

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3073

Appeal MA13-137

Niagara District Airport Commission

July 22, 2014

Summary: The commission received a request under the *Act* for records relating to its decision to reject the appellant's proposal in response to a Request for Proposal (RFP) to lease specific property at the airport. The two records at issue in this appeal were withheld by the commission as exempt under section 38(a), in conjunction with section 6(1)(b) (closed meeting) or section 12 (solicitor client privilege). The appellant appealed the commission's access decision and also claimed that additional responsive records should exist. This order upholds the commission's application of the exemptions in section 38(a), in conjunction with sections 6(1)(b) and 12. The commission's search is upheld as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 6(1)(b), 6(2)(b), 12 and 17

Orders and Investigation Reports Considered: MO-1285, MO-1558-I

OVERVIEW:

[1] The Niagara District Airport Commission (the commission) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

... general records and own personal information relating to the Niagara Airport Commission decision to reject the [requester's] proposal in

response to the commission's Request for Proposals to lease property at the airport known as "Area 13" [the RFP].

[2] The requester specified the types of records that he felt should be responsive to his request, including records relating to the commission's policies regarding Request for Proposals to lease land, the contact information of the applicants that responded to the RFP during the summer/fall of 2012, staff draft notes and any finished report used for the purpose of review of the requester's proposal to lease "Area 13" and records to support or document the commission's final decision. Additionally, the requester advised that he sought access to public information containing a description of the organization and responsibilities of the commission and a list of the general classes or types of records in its custody or control.

[3] In response to this request, the commission sent a letter dated March 3, 2013 to the requester advising:

The RFP document, which was publicly available on the airport's website, state that all proposals, including your own, were considered confidential.

Public records regarding this RFP are contained in the Commission's meeting minutes, which can be accessed on the airport's website. Attached is a copy of the most recent RFP related record.

3) Minutes of the Airport Commission Meeting; [date] (item 13).

[4] The requester, now the appellant, appealed the commission's decision.

[5] During mediation, the appellant advised the mediator that he submitted a proposal to the commission in response to an RFP to lease a part of the airport known as "Area 13". The appellant's proposal was rejected and he states that he would like to know why it was rejected and what other proposals were considered. In addition, the appellant states that he believes that more records should exist beyond those identified in the commission's letter.

[6] As the commission's March 3, 2013 letter did not constitute a formal decision letter, the mediator asked the commission to issue a final decision letter to the appellant that outlined its access decision to any responsive records, as its decision letter did not identify which exemptions in the *Act* the commission was relying upon.

[7] In response, the commission sent the mediator a letter advising that it denied the appellant access to the minutes of an in-camera meeting. The commission also advised that the appellant's proposal was the only one received and that the airport manager reviewed the appellant's proposal and concluded that it did not meet the requirements of the RFP. The commission advised the mediator that no other records

relating to the RFP exist and that it was “unable to produce the names and other information to other RFP respondents because, since no other responses were received, such records do not exist”.

[8] The mediator requested that the commission direct its access decision to the appellant and specify the sections of the *Act* it relied on to deny access to the records.

[9] The commission issued a final access decision to the appellant, advising that access was denied to the minutes of a closed session meeting under section 6(1)(b) of the *Act*. In addition, the commission advised that it denied the appellant access to a letter from a law firm under section 12 (solicitor-client privilege) of the *Act*.

[10] The appellant advised the mediator that he continues to seek access to the withheld records and believes that more records relating to the RFP process should exist. Specifically, the appellant believes that records relating to the process that the commission undertook to decide to reject his proposal should exist.

[11] Mediation did not resolve all of the issues in this appeal and the matter was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry.

[12] I began my inquiry by inviting the commission to make representations in response to issues set out in a Notice of Inquiry, as well as the following portion of the appellant’s request that was not addressed during mediation:

Public information containing a description of the organization and responsibilities of the institution and a list of the general classes or types of records in the custody or control of the Niagara District Airport Commission.

[13] In the Notice of Inquiry, I asked the commission to advise whether records responsive to this portion of the appellant’s request exist.

[14] On October 16, 2013, the commission issued a revised decision letter to the requester, granting him access to a responsive record. The commission advised that no records containing a list of the types of records in the custody or control of the commission exist. The commission also submitted representations.

[15] I then invited the appellant to make representations in response to the issues raised in the Notice of Inquiry and the commission’s arguments, which were shared in accordance with section 7 of this office’s *Code of Procedure* and *Practice Direction* number 7. The appellant submitted representations, in which he questioned the commission’s interpretation of the scope of the appeal and what records are “reasonably related” to his request. As a result, I have decided to add the issue of

scope to this appeal. I then sought reply representations from the commission, which submitted representations in response to the appellant's submissions.

[16] With their reply representations, the commission sent me a letter dated January 30, 2014 consenting to the release of portions of the in-camera meeting minutes. Although I directed the commission to issue a formal decision to the appellant, it is unclear whether they have done so. Accordingly, I will order the commission to disclose the information it indicated it was prepared to disclose in the January 30, 2014 letter to the appellant and remove this information from the scope of the appeal.

[17] In the discussion that follows, I uphold the commission's application of the exemptions in section 38(a), in conjunction with sections 6(1)(b) and 12, to withhold the two responsive records. I also uphold the commission's search as reasonable.

RECORDS:

[18] The records at issue consist of the withheld portions of the minutes of an in-camera meeting dated December 20, 2012 and a letter from a law firm addressed to the airport manager.

PRELIMINARY MATTERS

Conflict of Interest or Bias

[19] The appellant submits that the Chairman of the commission's (the chairman) correspondence and submissions made on behalf of the commission demonstrates that the chairman is acting as an advocate for the commission and her own personal political position. The appellant cites Interim Order P-524, which states that it is "a well-established principle of natural justice that a decision-maker must not be biased as 'no one shall be a judge in his own cause'."

[20] In Order MO-1285, Adjudicator Laurel Cropley discussed the factors to consider when addressing whether a conflict of interest exists. She wrote:

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Order M-640).

[21] Beyond making his assertion, the appellant did not provide me with evidence demonstrating that there is a conflict of interest with respect to his request or appeal. Reviewing the records and the circumstances of this appeal, I find that there is insufficient evidence before me that the chairman of the commission had a special or personal interest in the records at issue in this appeal. In my view, there is nothing before me to substantiate a finding that the chairman was in a conflict of interest with respect to the appellant's request and/or appeal under the *Act* beyond the appellant's assertion.

[22] I will now turn to the other issues in this appeal.

ISSUES:

- A. What is the scope of the request?
- B. Did the institution conduct a reasonable search for records?
- C. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- D. Does the discretionary exemption at section 38(a), in conjunction with the exemption in section 6(1)(b) apply to the information at issue?
- E. Does the discretionary exemption at section 38(a), in conjunction with the exemption in section 12 apply to the information at issue?
- F. Did the institution exercise its discretion under section 38(a), in conjunction with sections 6(1)(b) and 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. What is the scope of the request?

[23] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;

- (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[24] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹

[25] To be considered responsive to the request, records must "reasonably relate" to the request.²

[26] The appellant makes a number of general submissions with regard to the IPC's interpretation of the term "reasonably related", in relation to the commission's search. The appellant submits that it is improper of the commission to unilaterally decide records are not related or are not responsive, as the "request itself sets out the boundaries of relevancy, not the institution."

[27] In addition, the appellant states that the former commission chair advised him of the reasons for the rejection of his proposal. The appellant provided the following excerpt from a letter from the previous commission chair:

Over the past eight years you have failed to establish a serious and trustworthy relationship with any of the previous and current Airport Commissions and have repeatedly acted against the Niagara District Airport's interests, procedures and even its recent infrastructure funding.

Your history with the Airport Commission no longer warrants taking any of your propositions seriously and your relentless advances are perceived as frivolous. The Airport Commission will therefore not consider any of your "proposals" and has directed [two staff members] to no longer respond to your inquiries.

[28] Based on this excerpt, the appellant submits that all records based on this decision are also responsive records. I disagree. The appellant's original request is for

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

records relating to the commission's decision to reject his proposal in response to the commission's RFP to lease property at the airport known as "Area 13". It appears from the text of the former commission chair's letter that the appellant's actions against the commission resulted in a decision to cease considering his proposals and to no longer communicate with him. It is unclear, and the appellant's submission do not clarify, how the decision to, in future, not consider the appellant's proposals and not respond to his inquiries "reasonably relates" to the commission's decision to reject his application in response to the RFP to lease Area 13. Therefore, I find that the types of records based on the previous commission chair's decision excerpted above are not responsive to this request.

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

[29] 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 17.³ 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.

[30] 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.⁴ To be responsive, a record must be "reasonably related" to the request.⁵

[31] 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.⁶

[32] 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.⁷

[33] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.⁸

³ Orders P-85, P-221 and PO-1954-I.

⁴ Orders P-624 and PO-259.

⁵ Order PO-2554.

⁶ Orders M-909, PO-2469 and PO-2592.

⁷ Order MO-2185.

⁸ Order MO-2246.

[34] 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.⁹

[35] In representations submitted on behalf of the commission, the chairman submits that the Airport Administrator, who is an experienced employee knowledgeable in the subject matter of the request, expended a reasonable effort to locate any and all records that may be reasonably related to the request and provided them to the chairman for review. The chairman submits that the employee in question has the requisite experience and knowledge and expended a reasonable and diligent effort.

[36] In addition, the chairman submitted that she searched the minute books located at the airport from the early 1990's to the present date. The chairman states that the Airport Administrator searched the airport's paper files (all located at the airport) for any document in which the appellant was mentioned, or companies known to be his were mentioned, and provided the chairman with legal file folders and email correspondence. The chairman advises that she reviewed every document provided and found the following responsive records: commission meeting minutes dated May 17, 2012, commission minutes dated September 20, 2012 and the two records at issue. The commission advises that the May 17, 2012 and September 20, 2012 meeting minutes have been disclosed to the appellant.

[37] The chairman states that the Airport Manager, who created the draft notes and finished report for the purpose of review of the appellant's proposal to lease Area 13, advised her that no notes or reports were created because the appellant's proposal did not fit the requirements for further consideration. The chairman states that no committee, board or similar body considered the appellant's proposals to lease Area 13 because it did not meet the preliminary requirements of the RFP. The chairman submits that no such draft notes or other records relating to its decision to reject the appellant's proposal exist.

[38] The chairman stated that the commission follows a formal process in the consideration and review of proposals submitted in response to RFP. The chairman provided a copy of the RFP, which contains a description of this process. In the case of this RFP, the chairman advised that the appellant's response was the only one received. As the appellant's response did not meet the preliminary requirements of the RFP, it was rejected without further consideration and the formal process was not triggered.

[39] In his representations, the appellant submits that the commission did not conduct a reasonable search for responsive records. The appellant submits that the chairman was not forthright in her representations regarding the existence of additional

⁹ Order MO-2213.

responsive records and identifies particular additional records that he believes should exist as follows:

- (a) The commission's description of the May 17, 2012 motions leaves out that the motion was based on a "recommendation of the Airport Liaison Committee". The appellant submits that additional records would include this recommendation, staff reports and notes on discussions prior to the vote.
- (b) The commission did not address its meetings held on July 17, 2012 and August 16, 2012. The appellant submits that, although the meeting agendas and minutes are exempt under section 15(a) of the *Act*, the draft reports and notes to create the drafts are not exempt.
- (c) The commission made no reference to and did not provide a copy of the appellant's application. The appellant submits that a written application was provided to the commission.
- (d) The commission made no reference to a telephone interview and discussion between the appellant and the airport manager. The appellant submits that he understood that notes were being taken for a subsequent staff report.
- (e) The commission's submissions acknowledged that during a commission meeting on December 20, 2012, applicants were to be informed of its decision with regard to the RFP; however, the appellant submits that the commission did not refer to or provide any records relating to the rejection.

[40] The appellant also submits that while the commission confirmed that there is a formal process that it follows in the RFP process, it did not provide any records relating to that process. The appellant refers to previous correspondence from the previous commission chair in which he alleged that the appellant contacted the commission on a daily basis. However, the appellant submits that if he had contacted the commission on a daily basis, the commission would have documented these activities. Finally, the appellant notes that while the commission refers to records dating from the 1990's, it has not identified or provided any of these records.

[41] In reply representations, the commission addressed a number of the appellant's concerns. With regard to (a), the commission submits that it has already advised the appellant that Airport Liaison Committee records are not in the custody and control of the commission. Further, the commission submits that there was no written recommendation or staff report from the Airport Liaison Committee to the commission

in the form of a letter or memo. With regard to part (b) of the appellant's concerns, the commission states that the July 17 and August 16, 2012 meetings involved only brief verbal updates to the commission on the RFP being prepared by the Airport Manager. The commission submits that there were no draft reports or notes. With regard to part (c), the commission submits that the airport administrator did not produce a copy of the appellant's application in the search. The commission does not contest that the appellant submitted an application; however, the application was not considered because it was incomplete. With regard to part (d), the commission submits that the airport administrator did not produce a copy of notes or a staff report for this alleged conversation, which the appellant did not provide specifics such as date or topic, in her search. Finally, with regard to part (e), the commission submits that no written staff report regarding the outcome of the RFP was received because the only application received was incomplete. The commission was informed orally of the incomplete application.

[42] The commission reiterates that the formal process for the RFP is contained in the RFP document that was previously produced.

[43] Based on my review of the parties' representations, I am satisfied that the commission provided sufficient evidence to demonstrate that it discharged its responsibility under the *Act* and made a reasonable effort to identify and locate records responsive to the appellants request. I find that the searches were conducted by experienced employees knowledgeable in the subject matter of the request, in accordance with the commission's obligations under the *Act*.¹⁰ I find that the commission provided me with sufficient evidence to demonstrate that it made a reasonable effort to locate records responsive to the appellant's request. As noted above, the *Act* does not require an institution to prove with absolute certainty that additional records do not exist. Additionally, the institution is not required to go to extraordinary lengths to search for responsive records. An institution is only required to identify and locate records responsive to the request.

[44] In addition, I am not satisfied that there is a reasonable basis for the appellant's belief that additional records that are responsive to the request that is the subject of this appeal should exist. I find that the commission's representations to be sufficiently detailed and that it responded to each of the appellant's concerns in a satisfactory manner. With regard to the appellant's concern that the commission did not provide him with a copy of his application, while the commission does not dispute that the appellant submitted one, I find that it is not unreasonable that the commission did not provide the appellant with a copy of his own application. Further, I find that the appellant has not provided me with evidence to demonstrate that there exists a reasonable basis for his belief that additional records exist. In light of the commission's

¹⁰ Orders M-909 and PO-1744.

detailed submissions regarding the nature and extent of the searches conducted, I am satisfied that the commission's searches were reasonable.

C. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

[45] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[46] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹¹

[47] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[48] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.¹²

[49] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.¹³

[50] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁴

[51] In its representations, the commission submits that the records do not contain "personal information" within the meaning of section 2(1) of the *Act*.

[52] The appellant does not address whether the records at issue contain "personal information" within the meaning of section 2(1) of the *Act*.

¹¹ Order 11.

¹² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹³ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[53] Based on my review of the records at issue, I find that they contain the appellant's personal information, as that term is defined in section 2(1) of the *Act*. The records contain the appellant's name along with other personal information relating to him or information where the disclosure of his name would reveal other personal information about him, thereby falling within paragraph (h) of the definition of "personal information" in section 2(1) of the *Act*.

[54] I find that none of the records contain the personal information of any other individual.

[55] As I have found that the records contain the personal information of the appellant, I will consider whether they qualify for exemption under the discretionary exemption in section 38(a) in Part II of the *Act*.

D. Does the discretionary exemption at section 38(a) in conjunction with the exemption in section 6(1)(b) apply to the records?

[56] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from that right.

[57] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[58] The commission takes the position that the portions of the in-camera meeting minutes dated December 2012 that remain at issue (the minutes) is exempt from disclosure under section 6(1)(b). That section states:

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.

[59] 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.¹⁵

[60] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, this exemption has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.¹⁶

[61] I will review each part of this three-part test to determine whether the minutes qualify for exemption under this section.

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

[62] The commission states in its representations that it held a closed meeting on December 20, 2012. The commission submits that the meeting was held in accordance with section 239(2)(c) of the *Municipal Act*, which allows for a closed meeting where “a proposed or pending acquisition or disposition of land by the municipality or local board” is the subject being considered. In the circumstances, I am satisfied that the meeting took place, and that 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

[63] In support of its position that this part of the three-part test is established, the commission states that the meeting of December 20, 2012 was closed to the public in accordance with provision 239(2)(c) of the *Municipal Act*, which reads:

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

a proposed or pending acquisition or disposition of land held by the municipality or local board.

[64] The commission submits that the appropriate resolution, stating the general nature of the subject matter and the subsections under which the meeting was to be closed, was passed prior to going in camera. This is confirmed in the minutes of the

¹⁵ Orders M-64, M-102 and MO-1248.

¹⁶ Order MO-1344.

meeting, which were previously provided and publicly available on the airport website. The commission states that the meeting agenda was published on the airport's website at least 48 hours in advance of the meeting.

[65] In his representations, the appellant agrees that lease agreements may be suitable for discussion in camera under section 239(2)(c) of the *Municipal Act*. However, as the commission stated that the formal RFP process to lease Area 13 was not "triggered", the appellant submits that section 239(2)(c) does not apply. The appellant submits that, even if section 239(2)(c) of the *Municipal Act* applies, the exception to the exemption under sections 6(2)(a) and (b) applies because the draft was considered in an open meeting and the subject matter was considered in four other open meetings.

[66] The appellant also submits that the commission failed to make any submissions relating to any by-laws passed under section 238(b) of the *Municipal Act*. Further, the appellant submits that the commission failed to make any submissions or provide documents relating to closed meetings or the closed meeting at issue in this appeal.

[67] Based on my review of the meeting minutes, I am satisfied that the commission considered matters related to a proposed or pending disposition of land in its closed meeting on December 20, 2012, and that the commission was authorized to hold this part of their meeting in camera pursuant to section 239(2)(c) of the *Municipal Act*. As the appellant submitted, this office has found that the word "disposition" to be used in the context of sale, lease or "other disposition", such as the granting of an easement. In Order MO-1558-I, Adjudicator Laurel Cropley considered the meaning of the words "acquisition" or "disposition" in section 207(2)(c) of the *Education Act* and found that both of these words can be used to "relate to the purchase, sale, lease or other similar transfer of rights of use of the property, land and/or premises".¹⁷ Adopting this interpretation for the words "acquisition" or "disposition" in section 239(2)(c) of the *Municipal Act*, I find that the commission considered matters relating to the proposed or pending disposition of Area 13 and that it was authorized to do so under section 239(2)(c). Accordingly, I find that part 2 of the three-part test has been met.

Part 3 – substance of deliberations

[68] Under Part 3 of the test set out above, previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision¹⁸

¹⁷ Interim Order MO-1558-I, page 28.

¹⁸ Order M-184.

- “substance” generally means more than just the subject of the meeting¹⁹

[69] The commission submits that the disclosure of the minutes would reveal the actual substance of the deliberations of the meeting. The commission states the subject matter of the deliberations in question were subsequently considered, and a vote taken, in a meeting open to the public following adjournment of the closed meeting session. The commission states that the decision was recorded in the minutes of the December 20, 2012 meeting that was previously disclosed.

[70] The appellant did not make representations on Part 3 of the section 6(1)(b) test. He generally submits that the commission cannot rely on section 6(1)(b) to deny access to the records at issue.

[71] Based on my review of the record and the commission’s representations, I am satisfied that the commission deliberated upon the possible lease of Area 13 during the in-camera portion of the meeting on December 20, 2012. The minutes at issue summarize the discussions during the meeting and the commission’s decision. In my view, the record and the commission’s representations demonstrate that the commission deliberated upon the land disposition during this closed meeting. I find, therefore, that disclosing the in camera meeting minutes would have the effect of revealing the substance of the commission’s deliberations on that subject matter.

[72] Therefore, I find that the commission has met the third requirement of the three-part test for the section 6(1)(b) exemption with respect to the minutes.

Section 6(2) – exceptions

[73] In his representations, the appellant submits that the exceptions to the section 6(1) in sections 6(2)(a) and (b) apply to the records. These sections state:

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

- (a) in the case of a record under clause (1)(a), the draft has been considered in a meeting open to the public;
- (b) 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.

¹⁹ Orders M-703 and MO-1344.

[74] The appellant submits that these two exceptions applies because (a) the draft was considered in open meeting on May 17, 2012; and (b) the subject matter was considered in open meetings May 17, 2012, July 19, 2012, August 17, 2012 and September 20, 2012.

[75] The commission did not submit representations with regard to the application of section 6(2)(b) to the minutes.

[76] I find that the exception in section 6(2)(a) does not apply to the records because the commission did not claim section 6(1)(a) of the *Act* to withhold the in camera minutes.

[77] With regard to section 6(2)(b), I have reviewed the commission's Agendas and Meeting Minutes for May 17, 2012, July 19, 2012, August 17, 2012 and September 20, 2012 and am not satisfied that these meetings satisfy the requirement that "the subject matter of the deliberations has been considered in a meeting open to the public".

[78] The fact that the general issues relating to the RFP to lease Area 13 were discussed during an open meeting does not mean that the subject matter of the meeting had been considered in a meeting open to the public. This determination must be made on an examination of the specific subject matter of the in-camera meeting,²⁰ and it is not sufficient that the general nature of the issues were discussed at an open meeting. Although I accept the appellant's position that the RFP to lease Area 13 was discussed in public meetings, the minutes at issue in this appeal contain additional information that was not discussed during the open meetings. In the circumstances of this appeal, I find that the fact that the RFP to lease Area 13 was discussed at public meetings on May 17, 2012, July 19, 2012, August 17, 2012 and September 20, 2012 is not sufficient to trigger the application of the exception in section 6(2)(b), as I am not satisfied that the subject matter of the commission's deliberations at the in-camera meeting of December 20, 2012 was considered in an open meeting.²¹

[79] As all three requirements for the application of section 6(1)(b) have been met and the exception in section 6(2)(b) does not apply, I find that the minutes are exempt pursuant to section 38(a), in conjunction with section 6(1)(b), subject to my review of the commission's exercise of discretion below.

²⁰ Order MO-2726.

²¹ See the approach to this issue in Orders MO-2918, MO-2572-I, MO-2914 and MO-2425-I, upheld on judicial review in *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div. Ct.)

E. Does the discretionary exemption at section 38(a), in conjunction with the exemption in section 12 apply to the information at issue?

[80] The commission takes the position that section 38(a), in conjunction with section 12 applies to the letter from the law firm. Section 12 of the *Act* states:

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.

[81] In its representations, the commission submits that the letter withheld under the solicitor-client privilege exemption was a direct communication of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice. The commission submits that the letter was sent to the commission by counsel that it retained to provide legal advice. The commission states that advice was sought from this legal counsel and provided in the letter at issue. The commission submits that the record is subject to common law solicitor-client privilege because the communication was expressly made in confidence. The commission states that no waiver of privilege was given and no common interest has been established.

[82] The appellant submits that any solicitor-client privilege was waived by the commission when the commission shared the contents of its legal communications with the appellant in a letter to the appellant dated August 7, 2013, which states:

... made for the purpose of obtaining or giving professional legal advice. The gist of that communication has, however, been communicated to you above.

[83] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.²²

[84] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.²³

²² Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

²³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[85] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.²⁴

[86] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.²⁵

[87] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.²⁶

[88] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.²⁷

[89] The appellant has raised the issue of waiver of privilege. Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[90] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege.²⁸

[91] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²⁹

[92] Waiver has been found to apply where, for example

- the record is disclosed to another outside party³⁰

²⁴ Orders PO-2441, MO-2166 and MO-1925.

²⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

²⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

²⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

²⁸ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

²⁹ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669 see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.) and *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S.C.).

³⁰ Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

- the communication is made to an opposing party in litigation³¹
- the document records a communication made in open court³²

[93] Based on my review of the record remaining at issue, I agree with the commission that it contains direct solicitor-client communications or form part of a continuum of communication of legal advice. As the commission submits, the record contains legal advice sought by the commission.

[94] In addition, I find that the fact that the appellant has received the “gist of the communications” does not constitute waiver of the privilege attached to the records. The commission submitted that it has not waived the privilege and there is no indication that the appellant has been provided with any information beyond the “gist of the communications”. The record contains legal advice from the commission’s legal counsel and there is no evidence in the record that commission had waived its privilege in the advice provided by counsel.

[95] Accordingly, I find that the record is subject to solicitor-client communication privilege and section 38(a), read with section 12, applies to exempt the record from disclosure, subject to my review of the commission’s exercise of discretion. As I have found that the record is subject to solicitor-client communication privilege, it is not necessary for me to determine whether the record is also subject to litigation privilege.

F. Did the institution exercise its discretion under section 38(a), in conjunction with sections 6(1)(b) and 12? If so, should this office uphold the exercise of discretion?

[96] The section 38(a) 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, I may determine whether the institution failed to do so.

[97] In addition, I 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.

³¹ Orders MO-1514 and MO-2396-F.

³² Orders P-1551 and MO-2006-F.

[98] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.³³ However, I may not substitute my own discretion for that of the institution.³⁴

[99] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁵

- 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

³³ Order MO-1573.

³⁴ Section 43(2).

³⁵ Orders P-344 and MO-1573.

- the historic practice of the institution with respect to similar information.

[100] The commission submits that it has properly exercised its discretion and considered relevant considerations. The commission also submits that the interest of the municipalities that supports the commission in the protection of the public interest and wise stewardship of the assets the commission manages on their behalf is its paramount consideration.

[101] The appellant did not make submissions on the commission's exercise of discretion.

[102] On my review of the manner in which the commission exercised its discretion to apply the exemption in section 38(a), in conjunction with sections 6(1)(b) and 12 to the records at issue, and considering the circumstances of this appeal, I am satisfied that the commission properly exercised its discretion to apply the exemptions. It did not take into account irrelevant considerations or fail to take into account relevant considerations in exercising its discretion. As a result, I uphold the commission's decision to apply section 38(a), in conjunction with sections 6(1)(b) and 12, to the records.

ORDER:

1. I uphold the commission's decision and dismiss the appeal.
2. I order the commission to disclose the portions of the in-camera meeting minutes dated December 20, 2012 that it consented to the release of in its letter dated January 30, 2014 by **August 22, 2014**.

Original Signed by: _____
Justine Wai
Adjudicator

July 22, 2014