Information and Privacy Commissioner,
Ontario, Canada

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

Interim ORDER MO-3487 - I

Appeal MA16-91

The Corporation of the City of Oshawa

August 29, 2017

Summary: The appellant made a request under the *Act* for information relating to the Oshawa Public Utilities Commission's request for meeting(s) in the last quarter of 2015, the city's response and any confirmation between the city and OPUC that a meeting would be held on December 17, 2015. The city conducted its search and granted access to some responsive records while withholding certain records citing sections 6(1)(b) (meeting in the absence of the public), 11(c) (economic interests) and 11(d) (financial interests). In this interim order, the adjudicator finds that sections 6(1)(b), 11(c) and 11(d) do not apply to the withheld records. The adjudicator also orders the city to conduct a further search for records, and remain seized of the appeal to address notification and search issues.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b) (meeting in the absence of the public), 11(b), 11(c), 17.

Orders and Investigation Reports Considered: M-909.

BACKGROUND:

[1] The appellant made a request to the Corporation of the City of Oshawa (the city) under the *Act* for the following:

1. The Oshawa Public Utilities Commission's (OPUC) request to the city for meeting(s) last quarter of 2015

2. the city's response(s) to OPUC

3. confirmations between the city and OPUC that a meeting would be held on Dec 17 2015 9:00 am.

[2] The city granted partial access to the responsive records, withholding portions of some records and one entire record completely pursuant to sections 6(1)(b) (closed meeting), 11(c) and (d) (economic and other interests) and 14 (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the city's decision.

[4] During mediation, the mediator consulted with both the appellant and the city. In addition to objecting to the city's application of sections 6, 11 and 14 of the *Act*, the appellant raised the issue of reasonable search with the mediator, articulating her belief that more correspondence should exist pertaining to the meeting at issue. These concerns were brought to the city's attention, which responded by conducting a secondary search and subsequently providing the appellant with copies of the agenda and minutes pertaining to the closed meeting at issue. The city also attempted to address the appellant's concerns by providing an emailed explanation of the city's search and exemptions claimed.

[5] Subsequent to the receipt of this information, the appellant advised the mediator that she still wanted to pursue the appeal and still had issues as to the reasonableness of the search. The city advised the mediator that they maintain their original position with regards to the records at issue.

[6] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry under the *Act*. I commenced my inquiry by seeking the representations of the parties. Representations were shared in accordance with section 7 of IPC's *Code of Procedure* and *Practice Direction 7*.

[7] In its representations, the city has indicated, and I confirm, that the records do not contain personal information and section 14(1) does not apply and therefore has been removed from the scope of this appeal.

[8] In this order, I find that sections 6(1)(b), 11(c) and 11(d) do not apply. The city is ordered to conduct a further search for responsive records. As it is possible that disclosure of these records may affect the interests of other parties which have not been involved in this appeal, I remain seized of the appeal to address the issue of notification as well as the search issue.

ISSUES:

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

B. Does the discretionary exemption at section 11(c) or 11(d) apply to the records?

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

RECORDS:

[9] Pages 13 to 26 of the record, made up of two pages of emails and eleven pages of PowerPoint presentations. There are two copies of the same presentation contained in the records at issue.

DISCUSSION:

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

[10] As indicated above, the city takes the position that the records are exempt under section 6(1)(b). That section states:

> 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.

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

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting [Orders M-64, M-102, MO-1248]

[12] Each part of this three-part test must be established to determine whether the record qualifies for exemption under this section.

Representations:

[13] The city submits that the three-part test for an exemption under section 6(1)(b)

is met. It states that there was a meeting held by the city and that is was held *in camera*. The city submits that the meeting was closed to the public pursuant to subsection 239(3.1) of the *Municipal Act*, *2001* as the purpose of the meeting was to deal with the education or training of council members. It also refers to its own *By-law 126-75*. Both the *Municipal Act, 2001* and the by-law set out the following two requirements for the city to close its meeting to the public for the purpose of an educational or training session:

1. The meeting is held for the purpose of educating or training the members.

2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

[14] The city submits that section 6(1)(b) also requires that disclosure of the record would reveal the actual substance of the education and training which took place at the *in-camera* meeting, not merely the subject of the education and training session. The city submits that the closed meeting held on December 17, 2015, was specifically for the purpose of educating or training its members of Council, and that disclosure of the record would disclose the actual substance of that education and training session.

[15] The city comments on the Ombudsman's report that investigated the closed meeting and concluded that the city closed same in contravention of the *Municipal Act.* The city submits that given that it was unaware of the Ombudsman's investigation, at the time it made its access decision in this appeal, that the decision being appealed from was reasonable at the time it was made and continues to be so. The city states that it did not revisit its prior access decision in light of later events as there is no requirement within the *Act* to do so.

[16] In her representations, the appellant submits that although the city continues to claim that it was authorized to close the meeting under the authority of the *Municipal Act*, the provincial Ombudsman, after a lengthy investigation, ruled that the closed meeting, "contravened the Municipal Act, 2001 when it went in camera to obtain information about a specific proposed merger between OPUC and [a named company]." The appellant points out that the Ombudsman found that the meeting "did not fall within the 'education and training exception' or any exception, to the *Municipal Act's* open meeting requirement."

[17] The appellant does not agree with the city's submission that the decision being appealed from was reasonable at the time it was made and continues to be reasonable. The appellant submits that what the city believed reasonable at the time is irrelevant to this appeal as the meeting was not an education and training session as clearly found by the Ombudsman.

Analysis:

[18] As noted above, in order to establish that the exemption in section 6(1)(b) applies, the institution must establish that each part of the following three-part test has been met:

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

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

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting [Orders M-64, M-102, MO-1248]

[19] In the circumstances of this appeal, I find that the requirements in section 6(1)(b) have not been met. I make this finding for two reasons.

[20] First, I have considered whether the *Municipal Act*, *2001*, authorizes the holding of the meeting in the absence of the public, and find that it does not. The *Municipal Act, 2001,* authorizes in-camera meetings for various reasons as set out in section 239, however, on my review of the records and the various exceptions in section 239, I find that in this instance, none of them applies. I also note the decision of the Ombudsman's office, referenced by both parties, who specifically reviewed whether the city was authorized to go in-camera and stated:

> This meeting did not fall within the "education and training" exception, or any exception, to the *Municipal Act*'s open meeting requirements.

[21] Secondly, even if I had been satisfied that the city was authorized to meet in-camera under section 239(3.1) of the *Municipal Act*, section 239(9) specifically states:

> **Record may be disclosed**
>
> (9) Clause 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* does not apply to a record of a meeting closed under subsection (3.1).

[22] As a result, the city cannot rely on the exemption in section 6(1)(b) to withhold the records.

B: Does the discretionary exemption at section 11 apply to the records?

[23] Section 11 states, in part:

> A head may refuse to disclose a record that contains,

> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
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> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[24] For sections 11(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[1]

[25] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[2]

[26] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[3]

[27] This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[4]

Representations:

[28] In its representations, the city states that the records contain information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution (section 11(c)) and/or information whose disclosure could reasonably be expected to be injurious to the

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[1] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[2] Order MO-2363.
[3] Orders P-1190 and MO-2233.
[4] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

financial interests of an institution (section 11(d)). The city notes that the record was supplied to the city in confidence for the purpose of training or educating city Councilors.

[29] In her representations, the appellant makes no substantive comment on the application of section 11.

[30] Given the parties' representations and after examining the actual record in dispute, I do not find that section 11 exemption applies. The city has failed to provide sufficient evidence to illustrate that disclosure could reasonably be expected to prejudice its economic interest or competitive position or that of another institution. The city has merely repeated the description of harms in the *Act*. I have reviewed the withheld records which consist of 2 pages of emails (3 emails in total) and the OPUC's presentation (produced 2 times as it was sent to the city twice.) The presentation is a PowerPoint presentation that discusses industry trends, potentials of creating a combined utility, timing and financial summary scenarios. Having taken into consideration the nature of the information in the records, I find that the harms in section 11(c) and/or (d) cannot be inferred from the surrounding circumstances.

[31] As a result, I find that the city cannot rely on the exemption in section 11(1)(c) and 11(1)(d) to withhold the records.

C: Did the institution conduct a reasonable search for records?

[32] As the appellant claims that additional records exist beyond those identified by the city, I must determine whether the city conducted a reasonable search for records as required by section 17.[5] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the city's decision. If I am not satisfied, I may order further searches.

[33] The *Act* does not require the city to prove with absolute certainty that further records do not exist. However, the city must provide sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records.[6] To be responsive, a record must be "reasonably related" to the request.[7]

[34] 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.[8] In Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

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[5] Orders P-85, P-221 and PO-1954-I.
[6] Orders P-624 and PO-2559.
[7] Order PO-2554.
[8] Orders M-909, PO-2469 and PO-2592.

> an institution has met its obligations under the Act by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[35] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[9]

[36] 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.[10]

[37] I adopt the approach taken in the above orders.

Representations:

[38] In its representations, the city described its process for dealing with the appellant's request. It noted that the Records and Information Analyst (the analyst) coordinated the city's response to this access request. The city notes that the analyst works closely with the city clerk and the Manager, Records Information System and liaises with those staff in all of the city's departments who are responsible for departmental record maintenance and searching, each of whom is trained specifically for that role.

[39] It is the city's position that the request was clearly scoped with no need to seek clarification from the appellant. Therefore, city staff conducted a thorough and effective search of its records for the appellant's access requests. The city acknowledged that rarely is a requester in a position to indicate precisely which records the institution has not identified and noted its practice to foster and maintain an open and collaborative dialogue with all requesters, including assisting requesters as much as possible to obtain records available to them under the provisions of the *Act*.

[40] The city refers to the affidavit of its analyst in which she details the search that was conducted. In the affidavit, the analyst confirms that she is the records and information analyst in the City Clerks Services for the city. The analyst affirms that after receiving the access request, she contacted the relevant city branches, namely the City Manager's office and the Mayor's office on the same day the request was received. She requested that these branches provide copies of all records responsive to the request. She notes that a few days after receiving the request, a decision letter was drafted and she provided the appellant copies of responsive records and a list of excluded records.

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[9] Order MO-2185.
[10] Order MO-2246.

The analyst notes that she has been advised by the city's City Manager's Office, Mayor's Office and City Clerk Services Branch that there are no further records responsive to the request.

[41] In her representations, the appellant states that IPC mediator advised that the city informed her that it did not conduct a database search. The appellant states that the city is familiar with and has used database searches in the past, when it is in their interest to have information available.

[42] The appellant states that more records should exist based on her first hand conversation with the OPUC chair immediately following the closed meeting when, she states, he informed her that the meeting was arranged weeks earlier than the material the city released indicated. The appellant refers to a YouTube video of one of the city's Councilors stating that she was voting in favour of going into a closed session as that request came directly from the OPUC. The appellant notes that despite this indication from the city councilor, there is no record of anyone communicating with this Councillor that OPUC requested the meeting be closed. The appellant refers to the records that she did receive which contained emails. She notes that the emails refer to the OPUC presentation which was going to be on a "sensitive topic." The appellant argues that even though OPUC refers to sensitive information, the Clerk's response was that it did not have to worry about confidentiality.

[43] The appellant concludes that it is reasonable to expect that there is more information on the city's database leading up to the actual meeting. The appellant points to the city's representations where it states that there was "very limited dissemination of the information to only City Council and select staff." The appellant queries on the process for selecting which staff would attend the meeting noting that no staff left the meeting once it was closed. The appellant therefore argues that those staff in attendance would have been informed to attend but there is no transparency regarding who at the city or OPUC requested or confirmed the presence of this staff.

Analysis and finding:

[44] As set out above, the *Act* does not require the city to prove with absolute certainty that further records do not exist. However, the city must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[11]

[45] While I take no issue that the search was conducted by an experienced employee knowledgeable in the subject matter of the request who expended a reasonable effort to locate records which are reasonably related to the request, I conclude that the city has not conducted a reasonable search for records responsive to the appellant's request for the following reasons.

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

[46] In the appellant's representation, she provides the following reasons for her belief that further records should exist:

1. The city indicated during mediation that it did not do a database search

2. The OPUC chair informed her that the meeting was arranged weeks earlier than the city information indicated

3. The city councilor on a YouTube video indicating that she was voting to close the meeting as that is what the OPUC wanted

4. There were select city staff at the meeting who would likely have been informed prior to the meeting to attend.

[47] When the institution was asked to provide reply representations, it was sent a copy of the appellant's representations. In its reply representations, the city did not address the points raised by the appellant regarding her belief regarding why further records should exist. While I am not convinced that the appellant has met her burden with regard to items 2, 3 and 4, by raising the issue of a database search, the appellant has raised a valid concern that should be addressed. However, the city did not explain if, in fact, a database search had been completed and if not, why it chose not to conduct such a search. It seems reasonable, given the original request, that a search of the city's database for any information relating to the request would be part of the city's reasonable effort to identify and locate responsive records. Without this type of search being conducted or a reasonable explanation of why a search of the database was not required in this instance, I find that the city has not conducted a reasonable search.

[48] Accordingly, I find that the appellant has raised a reasonable basis to conclude that the city has not conducted a reasonable search for records responsive to the request. As a result, I will order the city to conduct a further search for responsive records and to provide a reasonable amount of detail to this office regarding the results of said search. Specifically, the city should search for records responsive to the request by conducting a search of its electronic database. The city should also have reference to the information provided by the appellant regarding the concerns that it appears that parties may have had notice of the meeting weeks before it is referenced in any responsive records, and the information regarding who was made aware of and invited to the meeting.

ORDER:

1. I find that the records do not qualify for exemption under sections 6(1)(b), 11(b) and 11(c) of the *Act*.

2. The city is ordered to conduct a further search in response to the appellant's request relating to this appeal. I order the city to provide me with an affidavit

sworn by the individual(s) who conducts the search(es), by **October 1, 2017** deposing their search efforts. At a minimum, the affidavit(s) should include information relating to the following:

a. The names and positons 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.

This information should be provided by way of representations with an affidavit which may be shared with the appellant, unless there is an overriding confidentiality concern.

3. If the city locates additional records as a result of its further search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

4. I remain seized of this appeal in order to address any outstanding issues as set out in this interim order, including notification issues.

Original Signed by: August 29, 2017

Alec Fadel
Adjudicator