Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-4365-I

Appeal MA21-00145

Town of Iroquois Falls

April 18, 2023

Summary: The Town of Iroquois Falls (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a certain property. Although the town processed the request, when the requester challenged the reasonableness of the town's search, under section 17 of the *Act* on appeal, the town claimed that the request is frivolous or vexatious under section 4(1)(b) of the *Act*. The town also maintained its decision to withhold the records it identified as responsive to the request, under the discretionary exemption at section 6(1)(b) (closed meetings) of the *Act*.

In this order, the adjudicator allows the appeal, in part. She finds that the town has not established that the request is frivolous or vexatious under section 4(1)(b) of the *Act*. She also does not uphold the reasonableness of the town's search efforts, and orders the town to conduct a further search. However, the adjudicator upholds the town's decision to withhold the records withheld under section 6(1)(b), and dismisses that aspect of the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1)(b), 6(1)(b), 6(2)(b), and 17; R.R.O. 1990, Reg. 823, sections 5.1(a) and 5.1(b); *Municipal Act*, 2001, S.O. 2001, c. 25, as amended, section 239(2)(c).

Orders Considered: Orders MO-1488, MO-1924, MO-2470, MO-3154, PO-4158-I

OVERVIEW:

[1] The town of Iroquois Falls (the town) received a request under the *Municipal*

Freedom of Information and Protection of Privacy Act (the *Act*) for access to the following:

> … all reports, communications, offers (monetary or otherwise) costs, regarding the pending acquisition of a home/property, located at [a specified address]; to include, all meeting minutes, including not limited to Council, Board, Solicitor, Owner of [the specified property] and all relevant communications relating to the purchase of the above-mentioned property.

[2] In response to the request, the town located responsive records and denied access to them under the discretionary exemption at section 6(1)(b) (closed meetings) of the *Act*.

[3] The requester, now the appellant, appealed the town's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC appointed a mediator to explore resolution. During mediation, the town described the records it located, and the appellant indicated which ones he was interested in. Two issues were also added to the scope of the appeal: whether the request is frivolous and vexatious (under section 4(1)(b) of the *Act*), and whether the town conducted a reasonable search (under section 17 of the *Act*). The appellant identified specific records that ought to have been included in records responsive to the request, but the town stated that all relevant records were identified and that it does not wish to conduct any further searches.

[5] No further mediation was possible, so the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] The adjudicator initially assigned to this appeal began a written inquiry under the *Act* by inviting the town, and then the appellant, to submit representations in response to a Notice of Inquiry, which summarized the facts and issues on appeal. The parties provided written representations in response.[1] The adjudicator shared the non-confidential portions of the town's representations with the appellant.[2]

[7] The appeal was transferred to me to continue adjudication. On my review of the file, I determined that I did not need to seek further representations from the parties, and closed the inquiry.

[8] For the reasons that follow, I allow the appeal, in part. I do not uphold the

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[1] The town unilaterally added the issue of the discretionary exemption at section 12(1) to the appeal, but due to my finding regarding section 6(1)(b), it is not necessary to consider the late-raising of this discretionary exemption, or whether the exemption applies.

[2] Portions of the town's representations were withheld for confidentiality reasons under *Practice Direction 7* (which relates to the sharing of representations) of the IPC's *Code of Procedure*.

town's determination that the request is frivolous and vexatious, and I do not uphold the reasonableness of the town's search. I order the town to conduct a further search and issue an access decision, whether it locates additional records or not. I uphold the town's decision that the records at issue are exempt under section 6(1)(b) of the *Act*, and dismiss that aspect of the appeal.

RECORDS:

[9] The three records withheld under section 6(1)(b) of the *Act* are:

- record 4.2 – Closed session meeting, [date #1] (Agenda and Legal Opinion);
- record 4.4 – Closed session meeting, [date #2] (Issue Report); and
- record 4.5 – Closed session meeting minutes, [date #2] (only item 4, pertaining to the address specified in the request)

ISSUES:

A. Is the access request frivolous or vexatious?

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

C. Does the discretionary exemption at section 6(1)(b) relating to closed meetings apply to the records?

DISCUSSION:

Issue A: Is the access request frivolous or vexatious?

[10] An institution that concludes that an access request is frivolous or vexatious has the burden of proof to justify its decision.[3] For the following reasons, I find that the town has not met that burden.

[11] Section 4(1)(b) of the *Act* provides institutions with a straightforward way of dealing with frivolous or vexatious requests. However, institutions should not exercise their discretion under section 4(1)(b) lightly, as this can have serious implications for access rights under the *Act*.[4]

[12] Section 4(1)(b) says: "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, the head is of the

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[3] Order M-850.
[4] Order M-850.

opinion on reasonable grounds that the request for access is frivolous or vexatious." Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the phrase "frivolous or vexatious."[5] Reading these sections together, under the *Act*, there are four grounds for claiming that a request is frivolous or vexatious:

- the request is part of a pattern of conduct that amounts to an abuse of the right of access,
- the request is part of a part of a pattern of conduct that would interfere with the operations of the institution,
- the request is made in bad faith, and/or
- the request is made for a purpose other than to obtain access.

[13] The town submits that that the request is part of a pattern of conduct that interferes with the operations of the town, and that it was made for a purpose other than to obtain access. However, in reviewing its representations, it also briefly submits that the request is part of a pattern of conduct that amounts to an abuse of the right of access. Furthermore, in the affidavit of its Chief Administrative Officer (CAO), the town adds the claim of bad faith (albeit in passing).

The parties' positions

[14] The town asserts that it "has reason to believe" that the appellant is submitting requests under the *Act* "in order to occupy the [t]own's already limited resources, as opposed to genuinely trying to gain access to information." The CAO's affidavit states:

> Furthermore, based on my communications with the Appellant and knowledge of the matters at issue in this appeal, I believe that the FOI request was made for a purpose other than to obtain access under MFIPPA. Rather, it is my opinion that the Appellant is attempting to hinder the operations of the Town by bombarding it with overly broad FOI requests which require the Town to focus its already limited resources to the response. It is my understanding the Appellant has made the Request in bad faith as a way to frustrate Town employees and interfere with the Town's operations.

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[5] Section 5.1 of Regulation 823 says:

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
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> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[15] Furthermore, the town states that the appellant has made "numerous requests" for information from the town, from 2018 to date, through about 40 emails. The town acknowledges that not all of these were requests through the *Act*, but states that the requests are "all for information that require the town to extend numerous resources in order to properly respond."

[16] The town also submits that the request is unreasonably broad, as it seeks "*all* reports, communications, offers" and "*all* relevant communications" regarding the property in question. Citing Order MO-3154, the town says that the IPC has found that unnecessarily broad requests for all records can support a conclusion that the request forms a pattern of conduct amounting to an abuse of the right of access or would interfere with the operations of the institution. The town submits that "the requests" here form such a pattern of conduct.

[17] In addition, the town says it already identified three responsive records, and "[d]espite" this, the appellant "insists on additional records." The town submits that its CAO's affidavit shows that the town has spent "extensive time and resources in responding to this request," arguing that "it would constitute an unreasonable interference in [the town's] operations to continue to do so where it is clear the requests are made to obstruct or hinder the [t]own's activities."

[18] Regarding interference with the town's operations, the town argues that its circumstances as a relatively small municipality (with a population of about 4,500 people) should be considered, in line with the IPC's recognition that it would take less to interfere with the operations of a small municipality compared to a large municipality. The town states that it has only one employee available to respond to requests under the *Act*, and asserts that "the overly broad and numerous requests made by the appellant have detrimentally impacted the town's ability to conduct its operations" have left the town "inundated" and "greatly exhausted its already limited resources." The town submits that a town of its size does not have the ability to conduct "the repeated, and unnecessary, searches that the appellant has indicated he requires." The town states that it has made every attempt to respond to the request at the expense of harming its own operations.

[19] The town also says that it should be noted that the request refers to matters that do not involve the appellant.

[20] Finally, I note the town's raising of access to the Municipal Roll Book. Although the appellant stated at IPC mediation that he does not seek access to the Municipal Roll Book (the assessment roll) through this request, the town characterizes the appellant's attempt to know the owner of the property named in the request through the assessment roll as an attempt to expand the scope of his request.

[21] The appellant submits that the town's frivolous and vexatious claim has not been met. He submits that the town's approach is "heavy handed" in characterizing his

request as frivolous and vexatious, and alleging a "personal vendetta." He states that including the assessment roll issue is a diversion from the issues on appeal. He states that his interests, concerns, and questions are "driven by conscience, rather than any personal vendetta."

[22] The town and the appellant made other submissions, which I have considered but will not set out here, due to confidentiality concerns.

Analysis/findings

[23] The town had the burden of proving that the request is frivolous or vexatious, but for the following reasons, I find that it did not meet that burden.

Pattern of conduct that amounts to an abuse of the right of access

[24] The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *Number of requests*: Is the number excessive by reasonable standards?
- *Nature and scope of the requests*: Are the requests overly broad and varied in scope or unusually detailed? Are they identical or similar to previous requests?
- *Purpose of the requests*: Are the requests intended to accomplish some objective other than to gain access to the requested information? For example, are they made for "nuisance" value, or is the requester's aim to harass the institution or to break or burden the system?
- *Timing of the requests*: Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?[6]

[25] Other factors specific to the case can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.[7]

[26] The IPC has found that the focus should be on the *cumulative* nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from their behaviour because a requester seldom admits to a purpose other than access.[8]

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[6] Orders M-618, M-850 and MO-1782.
[7] Order MO-1782.
[8] Order MO-1782. Note that the IPC may also consider an institution's conduct when reviewing a "frivolous or vexatious" finding. However, an institution's misconduct does not necessarily mean that it was wrong in concluding that the request was "frivolous or vexatious" (see Order MO-1782).

Number of requests

[27] There is only one request under the *Act* that is before me. I find that this is not an excessive number by a reasonable standard.

[28] Although the town would like me to consider other "requests," it did not specify how many were made under the *Act* (or anything substantial about their timing or wording), how many were made outside of the *Act*, and why any requests made outside of the *Act* should be considered here. This is important because the IPC has consistently held that the application of the frivolous and vexatious provisions is only relevant to the use of the "processes" of the *Act*.[9] The town's evidence about the number, purpose, timing, and nature and scope of the appellant's other "requests" since 2018 is insufficiently detailed for me to conclude that the single request before me is part of a pattern of conduct amounts to an abuse of the right of access.

[29] I observe that the town has not claimed that any of the previous requests were about the subject matter of this appeal, which also weighs against finding that the request before me is part of a pattern of conduct that amounts to an abuse of the right of access.

Nature and scope of the request

[30] Furthermore, I disagree that the appellant's request is overly broad.

[31] The town relies on Order MO-3154, but that order is not helpful to the town here. Order MO-3154 dealt with a requester's latest three requests, seeking a variety of records relating to various properties, and spanning timeframes between nine and fourteen years.[10] Therefore, Order MO-3154 sets out a request that cannot, in my view, reasonably be compared in breadth and level of detail to the one before me.

[32] Furthermore, while the use of the word "all" was found to contribute to the overly broad nature of the requests in Order MO-3154, I find that the use of the word

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[9] See, for example Order MO-1488.

[10] For ease of reference, the requests that instigated the appeals resulting in Order MO-3145 were as follows:

> 1. Copy of all yearly submissions to Information and Privacy Commission/Ontario from 1999 – [October 21, 2013]. All records related to Exeter Community Development Fund [the Fund] from its inception to [October 21, 2013] (Fund developed with regards to sale of Exeter P.U.C.)
> 2. All records related to Concession 2, Part lot 18, Stephen Ward, Municipality of South Huron, from the year 2000 to [November 26, 2013].
> 3. All records regarding zoning changes, plan amendments, permits, property standards and MPAC for the following properties [-] all Lot 5 Lake road concession east in the former township of Stephen as well as 110 Main St. North in the Exeter Ward for the period of 2005 to [February 10, 2014].

The appellant clarified the third request in two follow-up emails, but the adjudicator found that, even after this, the request remained very broad.

"all" here does not do so. I observe that requesters often word their requests with the word "all" in requests that are the subject of IPC orders (publicly available online), though institutions have not claimed that the requests were frivolous or vexatious. That is understandable because a requester will rarely be in a position to identify which records an institution would have about the subject matter of the request.

Purpose of the request

[33] I also find that it is irrelevant that the request relates to matters that do not involve the appellant. A requester does not have to establish a reason for seeking information through the *Act*,[11] and the *Act* does not limit a requester's right of access to matters that only involve the requester themselves.

[34] The parties' representations show an interest on the part of the appellant in certain town matters, which I find is a legitimate reason to seek records under the *Act*. Such a purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the town (or any other party).[12] Having reviewed the town's representations and affidavit evidence about the purpose of the request, I find that the town's evidence is vague and speculative, and amounts to a series of bald assertions about the appellant's purpose in making the request, insufficiently supported by other evidence.

[35] In addition, based on my review of the parties' representations and the town's affidavit, I can characterize the relationship between the town and the appellant as strained. However, I find that this is insufficient in the circumstances to establish that the purpose of the request is to accomplish a purpose other than to obtain access.

Timing of the request

[36] The town did not explain why the timing of the request should be a factor in concluding that the request is part of a pattern of conduct that would amount to an abuse of the right of process, so I find that it is not.

[37] For these reasons, the town failed to establish that the request is part of a pattern of conduct that amounts to an abuse of the right of access.

Bad faith

[38] The town CAO made a passing comment in his affidavit about bad faith. As this allegation was not substantiated in any way by the town, I will not address this ground of claiming that the request was frivolous or vexatious.

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[11] See, for example, Order PO-4158-I.
[12] See, for example, Orders MO-1269, P-1534 and MO-1488.

Purpose other than to obtain access

[39] If a request is made for a purpose other than to obtain access, the institution does not need to demonstrate a "pattern of conduct."[13]

[40] A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective.[14] The requester would need to have an improper objective above and beyond an intention to use the information in some legitimate manner.[15] In Order MO-1924, the IPC recognized that motives such as seeking information to assist a requester in a dispute with the institution, or publicizing what a requester considers to be an institution's inappropriate or problematic decisions/processes are examples of clearly permissible motives. That is because access to information legislation *exists* to ensure government accountability and to facilitate democracy.[16] In fact, to find that such reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*,[17] including the principle that "information should be available to the public."[18]

[41] As past IPC orders have held, it is difficult to assess whether a requester has an improper motive for an access request because requesters will seldom admit to a purpose beyond a genuine desire to obtain the information. Determining whether such a collateral purpose exists requires drawing inferences from the nature of the request and the surrounding circumstances.[19]

[42] Applying these principles, based on the evidence before me, I am unable to conclude that the request was made for a purpose other than to obtain access.

[43] The apparently strained relations between the town and the appellant and/or their disagreement about the substantive subject matter of the request, do not, together or alone, sufficiently establish that the request was made for a purpose other than to obtain access.

[44] From the representations and affidavit evidence before me, I am unable to conclude that the appellant has an improper objective above and beyond seeking information about the property specified in his request. As I found above, the town's evidence about the purpose of the request is vague and speculative, and amounts to a series of bald assertions about the appellant's purpose in making the request, insufficiently supported by other evidence. I also find that the town's allegation of a

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[13] Order M-850.
[14] Order M-850.
[15] Order MO-1924.
[16] Order MO-1924.
[17] See section 1 of the *Act*.
[18] Order MO-1924.
[19] Order MO-1782.

"personal vendetta" is insufficiently supported by the evidence before me. Likewise, the town's view that the appellant really seeks to "overwhelm" the town is not reasonable, given my finding (above), that the request is not overly broad.

[45] Most of the appellant's representations express his views about the substantive subject of his request (a certain property), and these views are not relevant to matters that fall within the scope of the *Act*. However, having read these views, I am satisfied that the appellant's motivation is to seek additional information relating to the property in question. I find that this is a legitimate purpose for making the request.

[46] For these reasons, I find that the town has asserted, but not established, that the request was made for a purpose other than to obtain access.

Pattern of conduct that would interfere with the operations of the institution

[47] At the outset, I highlight that the town has already issued the appellant an access decision in response to his request. In Order MO-2470, the IPC found that the institution's late raising of the frivolous or vexatious claim (at the IPC) is a factor that weighs against finding that the requests were frivolous or vexatious. I agree with that reasoning, and I adopt it here. I find that the town's position about interference with its operations is largely undermined by the fact that it already issued the appellant an access decision, after having conducted a search and identifying some responsive records.[20] In my view, this is a significant weakness in the town's position, which the town did not adequately address.

[48] Furthermore, interference is a relative concept that must be judged on the circumstances faced by the institution in question. While the IPC has recognized that it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry,[21] this does not mean that stating the town's population (or briefly describing limited resources to process access requests) establishes inference for the purpose of section 4(1)(b).

[49] In addition, there are insufficient details about the alleged interference with town's operations. A pattern of conduct that would "interfere with the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities.[22] Here, the town did not specify with sufficient detail how processing this request has interfered with its operations, or would do so in the future – or what those operations even are. The town asserts interference with its operations, but its assertion does not establish its claim.

[50] It is the town's legal obligation to process requests under the *Act*, even it if

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[20] Whether or not its search efforts were reasonable in the circumstances is a separate question (discussed under Issue B).
[21] Order M-850.
[22] Order M-850.

serves a small population and has limited resources. Despite the town's size and stated limited resources, it had tools available in the *Act*, such as fee provisions and time extensions. I find that these tools weigh against concluding that an activity would interfere with the institution's operations,[23] especially in the absence of evidence that any of these tools were used.

[51] Therefore, taking the above factors into consideration, I find that the evidence before me does not establish the town's claim that the request is part of a pattern of conduct that would interfere with its operations.

[52] In conclusion, the town has not established that the request is frivolous or vexatious under any of the four grounds for doing so. Accordingly, the town must continue to fulfil its legal obligations under the *Act*, as it pertains to responding to the request that is the subject of this appeal.

Issue B: Did the institution conduct a reasonable search for records?

[53] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[24] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records. That is the case here.

[54] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[25]

[55] Although the *Act* does not require the institution to prove with certainty that further records do not exist, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[26] that is, records that are "reasonably related" to the request.[27]

[56] In my view, the town's evidence in this appeal can be described as vague overall, and lacking in some important details, especially given the nature of the request.

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[23] Order PO-2151, citing Orders M-906, M-1071 and MO-1427. Note that where an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on limited resources as a basis for claiming interference (Order MO-1488). Also note that, while government organizations are not obligated to retain more staff than is required to meet its operational requirements, this is qualified by the fact that an institution must allocate sufficient resources to meet its freedom of information obligations (Order MO-1488).
[24] Orders P-85, P-221 and PO-1954-I.
[25] Orders M-909, PO-2469 and PO-2592.
[26] Orders P-624 and PO-2559.
[27] Order PO-2554.

[57] To begin, the town's CAO says that he took over the processing of the request from his predecessor in the position. His predecessor had conducted the initial search in response to the request, which yielded the three records that are at issue in this appeal (under Issue C). The town refers to "various searches and inquiries" that yielded these three records, but I am unable to conclude from this whether these search efforts were reasonable in the circumstances. The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[28]

[58] Furthermore, the town repeatedly says that it has done many searches, but fails to provide the necessary details to establish that it has conducted a reasonable search in the circumstances.

[59] In addition, the nature of the request is also important here in relation to the location(s) searched, if any. The request is about the purpose of a property that the town acknowledges having owned. In my view, this means that it would be reasonable to expect responsive records related to this property within the town's record holdings, such as those identified by the appellant. At IPC mediation, the appellant identified specific five records (or categories of records) that he believes ought to have been included as responsive records:

- minutes of the [specified date] council meeting;
- minutes and documents from a [another specified date] closed meeting session with an agenda item called "Proposed pending disposition of the land regarding [specified address of the property]";
- a Memorandum of Understanding from [specified year] indicating that the town intends to purchase the property for [a specified purpose];
- an Agreement between the town and a [professional] indicating that the town intends to purchase the property for the [specified purpose]; and
- letters the appellant has sent to the town about the specified property.

[60] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[29] Since the request relates to the purchase of a certain property that the town's council had closed meetings about (see Issue C), I find that the appellant has provided a reasonable basis on which to believe that the town's search in response to his request should included more records than the three records related to two closed meetings that the town located. In line with these reasonable expectations, I also do not accept the town's argument that because it had already sold

[28] Order MO-2185.
[29] Order MO-2246.

the property by the time the appeal was at IPC mediation, there were no further records it could provide the appellant. Having sold the property within months of receiving the request, it would be reasonable to expect the town to maintain records relating to this, in the absence of evidence to the contrary.

[61] The CAO states that he conducted his own independent search "by examining all of the physical boxes that were left by [his predecessor] following her departure which [he] had access to." He states that he "reviewed the files within these boxes and reviewed all the documents in relation to this file." I find that this evidence is vague and insufficient to accept that the locations searched were reasonable in the circumstances, given the nature of the request and what was already located by his predecessor.

[62] In my view, it is noteworthy that two items from the appellant's list of reasonably expected records, above, relate to town council meetings. The dates of these meetings are different than the ones relating to the records already located. The town's incomplete evidence about the town CAO searching through his predecessor's physical files, and unspecified other locations, does not help me understand why the town found some records related to town council meetings, but not others. This weighs against finding that the town provided sufficient evidence that it conducted a reasonable search.

[63] Similarly, I am unable to conclude from the town's evidence what locations, if any, the town CAO (or other town staff, if any) searched for records such as a Memorandum of Understanding of a certain year (reading an intention to purchase the property for a specified purpose), or an Agreement between the town about that. Likewise, I am unable to discern where the town searched for correspondence from the appellant about this issue, if it did so at all.

[64] For these reasons, I find that the town has not provided sufficient evidence that its search efforts were reasonable in the circumstances. Accordingly, I will order the town to conduct a further search.

Issue C: Does the discretionary exemption at section 6(1)(b) relating to closed meetings apply to the records?

[65] Section 6(1)(b) protects certain records relating to closed meetings of a council, board, commission or other body.

Section 6(1)(b): record that discloses deliberations of a closed meeting

[66] Section 6(1)(b) reads:

> A head may refuse to disclose a record,

> that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[67] For this exemption to apply, the institution must show 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.[30]

[68] Having reviewed the town's representations explaining why the records meet this three-part test, the appellant's position is that two *exceptions* to the section 6 exemption apply.

[69] Based on my review of the town's representations, the appellant's position, and the records themselves, I accept the town's submissions, and I find, that the records meet the three-part test for section 6(1)(b). I find that each of the three records is a record from a town council meeting that was closed to the public (part one of the test); the meetings were held in relation to the ownership of a certain property. Each of these meetings was authorized to be held in the absence of the public by section 239(2)(c) of the *Municipal Act, 2001,*[31] which allows for closed meetings if the subject matter is a proposed or pending acquisition or disposition of land by the town (part two of the test).[32] It is clear to me from my review of each record that disclosure would reveal the actual substance of the deliberations of the meeting (part three of the test).

[70] I will now consider whether an exception to the exemption applies.

The exception at section 6(2)(b): open meeting

[71] Section 6(2) of the *Act* sets out exceptions to the exemption at section 6(1)(b).

[72] The appellant submits that the town is refusing to recognize or consider the exception at section 6(2)(b), and "asserts" that it applies.[33]

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[30] Orders M-64, M-102 and MO-1248.

[31] S.O. 2001, c. 25.

[32] Section 239(2)(c) of the *Municipal Act, 2001* says: "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[.]"

[33] He also submits that the town is refusing to recognize or consider the exception at section 6(2)(a), and "asserts" that this exception applies too. However, the exception at section 6(2)(a) would only be relevant if the town had claimed the exemption at section 6(1)(a). Since it did not, the exception at section 6(2)(a) is irrelevant in this appeal.

[73] Section 6(2)(b) says:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> (b) in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public[.]

[74] Regarding this exception, the Notice of Inquiry asked the following:

- Has the subject-matter of the deliberations in question been considered in a meeting that was open to the public? Please explain.
- Was a vote taken in a public meeting concerning the subject-matter of the deliberations?

[75] The appellant asserts that the exception applies, but did not support his assertion with relevant evidence.

[76] In the absence of evidence that the answer to one or both of the above questions is "yes," I find that the exception at section 6(2)(b) does not apply to the records. As a result, my finding that the exemption at section 6(1)(b) applies, stands.

[77] The section 6(1)(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. In addition, the IPC 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; or it fails to take into account relevant considerations. The IPC cannot, however, substitute its own discretion for that of the institution.[34]

[78] Here, there is no dispute that the town exercised its discretion.

[79] The town submits, and I accept, that it considered relevant factors in exercising its discretion, such as the wording of the exemption and the interests it seeks to protect, whether the appellant is seeking his own personal information, and the sensitivity of the information to the town. The town also reiterates a concern about the appellant's motivation in making the request. While I find that this is an irrelevant consideration in the circumstances (and was found to be without merit, under Issue A), on balance, I accept that the town considered relevant factors in exercising its discretion under section 6(1)(b) of the *Act*. Given this finding, and having reviewed the records, I accept that the town did not exercise its discretion to claim this exemption in bad faith or for an improper purpose.

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[34] Section 43(2).

ORDER:

1. I allow the appeal, in part. I do not uphold the town's determination that the request is frivolous or vexatious under section 4(1)(b) of the *Act*, and I do not uphold the reasonableness of the town's search.

2. I order the town to conduct a further search, treating the date of this order as the date of the request for the purposes of the procedural requirements of the *Act*. I order the town to provide the IPC and the appellant with an affidavit containing details about this ordered search, within 30 days of the date of this order. At a minimum, the affidavit(s) should include the following:

    a. The name(s) and position(s) of the individual(s) who conducted the search(es) and their knowledge and understanding of the subject matter and the scope of the request;

    b. The date(s) the search(es) took place and the steps taken in conducting the search(es), including information about the type of files searched, the nature and location of the search(es), and the steps taken in conducting the search(es);

    c. Whether it is possible that responsive records existed but no longer exist. If so, the town must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and

    d. If it appears that no further responsive records exist after further searches, a reasonable explanation for why further records do not exist.

3. If the town locates additional records as a result of its further search(es), or if it does not locate such records, I order it to issue an access decision to the appellant, in accordance with the requirements of the *Act*, treating the date of this interim order as the date of the request for the purpose of the procedural requirements of the *Act.*

4. I remain seized of this appeal to deal with issues arising from order provisions 2 and 3.

5. In order to verify compliance with this order, I reserve the right to require the town to provide me with a copy of the access decision referred to in order provision 3, as well as any records disclosed with this access decision.

6. I uphold the town's decision to withhold the three records it withheld under section 6(1)(b) of the *Act*, and I dismiss that issue in the appeal.

Original Signed by: April 18, 2023

Marian Sami
Adjudicator