Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3032

Appeal MA13-53

Sault Ste. Marie Region Conservation Authority

April 7, 2014

Summary: An individual sought access under the *Act* to records held by the Sault Ste. Marie Region Conservation Authority (the CA) related to its approval of a Development, Interference with Wetlands and Alteration to Shorelines and Watercourses Permit under the *Conservation Authorities Act*. The CA identified four records related to the permit for the proposed development and disclosed one, but denied access to consultants' reports and meeting minutes under sections 6(1)(b) (closed meeting) and 10(1) (third party information). The adjudicator finds that the exemptions do not apply and orders the records disclosed to the appellant.

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), 10(1)(b) and 10(1)(c).

Orders and Investigation Reports Considered: Order MO-1212.

OVERVIEW:

[1] This order addresses the issues raised by the decision of the Sault Ste. Marie Region Conservation Authority (the CA) in response to a request submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "copies of recent correspondence tabled by" the CA, including:

1) The well report submitted on behalf of [two named individuals] prepared by [a named environmental consulting company] to support the Pointe Estates Development.
2) The response to the report prepared by [CA] staff.
3) The response by [the named environmental consulting company] to the [CA]'s request after their review.
4) Minutes of the "in committee" meeting held prior to the November Board meeting.

[2] Having identified the responsive records, the CA notified two parties whose interests may be affected by disclosure of the records (the affected parties), pursuant to section 21(1)(a) of the *Act*. This notification was intended to provide the author of the report ("the consultant") and the business that had commissioned the report ("the developer") with an opportunity to express their views on the possible disclosure of the records under the *Act.* After receiving comments from the two affected parties, the CA issued a decision denying access to three of the four requested records, relying on the mandatory exemption in section 10(1) (third party information) and the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*. The CA's response to the report (item 2 of the request) was disclosed in full.

[3] The appellant appealed the CA's decision to this office and a mediator was appointed to explore the possibility of resolution. During mediation, the appellant raised the issue of the public interest in disclosure of the records. Accordingly, section 16 of the *Act* – the public interest override – was added as an issue in this appeal.

[4] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I started my inquiry by sending a Notice of Inquiry outlining the issues to the CA and the two affected parties, seeking their representations. I received representations from all three of these parties.[1] After addressing matters related to the sharing of the affected parties' representations with the appellant, I sent copies of the non-confidential representations of the CA and the two affected parties with a Notice of Inquiry to the appellant, seeking his submissions on the issues. I received representations from the appellant, which conveyed that the Aquifer and Well Yield Analysis Report (item 1 of the request) was no longer at issue.

[5] In this order, I find that the records are not exempt under either section 6(1)(b) or section 10(1), and I order them disclosed to the appellant.

[1] During the adjudication stage of the appeals process, the developer was represented by legal counsel, who provided representations. Any reference to "the developer" in this order should be taken to mean either the developer, personally, or the developer's legal representative.

RECORDS:

[6] One of the records originally at issue was a September 25, 2012 record titled "Aquifer and Well Yield Analysis" (76 pages). In his representations, the appellant advised that he had obtained a copy of the "Aquifer and Well Yield Analysis" for the proposed development because the record was submitted to the City of Sault Ste. Marie as part of the development application.

[7] Since the usual issue to be determined in appeals before the Commissioner is whether records should be disclosed to a requester, the appellant's possession of the Aquifer and Well Yield Analysis raises a preliminary issue for me to determine. Where a record has previously been disclosed to a requester by the institution, or in another context, the issue of mootness is raised. The question raised here, therefore, is whether the appeal is moot as regards the Aquifer and Well Yield Analysis and if so, whether I ought nonetheless to proceed to a determination of the exemption claimed to deny access to it under the *Act*.

[8] In the circumstances of this appeal, I conclude that there is no live controversy between the CA and the appellant in relation to this record. I find that no useful, or public interest, purpose would be served by proceeding with my inquiry in relation to it.[2] Accordingly, this record is removed from the scope of the appeal, and it is unnecessary for me to address the possible application of section 10(1) to that particular record. However, the copy of the Aquifer and Well Yield Analysis provided to this office includes a two-page cover letter from the developer to the CA dated November 6, 2012. As there is no evidence before me that the appellant has a copy of the cover letter, I conclude that access to it remains a live controversy, and I will proceed with a review of its possible exemption under section 10(1).

[9] Accordingly, the following records remain at issue in this appeal:

- a November 6, 2012 cover letter to the Aquifer and Well Yield Analysis from the developer to the CA (2 pages), "the Cover Letter;"
- a December 11, 2012 letter written by the consultant for the developer in response to the CA's comment about the Aquifer and Well Yield Analysis (13 pages), "the Consultant's Response;" and
- "In Committee" minutes for the CA Meeting on November 20, 2012 (2 pages), "the Meeting Minutes."

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[2] *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342. See also Orders P-1295, MO-2049-F and MO-2525.

ISSUES:

A. Does the mandatory exemption in section 10(1) apply to the Cover Letter or the Consultant's Response?

B. Does the discretionary exemption in section 6(1)(b) apply to the Meeting Minutes?

DISCUSSION:

A. Does the mandatory exemption in section 10(1) apply to the Cover Letter or the Consultant's Response?

[10] The CA and affected parties oppose disclosure of a 13-page letter written by the consultant to the developer (the Consultant's Response), dated December 11, 2012 under section 10(1) of the *Act.* The two-page November 6, 2012 Cover Letter to the Aquifer and Well Yield Analysis addressed to the CA by the developer is also at issue.

[11] Neither the CA nor the consultant identified which part of section 10(1) was relied upon in opposing access. However, the developer relies on paragraphs (b) and (c) of section 10(1), which state:

> 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,
>
> (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

[12] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

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[3] *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.).

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

[13] For section 10(1) to apply, the CA or the affected parties were required to provide sufficient evidence to 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; and

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 (b) or (c) of section 10(1) will occur.

[14] Section 42 of the *Act* provides that the burden of proof that a record falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third parties who rely on the exemption provided by section 10(1) of the *Act* share the onus of proving that this exemption applies.[5]

Representations

[15] The CA submits that the Aquifer and Well Yield Analysis and the Consultant's Response were withheld due to the "forcefully expressed expectation of confidentiality" of the developer's representative regarding the technical information it contains, which "prompted the CA to act very cautiously." According to the CA, they felt it "was imperative to make [their] decision with caution rather than to distribute technical information without appropriate permission."

[16] The developer's arguments focus on the Aquifer and Well Yield Analysis report[6] but, in my view, apply equally to the Consultant's Response prepared on the developer's behalf to respond to the CA's concerns about the Aquifer and Well Yield Analysis. The developer's strongly-held view is that it must maintain control over the information and that the information should not be disclosed to any party without specific and intentional consent. The developer relies on the purpose behind the provision of the information to the CA in opposing its disclosure. According to the developer, the information was provided solely to the CA to fulfil the purposes of the CA's mandate, "not for disclosure to the public."

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[5] Order P-203.

[6] It was only at the second stage of this inquiry that the appellant advised that he had obtained a copy of this report; the developer's representations therefore naturally address both the Yield Analysis that is no longer at issue, as well as the Consultant's Response.

[17] The developer states that the records were provided "explicitly in confidence,"[7] and submits that if it had known that the information could be made public, additional steps would have been taken to preserve the confidentiality of the records. Examples provided of the possible steps include "only partially releasing said documents, requesting undertakings from the [CA] before providing such information or requesting the information be returned once it had been reviewed."

[18] The developer refers to the importance of the relationship between "any potential developer and the conservation authority of the region" since conservation authorities are mandated to "review studies and opine on the potential effects such developments will have" on the surrounding area. It submits that maintaining this relationship between developers and conservation authorities is essential to the conservation authority being able to properly carry out its mandate to ensure sustainable and proper development.

[19] Regarding the harm in section 10(1)(b), the developer submits that:

> The risk [of] such information not being provided to conservation authorities is a greater risk than the risk that would ensue from this information not being disclosed to the party requesting it. It is more desirable that the conservation authority have such information to make a fully informed decision.

[20] In the developer's view, if study findings can be obtained by development opponents after they have been provided to conservation authorities, then developers "will be reluctant to provide such findings or obtain them in the first place… [which] is clearly not a desirable outcome."

[21] Respecting the harms in section 10(1)(c), the developer submits that disclosure of the information would "most certainly result in undue gain for those requesting it" because their cause (in opposition to the development) would benefit from access to records paid for by the developer. The developer argues that such studies should not be provided to opponents as "a handout that they can obtain based on a freedom of information request…" because "it is totally improper for the parties seeking this information to obtain it in this fashion."

[22] The consultant who prepared the Aquifer and Well Yield Analysis (and the subsequent Response) submits that the reports it provides are "issued to our clients for their use only, and we do not distribute, nor authorize distribution of, our reports to third parties." He maintains that the decision on disclosure, or distribution of the records in this matter, rests solely with its client, the developer. In support of this position, the consultant refers to a standard clause that is included in its reports to

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[7] Here, the developer refers to the disclaimer clause in the Aquifer and Well Yield Analysis.

establish limits on any professional liabilities that may arise through reliance on the report, a warranty that is not extended to third parties who may receive copies of such reports.

[23] Respecting the type of information in the records, the consultant describes it as highly technical information related to the design of a proposed subdivision development that was prepared by a licensed professional engineer. According to the consultant, the records contain test results and interpretation related to the unique hydrogeological conditions of the property. Regarding confidentiality, the consultant indicates that he cannot comment on the developer's expectations in submitting the report to the CA. However, he states that this testing and interpretive information, which is unique to the property in question, is not available elsewhere.

[24] The appellant's representations do not directly address the test for exemption under section 10(1) of the *Act.* However, he submits that since the Aquifer and Well Yield Analysis was part of the development application (and was therefore, publicly available), so too should be the Consultant's Response to the CA's comments on, and questions about, the Analysis.

Analysis and findings

[25] Before setting out my findings in this section, I wish to address the developer's claim that it would be "totally improper for the parties seeking this information to obtain it in this fashion," i.e., under the *Act.*

[26] Section 4(1) of the *Act* states, in part: "Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless …". Section 4(1) creates an express and unambiguous right of access to records "in the custody or under the control" of an institution, such as the Sault Ste. Marie Region Conservation Authority.[8] In reviewing the decision of an institution, I must give effect to the clear access rights of the appellant under the *Act*, subject to the exemptions in sections 6 through 15 and section 38. These exemptions are applied on a case-by-case basis, and in accordance with the requirements of the particular exemption.[9]

[27] In this context, I reject the assertion that there is anything improper about the appellant, or other opponents of the development, obtaining access to the information at issue under the *Act,* if it is not exempt. Access to information legislation exists to ensure government accountability and to facilitate democracy.[10] In Order MO-1924, former Senior Adjudicator John Higgins observed that "requesters may also seek information … to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions." I agree. Furthermore, past orders

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[8] Orders PO-2520 and PO-2599.
[9] See, for example, Order PO-3176.
[10] *Dagg v. Canada* (Minister of Finance), [1997] 2 S.C.R. 403.

confirm that the fact that an appellant may publicly disclose the content of records, if granted access to them, does not mean that his or her reasons for using the access scheme under the *Act* are not legitimate.[11]

[28] I will now review the requirements of the mandatory exemption in section 10(1) of the *Act.*

Part 1: type of information

[29] To meet the first part of the test for exemption under section 10(1), the record must contain at least one of the types of information listed in the section. In this appeal, the parties have argued that the records contain technical information. In my view, the records also contain scientific information. As discussed in past orders,[12] these types of information are defined as follows:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.
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> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

[30] Having reviewed the records, I am satisfied that the Consultant's Response contains information that qualifies as scientific and technical, according to the definitions. I note that the consultant holds a Master's Degree in Science and a professional engineering designation (P.Eng.). The response prepared by this individual contains a detailed discussion of the hydrogeological testing and analysis conducted on the property by an environmental engineering firm, including particularized responses to issues raised by the CA's water resources engineer. With regard to the Cover Letter (for the Aquifer and Well Yield Analysis that is no longer at issue), I note that it summarizes the consultant's conclusions in that initial report, and I accept that the summary itself contains scientific information, if to a limited extent. Therefore, I find that part 1 of the test under section 10(1) is met for both records.

[11] See, for example, Orders M-1154 and PO-3325-I.
[12] See Order PO-2010.

Part 2: supplied in confidence

[31] The purpose of section 10(1) is to protect the informational assets of third parties. This purpose is reflected in the requirement under part two that it be demonstrated by the party resisting disclosure that the information was "supplied" to the institution.[13] 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.[14] Based on my review of the parties' representations and the records, I am satisfied that both the Cover Letter and the Consultant's Response were "supplied" to the CA to assist in the assessment of the suitability of the development application.

[32] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that at the time the information was provided, the supplier of the information had a reasonable expectation of confidentiality, either implicit or explicit. This expectation must have an objective basis.[15]

[33] In determining whether the "supplied" information was also provided "in confidence" to the CA, I considered whether the developer's expectation of confidentiality was reasonable and objective, based on its position that the records were "not for disclosure to the public" and that they were provided to the CA "explicitly in confidence." Past orders have established that the circumstances surrounding the supply of the information are relevant in determining the objective basis of the expectation. Such circumstances may include whether the information was:

- Communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- Treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the institution;
- Not otherwise disclosed or available from sources to which the public has access; and/or
- Prepared for a purpose that would not entail disclosure.[16]

[34] Based on the evidence, I conclude that the records were supplied by the developer to the CA with a reasonably-held expectation that they would be treated

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[13] Order MO-1706.
[14] Orders PO-2020 and PO-2043.
[15] Order PO-2020.
[16] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct.).

confidentially by the CA. In reaching this conclusion, I observe that the Cover Letter (to the September 25, 2012 report) and the Consultant's Response are not visibly marked with words suggesting an intention that they be kept in confidence. The evidence provided by the developer as to the explicit indication of confidence – a confidentiality "disclaimer" in the Aquifer and Well Yield Analysis – relates to a record no longer at issue. However, I take this evidence as signifying a subjective expectation of confidentiality in relation to the attached Cover Letter and the Consultant's Response. In any event, past orders have found that the presence or absence of words such as "Confidential" is not determinative of the issue.[17] Records may still meet the requirements of this component of part 2 of the section 10(1) test notwithstanding the manner in which the record is labeled.

[35] After considering the circumstances, I conclude that the developer and the consultant also had an objectively reasonable expectation of confidentiality when they submitted the information to the CA. In particular, I accept that parties who submit documentation required by an administrative body to support a development application hold a reasonable expectation that such documentation will not be disclosed for purposes unrelated to the application.[18] Having said that, I note that records created in the context of an environmental regulatory scheme have been acknowledged to be necessarily subject to a "diminished expectation of confidentiality."[19] Overall, however, I find that the records meet part 2 of the test for exemption under section 10(1). I will now consider whether disclosure of this information could reasonably be expected to result in one or more of the harms specified in section 10(1).

Part 3: harms

[36] To discharge the burden of proof under the third part of the test under section 10(1), the parties opposing disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed.[20] 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 other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[21]

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[17] Order PO-2453.
[18] See, for example, Orders MO-1225, MO-1974 and MO-2922.
[19] Order MO-2004, as adopted in Order PO-2558, among others. More on the implications for transparency of the CA's own regulations appears in the discussion of section 6(1)(b), below.
[20] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[21] Order PO-2020.

[37] To begin, I acknowledge the merit in the developer's position that open communication between developers and conservation authorities is essential to the proper carrying out of the conservation mandate "to ensure sustainable and proper development." However, the question to be answered under part 3 in this appeal is whether disclosure of the information at issue could reasonably be expected to result in the harms that sections 10(1)(b) and/or 10(1)(c) seek to prevent. In the circumstances of this appeal and with regard for the evidence, I am not convinced that the disclosure of the information contained in either the Cover Letter or the Consultant's Response could reasonably be expected to result in similar information no longer being supplied to the CA for the purpose of section 10(1)(b). I am also not persuaded that disclosure of these records could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency, as contemplated by section 10(1)(c).

[38] The developer argues that disclosure of these records will cause it (and other developers) to be reluctant to "provide such findings or obtain them in the first place." However, section 10(1)(b) is not intended to address reluctance, or a lack of inclination, on the part of a third party, to provide information to an institution because it could be disclosed under the *Act*. The exemption refers to such information "no longer being supplied." Concerns of the nature expressed by the developer are not persuasive evidence of a reasonable expectation of harm under section 10(1)(b) in situations where information is provided to the institution pursuant to statutory compulsion.[22] It is apparent that the developer was obligated to provide the records at issue to the CA to satisfy regulatory requirements under the *Conservation Authorities Act,* R.S.O. 1980 and Ontario Regulation 176/06, in particular.[23] Had the developer not supplied such documentation, it would simply have been unable to obtain the required approval. For these reasons, I find that section 10(1)(b) does not apply.

[39] Respecting section 10(1)(c), I conclude that there is not sufficient evidence that the appellant would experience undue gain (for the cause in opposition to the development) or that the developer would incur undue loss with disclosure of the records. In rejecting the developer's assertion of harm, I refer to Order MO-1212, where Adjudicator Holly Big Canoe reviewed the decision of the Nottawasaga Valley Conservation Authority (NVCA) to deny access to consultants' records regarding development at Snow Valley under section 10(1)(c).

> The records identify positive and negative environmental consequences of development and propose mitigating measures to address the negative impacts. The information was submitted to the NVCA because, under the Conservation Authorities Act, it is a requirement that requests for a Fill,

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[22] Order P-314.

[23] O.Reg. 176/06, passed under the *Conservation Authorities Act,* has the full title of Sault Ste. Marie Region Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses; as am. O.Reg. 80/13.

> Construction and Alteration to Waterways Permit Application be reviewed and approved by the local Conservation Authority having jurisdiction over the subject property. The records indicate that the affected person has included the mitigation measures into its proposed work program, and that the NVCA has granted the permit on this basis. Neither the NVCA nor the affected person have made it clear how an opponent to the development could undermine the affected person's position when the NVCA has already granted its permission for the work plans. **Further, it appears to me that should another party wish to oppose the plan, it would have to conduct additional research and investigation (at its own expense) in order to identify why the mitigation measures included in the plan were insufficient.** Accordingly, I am not convinced that disclosure of the records could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency, and section 10(1)(c) does not apply [emphasis added].

[40] I agree with this line of reasoning, and I adopt it in this appeal. Accordingly, I reject the developer's submission that disclosing the records to the appellant, as "a handout," would result in an undue gain to those who oppose the development. As in Order MO-1212, the appellant in this matter would presumably have to obtain the services of another engineering or water resources consultant to provide a countering study regarding the possible deleterious ramifications of the development for the surrounding wetlands. In this context, I find that the submissions under section 10(1)(c) fall short of the requisite detailed and convincing evidence to establish a reasonable expectation of harm occurring with disclosure.

[41] Aside from there not being "detailed and convincing" evidence from the parties opposing disclosure, I do not find anything on review of the actual records to substantiate the claim that disclosure could result in loss or gain to "any person, group, committee or financial institution or agency". The shortcoming in the evidence is pronounced because any loss or gain established must also be demonstrated to be *undue* under section 10(1)(c). I conclude, therefore, that the harms in section 10(1)(c) are not established by the evidence provided by the developer, the consultant or the CA in this appeal.

[42] In sum, I find that the developer, the consultant and the CA have failed to provide sufficiently "detailed and convincing" evidence to establish a "reasonable expectation of harm" with disclosure under either section 10(1)(b) or 10(1)(c) of the *Act.* Therefore, I find that the Cover Letter and the Consultant's Response are not exempt under section 10(1). Since no other exemptions were claimed to deny access, I will order them disclosed to the appellant.

B. Are the CA's November 20, 2012 meeting minutes exempt under the discretionary exemption at section 6(1)(b)?

[43] Before I review the application of section 6(1)(b) of the *Act* to the minutes of the CA's closed meeting of November 20, 2012, I will address the "responsiveness" of its content. To be considered responsive to a request, records (or information) must "reasonably relate" to the request.[24] One paragraph at the bottom of page 2 of the Meeting Minutes addresses a second item that was considered by the CA on that date. As the information in this portion of the record is clearly unrelated to the issue of the proposed development, I find that it is not responsive to the request. This portion is therefore removed from the scope of this appeal and will not be addressed further.

[44] I will now review the remaining, responsive portions of the Meeting Minutes to determine if section 6(1)(b) of the *Act* applies to exempt them from disclosure.

[45] 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.

[46] For this exemption to apply, the CA was required to 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.[25]

[47] 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 by the institution and that it was properly held *in camera*. In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, the purpose of the meeting must have been to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.[26]

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[24] Orders P-880 and PO-2661.
[25] Orders M-64, M-102 and MO-1248.
[26] Order M-102; *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

[48] 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.[27] Past orders have defined "deliberations" as discussions conducted with a view towards making a decision.[28]

[49] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. It has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.[29]

Representations

[50] The CA submits that it held an In Committee meeting – in the absence of the public – on November 20, 2012[30] for the purpose of discussing legal matters. The CA relies on "administrative regulations" passed under section 30 of *The Conservation Authorities Act* as the authority for holding this meeting in the absence of the public.[31] According to the CA, these regulations allow for "In Committee," or *in camera*, meetings to discuss personnel matters or sensitive legal matters. In this case, the CA indicates that the *in camera* meeting was convened by Resolution 88/12 at the beginning of the regular, open Conservation Authority Board Meeting on November 20, 2012. The CA provided copies of the relevant portions of the *Conservation Authorities Act* and regulations, as well as the minutes of the regular meeting, which include the resolution.

[51] The CA indicates that two topics were discussed at the In Committee meeting: the proposed development and a notice of legal action respecting an identified property. The CA admits that no vote was taken at the In Committee meeting; however, the CA board voted to approve the permit for the proposed development during an open meeting in December 2012, based, in part, on the study discussed during the In Committee meeting of November 20, 2012. As described by the CA, the development matter discussed *in camera* on November 20:

> … referred to an application for an O.Reg. 176/06 Development, Interference with Wetlands and Alteration to Shorelines and Watercourses permit which had been denied by the CA. The Applicant had appealed the CA's decision to the Ontario Mining and Lands Commissioner (MLC). Prior

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[27] Orders MO-1344, MO-2389 and MO-2499-I.
[28] Order M-184.
[29] Order MO-1344.
[30] The CA actually refers to the date of the meeting as Tuesday, November 12, 2012, but the reference is erroneous, given that Tuesday, November 20, 2012 is the date recorded on the record itself.
[31] Passed under section 30 of the *Conservation Authorities Act*, R.S.O. 1980.

> to the MLC hearing, the CA and the Applicant had jointly agreed to defer the MLC hearing to allow for mediation. The outcome of the mediation was that the Applicant would have a site specific hydrogeological study of the subject property undertaken and submitted for CA consideration. Since this matter was still the potential subject of a MLC hearing, the CA considered it to be a legal matter and therefore discussions about the proposal were held In Committee.

[52] The CA also submits that there was some possibility of one of its board members questioning the CA's own water resources engineer with respect to that individual's qualifications and his critique of the original study provided with the development application. The CA states that since this questioning could potentially transform into a personnel matter, they concluded that it was appropriate to deal with it *in camera*. Finally, the CA indicates that its decision to withhold the minutes of the In Committee meeting was based on the Board members' expectation that the Meeting Minutes would not be publicly circulated.

[53] In response to his review of the CA's submissions in this appeal, the appellant challenges the justification provided for holding a closed meeting for discussion of the proposed development. The appellant states that there were no legal proceedings at the time of the November 20, 2012 meeting that he was aware of; further, he expresses concern that the CA did not even address the requirement in its administrative procedures that "sensitive legal matters" may be considered "where personal items are mentioned." Based on his view that the In Committee meeting was held without justification under the CA's own rules, the appellant submits that the closed meeting was "illegal."

Analysis and findings

[54] To begin, I am satisfied that the CA held a meeting in the absence of the public on November 20, 2012, and I find that part 1 of the test under section 6(1)(b) is met.

[55] Under part 2 of the test for exemption under section 6(1)(b) of the *Act*, I must be satisfied that a statute authorized the holding of the relevant meeting in the absence of the public. Based on the evidence, I agree with the appellant. The CA's November 20, 2012 closed meeting was held without authorization under statute. Information may not be withheld under section 6(1)(b) simply because, as the CA submits, its board members expected that it would not be made public. The expectations of the CA's board members must align with the closed meeting requirements, not the other way around. In the discussion below, I explain my finding that the portion of the CA's November 20, 2012 meeting that was held In Committee to discuss the proposed development was not properly authorized by statute.

[56] According to the CA's representations, the CA board went *in camera* to discuss the proposed development and legal action relating to an identified property. The CA also suggests that its board members considered *in camera* discussion to be prudent due to the possibility of a personnel issue arising during discussion of the proposed development. As stated previously, the information in the minutes relating to the second topic (the legal action) is not responsive to this request and is, therefore, outside the scope of this appeal. However, to determine whether "the proposed development" was an item the CA was entitled to discuss in a closed meeting, or if the possible "personnel" issue otherwise justified the holding of this meeting in the absence of the public, I reviewed the CA's Administration Regulations.[32]

[57] In approaching this issue, I considered what the phrase "authorized by statute" means in a situation where there is no *statute* governing the CA's meetings. In this appeal, the provisions for closed meetings of the CA are found in its Administration Regulation (the Regulation) and the supplemental Rules of Conduct and Administration Procedures (the Rules), neither of which are statutes *per se*. In particular, I note that the Rules are passed merely by resolution of the CA.[33] However, I have decided not to proceed on a strict reading of the second part of the test under section 6(1)(b), which would demand reliance on a specific provision from a statute and effectively end the analysis of the issue without a substantive review.[34] Rather, I will proceed on the basis that the second part of the test under section 6(1)(b) contemplates that the authority for an institution's closed meeting may exist in a provision that *flows from* a statute.

[58] The CA did not identify the specific provision that establishes the required authorization for the closed meeting under consideration in this appeal. The resolution passed by the CA to go *in camera* does not clarify this matter. In its entirety, the resolution states:

> **1. <u>In Committee</u>**
>
> Resolution # 88/12, moved by [first identified CA board member], seconded by [second identified CA board member],
>
> "*Resolved that we go In Committee at 3:05 pm to discuss legal matters"*,
>
> was CARRIED.

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[32] Although the CA refers to the "Administrative Regulations" in its representations, the title on the document is "Administration Regulations" and this is the title used in this order.

[33] Resolution 102/93 of the Sault Ste. Marie Region Conservation Authority; passed on July 5, 1993, revised: September 23, 1993.

[34] For example, see section 239(2) of the *Municipal Act, 2001* in the case of closed meetings held by a municipal council.

[59] Several provisions of the CA's Administration Regulations and its Rules are relevant to my conclusion that this closed meeting was held without statutory authority: section 14 of the Administration Regulation passed on February 5, 1985, which applies to all conservations authorities; and section 6.d) of the CA's own Rules. As suggested above, the Rules are, according to paragraph d) of the Definitions section, intended to act as "a supplement to the Administrative Regulations passed February 5/85."

[60] I begin with section 6.d) of the 1993 Rules, titled "In Committee Meetings," which states:

> In Committee meetings will be held by majority vote of members at a meeting and will be held only for personnel issues and land acquisition discussions where landowners and compensation is discussed.
>
> Sensitive legal matters may be considered where personal items are mentioned.

[61] I find that discussion about the proposed development does not fit into any of the categories in section 6.d). First, I note that Resolution 88/12, which was passed at the CA's November 20, 2012 meeting, refers to "legal matters" as the reason for the *in camera* meeting. Section 6.d) is clear that "sensitive legal matters" may be considered at an In Committee meeting of the CA "where personal items are mentioned." As the appellant points out, the CA did not address this aspect of the requirement. I have reviewed the Meeting Minutes, which is the record withheld under section 6(1)(b), and I find that they contain no reference to items or matters of a personal nature. Furthermore, I find that the Meeting Minutes contain no information about personnel issues. While the CA relies in its representations (if not in the wording of Resolution 88/12 itself) on the *possibility* of personnel issues arising as a basis for going *in camera* at the November 20, 2012 meeting, the content of the Meeting Minutes speak for themselves: no personnel issues were discussed. Finally, I find that the Meeting Minutes contain no reference, or discussion related to, land acquisition matters or compensation. In sum, as none of the stated criteria for holding an In Committee meeting under section 6.d) of the CA's Rules of Conduct and Administration Procedures are satisfied, I find that part 2 of the test for exemption under section 6(1)(b) of the *Act* is not met.

[62] This conclusion is sufficient for me to find that the Meeting Minutes are not exempt. However, in my view, additional guidance for the CA about the limits of the closed meeting provision in section 6.d) of its 1993 Rules is offered by section 14 of the 1985 Administration Regulation. In particular, section 14 states:

> FREEDOM OF INFORMATION
>
> 14. **All matters arising out of Authority meetings, and supporting technical reports shall form part of the public record and shall be available for public review** immediately upon request. Exceptions to the foregoing include the following matters [emphasis added]:
>
> (a) Personnel Records
> (b) On-going Property Negotiations
> (c) Court cases in which the Authority is involved
> (d) Discussions which could adversely affect the interests of a third party

[63] As I interpret it, this provision signals the intention of the legislature to promote the transparency of the province's conservation authorities in carrying out their statutory duties and responsibilities, including the granting of permits under Ontario Regulation 176/06 under the *Conservation Authorities Act*. By the use of the word "include" in the list of exceptions, the reader understands that the list is not exhaustive and that there *may* be other exceptions not so listed. However, in my view, of those listed, paragraphs (a) to (c) mirror the three In Committee meeting criteria in section 6.d) of the CA's 1993 Rules; and paragraph (d) may be considered to reflect section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, under which the CA must refuse to disclose information if it fits within the mandatory exemption for confidential third party information in section 10(1). The CA did not claim that the Meeting Minutes were exempt under section 10(1) and, in any event, I would conclude that they are not.

[64] All three parts of the test for exemption under section 6(1)(b) must be met for the exemption to apply. Part 2 of the test has not been met because the CA's In Committee meeting of November 20, 2012 to discuss the proposed development was not authorized by statute, namely section 6.d) of the 1993 Rules of Conduct and Administration Procedures. Accordingly, I find that section 6(1)(b) does not apply.

[65] Even if the three-part test for exemption under section 6(1)(b) had been met, I would have concluded that the exception to this exemption, in section 6(2)(b), applies. Section 6(2)(b) states:

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

[66] The CA held a Special Meeting on December 13, 2012 at which the subject matter of the November 20, 2012 In Committee meeting was considered in a meeting that was open to the public. Discussion about the proposed development, specifically relating to the CA water resources engineer's critique of the study provided by the developer, appears in the minutes for the CA's Special Meeting of December 13, 2012, where members of the public were present, including the developer, his representative and local media. In fact, even greater detail of the "back-and-forth" between the CA's staff and the developer and consultant respecting the hydrogeological matters is provided in these minutes, which are publicly available. The December 13, 2012 minutes demonstrate that a vote was taken in this public meeting concerning the subject matter, that is, the granting of the permit under Ontario Regulation 176/06.[35] This information is sufficient to support a finding that the exception in section 6(2)(b) would have applied in the circumstances of this appeal, thus resulting in the Meeting Minutes not being exempt under section 6.

[67] Regardless, the Meeting Minutes are not exempt under section 6(1)(b), and in view of this finding, it is not necessary for me to review the CA's exercise of its discretion under the exemption.

[68] Similarly, as I have concluded that section 10(1) does not apply, I do not need to review the possible application of section 16 of the *Act* to override it in the public interest.

ORDER:

I order the Sault Ste. Marie Region Conservation Authority to disclose the Cover Letter (to the Aquifer and Well Yield Analysis), the Consultant's Response and the November 20, 2012 In Committee Meeting Minutes, (with the exception of the non-responsive portion on page 2) to the appellant by **May 14, 2014** but not before **May 9, 2014**.

For certainty, I have highlighted the portion of the Meeting Minutes that is not to be disclosed to the appellant on the copy of the record sent to the CA with this order.

Original signed by: April 7, 2014
Daphne Loukidelis
Adjudicator

[35] http://www.ssmrca.ca/about-the-ssmrca/board/meetings/archive-meetings-minutes/2012-meetings-minutes.