



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-2177**

**Appeal MA-060216-1**

**City of Vaughan**



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## **NATURE OF THE APPEAL:**

The City of Vaughan (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...all audit reports submitted to council by the City Auditor as of April 30/2006.  
All findings to date by the City Auditor of audits conducted within City of Vaughan departments should be included up to and including April 30/2006.

The City located four responsive records and granted access to two Audit Committee Reports that had been considered at two open sessions of City Council. The City withheld the Audit Committee Reports considered during closed sessions of City Council, claiming the application of the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*.

The requester, now the appellant, appealed the City's decision.

The appellant advised the mediator that he would like to pursue access to all of the information contained in the withheld records and raised the possible application of the "public interest override" in section 16 of the *Act*.

Further mediation was not possible and the file was transferred to me to conduct the inquiry. As section 16 cannot apply to records which are found to be exempt under section 6, the possible application of the "public interest override" exception was not canvassed with the parties. I sent a Notice of Inquiry setting out the facts and issues in this appeal to the City initially, seeking its representations. I received submissions from the City. I then sent a Notice of Inquiry, along with a complete copy of the City's submissions, to the appellant, seeking his representations. The appellant also provided submissions in response to the Notice of Inquiry. I sent a complete copy of the appellant's representations to the City seeking its reply representations on the questions raised by the appellant, including the issue of reasonable search. The appellant had raised the issue of reasonable search in his submissions. The City provided representations in reply.

## **RECORDS:**

The records consist of the following two reports:

Record 1 - Audit Committee (June 27, 2005) – Closed Session – pages 4.1 to 4.17; and

Record 2 - Audit Committee (October 17, 2005) - Closed Session – pages 1 to 3.

## **DISCUSSION:**

### **CLOSED MEETING**

The City relies on section 6(1)(b), which reads:

A head may refuse to disclose a record,

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

For this exemption to apply, the City 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]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

### **Representations for Record 1**

The City submits that:

#### Record 1 - Audit Committee June 27, 2005 - Audit on Winter Control

Vaughan City Council met on June 27, 2005. Item 4 of Report No. 1 of the Audit Committee was adopted without amendment by the Council of the City of Vaughan on June 27, 2005. The Audit Committee recommended approval of the confidential recommendation contained in the confidential report of the City Auditor, dated June 27, 2005... It is the City of Vaughan's position that a meeting took place and it has met the requirements for Part one of the test....

It is the City of Vaughan's position that disclosure of the Auditor's report, ... would reveal the substance of deliberations of the meeting. Item 4 dealt with an Internal Audit Report of a Property Matter. The City Auditor evaluated and made recommendations to improve the effectiveness of risk management, control and governance processes. The City Auditor examined and evaluated the adequacy and efficiency of the organization's systems of control and the quantity of performance that are in place in carrying out assigned responsibilities related to

the City of Vaughan's Winter Control Program with a view to safeguard the assets of the City of Vaughan. ...The substance of the Winter Control report was not discussed in a meeting open to the public.

Record 2 - Audit Committee October 17, 2005 - Internal Audit Report of Property Matter

The Audit Committee met on October 17, 2005. The audit committee resolved into closed session for the purposes of 1) the security of property of the City or local board and 2) the receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose related to item 1. The Audit Committee recommended that the confidential recommendation of the Audit Committee (closed session) be approved. Council, at its meeting of October 17, 2005, adopted the foregoing item without amendment...

It is the City of Vaughan's position that the Auditor's report forms the substance of the deliberations of that meeting and disclosure would reveal the substance of deliberations of that meeting. Report No. 2, Item 1 dealt with an Internal Audit Report of a Property Matter. The City Auditor gave an independent opinion as to whether or not the City of Vaughan exercised "due diligence" in the handling of soil and groundwater conditions of [named] Park and surrounding schools and ensuring that the public safety was not at risk. ...The substance of the Internal Audit Report of the Property Matter was not discussed in a meeting open to the public.

The appellant submits that:

By not making the City Auditor's reports public, the City has gone against the initial terms. The City Auditor, a public servant of the residents, paid by the public undertook the task of collecting, using and distributing data for the purpose of rebuilding the public's confidence into the affairs of the City. If the auditor's reports are only reported confidentially and in closed session, the task of rebuilding the public's confidence has been defeated and the public is still left with a low level of confidence into the way the city's affairs are conducted. I also found a note on the "winter control" audit report [Record 1]... It was not presented at a closed session - it was submitted as a confidential report. The confidential report was approved and adopted.

In reply, the City submits that:

In relation to this appeal, the internal City Auditor was not appointed pursuant to the *Municipal Act*. The *Municipal Act* dealt with external City Auditors. Pursuant to the *Municipal Act*, there was no requirement for the City of Vaughan to make audit reports of the internal City Auditor public.

## **Analysis/Findings**

### ***Part 1- a council, board, commission or other body, or a committee of one of them, held a meeting***

The City and the appellant both indicate that in camera meetings of the Audit Committee of Council were held to consider the subject matter of both records in issue.

I accept that these meetings did, in fact, take place. Therefore Part 1 of the three part test under section 6(1)(b) has been met.

### ***Part 2 - a statute authorizes the holding of the meeting in the absence of the public,***

The City relies on section 239 of the *Municipal Act* as its authority to hold meetings in the absence of the public. The relevant portions of section 239 of the *Municipal Act*, R.S.O. 2001, c. 25, state:

(1) Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (a) the security of the property of the municipality or local board;
- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

- (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2)...

(4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,

- (a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or

The City also relies on its By-law to Govern the Proceedings of Council and Committees of Council By-law Number 400-2002, which states:

(2) Before all or part of a meeting is closed to the public, the body proposing to hold the meeting shall state by Resolution:

- i) the fact of the holding of the closed meeting;
- ii) the general nature of the matter to be considered at the closed meeting.

Record 1 is an Internal Audit Report concerning the City's Winter Control Program, dealing primarily with snow removal. I have reviewed this record, along with the above-noted representations and statutes. I do not find that the City was authorized by section 239 of the *Municipal Act* to hold a closed meeting to consider this record. Therefore, I find that Part 2 of the test has not been satisfied with respect to Record 1 and I will order this record to be disclosed.

However, I find that that the City was authorized by section 239 of the *Municipal Act* to hold a closed meeting to consider Record 2. This record concerns an auditor's review of issues surrounding the security of property of the City or a local board as contemplated by section 239(2)(a) of the *Municipal Act*.

The City has provided me with a copy of the resolution closing the October 17, 2005 Audit Committee meeting to the public, in accordance with section 239(4) of the *Municipal Act*. I find that the City was authorized by statute to hold the meeting in the absence of the public, thereby satisfying Part 2 of the test under section 6(1)(b) of the *Act*.

***Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting***

I will now consider whether Part 3 of the test has been met with respect to Record 2.

Under Part 3 of the test

- “deliberations” refer to discussions conducted with a view towards making a decision [Order M-184]
- “substance” generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Previous orders of this office have established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question [see Order M-98, M-208], where the record does not reveal the actual substance of the deliberations or discussions that took place leading up to the decisions that were made.

Based on my review of Record 2, I find that disclosure of its contents would reveal the substance of the deliberations at the closed meeting. Accordingly, I conclude that the third part of the test has also been met.

In conclusion, I find that all three parts of the test under section 6(1)(b) have been satisfied to exempt Record 2 from disclosure.

### **Section 6(2)(b): Exception to the Exemption**

Section 6(2)(b) sets out an exception to the exemption in section 6(1)(b). It reads:

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

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;

Upon review of the record and the representations of the parties, I find that the subject matter of the deliberations in question have not been considered in a meeting open to the public. At its meeting of October 17, 2005, City Council adopted Record 2 without amendment. I agree with the findings of Adjudicator Donald Hale in Order M-241 where he found that:

In my view, the Council's adoption of a report, without discussion in a public meeting, cannot be characterized as the consideration of the subject matter of the in-camera deliberations as contemplated by section 6(2)(b) of the *Act*.

Therefore, I find that the exception in section 6(2)(b) is inapplicable to the circumstances in this appeal.

## EXERCISE OF DISCRETION

As the section 6(1)(b) exemption is discretionary, I will now consider whether the City exercised its discretion properly in not disclosing Record 2 to the appellant.

Section 6(1)(b) permits the City to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution



- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The City submits that:

The City of Vaughan considered the nature of the information and the extent to which it is significant and/or sensitive to the City of Vaughan, the requester and any affected parties. The City of Vaughan determined that the report was strictly confidential. The report identified substandard soil and ground water conditions related to the City's property. These conditions were reviewed by the City Auditor. The report also contained recommendations of a City Solicitor that are exempt pursuant to Section 12 of the [Act]. The reports findings, if made public, could affect the economic interest of the City of Vaughan. The City Auditor considered whether or not the City exercised "due diligence" to mitigate and/or reduce the likelihood of receiving an insurance claim or the commencement of litigation against the City...

The City of Vaughan considered whether or not the requester was requesting his or her own personal information. This did not apply. The City of Vaughan considered whether or not the requester has a sympathetic or compelling need to receive the records. The City of Vaughan determined that the need to protect the confidential report, the need to protect the City's property and assets outweighed the requesters compelling need for the record. It is the City of Vaughan's position that they did not exercise their discretion in bad faith or for an improper purpose. It is the City of Vaughan practice to prevent public access to closed session minutes if the records are exempt under the [Act].

### **Analysis/Findings**

I find that in denying access to Record 2, the City exercised its discretion under section 6(1)(b) for a proper purpose, not taking into account irrelevant considerations and taking into account relevant considerations. I agree with the City that a relevant consideration in not disclosing this record was the nature of the information in the record and the extent to which it is significant and/or sensitive to the City.

## SEARCH FOR RESPONSIVE RECORDS

### *Did the City conduct a reasonable search for records?*

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 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

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.

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

The appellant submits that the City did not conduct a reasonable search, as follows:

There were several audit conducted. This is a search issue, given they have not disclosed several audits. There were several Committee of the Whole meetings where the audit was discussed ... where the special auditor was appointed, and I would like you to please reference the section of the *Municipal Act* that deals with this - and how cities MUST do audits and make them public... The way the Municipal Act reads it pertains to an external auditor-BUT the auditor that the City of Vaughan hired per the bylaw ... is consistent with an external auditor... and the audits are being done as per this section of the [*Municipal*] Act...

Where are the other audits that the plan says they're going to do? ...

The City was asked respond to the appellant's claim that there are additional records responsive to the request in this appeal.

In response, the City describes the differences between an internal and an external auditor. The City states:

The external Auditor is appointed by Council. In consultation with the Commissioner of Finance and Corporate Services, the external Auditor's function is to audit the financial statements of the City of Vaughan. As required by the

*Municipal Act*, the audited financial statements are made available for public inspection.

The internal City Auditor reports to the City Manager and to the Audit Committee. The internal City Auditor focuses on two areas being compliance audits as well as operational efficiency and cost effectiveness audits. The reports of the internal City Auditor may or may not be made public. The reports may conclude that there are areas of concern that need to be addressed by the City of Vaughan. An Economic and Other Interests exemption pursuant to Section 11 or a Section 6 Draft By-laws exemption under the *Municipal Freedom of Information and Protection of Privacy Act* may apply...

The distinction must be made between the reports that are prepared by the internal City Auditor and the reports that are prepared by other City staff and submitted for the consideration of the Audit Committee...

The internal City Auditor may have initiated audits in some departments as indicated in the Audit Plan. However, the internal City Auditor will not have issued a final report for these audits if these audits were not completed by the date indicated in the access request as April 30, 2006. Only final reports for completed audits are submitted by the internal City Auditor to the Audit Committee for their consideration.

### **Analysis/Findings**

The appellant sought the following in his access request:

...all audit reports submitted to council by the City Auditor as of April 30/2006.  
All findings to date by the City Auditor of audits conducted within City of Vaughan departments should be included up to and including April 30/2006.

I have reviewed the representations of the parties, the wording of the appellant's request, the City's decision letter and the records. I find that the City has properly responded to the appellant's request for audit reports that were submitted to City Council by the City Auditor for the time period specified.

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 within its custody or control [Order P-624]. In my view, the appellant has not provided a reasonable basis for concluding that additional records exist. I am satisfied that the City conducted a reasonable search for records responsive to the appellant's request and I dismiss that part of the appeal.

**ORDER:**

1. I uphold the City's search for responsive records.
2. I order the City to disclose Record 1, to the appellant by **May 1, 2007**.
3. I uphold the City's decision not to disclose Record 2.
4. In order to verify compliance with provision 2 of this Order, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant.

Original signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

\_\_\_\_\_ March 29, 2007