

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3285-I

Appeal MA14-400

The Corporation of the City of Cambridge

February 4, 2016

Summary: A city councillor submitted an 8-part request to the City of Cambridge (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the city's purchase and restoration of a historic building to house a new library. The city located responsive records and granted the appellant access to a one-page excerpt of minutes from a city council meeting but denied the remaining records pursuant to the various exemptions and exclusions under the *Act*. The appellant appealed the city's decision to this office and raised questions about the reasonableness of the city's search. In this order, I find that the records the city claims fall outside of the *Act* are subject to the *Act*. I also find that the agenda items assembled for a meeting authorized by statute to be held *in camera* qualify for exemption under section 6(1)(b)(closed meeting). However, I find that an appraisal report the city submits is exempt under section 6(1)(b) is not. I also find that a feasibility study and needs assessment is within the city's custody or control and order it to issue a decision regarding access. Finally, I find that the city did not conduct a reasonable search for parts 2 and 3 of the request and order it to conduct a further search for these records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1), 6(1)(b), 17, 18(2), 18(3), and 52(3).

OVERVIEW:

[1] An appellant, who serves as a city councillor, submitted an 8-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of Cambridge (the city) for information relating to the city's

purchase of the old post office building, which read as follows:

- 2012 Appraisal to City of Cambridge on appraised value of the Post Office Building [part 1];
- Business plan of [named company] to Council allow for sole partner and other supporting documentation [part 2];
- Any documents with [named company] to allow as sole partner, in particular signed documents [part 3];
- Cost of the contracted communications services for the project & the branding process; and contract [part 4];
- Costs of the architectural feasibility study through the library board and the feasibility study [part 5];
- Costs of the contracted position of the library consultant for the project, [named individual] and contract [part 6];
- Analysis of the library needs for current projects used to determine current project [part 7]; and
- How much was [named individual's] salary & benefits before his retirement [part 8].

[2] The city conducted a search for responsive records and issued a decision granting partial access to the responsive records.

[3] The appellant appealed the city's decision to this office and a mediator was assigned to the appeal.

[4] During mediation, the appellant advised that she believes that the general public should have access to the records at issue. The appellant also advised that she believed that additional records should exist.

[5] Also during mediation, the city clarified that, with regard to part 1 of the request it was relying on section 6(1)(b)(closed meeting) to deny access to the appraisal report and closed meeting agenda items. The city also advised that invoices responsive to part 4 of the request are excluded from the scope of the *Act* under section 52(3)(labour relations or employment-related matters). With respect to the type of information at issue in the records responsive to part 4 of the request, the appellant advised the mediator that she is not seeking access to personal information.

[6] With regard to parts 5, 6, 7 and 8 of the request, the city advised the appellant to make a request to the library for these records. The appellant, in turn, made a

request to the library for these records but advised that she only received records responsive to part 6 of the request. Though the appellant no longer seeks access to records responsive to part 6 of the request, she continues to seek access to the records responsive to parts 5, 7 and 8 and claims that the city has custody or control of these records.

[7] No further mediation was possible and this file was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I decided to commence my inquiry by seeking the representations of the city, initially. The city's representations raised the possible application of the mandatory personal privacy exemption under section 14(1) to some of the records. Accordingly, I decided to seek supplemental representations from the city on whether or not disclosure of some of the records would constitute an unjustified invasion of personal privacy. The appellant also had an opportunity to make representations in this appeal. The city's and appellant's representations were exchanged in accordance with this office's confidentiality provisions set out in *IPC Code of Procedure*.

[8] Throughout its representations, the city raised concerns about the appellant's request under the *Act* given the appellant's role as a city councillor. The city appears to take the position that its policies and by-laws prevent the appellant from distributing any information obtained by freedom of information legislation but considered at a closed council meeting. The city also argues that any information I order it to disclose to the appellant should be subject to the same type of agreements contemplated in *Regulation 823*, section 10(1) which sets out the terms and conditions relating to the security and confidentiality of personal information disclosed for research purposes. It appears that the city suggests that the appellant should be bound by these terms and conditions because of her role as a councillor, despite the fact that the request does not seek access to personal information and the appellant has not identified a research purpose.

[9] There is nothing in the *Act* prohibiting a councillor from making an access request, and any such request should be treated the same as other requests made by members of the public.¹ As a result, I will not impose the requested terms or conditions in this appeal.²

[10] In this order, I find that the invoices fall within the ambit of the *Act* and thus are not excluded under section 52(3)3. I also find that the agenda items assembled for a meeting authorized by statute to be held *in camera* qualify for exemption under section 6(1)(b). However, I find that an appraisal report the city also claims is exempt under section 6(1)(b) is not. I also find that the feasibility study and needs assessment are within the city's control or custody. Finally, I find that the city did not conduct a

¹ See Order M-118.

² This appeal has no impact on a councillor's separate statutory or other confidentiality obligations.

reasonable search for parts 2 and 3 of the request and order it to conduct a further search for these records.

RECORDS:

[11] The records at issue in this appeal consist of the following:

Record No. 1: Bundle of documents, including:³

- report to council [Agenda items], dated February 27, 2012 (2 pages);
- report to council, dated June 11, 2012 attaching a document entitled "Preliminary Report – The Old Galt Post Office Redevelopment Proposal" (9 pages);and
- report to council, dated September 10, 2012 attaching the draft Agreement of Purchase and Sale (appendix A) and Chronology of Key Events (appendix B) (14 pages including 4 duplicate pages)

Record No. 2: Invoices (12 pages)

Record No. 3: Narrative Appraisal Report, dated October 20, 2011

ISSUES:

- A. Does section 52(3) exclude the invoices from the *Act*?
- B. Did the institution conduct a reasonable search for records responsive to parts 2 and 3 of the request?
- C. Are the records responsive to parts 5, 7 and 8 of the request "in the custody" or "under the control" of the institution for the purpose of section 4(1)?
- D. Does the discretionary exemption at section 6(1)(b) apply to the agenda items (Record 1) and appraisal report (Record 3)?
- E. Did the city properly exercise its discretion?

³ A 1-page excerpt entitled Minutes of September 10, 2012 meeting, re: motions #86 and 87 and the first page of the September 10, 2012 meeting minutes published on the city's website were also included as part of Record 1. However, these two pages are not at issue as the city either disclosed these documents or they are available on the city's website.

DISCUSSION:

A. Does section 52(3) exclude the invoices from the *Act*?

[12] The city claims that records responsive to part 4 of the appellant's request are excluded from the *Act*. Part 4 of the appellant's request sought access to the "[c]ost of the contracted communications services for the project & the branding process, and contract". The city located 12 invoices but withheld them claiming that section 52(3) applies in the circumstances of this appeal. Section 52(3) provides for three situations in which records are excluded from the scope of the *Act* because they relate to labour relations or employment related proceedings, negotiations and discussions.⁴ Section 52(4) lists a number of exceptions to the exclusions provided in section 52(3).

[13] During the inquiry stage, I sent a Notice of Inquiry to the city and invited its representations on whether the *Act* applied to the invoices. In response, the city submitted representations which state:

... the release of the costs of the compensation with this individual would put their identity at risk and that is protected under section 14 of the *Act* [personal privacy]. Also as per section 52(3)3 this is a labour related matter.

[14] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[15] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.⁵

[16] The term "labour relations" refers to the collective bargaining relationship

⁴ Section 52(3) states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

⁵ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.⁶

[17] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.⁷

[18] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.⁸

Section 52(3)3: matters in which the institution has an interest

[19] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Representations of the parties

[20] The city's representations state:

In this case the terms and conditions of the agreement where the City is acting as the employer are at stake. Also, the invoices were not prepared by the City of Cambridge, but submitted to it. The City of Cambridge received these records in order to fulfil the employment of [an] individual. The City and the individual came to an agreement on a negotiated price for labour.

[21] The appellant's submissions did not address whether the exclusion at section 52(3)3 applies to the invoices. However, the appellant submits that she is not interested in obtaining information about the "wages" of any employee but seeks access to

⁶ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

⁷ Order PO-2157.

⁸ *Ministry of Correctional Services*, cited above.

information about “the cost of completing the services” provided.

Part 1: collected, prepared, maintained or used

[22] Part 1 of the test asks whether the city collected, prepared, maintained or used the record.

[23] I note that the invoices contain the name, address and contact information of an individual who provided communication services to the city. The invoices detail various services the individual provided from March to October 2014. It appears that invoices were prepared by the individual providing services to the city for the purpose of receiving payment.

[24] Having regard to the records themselves, I am satisfied that the city collected, maintained or used the invoices. Accordingly, I find that the first part of the three-part test has been met.

Parts 2 and 3 meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest

[25] Parts 2 and 3 of the test asks whether the records were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city has an interest.

[26] The city’s representations did not address the issue of whether the records were collected, maintained or used by the city in meetings, consultations, discussions or communications. However, the city submits that the invoices relate to a “labour relations or employment-related” matter between itself and the individual who submitted the invoices.

[27] However, without addressing whether part 2 of the test has been met, I find that part 3 of the three-part test has not been met as the subject-matter of the invoices do not relate to a “labour relations or employment-related matters”.

[28] Part 3 of the test asks whether the invoices were collected, prepared, maintained or used in meetings, consultations, discussions “labour relations or employment-related matters” in which the city has an interest in.

[29] The city argues that the invoices relate to a “labour relations or employment-related” matter between itself and the individual who submitted the invoices.

[30] However, the type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

Despite the city's submissions to the contrary, its relationship for the time period captured in the invoices is not one where the city is acting as an employer. Rather, the individual appears to have been providing services to the city for a fee.

[31] For the reasons above, I find that part 3 of the three-part test under section 52(3)3 has not been met. Accordingly, I find that the records fall under the scope of the *Act*.

B. Did the institution conduct a reasonable search for records responsive to parts 2 and 3 of the request?

[32] Parts 2 and 3 of the request seek access to:

- Business plan of [named company] to Council allow for sole partner and other supporting documentation [part 2]; and
- Any documents with [same named company] to allow as sole partner, in particular signed documents [part 3].

[33] The city's decision letter to the appellant advised that records responsive to parts 2 and 3 of the request exist.

[34] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.⁹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[35] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹⁰ To be responsive, a record must be "reasonably related" to the request.¹¹

[36] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.¹²

[37] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all

⁹ Orders P-85, P-221 and PO-1954-I.

¹⁰ Orders P-624 and PO-2559.

¹¹ Order PO-2554.

¹² Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.¹³

[38] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹⁴

[39] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.¹⁵

Representations of the parties

[40] The city did not submit an affidavit in support of its position that it conducted a reasonable search for records responsive to parts 2 and 3 of the request. However, the city submitted representations and raised a concern that the appellant has not provided a reasonable basis for concluding that additional records exist. The city goes on to argue that the appellant did not identify which records he or she believes are missing.

[41] The city also states:

... many decisions [relating to the Old Post Office restoration project] are outside the City of Cambridge jurisdiction pertaining to this project, many decisions pertaining to the internal use of the building is done through the Library Board; and during [the city's] questioning of staff at the City and Library it has been reiterated to [the city] that there are still many decisions to be made and possible [Request for Proposals] to be administered; therefore these records are not under the jurisdiction of the City nor are they in the custody or control of the City, and many are still in draft.

[42] With respect to its actual search, the city states:

The [f]irst step to searching for records relevant to this request was to determine which records contain the information the [appellant] wants and where these records are located. [Most] of the requested information was current and possibly still in the early review/processing phases.

...

[A] requested a search of our Archives Database and performed a search in our Documentum database (ECM database). [The city] also coordinated the search for records responsive to the [appellant's] request, which could

¹³ Order MO-2185.

¹⁴ Order MO-2246.

¹⁵ Order MO-2213.

be held by different departments. Department staff was required to search for, locate and retrieve all records responsive to the [appellant's] request... [The city has] been in constant contact with [the Director of Sustainable Design and Development] throughout this process as he has some casual contact with Library staff, and is involved in the dealings with the Old Post Office from a City perspective.

[43] The city also submitted confidential submissions in support of its position that it conducted a reasonable search. The city also provided copies of its email exchanges with the appellant and mediator as evidence of its willingness to obtain clarification about the request during the request and mediation stages of this appeal.

[44] The appellant responded with the following arguments;

- With respect to the business plan requested as part 2 of the request, the appellant submits that there is no basis to withhold this document; and
- With respect to the agreement/partnership documents between the named company and the city responsive to part 3 of the request, the appellant states that the named company is no longer involved in the project. As a result, the "initial memorandum of understanding or any other similar subsequent documents in the possession of the city should be released as such a document is considered a finalized document in its nature, not ongoing".

Decision and Analysis

[45] I have carefully reviewed the representations of the parties and find that the city failed to conduct a reasonable search for the records responsive to parts 2 and 3 of the request.

[46] Based on the city's evidence, it appears that upon its receipt of the request the city had discussions with staff about the status of the company's proposed involvement in the project and decided that there were no finalized records responsive to parts 2 and 3 of the request. Accordingly, the city stated in its access decision that "[t]his is something city staff continues to work towards. This phase of the project will come later in the construction of the building. Negotiations are still very much underway, therefore currently there are no records to support this part of [the] request".

[47] In my view the city's submissions do not explain the steps it took to respond to parts 2 and 3 of the request. Based on the city's evidence, it appears that the city did not conduct an actual search for the requested business plan and partnership/agreement records relating to the named company's potential involvement in the project. Instead, it appears that the city decided for various reasons that a search for these records would be premature having regard to the status of the project. In support of its position, the city submits that records responsive to parts 2 and 3 of the

request are either in draft form or in the custody or control of the library. The city's representations also suggest that once final drafts of the requested records materialize, the contents would likely qualify for exemption under various exemptions under the *Act*.

[48] In my view, the manner the city responded to parts 2 and 3 of the request does not reflect the intention of the legislation. Section 17 requires institutions to search, locate and identify responsive records. If after its search, the city determines that it does not have custody or control of records which respond to parts 2 and 3 of the appellant's request, the city must identify its position and/or discharge its obligations under sections 18(2) and (3).

[49] Sections 18(2) and (3) require the city to forward the request to the library within 15 days of receiving the request if it determined that it did not have custody or control of the records or in the alternative, if it determined that the library has a greater interest in the records.

[50] Having regard to the above, I find that the city's search for records responsive to parts 2 and 3 of the request was not reasonable and order it to conduct a further search for these records.

Summary

[51] The city is ordered to conduct a further search of its entire electronic and paper records for records responsive to parts 2 and 3 of the request. The city is also ordered to:

- send representations on the results of its new search to me;
- issue an access decision to the appellant regarding access to any records located as a result of its further search; and
- if the city takes the position that it does not have custody or control of records which respond to parts 2 and 3 of the appellant's request the city must issue an access decision in accordance with the requirements of the *Act*, considering also sections 18(2) and (3).

C. Are the records responsive to parts 5, 7 and 8 of the request "in the custody" or "under the control" of the institution for the purpose of section 4(1)?

[52] The city takes the position that it does not have custody or control of the records responsive to parts 5, 7 and 8 of the request. Section 4(1) reads, 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 . . .

[53] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[54] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.¹⁶

[55] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.¹⁷ A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[56] The courts and this office have applied a broad and liberal approach to the custody or control question.¹⁸

[57] In its access decision, the city advised the appellant that records responsive to parts 5 and 7 of the request "... can be obtained through the Library Board. The City of Cambridge is a separate entity from the Library Board". With respect to the records requested under part 8 of the request, the city advised the appellant that the named individual's salary was not processed by the city and it does not manage the library's payroll. The city also advised that, as the individual was employed by the library, the appellant should contact the library directly.

[58] During mediation, the appellant advised that she filed a separate access request to the library for records responsive to parts 5 to 8 of her original request to the city, but only received records responsive to part 6 of the request. At the end of mediation, the appellant confirmed that she continues to seek access to records responsive to parts 5, 7 and 8 of her request to the city and takes the position that the city has custody or control of these records.

Representations of the parties

[59] Parts 5, 7 and 8 of the request sought access to:

- Costs of the architectural feasibility study through the library board and the feasibility study (part 5);
- Analysis of the library needs for current projects used to determine current project (part 7); and

¹⁶ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

¹⁷ Order PO-2836.

¹⁸ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.

- How much was [named individual's] salary & benefits before his retirement (part 8).

[60] In support of its position that it does not have custody or control of records responsive to parts 5 and 7, the city submits:

- It is not privy to "any dealings/agreements" pertaining to the proposed restaurant in the new library; and
- Many decisions regarding the internal use of the library are outside the scope of the city's jurisdiction.

[61] With respect to the salary information requested in part 8 of the request, the city submits that the individual was not employed by the city.

[62] The appellant's representations questioned the city's position that it did not have custody or control over the feasibility study, given that the project manager is a city employee.

Decision and analysis

[63] After the exchange of representations, I asked the appellant to send a copy of the library's access decision letter to me. In response, the appellant sent a copy of a letter, dated October 27, 2014 from the library.

[64] I have carefully reviewed the library's access decision, along with the parties representations and am satisfied with the city's explanation that it does not have custody or control of information regarding a named individual's salary and benefits before his retirement (part 8 of the request). In its access decision to the appellant, the library advised that the individual's "...salary did not meet the Public Sector Salary Disclosure (Sunshine List) criteria". The library went on to deny the appellant access to the salary information on the basis that disclosure would constitute an unjustified invasion of personal privacy under section 14(1) taking into consideration the presumption against disclosure at section 14(3)(f).

[65] In my view, there is insufficient evidence to support the appellant's position that the city has custody or control of records which would contain information about this individual's salary and benefits. The individual was not employed by the city and I have not been provided with evidence suggesting that this individual's payroll and human resource records were created or maintained by an employee at the city. Having regard to the above, I find that the city does not have custody or control of this record and uphold its decision.

[66] The remaining two responsive records consist of an architectural feasibility study and needs assessment, which the city submits respond to parts 5 and 7 of the request. I note that the library, in its access decision to the appellant, takes the position that

these records qualify for exemption under the third party information exemption under section 10(1). The library's access decision also states that the information contained in these records was developed in conjunction with the architectural design firm retained to restore the Old Post Office building and construct the new library.

[67] I have carefully reviewed the representations of the parties, along with the description of the records in the library's access decision and am satisfied that for the purpose of the *Act*, the city has custody or control of the architectural feasibility study and needs assessment which responds to parts 5 and 7 of the request. Despite the city's statement that the library manages the day-to-day matters relating to any internal use of the library, the fact remains that the city is in a contractual relationship with the architectural design firm hired to restore the site and construct the library. Accordingly, given the contractual relationship between the city and the design firm, the city would have a right to possess or otherwise control these records.¹⁹ In addition, given the city's involvement in the project, and its efforts to keep the public informed about the project, it is reasonable to expect that the city could obtain a copy of the document upon request if it already is not in its possession.²⁰

[68] As noted above, a finding that an institution has custody or control of a record does not necessarily mean that the party seeking access to the record will be provided access to it. Based on the circumstances of this appeal, I will order the city to issue an access decision to the appellant.

D. Does the discretionary exemption at section 6(1)(b) apply to the agenda items (Record 1) and appraisal report (Record 3)?

[69] The city submits that records 1 and 3 qualify for exemption under section 6(1)(b), which 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.

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

¹⁹ Orders 120 and P-239, See also: *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

²⁰ In *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25, [2011] 2 SCR 306, the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

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 meeting²¹

[71] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;²² and
- “substance” generally means more than just the subject of the meeting.²³

[72] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.²⁴

Parts 1 and 2

[73] 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*.²⁵

[74] In determining whether there was a statutory authority to hold a meeting *in camera* under part two of the test, it must be established that the purpose of the meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.²⁶

[75] The city submits that Records 1 and 3 were considered at a council meeting authorized by statute to be held in the absence of the public. In particular, the city cites section 239(2)(c) of the *Municipal Act*, which reads:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is a proposed or pending acquisition or disposition of land by the municipality or local board.

²¹ Orders M-64, M-102 and MO-1248.

²² Order M-184.

²³ Orders M-703 and MO-1344.

²⁴ Order MO-1344.

²⁵ Order M-102.

²⁶ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

[76] Record 1 consists of agenda items that appear to have been assembled for a September 10, 2012 council meeting. The agenda items consist of a number of reports to council, some of which attach proposals, draft agreements and a chronology of events which appear to have been distributed at earlier council meetings on February 27, 2012 and June 11, 2012 (in addition to the materials distributed at the September 10, 2012 meeting). Record 3 consists of a 65-page appraisal report prepared by a real estate consultant company.

[77] Having regard to the records themselves, along with the meeting minutes published on the city's website, I am satisfied that council held a meeting on September 10, 2012 and it was properly authorized under section 239(2)(c) of the *Municipal Act* to hold the meeting *in camera*.

[78] Accordingly, I find that parts 1 and 2 of the three-part test in section 6(1)(b) has been met.

Part 3

[79] 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

[80] The city submits in its representations that:

[d]isclosure of the document would reveal the actual substance of the discussions conducted by Council... The records address the circumstances surrounding a property, and address specific details of the position taken by the municipality in response to the project. This is the substance of what Council was being asked to decide upon, how the municipality ought to respond to the project. [The city takes the position that] the disclosure of the records would reveal the substance of Council deliberations and the records qualify for exemption under section 6(1)(b). The specifics of the matter were not considered at a meeting open to the public.

[81] The appellant does not dispute that the records were considered and discussed by council. However, the appellant takes the position that the records should be available to the public as the real estate transaction contemplated at the closed meeting is now complete.

²⁷ Orders MO-1344, MO-2389 and MO-2499-I.

[82] Having regard to the records and the representations of the parties, I am satisfied that disclosure of the agenda items (Record 1) would reveal the actual substance of the deliberations of council's in camera meeting held on September 10, 2012. The agenda items were provided to council in order to facilitate their deliberations regarding the purchase of the Old Post Office Building. Included in the agenda are recommendations for the council's consideration and deliberation. Also included are copies of past reports to council, proposals, a draft purchase agreement and a chronology of key events which in my view contains the factual and historical background to the recommendations before council on September 10, 2012. Accordingly, I find that part 3 of the test in section 6(1)(b) has been met for Record 1. The appellant has not claimed and I am satisfied that none of the exceptions at section 6(2) apply in the circumstance of this appeal. As a result, I find that Record 1 is exempt under section 6(1)(b) and uphold the city's decision to withhold this record, subject to my consideration of the city's exercise of discretion.

[83] However, I am not satisfied that part 3 of test in section 6(1)(b) has been met for Record 3. As noted above, Record 3 is a 65-page appraisal report prepared by a real estate consultant company. Having the benefit of reviewing the agenda items along with the appraisal report, I am satisfied that disclosure of the appraisal report would not reveal the substance of the deliberations of council's in camera meeting held on September 10, 2012. As a result of my finding, I find that the exemption at section 6(1)(b) does not apply to this record.

[84] However, I will not order the city to disclose the appraisal report (Record 3) to the appellant at this time. I will consider the city's claim that the mandatory third party information exemption under section 10(1) applies to this record at a later date.

Summary

[85] I find that the agenda items (Record 1) qualifies for exemption under section 6(1)(b) and uphold the city's decision to withhold this record from the appellant, subject to my decision regarding the city's exercise of discretion.

[86] I will now go on to decide whether the city properly exercised its discretion to withhold the agenda items I found met the three-part test under section 6(1)(b).

E. Did the city properly exercise its discretion?

[87] The section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[88] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[89] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁸ This office may not, however, substitute its own discretion for that of the institution.²⁹

[90] The parties' submissions did not specifically address whether the city properly exercised its discretion in applying section 6(1)(b) to the withheld agenda items. However, based on the city's submissions, I am satisfied that the city took into account relevant considerations in applying section 6(1)(b) to the record. In making my decision, I took into account the appellant's submission that information, particular information relating to the expenditure of public funds, should be available to the public.

[91] However, I also took into account that the purpose of section 6(1)(b) is to protect the deliberative processes of governmental agencies even after a decision has been made. The desire of the legislature to protect records of this nature is evidenced in the wording of section 6(1)(b) and by the exemption's exclusion from the list of exemptions which could be found subject to the public interest override in section 16.³⁰

[92] Given the absence of evidence that the city took into account irrelevant considerations or exercised its discretion in bad faith or for an improper purpose, I find that the city's submissions demonstrate that it balanced the wording of the exemption and the interests it seeks to protect with whether disclosure of the agenda items would increase public confidence.

[93] For the reasons above, I find that the city properly exercised its discretion in applying section 6(1)(b) to the agenda items.

ORDER:

1. I uphold the city's decision to withhold the agenda items (Record 1) under section 6(1)(b).

²⁸ Order MO-1573.

²⁹ Section 43(2).

³⁰ Section 16 provides that an exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

2. I order the city to conduct a new search for records responsive to the appellant's request for records responsive to parts 2 and 3 of the request. The city is to send representations on the results of its new search that it carries out to locate additional records and to provide me, by **March 7, 2016**, an affidavit outlining the following:
 - a. the names and positions of the individuals who conducted the searches;
 - b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search; and
 - c. the results of the search.

I order the city to issue an access decision to the appellant regarding access to any additional records located as a result of the search ordered in provision 2, in accordance with the *Act*, treating the date of this order as the date of the request.

3. The city's representations prepared in compliance with order provision 2 may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The city should indicate whether it consents to the sharing of its representations with the appellant.
4. I order the city to issue an access decision to the appellant regarding access to records responsive to parts 2, 3, 4, 5 and 7 of the request and any additional records located as a result of the search ordered in provision 2, in accordance with the *Act*, treating the date of this order as the date of the request.
5. I order the city to provide me with a copy of its decisions rendered to the appellant in accordance with order provision 4.
6. I remain seized of this appeal in order to deal with any other outstanding issues arising from this interim order.

Original Signed by: _____
Jennifer James
Adjudicator

February 4, 2016 _____