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

ORDER MO-2503

Appeal MA08-208-2

County of Simcoe

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The County of Simcoe (the County) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to the Canadian Forces Support Training Group's decision not to pursue the County's proposal to offload a landfill site located on a Canadian Forces Base. The requester specified:

> I request a copy of the proposal and all documentation related to the County's preparation into the Environmental Assessment (EA).

The County located one record that responded to the portion of the request for access to a copy of the proposal and issued a decision letter in which it denied access to the record pursuant to sections 6(1)(b) (closed meeting), 9 (relations with other governments), 11(a) (valuable government information), 11(d) and (e) (economic and other interests) and 11(g) (proposed plans) of the *Act*. With respect to records relating to the portion of the request that sought access to "all documentation related to the County's preparation into the Environmental Assessment," the County advised in its decision letter that no responsive records exist. The requester, now the appellant, appealed the decision.

During mediation, the appellant confirmed that he seeks access to the entire proposal. He also stated that records should exist relating to the preparation of an environmental assessment that he believes should have been initiated or completed as a result of the proposal. As a result, the issue of whether the County conducted a reasonable search for responsive records was raised.

During mediation, the County maintained its position that no additional records responsive to the appellant's request exist.

Also during mediation, the appellant took the position that the public interest override provision at section 16 applies to the record at issue in this appeal.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry to the County. The County submitted representations.

I then sent a copy of the Notice of Inquiry to the appellant, together with a copy of the County's representations (parts of which were severed for confidentiality reasons). The appellant provided representations in response. As the appellant's representations raised issues which I believed the County should be given an opportunity to respond to, I provided the County with a copy of the appellant's representations, in their entirety. The County provided representations by way of reply.

Following the County's submission of reply representations, the appellant provided me with some additional materials that he believes are relevant to the appeal.

RECORDS:

The record at issue in this appeal is a 9-page proposal prepared by the County regarding a landfill site at a Canadian Forces Base and an attached 1-page site plan. For the purposes of this order, the record will be identified as "the proposal" and will refer to both the proposal and the site plan.

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]

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) of the *Act* sets out exceptions to the exemption at section 6(1)(b). The appellant does not claim that any of the exceptions at section 6(2) apply to this appeal and I am satisfied that none apply.

In determining whether section 6(1)(b) of the *Act* applies to the record, I will consider the three-part test set out above.

Part 1: Did a council, board, commission or other body, or a committee of one of them, hold a meeting?

The County submits:

> [T]he Corporate Services Committee of the County held a meeting on June 15, 2005 to discuss the Proposal and the Committee was provided with an update on the status of the negotiations and the proposed next steps. Subsequently, County Council discussed the Proposal at its meeting on June 28, 2005. Both of the meetings were held in the absence of the public. At each of these meetings the relevant officials (the Corporate Services Committee, then County Council) resolved itself into private session to review this matter. The first part of the test under section 6(1)(b) has been met.

In support of its representations, the County provided a copy of both the minutes and the agendas for the meetings on June 15, 2005 and June 28, 2005.

The appellant does not dispute that either of these meetings took place.

Based on my review of the agendas and minutes of the two meetings, I find that the County's Corporate Services Committee (the Committee) held a meeting on June 15, 2005 and the County Council (the Council) held a meeting on June 28, 2005. Accordingly, I am satisfied that the County has met the first requirement of the three-part test established for the section 6(1)(b) exemption.

Part 2: Does a statute authorize the holding of the meeting in the absence of the public?

The County submits that section 239(2)(c) of the *Municipal Act, 2001,* authorized the holding of these meetings in the absence of the public. The relevant portions of the *Municipal Act, 2001* state:

> 239 (1) Except as provided in this section, all meetings shall be open to the public.
>
> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is …
>
> (c) a proposed or pending acquisition or disposition of land by the municipality or local board …

The County submits that on June 15, 2005, the Committee went *in camera* to discuss its proposed or pending acquisition of the property which is the subject of the proposal. It submits that the Committee was authorized to hold a closed session to discuss this matter pursuant to section 239(2)(c) of the *Municipal Act, 2001*. The County also submits that the matter was also discussed at an *in camera* meeting of Council on June 28, 2005.

In support of its position, the County provides copies of the resolutions made that enabled the members to resolve themselves into private session for the June 15, 2005 and June 28, 2005 meetings. The County submits that prior orders [see for example, Order M-64 and Order MO-2368] have accepted reports and agendas for meetings as sufficient evidence of those meetings taking place *in camera*.

Having reviewed the record and the meeting minutes, I am satisfied that the Committee and Council were considering matters related to a proposed or pending acquisition of land by the County, and that the Committee and Council were both authorized to hold this part of their meetings *in camera* pursuant to section 239(2)(c) of the *Municipal Act, 2001*. Accordingly, I find that part 2 of the three-part test has been met.

Part 3: Would disclosure of the record reveal the actual substance of the deliberations of the meeting?

The County submits that disclosure of the proposal would reveal the actual substance of the deliberations of the closed meetings held by the Committee and County Council regarding the proposed or pending acquisition of land for the purpose of a waste management site. It submits:

> The deliberations that were held at the June 15, 2005 meeting were discussions that were conducted for the purpose of considering and discussing the appropriateness of presenting the proposal to the owner of the property that would form the basis of an agreement for the acquisition of property rights in the site. This is very similar to the purpose of the meetings in Order MO-1248. The Committee members met with a view of determining whether or not to recommend the proposal to County Council. County Council's role, in this matter, was to receive information, including the proposal and recommendations of the Corporate Service Committee and to make a decision as to whether the proposal should be presented to the owner of the property. In order for these two bodies to fulfill their roles, each had to review, discuss and deliberate the details of the proposal. If the proposal were disclosed, the very details and substance of what was being deliberated at the meeting would be disclosed.

The appellant's representations do not specifically address the evidence provided by the County or discuss the possible applicability of the exemption at section 6(1)(b). However, the appellant's representations suggest that he disagrees with the County's decision to exercise it's discretion to withhold the record at issue because its disclosure would be in the public interest.

As identified above, previous orders issued by this office have established that the third requirement would not be satisfied if the disclosure would merely reveal the subject of the

deliberations and not their substance, and have also determined that "deliberations" in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision.

I accept that the proposal, which deals with the possible acquisition of land by the County, was put before the Committee and Council at their respective *in camera* meetings on June 15, 2005, and June 28, 2005. I also accept that both the Committee and Council had the authority to discuss the proposal with a view to approving it or making a decision about whether or not to move forward with it and present it to the property owner. Based on my review of the evidence before me, I am satisfied that both the Committee and Council deliberated over the substance of the proposal with a view to making a decision regarding the proposed or pending acquisition of property and that disclosure of the proposal would reveal the substance of the deliberations which took place in closed meetings.

Accordingly, I find that part 3 of the section 6(1)(b) test has been met. As I have found that all three requirements of the three-part test have been met, subject to my analysis of the County's exercise of discretion, the proposal qualifies for exemption under section 6(1)(b).

EXERCISE OF DISCRETION

The exemption at section 6(1)(b) 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.

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 County submits that it exercised its discretion properly in withholding the proposal under section 6(1)(b) of the *Act*:

> The County submits that in the circumstances at hand, it carefully considered the importance of public access to information when exercising its discretion. The County had to balance this principle with the wording and the purposes of the available exemptions including the interests that these exemptions seek to protect…

…

> The County also considered its historical practice with respect to similar information. It is standard practice to keep the terms of negotiations and proposals in such commercial matters confidential, at least until the parties have come to an agreement. Information about all prospective property purchases by the County is held as confidential until the property negotiations have been completed and an agreement is reached. This is done by ensuring all Committee reports to County Council are confidential and that the discussions regarding the prospective purchases are *in camera*. The Commission has upheld this right of confidentiality in Order M-533 and the County respectfully submits that the same right to confidentiality be respected in the matter at hand.

The appellant does not make any specific representations on the County's exercise of discretion to exempt the record under section 6(1)(b) of the *Act*. However, his representations generally suggest that in withholding the proposal, the County failed to take into account the purpose of the *Act* and that disclosure would serve the public interest.

I have carefully considered the representations of the parties and find that the County exercised its discretion based on proper considerations. I am not persuaded that it failed to take relevant factors into account or that it considered irrelevant factors in withholding the proposal under the discretionary exemption at section 6(1)(b). In particular, I find that the County considered the transparency purpose of the *Act* in light of the nature of the information at issue and accept that, in the circumstances of this appeal, it appropriately applied its discretion to withhold the proposal based on the exemption at section 6(1)(b). I find, therefore, that the County's exercise of discretion was proper.

As I have found that the proposal is properly exempt under section 6(1)(b), it is not necessary for me to consider whether the exemptions at section 9(1) and sections 11(a), (d), (e) and (g) also apply to the record.

PUBLIC INTEREST OVERRIDE

The public interest override provision at section 16 of the *Act* reads:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The exemption at section 6 is not an exemption that is identified in section 16 as one that may be overridden by a compelling public interest in disclosure. As I have found that the proposal is exempt from disclosure under section 6(1)(b), it is not within my jurisdiction to contemplate whether section 16 applies to override the application of that exemption.

In Order MO-2499-I, Senior Adjudicator John Higgins found that the public interest override in section 16 of the *Act* did not apply to records related to a settlement agreement because that section does not identify section 6 as an exemption that can be overridden. However, in the order he went on to discuss whether an argument could be made to have section 6 "read into" the public interest override found at section 16. He stated:

> In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.), the Ontario Court of Appeal found that sections 14 and 19 of the *Freedom of Information and Protection of Privacy Act* (equivalent to sections 8 and 12 of the *Act*) should be "read into" the public interest override found at section 23 of that statute (equivalent to section 16 of the *Act*). The remedy of reading in was granted by the Court to cure what it found to be an infringement of the guarantee of freedom of expression found at section 2(b) of the *Canadian Charter of Rights and Freedoms*.
>
> However, no similar finding has been made in connection with section 6(1)(b) of the *Act*. The appellant has not argued that section 6(1)(b) should be read into section 16. In order to make such an argument, a Notice of Constitutional Question pursuant to section 12 of this office's *Code of Procedure* and section 109 of the *Courts of Justice Act* would be required, and no such notice has been served.
>
> The result is that section 16 can not be applied to override section 6(1)(b).

Despite his finding, in his Postscript to Order MO-2499-I, Senior Adjudicator Higgins went on to state:

> In this order, I am expressly *not* ruling on whether there is a compelling public interest that would outweigh the purposes of the claimed exemptions. But it is unfortunate that deliberations of a closed meeting may be withheld from disclosure even when such an interest exists.
>
> …
>
> In my view, it would be advisable for the Legislature to consider amending the *Act* to add section 6 as an exemption that can be overridden under section 16.

Although the records at issue in Order MO-2499-I raise different considerations than the record at issue in this appeal, I concur with Senior Adjudicator Higgins' statements and find them equally applicable in the current appeal. However, given the circumstances before me, section 16 cannot be applied to override section 6(1)(b).

SEARCH FOR RESPONSIVE RECORDS

In the current appeal, the appellant is of the view that records relating to the preparation of the environmental assessment that should have been initiated or completed as a result of the proposal, should exist. Accordingly, the appellant submits that additional records responsive to his request should exist.

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.

Representations

The County submits that an environmental assessment was never commissioned, and that records relating to the preparation of the environmental assessment do not exist. In support of its position, the County prepared an affidavit sworn by its Director of Environmental Services (the Director).

In his affidavit, the Director provides information about when environmental assessments are done and under what authority. He submits that there are two pieces of legislation that regulate environmental assessments. The first is a provincial act, the *Environmental Assessment Act*, R.S.O. 1990, C.E.18 (the Provincial Act) and the second is a federal act, the *Environmental Assessment Act*, s. 6.1(1) and (3) (the Federal Act).

The Director explains that under the Provincial Act, when a municipality wants to engage in the project such as the development of a landfill site it must make an application to the Minister of the Environment. The application consists of a two step process; first, the submission of proposed terms of reference and second, the completion of an environmental assessment completed in accordance with the approved terms of reference. The Director then details what information must be included in the environmental assessment.

The Director explains that under the Federal Act the term "environmental assessment" means "an assessment of the environmental effects of the project that is conducted in accordance with the [Federal Act] and the regulations." He submits that under that act, an environmental assessment is required where a federal authority has the administration of federal lands and sells,

leases or otherwise disposes of those lands or interests in those lands. He explains that the environmental assessment process is set out in the Federal Act.

With respect to the project that relates to the records that are at issue in this appeal, the Director submits:

> This project is a municipal project which would be taking place on a piece of property which is currently federal property. The County had sought an opinion with regard to which environmental assessment was applicable if the project reached that state; however, this level of detail had not been determined at the time the request was made. Since the proposal was not far enough along to require an environmental assessment under either [the Federal or Provincial Act], I did not retain a consultant to prepare such an assessment for the project. Furthermore, to the best of my knowledge no other County Staff person commissioned such an assessment.

The Director also submits that no searches for environmental assessment records were carried out because in his role as Director of Environmental Services, he would be the person who would request County Council approval to commission an environmental assessment. He explains that he has not done so because the negotiations are at a stage where the County has not determined under which act such assessment would be required, or even if one would be required. He submits, therefore, that "a search for environmental assessment related documents would be futile." He further submits that it is not possible that such records existed but no longer exist because, to his knowledge, no environmental assessment was ever commissioned by the County.

The appellant submits that:

> My request for all documentation was based on my experience from participating in [another undertaking relating to a proposed landfill site]. Evidence given in the [environmental assessment] hearings was gathered over a ten year period beginning in 1979 and ending in 1989 at which time the Hearings began. All evidence gathered over the 10 years was utilized to create the Environmental Assessment. That is the documentation I asked for.

The appellant identifies three County reports that he obtained access to as a result of another freedom of information request and states that he believes they "form part of the documentation [he] requested." All three reports relate to the County's development of an Integrated Waste Management Facility [IWMF]. The first report reveals that one of the parties involved in the project stipulated that before it would agree to locate an IWMF on an identified site, it wished to have environmental assessment approval for the full site development completed first. The second report addresses issues related to identifying a suitable location for an IWMF. The third report outlines the County's intentions of pursuing an agreement for a particular property site for an IWMF. Neither the second nor third report specifically mentions an environmental assessment.

The appellant also submits that his request for "all documentation related to the County's preparation into the Environmental Assessment" arose from an email that he obtained through a Federal Freedom of Information request. He submits that the contents of the email led him to believe that the County had already invested monies into an environmental assessment.

On reply, the County responds:

> The short and simple answer is that there has been no agreement reached with the property representatives and therefore no preparation into an environmental assessment has been undertaken. If there is no environmental assessment, there can be no records related to an environmental assessment. The fact that a term of a settlement would include the requirement to undertake an environmental assessment is not a record related to an environmental assessment.

Analysis and finding

I accept the County's position that, given that an environmental assessment was never commissioned, records related to its preparation do not exist.

As noted above, 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. The appellant submits that with respect to the other landfill site with which he is familiar, evidence given in the environmental assessment hearings was gathered over a ten-year period prior to the time that the hearings began, and it is this type of information that he seeks for the site at issue in the proposal. In my view, the fact that records used at a hearing for an environmental assessment related to an entirely different project spanned the course of ten years does not support a conclusion that, in the circumstances of the current appeal where an environmental assessment has not been commissioned at all, records related to that non-existent assessment must exist.

With respect to the reports and email provided by the appellant and his view that these records led him to believe that the County had already begun the process of preparing an environmental assessment for the subject property, based on the County's representations and the affidavit prepared by its Director, I am satisfied that an environmental assessment has not been commissioned. I do not accept that statements to the effect that an environmental assessment is desired or required necessarily leads to a conclusion that the County has begun to prepare one, particularly in the circumstances of this appeal given the stage of the negotiations. Additionally, I do not accept that an internal email between staff at a Federal Department confirms that the County had already begun to prepare an environmental assessment. I also find that records which may exist that refer to the possibility of the commissioning of an environmental assessment are not records "related to the County's preparation into the environmental assessment," nor was I provided with representations to that effect.

Furthermore, the appellant's representations appear to suggest that if an environmental assessment were commissioned, the preparation of that assessment may require or include reference to records that are currently in existence prepared for another purpose but may, in the

future, be used or gathered in the preparation of an environmental assessment, were one commissioned. Although this may be correct, in the circumstances of this appeal an environmental assessment was never commissioned and any records that currently exist cannot be identified as applicable for the purpose of its preparation.

Accordingly, I find that the appellant has not provided a reasonable basis to conclude that records "related to the County's preparation into the Environmental Assessment" exist.

In addition, in their representations, both parties raise the issue of the clarification of the request. The appellant takes the position that the County should have contacted him to clarify what he meant by "all documentation related to the County's preparation of an Environmental Assessment." In his affidavit, the County's Director states that he believed that the request was clear and required no clarification. Having reviewed the appellant's request and the representations submitted by both parties, I am satisfied that it was reasonable for the County not to have contacted the requester to clarify his request because I accept that its wording was sufficiently clear to enable an experienced employee to identify responsive records upon a reasonable effort.

In my view, the County has provided a thorough explanation by an experienced employee as to why no records responsive to the appellant's request for "all documents related to the County's preparation into the Environmental Assessment" exist. Therefore, I find that the County has provided sufficient evidence to establish that it has made a reasonable effort to identify and locate the records responsive to the appellant's request.

ORDER:

1. I uphold the County's decision to deny access to the proposal (including the site plan).

2. I uphold the County's search for responsive records as reasonable.

3. I dismiss the appeal.

Original Signed by: March 12, 2010
Catherine Corban
Adjudicator