Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2335

Appeal MA07-237

City of Ottawa

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NATURE OF THE APPEAL:

A request was submitted to the City of Ottawa (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> The City and [named company] signed an agreement in 2004 to have [named company] operate and mange the Ray Friel Recreation Complex. I would like to view any documents since that time that refer to a review of, or change to, that agreement. I would be especially interested in any recent information (any format) produced in the last few months pertaining to the review of the agreement, or options to modify or replace the agreement, or work to determine or investigate if there are options to the current agreement.

The City granted partial access to the responsive records pursuant to sections 6(1)(b) (closed meeting), 11(c), (d), (e) (economic interests), and 12 (solicitor-client privilege) of the *Act*.

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

During the course of mediation the City advised that it would not disclose any of the withheld records. The City further clarified that all of the responsive records have been identified and were disclosed tot the appellant except for the ones that are at issue in this appeal.

The appellant advised that he is pursuing access to the withheld records and is also of the view that additional records exist including emails and other documents that "set out" changes to the agreement. Accordingly, reasonableness of search has been added as an issue in this appeal.

As further mediation was not possible, the appeal was moved to the adjudication stage of the process.

I initially sent a Notice of Inquiry to the City setting out the facts and issues on appeal. The City provided representations in response.

I then sent a Notice to the appellant along with a copy of the non-confidential portions of the City's representations. The appellant provided representations.

I then provided the City with an opportunity to make representations in reply by providing it with a copy of the appellant's representations. The City provided additional representations.

RECORDS:

There are two records at issue. The first record is the two-page minutes of City Council. The second record is a 19 page report.

DISCUSSION:

CLOSED MEETING

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.

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]

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

The City submits that under section 6(1)(b), it may refuse to disclose the record if the City is able to establish the following:

1. a Council held a meeting
2. a statute authorized the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberation of the meeting.

The City submits that City Council met on April 25, 2007. During that meeting Council passed Motion No. 12/2 to authorize the closing of the meeting to the public to deliberate on the In Camera Report which was written by the City's Parks and Recreation Branch.

The City further submits that section 239 of the *Municipal Act, 2001* addresses both public and in camera (closed) meetings of Council. Subsection 239(1) of the *Municipal Act* states that, except as provided by this section of the Municipal *Act*, all meetings shall be open to the public. Subsection 239(2) of the *Municipal Act* sets out the possible heads or reasons why a meeting can be closed to the public as follows:

> Exceptions
>
> (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.
>
> [emphasis in original]

The City submits the following with respect to the application of section 239(2) of the *Municipal Act*:

> In the records at issue, in the motion passed by Council, the City identified that there were two in camera reports to be considered at its in camera meeting, one of which was report on the Ray Friel Recreation Complex, with specific reference to items (a), (d) and (f) as bolded above.

> In the records at issue, it is clear that the City is the property owner of the Ray Friel Recreation Complex and that the City has entered into a Public-Private Partnership Agreement with a third party to manage this Complex. This Complex provides a large array of recreational services to the public both in terms of aquatic and dry land programming, and the provisions of ice time to the recreational and hockey users for the entire Ottawa area…As such, the City submits that the in camera report clearly speaks to both City property and the security of the property, in terms of both the City and the third party's ability to continue to provide the level of service that is mandated by the Agreement, directly addressing the subsection 239(2)(a) authority of the [*Municipal*] *Act*.
>
> …
>
> The report also sets out specific legal advice…As such the City submits that this report contains solicitor-client privileged advice and communications necessary for the purpose of providing that advice pursuant to subsection 239(2)(f) of the [*Municipal*] *Act*.
>
> …
>
> As such, the City submits that the three-pronged test for the application of subsection 6(1)(b) has been satisfied by the proper exercise of its power to have a meeting to deliberate on such matters, properly close the Council meeting by passing a motion in reference to three authorities cited with the motion and in the *Act*. Due to the nature of the subject matter of the report and the legal advice within, the City submits that disclosure of either the in camera minutes and/or the report would reveal the actual deliberations of the matter discussed by Council.

The City also makes submissions on the record and the application of subsection 239(2)(d) of the report. Due to confidentiality concerns, I can not provide further information except to say that the City submits that part of the subject matter being considered relates to labour relations or employee negotiations.

The appellant provided representations on the application of the exception found at section 6(2)(b) which I provide below.

Analysis and Finding

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

As the City states above, the City council held a meeting on April 25, 2007. This is supported by record 1 itself and I accept 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

Again, as stated above, the City relies on section 239(2)(a), (d) and (f) of the *Municipal Act* as its authority to hold the meeting in the absence of the public. The subject matter of the report (Record 2) at issue is the Ray Friel Complex. The records provide a summarized assessment of the performance of the third party service provider's management and operations of the Complex in the first few years of the management agreement. The records also relate to specific courses of actions to be taken by the City with respect to the third party service provider. The records present the options recommended by the City's legal department and have labour relation as well as legal implications for the City.

From my review of the record and the City's representations, I find that the City was authorized by sections 239(2)(a), (d) and (f) of the *Municipal Act* to hold a closed meeting to consider the report and its recommendations. Accordingly, the City has satisfied 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

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 Orders 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 discussions that were made.

From my review of the records I find that disclosure would reveal the actual substance of the deliberations of the meeting. As stated above, Record 2 contains an assessment of the third party service provider's management and operations of the Complex. Record 2 also contains recommendations for the City to take in regard to the Complex. Record 1 refers to the recommendations. Council's in camera meeting was to deliberate on the report and the recommendations set out therein. Disclosure of these records would reveal the substance of the deliberations of Council's meeting. I find that Part 3 of the test has been met.

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

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

Section 6(2)(b) of the *Act* sets out exceptions to 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; or

The appellant submits that the 18 page report which was discussed in the closed meeting was tabled twice at the meetings open to the public and as such the exception in section 6(2)(b) of the *Act* applies. The appellant states:

> ..the 18 page report was tabled twice previous to the City Council meeting at the City's Community Services Committee as indicated in appendix 1. A review of the minutes to these Community Services Committee meetings, through the City's website, indicates that these meetings were not held in the absence of the public. Therefore, the appellant submits that although City Council did discuss the report in the absence of the public, the report itself had been tabled elsewhere not in the absence of the public.

The appellant provided three appendices which contain newspaper articles about the Ray Friel Complex. The appellant then submits that the 18 page in-camera report should be severed.

In response to the appellant's allegation the City stated the following:

> The City admits that there have been previous public reports concerning the expansion of the Ray Friel Centre ("the Complex") and the appointment of a Third Party,[named company], as a municipal service partner in a Public-Private Partnership (P3).
>
> However, the City submits that the subject matter addressed in this 18 page In Camera Report, namely…had not been discussed at any public meeting open to the public as of the date of the Appellant's request (May 29, 2007).
>
> In addition, the In Camera Report was considered as part of the in camera agenda of [the] Community and Protective Services Committee on April 19, 2007. Tabling of a report for an in camera meeting does not mean that the subject matter has been discussed in open/public session. The City, therefore, submits that the exception to section 6(1)(b) found at section 6(2)(b) of [the *Act*] does not apply to this record.

The City provided confidential representations in regard to the subject matter of the report and the matter being deliberated. I cannot provide further detail on the City's representations as disclosure of the representations would disclose the substance of the records.

I have reviewed the appellant's representations including the appendices (newspaper articles) and the recorded representations made on the compact disc. While I find that the newspaper articles and references made to the Ray Friel Complex partially discuss the subject matter of the records, I am unable to find that the "subject matter of the deliberations" which is set out in the records was considered in a meeting open to the public. Appendix 1 is a newspaper article titled, "Ray Friel alliance still on shaky ground" and details the fact that the City's agreement with the third party service provider was unclear and that council was still examining its options. Appendix 2 is a newspaper article titled, "Taking on Ray Friel Centre adds $2.4 million expense". This article focuses on ways in which the City was looking at reducing its 2008 budget including a discussion on the "collapse" of the City's agreement with the third party service provider. Appendix 3 is a newspaper article titled "Ray Friel P3 officially kaput". This article discusses the fact that the City has assumed the Complex's operations and debt. This last article, of all three articles provided by the appellant, provides the most detail of the subject matter of the appellant's request. Nevertheless, while the article in Appendix 3 sets out many of the details of the issues discussed in the records, there is a greater level of detail and information in the records which was not provided in the newspaper articles. It is clear from the appellant's written and oral (on disc) representations that he is quite knowledgeable about City affairs including issues surrounding the Ray Friel Complex. However, despite the appellant's understanding of the City's public expenditures and the amount of media coverage on the Ray Friel Complex, I am unable to find that the subject matter of Council deliberations, namely the City assuming operation of the Complex, have been considered in a meeting open to the public. Further, from my view of newspaper article in Appendix 1, I am unable to find information which substantiates the appellant's claim that Record 2 was considered by the Community Services Committee in meetings that were open to the public. Accordingly, I find that the exception at section 6(2)(b) does not apply in this appeal.

The appellant in his representations also argues that I should apply the exceptions found at section 7(2) of the *Act*. The mandatory exceptions found at section 7(2) only apply to information for which City has claimed section 7(1) (advice or recommendations). As the City did not apply this exemption to the record I am unable to consider the application of this exemption or the exceptions found in section 7(2).

As I have found that section 6(1)(b) applies to the records at issue, I do not need to consider the application of sections 11 and 12 of the *Act*.

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 the records 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.
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 it exercised its discretion to withhold disclosure of the records at issue in a reasonable manner and took into consideration all relevant factors. The City states:

> [The exemptions] were claimed by the City in order to safeguard the confidentiality and integrity of its deliberations and communications between

elected officials and Legal Counsel and other staff. The City also wishes to protect both its negotiating and competitive position regarding this property and other properties.

The appellant submitted extensive arguments in support of his position that the City failed to consider all relevant considerations. I provided the City with the opportunity to respond to the appellant's representations and this discussion is as follows. The appellant's representations are set out in italics.

- *"Principle of [the Act] that information should be made available to the public and exemptions from the right of access should be limited and specific."*

  The City agrees with this principle and states that in this instance that it has properly applied specific exemptions for the communications at issue.

- *"The requester is an individual interested in the use of public funds and the processes influencing the expenditures of public funds."*

  The City states that it aims to process all Part I information requests under [the *Act*] that it receives from the public in a fair and consistent manner. As such, the City is and must remain indifferent to the policy interests of [the] Appellant.

- *"The requester is an individual without relationships to the affected persons and organizations."*

  The City states that it has no actual knowledge to confirm or deny this statement…

  In any case, as above, the City must take care in processing Part I requests for information to ensure that both City's interest and the Third Party's interests would not be negatively affected by disclosure. The City submits that it exercised its discretion in applying the exemptions under [the *Act*] in a fair and cautionary manner.

- *"Disclosure will increase public confidence in the operation of the institution, a topic of many newspaper articles (Appendices 1, 2 and 3) and letters to the editor."*

  The City submits due to the timing of the access request, that disclosure of the communications at issue would have, potentially, put the City at risk of a lawsuit from [named company] (for bargaining in bad faith)…The City submits, to disclose the information in the Report, would place a "chill" over all of the negotiations that it has in confidence with third party service providers…As such,

the City submits that disclosure of these communications would actually decrease public confidence.

- *"In light of the announcement that an agreement has been reached between [named company] and the City as described in Appendix 3 and Appendix 6, the appellant submits that the information is no longer sensitive to negotiations or litigation."*

  The City agrees that a summary of the end results of the negotiations have indeed been made public. The City reported out this matter in public on November 28, 2007 with the adoption of a different in camera report by Council. Reporting out means that the recommendations of that report have been made public as is evidenced by the inclusion of Appellant's Appendix 6. It is the City's position, however, that the Report at issue in this appeal and the Report tabled at Council on November 28, 2007 remain privileged and that those privileges have not been waived by the City.

- *"The City's competitive position is irrelevant in that the budgets, policies and operation of the City's recreational facilities are in the public domain…"*

  The City agrees with the Appellant that its budgets are in the public domain and the City's policy documents, once approved by Council, are also in the public domain…

  The City may or may not compete with the private sector depending on the type of service. In this case, the City does compete with the private recreational facility sector, but with its budgets, policies and details of its operations in the public domain. As such, the City is at a competitive disadvantage when negotiating with service providers. The City wishes to eliminate as much of this disadvantage as it can…

From my review of the representations, I find that the City properly exercised its discretion to deny access to the records under section 6(1)(b). The appellant raised many relevant considerations which I find the City properly considered. In particular, the City considered the exemption and the interests it seeks to protect, the negotiations between itself and the third party provider, the purposes of the *Act*, the nature of the information and the extent to which it is sensitive to the institution and the third party provider. The City also considered the requester and whether he had a compelling need to receive the information. The City did not take into account irrelevant considerations and I uphold the City's exercise of discretion.

SEARCH FOR RESPONSIVE 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).

In its representations, the City submits that the records at issue that were identified by the City as responsive were identified as such because they directly address the subject matter of the request. However, the City also admits that it has recently learned of additional responsive records. The City broadened its search for responsive records and issued a decision letter to the appellant along with a fee request. The City's decision letter, dated December 10, 2007 reveals that additional responsive records were located within the Parks Recreation Division which led to the creation of the in-camera report. In its representations, the City states:

> Upon further review, in the course of this Appeal, City staff realized that it did not do a full and complete search for all of the records responsive to the Appellant's request. When the City realized this, it issued a follow-up correspondence to deal with the balance of the records. Specifically, on November 27, [Access to Information Privacy] staff issued an electronic request to staff in the Parks and Recreation Branch [and other branches] for all documents responsive to the Appellant's request.
>
> The Appellant was notified by [Access to Information Privacy] staff that there were additional Parks and Recreation records and the estimated fee for the search would be $1560.00. The Appellant replied to this Letter asking for more information to narrow his request. [Access to Information Privacy] staff notified the Appellant that there were additional records in Parks and Recreation and two other departments and that the City could not provide [the Appellant] with a description of the records until the receipt of a fee deposit of $870.00. However the City did confirm that eight employees would be reviewing 8 months of emails and records.

In its representations, the City also provided two affidavits of City staff. The first affidavit is from the Area Manager of the City's Parks and Recreation Branch of the Community and Protective Services Department of the City. The second affidavit is from the Access and Privacy Analyst within the Corporate Services Department for the City. These two appendices were shared with the appellant.

The appellant provided his reasons for his belief that additional records exist including the following:

- City unreasonably restricted number of responsive records by identifying the two documents as the only responsive records.
- Newspaper articles indicate that considerable information has been created and distributed regarding the agreement between the City and [third party], other than the two responsive records identified by the City.
- The City reduced scope of the request.
- City has not provided adequate detail as to areas searched, types of files searched, details of the search and possibility that responsive records may no longer exist.

Analysis and Finding

I agree with the reasons provided by the appellant and find that the appellant's has provided a reasonable basis for concluding that additional records do exist. In particular, I agree with the appellant's arguments that the City initially reduced the scope of the appellant's appeal and restricted the number of responsive records based on this "reduced request."

However, the City has now admitted that its initial search for records was not reasonable and has conducted additional searches for records. The City has provided a new decision based on these searches to the appellant along with a fee estimate. The City indicates that records were located in the Parks and Recreation branch as well as two other departments.

While the City's description of its search is not as detailed as the appellant would like, I find that the City has provided me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. The City has admitted, in its representations, that its search was unreasonable and has expanded its search to the other branches of the City and has located additional responsive records. Once the appellant has provided the deposit for the fee, the City could provide further detail as to the records located.

From my review of the representations of the parties, the newspaper articles provided by the appellant and the affidavits provided by the City, I find that the City has conducted a reasonable search for responsive records and I dismiss this part of the appeal.

ORDER:

I uphold the City's decision.

Original Signed By: August 12, 2008
Stephanie Haly
Adjudicator