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

ORDER MO-2444

Appeal MA-060094-2

City of Waterloo

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NATURE OF THE APPEAL:

The City of Waterloo (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records containing reference to the requester that "are in the possession or under the control" of 10 named individuals, including the Mayor and other City officials.

The City issued an access decision, which the requester (now the appellant) appealed to this office. This initial appeal (MA-060094-1) was resolved during the mediation stage of the appeal process and was closed. The City then issued a new access decision which led to the current appeal (MA-060094-2). This appeal underwent extensive mediation, during which the appellant narrowed the scope of his request and indicated that he was only seeking access to records relating to the following two items:

> Item 1:
>
> a) [Appellant's] complaint to [City's external legal counsel] about Mayor's misconduct;
>
> b) [External legal counsel's] report to City of Waterloo Council regarding appellant's complaint about Mayor misconduct; and
>
> c) City of Waterloo Council's subsequent response to [external legal counsel's] report.
>
> Item 2:
>
> The By-Law/Resolution authorizing the City of Waterloo to intervene in appellant's lawsuit against [Mayor and several named individuals].

The City then issued a revised decision letter in response to the appellant's narrowed request, along with a revised index of records. With respect to item 1(a), the City claimed that because the City's external legal counsel is not a City employee, no responsive records exist at the City. With respect to items 1(b), 1(c) and 2, the City located responsive records and denied access to them pursuant to the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice to government) and 12 (solicitor-client privilege) of the *Act*.

The appellant advised the mediator that he believes a record pertaining to item 1(a) should exist, and that this record should fall under the City's custody and control. Consequently, whether the City has conducted a reasonable search for this record is at issue in this appeal. In addition, whether this record is in the custody or under the control of the City is also at issue. The appellant also advised the mediator that he wishes to pursue access to the withheld records pertaining to items 1(b), 1(c) and 2 of his request.

The City subsequently provided the mediator with a copy of the records at issue. After reviewing the records responsive to item 1(b) and the index of records, the mediator sought clarification from the City about an apparent discrepancy between two sets of notes pertaining to whether or not the City's external legal counsel had attended an *in camera* meeting held on

May 9, 2005. Upon further review of this matter, the City Clerk confirmed that the City's external legal counsel had not attended the meeting of May 9, 2005 as indicated on the index of records, and any reference to this effect was an error made by a note taker at that meeting.

The City Clerk further advised the mediator that its external legal counsel had discussed the appellant's lawsuit with City Council at an *in camera* meeting on April 11, 2005, and the City Clerk agreed to conduct a new search for records relating to that meeting. The City located one additional record and issued a revised decision letter and index of records to the appellant with respect to that record. It denied him access to the record pursuant to sections 6(1)(b), 7(1) and 12 of the *Act*.

This appeal was not resolved in mediation and was transferred to the adjudication stage of the appeal process for an inquiry. I started my inquiry by sending a Notice of Inquiry to the City, which submitted representations in response. Subsequently, the City submitted two pages of additional representations that urge me to follow Order MO-2373, which concerns the same appellant.

I then sent a Notice of Inquiry to the appellant, along with the non-confidential representations of the City. Portions of the City's representations were withheld from the appellant because they fall within this office's confidentiality criteria on the sharing of representations. The appellant did not submit any representations in response.

RECORDS:

The records at issue in this appeal are summarized in the following chart, which is based on the mediator's report and the final index of records issued by the City:

Record number	Title/description of record	Number of pages	City's decision	Exemptions claimed
1	Appellant's complaint to City's external legal counsel about Mayor's conduct	Not available	No record exists at the City of Waterloo	Not available
2	City of Waterloo – *In camera* minutes, April 11, 2005	1	Withheld in full	Sections 6(1)(b), 7(1) and 12

3	City employee's rough notes of May 9, 2005 *in camera* meeting	4 pages	Withheld in full	Sections 6(1)(b), 7(1) and 12
4	City of Waterloo – *In camera* minutes, May 9, 2005	15 pages	Withheld in full	Sections 6(1)(b), 7(1) and 12
5	City of Waterloo – *In camera* minutes, August 30, 2005	2 pages	Withheld in full	Sections 6(1)(b), 7(1) and 12

DISCUSSION:

CLOSED MEETING

General principles

Section 6(1)(b)

The City claims that Records 2, 3 4 and 5 are exempt from disclosure under section 6(1)(b) of the *Act*. This provision 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]

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]

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].

Section 6(2)(b) – exception

Section 6(2)(b) of the *Act* sets out an exception 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;

Analysis and findings

In determining whether Records 2, 3, 4 and 5 qualify for exemption under section 6(1)(b) of the *Act*, I will consider the three-part test set out above.

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

To satisfy the first requirement of the three-part test for the section 6(1)(b) exemption, the City must establish that City Council held a meeting.

The City submits that City Council held meetings for the purpose of obtaining advice from its legal counsel and to provide instructions to him with respect to matters relating to the appellant.

Record 2 is the minutes of an *in camera* meeting of City Council that took place on April 11, 2005. Record 3 is a city employee's rough notes of another City Council meeting that took place on May 9, 2005. Record 4 is the minutes of the *in camera* meeting of City Council that took

place on May 9, 2005. Record 5 is the minutes of the *in camera* meeting of City Council that took place on August 30, 2005.

I am satisfied that the City has established that City Council held meetings. Consequently, I find that the City has met the first requirement of the three-part test for the section 6(1)(b) exemption.

Part 2 – statute authorizes the holding of the meeting in the absence of the public

To satisfy the second requirement of the three-part test for the section 6(1)(b) exemption, the City must establish that a statute authorized the holding of the City Council meetings in the absence of the public.

The City has provided me with a copy of section 239 of the *Municipal Act* and submits that section 239(2) authorized City Council to hold closed meetings because the subject matter of these meetings related to potential litigation and advice that is subject to solicitor-client privilege.

Section 239(2) states, in part:

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

I have carefully reviewed the records at issue, and it is evident that the City Council meetings on April 11, 2005, May 9, 2005 and August 30, 2005, were held for the purposes of discussing litigation or potential litigation against the City by the appellant [section 239(2)(e)] and to consider advice that is subject to solicitor-client privilege [section 239(2)(f)]. In short, I accept that sections 239(2)(e) and (f) of the *Municipal Act* authorized City Council to hold the three meetings, which are the subject of the records, in the absence of the public. Consequently, I find that the City has met the second requirement of the three-part test for the section 6(1)(b) exemption.

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

To satisfy the third requirement of the three-part test for the section 6(1)(b) exemption, an institution must establish that disclosure of the record would reveal the substance of the deliberations of the closed meeting.

In Order MO-1344, former Assistant Commissioner Tom Mitchinson stated the following with respect to the meaning of the third requirement of the section 6(1)(b) test:

> To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations on this *in camera* meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the **subject** of the deliberations and not their **substance** (see also Order M-703). "Deliberations" in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385).

The City submits that disclosure of Records 2, 3, 4 and 5 would reveal the substance of the discussions that took place at the City Council meetings and thus pierce solicitor-client privilege.

Based on my review of the records, I find that disclosing the minutes of the three City Council meetings would reveal the substance of the deliberations that took place. Moreover, disclosing the City employee's rough notes of the meeting of May 9, 2005 would have the same effect. Consequently, I find that the City has met the third requirement of the three-part test for the section 6(1)(b) exemption.

Section 6(2)(b) – exception

As noted above, section 6(2)(b) of the *Act* sets out an exception to the discretionary exemption in section 6(1)(b). Under this exception, an institution cannot refuse to disclose a record under section 6(1)(b) if the subject matter of the deliberations with respect to the record has been considered in a meeting open to the public. There is no evidence to suggest that the subject matter of City Council's deliberations in the three closed meetings was considered in an open meeting. Consequently, I find that the section 6(2)(b) exception does not apply.

In short, Records 2, 3, 4 and 5 qualify for exemption under section 6(1)(b) of the *Act*.

EXERCISE OF DISCRETION

General principles

The section 6(1)(b) exemption is discretionary, and permits an institution 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 addition, the Commissioner 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
- it fails to take into account relevant considerations

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)].

The City submits that it exercised its discretion properly in withholding Records 2, 3, 4 and 5 under the section 6(1)(b) exemption. There is no evidence before me to suggest that the City failed to take into account relevant considerations, took into account irrelevant considerations, or exercised its discretion in bad faith or for an improper purpose. Consequently, I find that the City exercised its discretion properly in withholding Records 2, 3, 4 and 5 under the section 6(1)(b) exemption.

REASONABLE SEARCH/CUSTODY OR CONTROL

The appellant is also seeking a copy of his own complaint to the City's external legal counsel about the Mayor's conduct, which is identified in the chart above as Record 1. During the mediation stage of the appeal process, the appellant's representative advised the mediator that he believes this record should exist, and that it should be within the City's custody and control. Consequently, whether the City has conducted a reasonable search for this record and whether this record is in the custody or under the control of the City is also at issue.

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 of the *Act* [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]. A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Moreover, section 4(1) provides for a right of access to a record that is "in the custody or under the control of an institution." If an institution's custody or control of a record is established, the right of access under section 4(1) applies, subject to the exceptions in paragraphs (a) and (b).

The City submits the following with respect to existence of Record 1:

> [This record] does not exist as a written record and never has. Thus the City is not, and cannot be, in possession [of] that record. To confirm this, staff have

> conducted an extensive search of the City's files. This search should reasonably be the end of any obligation of the City to locate a record. Moreover, [the appellant] has not provided, to the best of our knowledge, any reasonable basis for concluding that this record exists. His speculation has resulted in an expensive and unnecessary goose chase.

I did not receive any representations from the appellant as to whether the City has conducted a reasonable search for Record 1, as required by section 17 of the *Act*, or whether this record is in the custody or under the control of the City.

In my view, the City has provided sufficient evidence to show that it has conducted a reasonable search for this record. I would note as well that the appellant did not provide any evidence to substantiate his view that this record is in the custody or under the control of the City. In such circumstances, I find that the City has conducted a reasonable search for Record 1 in accordance with section 17 of the *Act*, and that there is insufficient evidence to support a finding that this record is in the custody or under the control of the City.

OTHER MATTERS

The City claims that Records 2, 3, 4 and 5 are also exempt under sections 7(1) and 12 of the *Act*. However, given that I have found that these records qualify for exemption under section 6(1)(b), it is not necessary to determine whether they are also exempt under sections 7(1) and 12.

The City also submits that the appellant's access request is "contrary to law" and "frivolous and vexatious," and that his appeal constitutes an "on-going abuse of process." However, given that I am upholding the City's access decision and dismissing the appeal, I find that it is not necessary to address those issues.

ORDER:

I uphold the City's decision and dismiss the appeal.

Originally Signed by: July 29, 2009
Colin Bhattacharjee
Adjudicator