioner Irwin Glasberg stated that: "In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view toward making a decision..."
>
> The City submits that in the present case, the disclosure of the Report would reveal in detail the discussions and considerations by Policy and Finance Committee and City Council concerning the financial implications of the sale of the street lighting assets, the possible terms and conditions of any agreements, strategies and related matters … with the view to deciding on what course(s) of action the City should take in these matters. The City submits therefore, that the disclosure of the Report would reveal the actual deliberations of the Policy and Finance Committee and City Council in its in-camera meetings and thus, the third part of the test has been met.

The appellant's representations on Part 3 of the test state:

> … Appendix [B] does not reveal the substance of the deliberations of committee or City Council.
>
> The minutes of the meetings indicate what the deliberations were about: negotiations for the sale of assets.
>
> The minutes of the meetings do not give any indication that the deliberation involved an evaluation of the pilot project to contract out the maintenance of street lights.
>
> The City's representations suggest that the record might reveal discussions concerning "financial implications of the sale of the street lighting assets, the possible terms and conditions of any agreements, strategies and related matters including [withheld] ..."

> That may well be the case with the rest of the report, but it has nothing to do with the record we requested, namely, Appendix [B].
>
> …
>
> In Order M-98, Assistant Commissioner Mitchinson held that just because a report was considered at a closed meeting did not mean that the report revealed the substance of deliberation at the closed meeting. Appendix [B] is part of larger report that was considered at a closed meeting. There is no indication, however, that Appendix [B] reveals the substance of deliberation at the meeting. Indeed, the minutes suggest that the deliberation was all about the sale of assets, and not about the evaluation of a pilot project to contract out maintenance.
>
> See also Order M-353, where Inquiry Officer Anita Fineberg concluded that because a record was in front of Toronto City Council might make it the *subject* of deliberations but does not mean that it would reveal the *substance* of deliberations. In this case, the exact same analysis applies to Appendix [B].
>
> There is no suggestion that the committee or City Council made any decision about the pilot project. It was just receiving the report, Appendix [B], for information. This situation is similar to appeal decided by Assistant Commissioner Mitchinson in Order M-1160, where he wrote:
>
> > In my view, these two records deal with the subject of the human rights complaint and the outcome of the mediation exercise, but not the substance of any deliberations about this matter. The terms of settlement were simply reported to the Board at the … meeting. The Board did not, and it would appear did not have authority to, discuss these terms with a view to approving or making a decision about them. Therefore, I find that the third requirement has not been established for these two records, and that they do not qualify for exemption under section 6(1)(b).

The appellant's representations were shared with the City. The City chose not to directly address the appellant's position on the third part of the test. However, in its reply representations on the manner in which it exercised its discretion, the City stated:

> The report requested was included as an appendix to, and was therefore, an integral part of the confidential report discussed in-camera. The confidential report dealt with the sale of assets ….

The City also provides confidential representations which identify the ties between the Appendix and the full confidential report.

Analysis and Findings

I have reviewed the records at issue in this appeal, as well as the representations of the parties.

As I determined earlier, the record requested by the appellant is clearly the document entitled *Appendix B: Final Evaluation of Street Lighting Maintenance Pilot Project*. It is also clear that this document was an Appendix to a larger document, which is entitled *Street and Expressway Lighting Asset Sale* and deals with the Asset sale.

The City has provided some evidence that ties the requested record [Appendix B] to the confidential report dealing with the asset sale, while the appellant's representations focus on the differences between these two records.

It is apparent from a review of the records at issue, and the relationship between the larger report and the requested record, that there is some connection between the two, and I must review the application of section 6(1)(b) to the requested record in the context of the larger report (*Lincoln County Board of Education v. Ontario (Information and Privacy Commissioner)* [1995] O.J., No. 4293). The confidential representations of the City support this connection. However, in order to find that section 6(1)(b) applies to the record, I must determine whether the disclosure of the record (Appendix B) would reveal the actual substance of the deliberations of the *in camera* meetings. In my view, I have not been provided with sufficient evidence to support such a finding.

In particular, although it appears from the material provided by the City that the larger report, dealing with the Street and Expressway Lighting Asset Sale, was discussed *in camera*, the City has failed to provide sufficient evidence to satisfy me that the information contained in Appendix B, which contains the evaluation of Street Lighting Maintenance Pilot Project, was discussed at the *in-camera* meetings.

The appellant's representations stating that "There is no suggestion that the committee or City Council made any decision about the pilot project. It was just receiving the report, Appendix B, for information". These representations were shared with the City, and the City had the opportunity to rebut or dispute this position by providing evidence that Appendix B was the subject of deliberations. Other than focussing on the connections between the Appendix and the larger report, the City did not take the opportunity to address the appellant's submissions regarding the Appendix. In failing to do so, the City did not provide sufficient evidence to satisfy me that this Appendix was the subject of deliberations.

In addition, on my review of Appendix B and the larger report, I note that the subject matter of these two records is quite distinct. One deals with an evaluation of the Pilot Project, the other with the sale of assets. Although there is some connection between these two records, and one was appended to the other, the difference between the subject matter of these two records is obvious and significant. In the absence of additional information from the City, I am not

satisfied that the disclosure of Appendix B would reveal the substance of the deliberations of an *in-camera* meeting.

As a result, I find that Appendix B does not qualify for exemption under section 6(1)(b) of the *Act*, and I will order that it be disclosed to the appellant.

Having found that Appendix B (which was attached to a record which was provided to an *in-camera* meeting) does not qualify for exemption under section 6(1)(b), I also find that the earlier drafts or versions of this document that I have found to be responsive to this request also do not qualify under that section. As noted above, although the City did not provide representations in support of the application of section 6(1)(b) to these drafts or other versions, the City did state in its decision letter that "None of the additional records have ever been discussed in open public meetings and they are the same or substantially similar or connected to the draft that was appended to the in-camera report that was initially at issue in this appeal." In other material provided by the City, the City states that "None of these [additional] drafts were ever discussed in open public meetings." Although it may be true that these drafts were not addressed in open meetings, having found that the later document does not qualify for exemption under section 6(1)(b), I also find that the earlier drafts do not qualify under that section.

Section 6(1)(b) is the only exemption claim made for Appendix B or for any of the drafts or other versions of that document which were located, and which are responsive to the request. Having found that these records do not qualify for exemption under that section, I will order that they be disclosed to the appellant.

ORDER:

1. I order the City to disclose the records I have found to be responsive to the request to the appellant by **February 19, 2009**. These records are:

   - The 5-page record identified as "*Appendix 2*" and titled *Final Evaluation of Street Lighting Maintenance Pilot Project*,
   - The 5-page record identified as "*Appendix B*" and titled *Final Evaluation of Street Lighting Maintenance Pilot Project*,
   - New Record #2 (dated June 6, 2005 – 15 pages), page 1 (to the end of the subject line), page 2 (from the heading before the second paragraph) to page 7 (to the end of the first paragraph),
   - New Record #3 (dated June 8, 2005 – 14 pages), pages 1 through 6 (to the end of the third paragraph),
   - New Record #6 (dated September 12, 2005 – 14 pages), pages 1 through 6, and
   - New Record #7 (dated September 23, 2005 – 9 pages), pages 5 through 9.

2. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the City to provide me with copies of the records that are disclosed to the appellant.

Original signed by: January 30, 2009
Laurel Cropley
Adjudicator