

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4111-I

Appeal MA19-00010

The Nation Municipality

October 19, 2021

Summary: The municipality attempted to develop a sports facility using a public-private partnership arrangement (the "P3 Project"). Later, the appellant submitted a multi-part access request under the *Act* to the municipality for records relating to the P3 Project.

The appellant appealed the municipality's access decision to the IPC and after mediation, only one portion of the request remained at issue: copies of all agreements or memorandums of understanding entered into between the municipality and a named entity (Company X) related to the development of a sports facility. During mediation, the municipality issued a revised access decision partially disclosing a draft "memorandum of understanding," citing the solicitor-client privilege and third party information exemptions to withhold the information (the Draft MOU). The municipality also stated that the Draft MOU may not be responsive to the request.

The appeal proceeded to adjudication to resolve whether the municipality conducted a reasonable search and whether the Draft MOU should be disclosed in full.

In this interim order, the adjudicator finds that the municipality did not conduct a reasonable search and orders it to carry out additional searches.

Regarding the Draft MOU, the adjudicator finds that it is outside the scope of the request and she upholds the municipality's decision not to disclose the withheld information on that basis. It was therefore unnecessary to consider the municipality's exemption claims.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

OVERVIEW:

[1] In 2016, the Nation Municipality (the municipality) undertook efforts to develop a sports facility using a public-private partnership arrangement (the "P3 Project"). The P3 Project was discussed at (at least) two meetings of the municipality's council (the council).

[2] In 2018, a requester (now the appellant) submitted a multi-part access request under the *Municipal Freedom of Information and Protection of Privacy Act*¹ (the *Act*) to the municipality for records relating to the P3 Project. The only portion of the request that remains at issue in this appeal is part one, which is:

1. Copies of all agreements or memorandums of understanding entered into between [a named company] and [the municipality] related to the development of a sports facility/community centre in [specified location]. (Such as but not limited to MOU referenced in minutes of 27 June 2016 council meeting)

[3] I will refer to the named company as Company X in this Order.

[4] The municipality issued an initial access decision stating that no documents would be disclosed because of the solicitor-client exemption at section 12 of the *Act*.² The appellant appealed the municipality's decision to the Information and Privacy Commissioner (IPC).

[5] During mediation, the municipality issued a revised access decision. Referencing part one of the request, the municipality stated that access could not be granted to a "Memorandum of Understanding" because no responsive records exist.³

[6] In its revised access decision, the municipality also advised that it had not completed a search *for electronic records* due to a recent ransomware attack, but that it would do so when it was able.

[7] After completing the search for electronic records, the municipality issued a supplemental access decision. The supplemental access decision did not change the municipality's decision about part one of the request – that is, it stated that no responsive records exist.

[8] At this stage in the mediation, the appellant stated that a memorandum of understanding or agreement should exist, based on the minutes of meetings held by

¹ R.S.O. 1990, c. M.56.

² This decision pertained to all parts of the access request.

³ The municipality also granted the appellant access to a council resolution and identified two other records that it did not disclose claiming the section 12 exemption for solicitor-client privilege (an executive summary and a different resolution of council). Neither of these records are agreements and the appellant did not pursue access to them in this appeal.

the municipality's council on June 27, 2016 and June 26, 2017. Also at this stage of the mediation, the appellant advised the mediator that he did not wish to appeal further the municipality's decisions regarding the other parts of the request, meaning that only part one remained at issue.

[9] In response, the municipality stated that no agreement or memorandum of understanding was entered into by the municipality and Company X for the development of a sports facility/community centre in the specified location and as such, the municipality did not have records responsive to part one of the request.

[10] The appellant maintained that an agreement or memorandum of understanding must exist, meaning that the sole issue under appeal was whether the municipality conducted a reasonable search for records responsive to the appellant's request.

[11] Just prior to the file being transferred to adjudication, the municipality issued a second supplemental access decision, in which it partially disclosed a draft document titled, "Memorandum of Understanding" (the Draft MOU). The municipality explained that the Draft MOU "may be responsive" to part one of the appellant's request. However, it said that although the Draft MOU related to "the development of a sports facility/community centre...", "Company X is not a party to the Draft MOU nor was the Draft MOU "finalized, signed or 'entered into'" by the municipality with any party.

[12] The municipality withheld portions of the Draft MOU on the basis of the discretionary section 12 exemption for solicitor-client privilege and the mandatory section 10(1) exemption for third party information.

[13] The appellant confirmed his interest in proceeding to adjudication on the issue of reasonable search as well as to pursue access to the Draft MOU in its entirety.

[14] The appeal was transferred to the adjudication stage. A written inquiry occurred in which the municipality and the appellant were invited to make representations. The non-confidential portions of the municipality's representations were shared with the appellant in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*, and likewise, the appellant's representations were shared with the municipality.

[15] I attempted but was not able to notify the counterparty named in the Draft MOU (the affected party). I first attempted to notify the affected party through its last known legal counsel, who had no instructions to respond. I then attempted to deliver notice to the affected party at its last known address, which was returned.

[16] In the inquiry, the municipality refused to provide the IPC with a complete copy of the Draft MOU, claiming that the withheld information is protected by solicitor-client privilege. Instead, it has provided confidential affidavit evidence describing the withheld information.

[17] During the inquiry, the municipality also asserted that the Draft MOU is outside

the scope of the request made by the appellant. It also made additional alternative exemption claims to withhold information within it: the exemption for closed meetings in section 6(1)(b) and the exemption for economic interests at section 11.

[18] The appellant was invited to make representations about these additional exemption claims, including whether he had suffered any prejudice by the municipality's delay in raising the new discretionary claims.

[19] In this interim order, I address whether the Draft MOU is within the scope of the request and whether the municipality has conducted a reasonable search for records responsive to part one of the request. As explained below, I find that the Draft MOU is outside of the scope of the request and it is therefore not necessary for me to consider the municipality's exemption claims. However, I find that the municipality did not conduct a reasonable search and I order it to carry out further searches.

RECORD:

[20] The record at issue in this appeal is the nine-page Draft MOU, portions of which have been disclosed to the appellant.

[21] The appellant also asserts that additional records exist that are responsive to part one of the request.

ISSUES:

- A. Is the Draft MOU responsive to the request?
- B. Did the municipality conduct a reasonable search for records responsive to part one of the request?

DISCUSSION:

Further background

[22] Before turning to the issues in the appeal, it will assist if I describe a chronology of events to put the request in context. The following chronology is based on parties' non-confidential representations.

[23] In 2016, the municipality issued a request for proposal (RFP) for a public private partnership for the development of a sports facility. In its representations, the municipality refers generally to the public private partnership as a "proposed public/private partnership agreement," "the P3 Agreement" or, "the project." As indicated above, in this order I will refer to this project, in general, as the P3 Project.

[24] According to minutes from the municipality's council, one RFP submission was received from Company X for the design, construction, financing and operation of a domed or permanent sports structure. Staff for the municipality recommended that the council approve the commencement of discussions for the P3 Project with Company X.⁴

[25] The P3 Project was discussed at the June 27, 2016 meeting of council, which is the meeting referred to in the request. These minutes state,

9. Unfinished Business from Previous Meetings

Approval of P3 Dome executive summary

Whereas The Nation Municipality is interested in entering into a Public Private Partnership (P3) with [Company X] for the purpose of building a sports dome;

Therefore **be it resolved** that the Municipality approve the terms of the executive summary and authorize the entry into a Memorandum of Understanding incorporating the substantive provisions contained in the executive summary and;

Be it further resolved that the Municipality authorize the entry into the project agreement based on the terms outlined in the executive summary.

[26] According to the municipality, the Draft MOU "came into existence" near the end of March 2017. It was provided to the municipality by the affected party, an entity *other than* Company X. The Draft MOU deals with a sports facility. However, according to the municipality, the Draft MOU was never finalized or entered into. The municipality maintains that the identity of the entity that provided it with the Draft MOU is confidential and that various exemptions under the *Act* apply to that information. As indicated above, this entity is referred to in this order as the "affected party."

[27] The sports facility is referenced in the June 26, 2017 minutes of council (which the appellant has also referred to throughout his appeal at the IPC in support of his request); these minutes state:

9.3 Sports Dome in [...]

...

Be it resolved that Council approves to sign a contract for the construction of a sports dome and community centre that meets the conditions stipulated in the confidential report AD-04-2017.

⁴ According to a May 9, 2016 Administration Report of the Municipality (Number AD-02-2016), included with the appellant's representations.

[28] In its non-confidential representations, the municipality refers to a "P3 agreement" that is no longer in effect and explains that the Draft MOU relates to the "settlement of the P3 Agreement." In its confidential representations, the municipality provided me with some additional information about other underlying circumstances.

[29] In July 2019, the municipality announced a new plan for a sports facility that involves different entities and is unrelated to the P3 Project that was explored previously.

Issue A: Is the Draft MOU responsive to the request?

[30] The municipality takes the position that the Draft MOU is outside of the scope of the request or, in other words, not responsive to the request. The appellant appears to agree, stating that the Draft MOU is not one of the records that he is seeking. The appellant nevertheless made representations about why the withheld information in the Draft MOU should be disclosed.

[31] Section 17 of the *Act* requires that access requests be in writing and that they contain sufficient detail to enable an experienced employee to identify the record. When responding to an access request, institutions should adopt a liberal interpretation of the request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁵

[32] Below, I find that the Draft MOU is not responsive to part one of the appellant's access request. On that basis, I uphold the municipality's decision to withhold the information at issue.

Representations

[33] The municipality submits that the Draft MOU is outside of the scope of the request because it is not a memorandum of understanding that was "entered into between [Company X] and" the municipality. It submits that it was never entered into at all and, as noted already, that Company X is not a party to the Draft MOU. The municipality provided additional confidential representations explaining the circumstances about how the Draft MOU came into the possession of the municipality.

[34] The appellant submits that the Draft MOU is a "diversion" and it is not among the documents that he is seeking. Rather, he seeks the agreements or memorandum of understanding that were referred to in the council minutes providing authorization to enter into such agreements *or*, as he elaborates on in more detail in his representations, that gave rise to a settlement between the municipality and Company X (or any entity) in relation to the development of a sports facility.

[35] Although the appellant has taken this position, he also submitted some

⁵ Orders P-134 and P-880.

arguments about why the exemptions claimed by the municipality do not apply to the withheld information. I note that many of the appellant's representations also argue that the exemptions claimed should not apply to *the yet unidentified records*, and which he seeks by pursuing his appeal for reasonable search (to be discussed at Issue B).

Finding

[36] I find that the Draft MOU is not responsive to the request.

[37] The access request, made in November 2018, is (emphasis added):

copies of all agreements or Memorandums of Understanding entered into between [Company X] and [the municipality] related to the development of a sports facility/community centre in [a specific location]. (Such as but not limited to MOU referenced in minutes of 27 June 2016 council meeting)

[38] The wording of the request is clear. When I consider the wording in conjunction with the appellant's arguments made in this appeal, it becomes clearer that he seeks access only to final agreements entered into by the municipality in relation to the P3 Project, not drafts or other related documents.

[39] The municipality's evidence, which I accept, is that the Draft MOU was never finalized or entered into. It is a draft document.

[40] For reasons that will become apparent at Issue B, below, I specifically reject the municipality's argument that the Draft MOU is not responsive *because* the counterparty is an entity other than Company X. The clear objective of the appellant's request is to access information about the financial and other obligations between the municipality and other parties involved in the P3 Project, which could include Company X or other parties engaged in it.

[41] I uphold the municipality's decision to withhold the information at issue in the Draft MOU on the basis that the Draft MOU is not responsive to the request. It is therefore not necessary for me to consider the municipality's exemption claims to withhold the information at issue in the Draft MOU.

[42] The only remaining issue is whether the municipality conducted a reasonable search for records.

Issue B: Did the municipality conduct a reasonable search for records responsive to part one of the request?

[43] The appellant asserts that there are responsive records that have not been identified in the municipality's searches to date. 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 17.⁶

[44] Although the *Act* does not require the institution to prove with absolute certainty that further records do not exist, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁷

[45] As discussed at Issue A, when responding to an access request, institutions should adopt a liberal interpretation of the request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁸ To be responsive, a record must be "reasonably related" to the request.⁹

[46] 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.¹⁰ 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.¹¹

The request

[47] Although only part one of the request is at issue in this appeal, the entire request provides necessary context. I therefore repeat the request in its entirety (emphasis added):

1. Copies of all agreements or Memorandums of Understanding entered into between [Company X] and [the municipality] related to the development of a sports facility/community centre in [a specific location]. (Such as but not limited to MOU referenced in minutes of 27 June 2016 council meeting)
2. Copies of any documentation pertaining to litigation or settlements related to the development of a sports facility/community centre in [a specific location] by [Company X]
3. Any written information, emails or otherwise, concerning interested bidders in the RFP posted in April 2016 for a sports facility/community centre. Were there more than just [Company X] interested? Did others request an extension to the submission deadline of May 3, 2016?

⁶ Orders P-85, P-221 and PO-1954-I.

⁷ Orders P-624 and PO-2559.

⁸ Orders P-134 and P-880.

⁹ Order PO-2554.

¹⁰ Orders M-909, PO-2469 and PO-2592.

¹¹ Order MO-2246.

Representations

The municipality

[48] In support of its search, the municipality provided affidavit evidence from the CAO/ Clerk (the clerk). After receiving the request, the clerk searched her own records and had discussions with the municipality's legal counsel and the mayor. The clerk attests that she had carriage and control of records involved in what she refers to as "the transaction," which I understand to mean the P3 Project. The clerk attests that she concluded that "no responsive record or agreement had been entered into that could be found."

[49] The clerk attests that in its supplemental decision, the municipality advised the appellant that the municipality had been the victim of a ransomware attack and that it planned to carry out additional searches when its computer systems were restored and that when the municipality's "compliance management tool" was restored in September 2019, the municipality conducted additional searches, which yielded only the Draft MOU.

[50] The clerk also took additional steps to search for records that involved the municipality's legal counsel, which did not yield "a signed memorandum of understanding." Lastly, the clerk reviewed a transaction binder, which did not yield any responsive records, including a paper copy of the Draft MOU.

The appellant

[51] The appellant argues that common sense dictates that an agreement or memorandum of understanding must exist. He is aware of the possibility of a settlement, as is clear from part two of his request, and seeks information about the liabilities between the municipality and others in relation to the discontinued P3 Project. The appellant refers to the minutes of the June 2016 and 2017 council meetings that reference that agreements or memorandums of understanding were entered into.

[52] In further support, the appellant points out that in its non-confidential representations in this inquiry, the municipality made multiple references to the "public/private partnership agreement," which suggests that there is an agreement that has not been identified in the municipality's searches to date.

[53] He also notes that many of the municipality's arguments made to support its decision to withhold information in the Draft MOU refer to a "settlement" and the risk that its terms could become known. He states,

[c]onsidering the record(s) sought are the MOU and Agreement which must have been breached in order to create liability, the municipality could disclose the records but still withhold the terms of the settlement of solicitor-client privilege. Such an arrangement would not allow the public

to gain access to the terms of settlement, yet would satisfy the desire to view precisely what breach of contract led to the need for litigation.

The municipality's reply

[54] The municipality made further confidential replies.

Analysis and finding

[55] For the reasons that follow, I find that the municipality has not conducted a reasonable search.

[56] First, the municipality appears to have restricted its search only to documents labelled or titled "memorandum of understanding." I reach this conclusion in consideration of the confidential evidence provided by the clerk and the precise wording used to describe the search undertaken. In my view, this is an overly narrow and inappropriate way to interpret the request. Part one of the request, when viewed in its context, seeks access to *any* agreement related to the P3 Project. Although the request refers to minutes of a council meeting in which a "memorandum of understanding" was discussed, it is clear that the appellant included this information not to narrow the scope of the request but rather to provide explanatory information and hypotheses about when and how such agreements were entered into.

[57] Second, as discussed at Issue A, I disagree with the municipality that records are only reasonably related to the request if they are agreements with Company X. The plain and obvious objective of the appellant's request is to access information about the financial and other obligations between the municipality and any other parties involved in the P3 Project, which could include Company X or other parties engaged in it.

[58] Third, I am compelled by the appellant's argument that because the P3 Project appears to have come to an end and the municipality has moved in a different direction, it is reasonable to conclude that there were agreement(s) that gave rise to obligations between the municipality and other parties involved in the P3 Project that may have needed to be resolved.

[59] Fourth, there is the disclosed information contained within the Draft MOU. Although it is not responsive to the request before me, it includes information about the P3 Project. The disclosed portions of the MOU refer to several agreements that may be reasonably related to the request. For instance, there is a section titled, "Project Agreements," which states, "The Project is governed by a number of agreements, including...." Later, there is also reference to an umbrella Project Agreement. In my view, there is a reasonable basis for me to conclude that these agreements may be reasonably related to the request and should therefore be included within the scope of the search.

[60] Lastly, there is other confidential information before me that has led me to

conclude that there is *at least* a reasonable basis to conclude that there are other agreements that are responsive to the request.¹² I have decided not to elaborate further on this information in this order as it is the municipality's view that it is confidential.

[61] In summary, the municipality has not conducted a reasonable search and I will order it to conduct further searches to identify final agreements, other than settlement agreements (if any), involving the municipality, Company X or other entities *and* the P3 Project.

ORDER:

1. I find that the MOU is not responsive to the request and I therefore uphold the municipality's decision not to disclose the withheld information.
2. I order the municipality to conduct a further search in response to the appellant's request, including for final agreements involving the P3 Project, other than settlement agreements. P3 Project refers to any of the "proposed public/private partnership agreement," "the P3 Agreement," "the transaction," or, "the project" as referred to in the municipality's representations. This could include agreements between the municipality and Company X or other entities (including the affected party) and are not restricted to documents titled, "memorandum of understanding."
3. If the municipality locates additional responsive records because of its further search(es), I order the municipality to issue an access decision to the appellant in accordance with the *Act*, treating the date of this order as the date of the request.
4. I order the municipality to provide me with a copy of its decision rendered to the appellant in accordance with order provisions 2 and 3.
5. I order the municipality to provide me and the appellant with affidavit evidence describing its search efforts to respond to order provision 1 by **November 23, 2021**. The affidavit should include:
 - 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;
 - c. the results of the search; and,

¹² That is, information contained in or appended to the municipality's confidential affidavit evidence.

- d. details of whether the record could have been destroyed, including information about record maintenance policies and practices such as retention schedules.

Original Signed by: _____

Valerie Jepson
Adjudicator

October 19, 2021 _____