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

ORDER MO-2639

Appeal MA10-81

Corporation of the City of Brantford

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NATURE OF THE APPEAL:

The appellant submitted a request to the Corporation of the City of Brantford (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for the following information:

- Any communications between the City and the Brantford Police Services about the native protests occurring in Brantford;

- Any communications between the City and other governments regarding the native protest occurring within the City;

- Any communications between the City and federal and provincial representative regarding the native protests.

In his request, the appellant set out a detailed listing of some of the particular information he was seeking.

The City issued a decision denying access to the responsive records in accordance with sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 8(1) and (2) (law enforcement), 9(1)(a) and (b) (relations with other governments), 11(c) and (d) (economic and other interests), 12 (solicitor-client privilege), and 15(a) (publicly available) of the *Act*. In its decision, the City further advised that agendas and minutes for all Special and Regular City Council meetings held in Open Session are available on the City's website.

The appellant appealed the City's decision.

During mediation, the appellant agreed to narrow the scope of the request to include only the following records:

- Meeting minutes, committees' notes, Council meetings' minutes (including closed meetings' minutes) and recorded discussions on the topic of native protesting (including the native protest by-law subject), from 2005 to the date of the request.

- Emails between the Mayor's Office and Provincial and Federal representatives on the topic of native protesting, since 2005.

- Emails between a named Councillor and the City Mayor's office, and/or Provincial and Federal representative on the topic of native protesting, since 2005.

In response to the narrowed request, the City provided a revised decision along with a detailed index of the 121 located records, to the appellant. In its letter, the City responded to each of the three parts of the narrowed request.

With respect to the first part of the narrowed request, the City stated that no records for the year 2005 were found, and no meetings of the City, County of Brant, and Six Nations Tri-Council have occurred since 2007.

The City further stated that the minutes to certain identified public meetings held between 2008 to present can be found on the City's website. The City stated that it is prepared to provide the minutes of these meetings for the years 2006 to 2007, which are not posted on its website. The City also stated that it is prepared to provide the minutes of a number of other identified public meetings from 2007 to 2008.

The City denied access to the minutes of all *in camera* Special City Council meetings from 2006 to the date of the request, and to the minutes of the *in camera* First Nations Issues Task Force meetings of March 18, 2008, March 24, 2009, and September 28, 2009, pursuant to section 6(1)(b) of the *Act*. The City stated that section 12 of the *Act* has also been applied to some of these records. In addition, the City stated that minutes of meetings relating to outstanding litigation between the City and certain aboriginal protestors would not be disclosed because the "City is under court order not to disclose documents or discussions relating to this process."

The City granted access to two emails in response to the second part of the narrowed request, and stated that no records exist that respond to the third part of it.

Lastly, in its decision the City stated that upon payment of the $347.40 fee, the non-exempt records would be provided to the appellant.

During mediation, the appellant indicated that he wishes to pursue access to all of the withheld records, and initially indicated that the requested $347.40 fee is at issue in this appeal. The appellant subsequently submitted a fee waiver request, along with some financial information, to the City.

In response, the City wrote to the appellant requesting additional financial information in support of his fee waiver request, as the supplied documentation was not sufficient to enable it to make a final decision on a full or partial fee waiver. In its letter, the City proposed that the appellant make an appointment with the City's FOI coordinator to review the documents that are not available on the City's website in order to narrow them down and reduce the photocopying charges.

The appellant subsequently indicated that he does not intend to provide additional financial information to the City during the mediation of this appeal, and although the appellant no longer challenges the amount of the fee, the fee waiver request remains at issue in this appeal. The appellant further indicated that he is no longer seeking access to the records that the City has decided to disclose. However, he wishes to pursue access to the withheld records, covering the period from 2006 to the date of the request.

As a result, the City waived the $47.40 photocopying fee; though the $300.00 search fee remains unchanged.

Also during mediation, the appellant took the position that emails between an identified City Councillor and the Brantford Police Service pertaining to the anti-protests by-law ought to exist, and have not been disclosed. Although the City did not believe that the narrowed request includes the search for emails between these two parties, it reviewed approximately 1500 emails of all Staff and Members of Council containing the keywords "native" and/or "protest", and no emails involving the identified Councillor and the Brantford Police Service were found.

No further mediation was possible and the file was forwarded to the adjudication stage of the appeal process. I sought, and received, representations from the City, and shared them in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction* number 7. Although provided with an opportunity to make submissions, the appellant did not respond to the Notice of Inquiry.

During the representations stage, the Court of Appeal released its decision in *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681, (*Magnotta)* which held that Branch 2 of section 19 (the provincial *Act* equivalent to section 12) exempts from disclosure records prepared for use in the mediation or settlement of actual or contemplated litigation. After considering the City's representations regarding certain records at issue, I sent a supplementary Notice of Inquiry to the parties seeking their views on the implications of this decision to five of the records at issue. Only the City submitted representations.

RECORDS:

The records remaining at issue consist of in camera minutes of City Council, the First Nations Issues Task Force and Meeting Notes of First Nations Negotiations.

In addition, the appellant maintains that emails between an identified City Councillor and the Brantford Police Service pertaining to the anti-protests by-law ought to exist, and have not been disclosed.

BACKGROUND:

The City provided some background relating to the native protests and the manner in which the City attempted to address the issues, which is helpful in understanding the issues in this appeal. The City states:

> As early as the year 2006, there were threats of protests and intimidation in the [City] by first nations protestors. In the spring and summer of 2008, they escalated and the City experienced a number of protests and occupations by native protestors at numerous development and construction sites. On May 12th, 2008, the City passed two By-laws to prohibit interference with certain development sites and to prohibit demands for unauthorized fees and charges in exchange for development approvals…On may 20th, 2008, the City commenced an action against certain protestors and the Haudonosaunee Development Institute. Also on May 20th, the City brought a motion for an interlocutory injunction against protests pending trial…The main action against the protestors is ongoing.

ISSUES:

A. Does the discretionary exemption at section 6(1)(b) apply to Records 1, 4, 12, 14, 19, 21, 23, 25, 27, 29, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 55, 57, 60, 62, 65, 69, 71, 73, 75, 77, 80, 82, 84, 87, 89, 92, 94, 96, 98, 100, 102, 104, 108, 110 and 119?

B. Does the discretionary exemption at section 12 apply to Records 106, 112, 113, 115 and 117?

C. Did the City properly exercise its discretion in applying sections 6(1)(b) and 12 to the records at issue?

D. Should the search fee of $300 be waived on the basis of financial hardship?

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

DISCUSSION:

A. DOES THE DISCRETIONARY EXEMPTION AT SECTION 6(1)(B) APPLY TO RECORDS 1, 4, 12, 14, 19, 21, 23, 25, 27, 29, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 55, 57, 60, 62, 65, 69, 71, 73, 75, 77, 80, 82, 84, 87, 89, 92, 94, 96, 98, 100, 102, 104, 108, 110 and 119?

Section 6(1)(b): 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]

Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]; and
- "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].

Parts 1 and 2 – was an in camera meeting of council, board, commission or other body, or a committee of one of them held and was is authorized by statute?

The first and second parts of the test for exemption under section 6(1)(b) require the City to establish that a meeting was held by the City and that it was properly held *in camera* (Order M-102).

The City submits that the records identified above all "relate to a closed meeting of City Council or a committee of Council being the First Nations Issues Task Force."

The City provides extensive representations on the statutory basis for its decision to enter into *in camera* meetings, which includes sections 238 and 239 of the *Municipal Act, 2001* and the City's procedural by-law (Chapter 15 of the City of Brantford Municipal Code). The City provides corroborative evidence to establish that *in camera* meetings were held and that they were properly constituted in accordance with this statutory scheme.

Section 239(1) of the *Municipal Act, 2001* requires that all meetings be open to the public, subject to the exceptions and other criteria and conditions set out in sections 239(2), (3) and (3.1). The relevant provisions at issue state:

(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,

(a) the security of the property of the municipality or local board;

> (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

The records noted above pertain to matters concerning security issues relating to the property of the City as a result of the protests. Some portions of the records also contain communications between legal counsel and members of Council. Having reviewed the City's representations, the attachments it provided in support of its position, and the records themselves, I am satisfied that the City has satisfied the first two parts of the section 6(1)(b) test. The evidence clearly establishes that *in camera* meetings were held and that they were properly authorized pursuant to section 239 of the *Municipal Act, 2001*.

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

The wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations (Orders MO-1344, MO-2389 and MO-2499-I).

The City notes that the records at issue comprise the minutes of the *in camera* meetings. The City submits that "divulging the minutes would reveal substantive discussions including, questions, direction to staff and other sensitive confidential information."

The records at issue are clearly identified as the minutes of *in camera* meetings. I am satisfied that the information recorded in them relating to the issues discussed at the meeting and their disclosure would reveal the actual substance of the deliberations of the meeting. As I have found that disclosure of the substantive content of the records would reveal the substance of deliberations of the *in camera* meetings, the third part of the test has been met for these portions of the records.

However, as I noted above, previous orders have found that section 6(1)(b) does not apply to exempt the names of individuals attending meetings, and the dates, times and locations of such meetings (Orders MO-1344). I agree with this approach, as disclosure of this type of information would not reveal the substance of the deliberations of a closed meeting of Council or one of its Committees. Each of the records at issue contains a section at the beginning that identifies the staff and Council or Committee members present, as well as evidence that there was a motion to go into closed session and the reasons for doing so. I note that in the particulars of the appellant's request, he indicated that he was seeking this information. I find that the City has not established that disclosure of this information would reveal the substance of the deliberations of Council or one of its Committees. Accordingly, I find that section 6(1)(b) does not apply to it and I will, accordingly, order that it be disclosed.

I have highlighted the information that is not exempt under section 6(1)(b) on the copies of these pages that I am sending to the City along with this order.

B. DOES THE DISCRETIONARY EXEMPTION AT SECTION 12 APPLY TO RECORDS 106, 112, 113, 115 and 117?

General principles

Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

The City claims that the statutory litigation privilege in branch 2 applies to exempt Records 106, 112, 113, 115 and 117.

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation. [*Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.]

Termination of litigation does not affect the application of statutory litigation privilege under branch 2. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).]

The City states that Records 106, 112, 113, 115 and 117 were prepared during a court-ordered "confidential mediation and settlement process." The City takes the position that these records fall squarely with scope of branch 2 in accordance with the decision of the Court of Appeal in *Magnotta*. The City states:

> [The] Order compelled the parties to enter into 'meaningful consultation, negotiation, accommodation and reconciliation.' Effectively the Court ordered settlement discussions to attempt to resolve the litigation between the parties. The

> communications in records 106, 112, 113, 115 and 117 are all prepared 'in contemplation of or for use in' the mediation.

The City attached copies of the court orders to its original representations.

Based on the City's submissions, I am satisfied that Records 106, 112, 113, 115 and 117 fall within the "settlement privilege" aspect of section 12 of the *Act*. It is clear from the City's evidence that the parties were directed by the Court to engage in settlement discussions. Based on the City's description of these records, I find that they are records prepared for use in the mediation or settlement of actual or contemplated litigation.

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

I have no evidence before me that the City has lost its privilege in these five records. Accordingly, the statutory litigation privilege in Branch 2 applies to exempt the records from disclosure.

C. DID THE CITY PROPERLY EXCERISE ITS DISCRETION IN APPLYING SECTIONS 6(1)(B) AND 12 TO THE RECORDS AT ISSUE?

General principles

The section 6(1)(b) and 12 exemptions are discretionary, and permit 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 did not make specific representations on its exercise of discretion, however its representations overall reflect the considerations that formed the basis of its decision. The majority of this information is contained in the confidential portion of the City's representations and I am unable to discuss it in this order. However, based on the City's representations, taken as a whole, I am satisfied that its decision was made in good faith and that it took into account relevant considerations. Accordingly, I find that the City has properly exercised its discretion in withholding the records at issue from the appellant.

D. SHOULD THE SEARCH FEE OF $300 BE WAIVED ON THE BASIS OF FINANCIAL HARDSHIP?

General principles

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) and outlined in section 8 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726].

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F].

The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Section 45(4)(b): financial hardship

The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship [Order P-1402].

For section 45(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393].

The City notes that it has already waived the photocopying fee and has provided the appellant with copies of those records that are publicly available at no charge. The City indicates that the request involves a large number of records going back to May 2006, and claims that its staff has spent considerably more time locating and preparing the records for disclosure than it charged the appellant.

Although the appellant provided some financial information to the City at the time of requesting a fee waiver, the City determined that it was insufficient to enable it to make a determination regarding the appellant's request. The appellant refused to comply with the City's request for additional information. The City takes the position that the appellant has not provided sufficient evidence regarding his financial situation to enable it to make a determination that payment of the fee would cause financial hardship. The City submits that given the fee waiver it has already given, the amount of information requested and the difference between the actual cost of processing this request and the amount charged, the search fee should not be waived.

As I indicated above, the fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The onus to provide sufficient evidence to support a fee waiver rests with the appellant. The appellant did not make representations in this appeal, although he was invited to do so. Consequently, the appellant has

not provided me with sufficient evidence to determine his financial situation. In the absence of sufficient information from him regarding his financial circumstances, I find that he has failed to establish that paying the fee of $300 would cause him financial hardship. Accordingly, I uphold the City's decision to refuse to waive this fee.

E. DID THE INSTITUTION 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 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

The appellant maintains that emails between a named Councillor and the Brantford Police Service pertaining to the anti-protests by-law ought to exist, and have not been disclosed. 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 [Order MO-2246]. As I indicated above, the appellant did not make representations in this appeal.

A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

The City provided an affidavit sworn by the Deputy City Clerk/Manager of Legislative Services for the City (Deputy Clerk) in which she indicates that she has been involved in the processing of this access request. The City attached a number of documents to the affidavit in support of the statements made therein.

The Deputy Clerk states that upon receipt of the original request, she contacted the Manager, Corporate Information of the Information Technology Services Department (the Manager) who has over 12 years of experience in the department. This individual is considered the most

experienced employee within the City with respect to how e-mails are stored within the mail databases and is most knowledgeable about the methods of searching and retrieving information from these systems. Searches were conducted by both the Deputy Clerk and the Manager as follows:

- the Manager conducted searches of all e-mails on the City's server that contained the word "protest" for thirteen staff members who would most likely have been involved in dealing with the native protests, as well as all members of Council;

- the Manager then expanded the search to include all e-mails on the City's server (not restricted to the individuals noted above) that contained the words "native" and "protest". The Deputy Clerk indicates that this search located over 2000 e-mails dating from May 17, 2000 to April 15, 2010;

- after the request was narrowed to "e-mails between the Mayor's Office and Provincial and Federal representatives on the topic of native protesting, since 2005" and "e-mails between [a named Councillor] and the City Mayor's office and/or Provincial and Federal representatives on the topic of native protesting, since 2005," the Deputy Clerk reviewed the over 2000 e-mails and conducted additional searches "using such key words as 'MP', 'MPP', 'Ministry', 'Minister', 'Aboriginal Affairs' etc. to find any e-mail chains that may have been started by [the named Councillor] or the May on this subject matter."

- this search produced two e-mails from the Mayor's office. No e-mails from the named Councillor were located;

- the Deputy Clerk conducted searches for e-mails sent from the named Councillor to the Brantford Police Services, even though this did not form part of the narrowed request;

- the Manager conducted additional searches for all e-mails between the named Councillor and the Brantford Police Service. One e-mail was located, but a review established that it did not deal with native protests.

The City points out that the appellant has not provided any evidence to substantiate his claim that e-mails between the named Councillor and the Brantford Police Service should exist and submits that the search it conducted for records responsive to the appellant's request was reasonable.

Based on consideration of the affidavit and supporting documentation provided by the City, I am satisfied that the search conducted by the City for responsive records was reasonable. The search was conducted by knowledgeable individuals in locations where records could reasonably be expected to be found. Accordingly, this part of the appeal is dismissed.

ORDER:

1. The search for records was reasonable and this part of the appeal is dismissed.

2. I uphold the City's decision to deny a fee waiver.

3. I uphold the City's decision to withhold the records at issue, except for those portions that are highlighted in yellow on the copy of the records that I am sending to the City along with this order.

4. I order the City to provide the appellant with a copy of the highlighted portions of the records within 20 days from the date of its receipt of payment of the required fee of $300.00 from the appellant.

5. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to order provision 4.

Original signed by: July 20, 2011
Laurel Cropley
Adjudicator