Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3074

Appeal MA13-14-2

Town of Tillsonburg

July 24, 2014

Summary: The appellant made an access request to the Town of Tillsonburg for records relating to information technology issues and the cancellation of a contract. The town provided a fee estimate to the appellant, who paid the fee deposit. The appellant subsequently filed a deemed refusal appeal to this office, as the town did not disclose records to him respecting his request. Appeal MA13-14 was opened to deal with this matter, and was resolved when the town issued an access decision, identifying 12 responsive records. The town granted access, in part, and denied access to other records, claiming the application of the discretionary exemptions in sections 6(1)(b) (closed meeting), 12 (solicitor-client privilege) and 14(1)(a) (personal privacy) of the *Act*. The town also advised the requester that the total fee for obtaining access to the records was $1,420.10. The issues in this appeal are the application of section 6(1)(b), the fee, whether the records contain personal information, reasonable search and the late raising of a discretionary exemption. The last three issues were raised during mediation and/or the inquiry.

In this order, the adjudicator finds that the records do not contain personal information. She allows the late raising of the discretionary exemption in section 6(1)(b), but does not uphold the application of the exemption. She orders the town to disclose the records to the appellant. In addition, she does not find the town's search to be reasonable and orders it to conduct a further search for records responsive to the request. Lastly, she finds that the fee for search time was unreasonable, and orders the town to refund that amount to the appellant.

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), 17, 45(1)(a); *Regulation 823*, section 6.

Orders Considered: Order MO-2070.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request to the Town of Tillsonburg (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> 1) …copies of all entries in any notebooks, notepads etc. used and maintained by (named employee) or (named employee) that relate to (the requester and an identified company) or notes, reports about IT or Information Technology reports, staff reports or notes read to or presented to Town Council relating to (the requester and identified company) or other notes about IT or Information Technology that he or she made before, during or after any meetings, including closed sessions of Council, or conversations concerning the above including all notes, records, emails etc.
>
> 2) …copies of all reports, staff reports, letters, faxes, emails etc. that relate to the cancellation of contracts with (the requester and identified company).

[2] The town acknowledged receipt of the request and provided a fee estimate to the requester, who paid the fee deposit. The requester (now the appellant) subsequently filed a deemed refusal appeal to this office, as the town did not disclose the responsive records to him. Appeal MA13-14 was opened to deal with this matter, and was resolved when the town issued a decision letter to the appellant, identifying 12 responsive records. The town granted access, in part, and denied access to other records, claiming the application of the discretionary exemptions in sections 6(1)(b) (closed meeting), 12 (solicitor-client privilege) and 14(1)(a) (personal privacy) of the *Act*. The town also advised the requester that the total fee for the records was $1,420.10.

[3] The appellant appealed the town's decision to this office.

[4] During the mediation of the appeal, the appellant confirmed that he paid the fee in full, but that he was appealing the amount, as he was of the view that he was overcharged by the town. He also advised the mediator that further records should exist, likely in the form of e-mails, correspondence and notebook entries by an identified employee of the town. Consequently, the adequacy of the town's search was added as an issue in this appeal.

[5] After the mediator's report was issued, the town issued a revised decision to the appellant, advising him that it had conducted a further search for records, located two

records and granted access to them, as well as to two other records that had been previously withheld. In addition, the town decreased its fee to $949.60, and refunded $470.50 to the appellant. The town also confirmed that access to records 8, 11 and 12 was denied pursuant to section 6(1)(b) and raised, for the first time, the application of section 6(1)(b) to record 4. The town indicated that it was no longer relying on the exemptions in sections 12 and 14(1)(a) to deny access to the records at issue.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. After reviewing the records and request, the adjudicator assigned to the appeal noted that the records contain information about the appellant and his company. This raised the question whether any portion of the records contain the appellant's personal information. Accordingly, the adjudicator added the possible application of section 2(1) (definition of personal information) and section 38(a) (discretion to refuse requester's own information) as issues to be determined in this appeal. The adjudicator then sought and received representations from the town and the appellant. Representations were shared in accordance with this office's *Practice Direction 7*.

[7] The appeal was then transferred to me for final disposition. For the reasons that follow, I find that the records do not contain personal information. While I allow the late raising of the discretionary exemption in section 6(1)(b), I do not uphold its application. I order the town to disclose the records to the appellant. In addition, I do not find the town's search to be reasonable and order it to conduct a further search for records responsive to the request. Lastly, I find that the fee for search time was unreasonable, and order the town to refund that amount to the appellant.

RECORDS:

[8] There are 16 pages of records, consisting of reports and a notes summary and identified by the town as records 4, 8, 11 and 12.

ISSUES:

A. Should I allow the town to raise a discretionary exemption late?

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

C. Does the discretionary exemption at section 6(1)(b) apply to the records?

D. Did the town conduct a reasonable search for records?

E. Should the fee be upheld?

DISCUSSION:

A. Should I allow the town to raise a discretionary exemption late?

[9] The town was notified of this appeal by way of a Notice of Mediation sent to it on February 21, 2013 containing the following statement: "Since this is an appeal of a decision arising from a deemed refusal appeal, you are not permitted to claim any new discretionary exemptions." In its revised decision letter to the appellant which was issued during mediation on May 21, 2013, the town sought to add the discretionary exemption at section 6(1)(b) for record 4, which is a report to Council from the Office of the Chief Administrative Officer.

[10] The *Code* provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Sections 11.01 and 11.02 state:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.
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> An institution does not have an additional 35-day period within which to make a new discretionary exemption claim after it makes an access decision arising from a Deemed Refusal Appeal.

[11] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. A number of previous decisions of this office and decisions of the court have addressed the 35-day rule in section 11.01 of the *Code*.[1] Section 11.02 has not received the same degree of attention.[2] However, it would appear that similar considerations apply in determining its application in the circumstances of a particular appeal. Accordingly, much of the discussion set out below, is relevant to both sections of the *Code*.

[1] For example: Orders PO-2780, PO-2664 and MO-2576.
[2] See Order MO-1647.

[12] With respect to section 11.01, where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[3] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the institution and to the appellant.[4] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[5]

[13] The wording of section 11.02 does not appear to consider an exercise of discretion on the part of the adjudicator determining the issue. However, in addition to the above discussion, sections 2.01 and 2.04 of the *Code* must also be considered:

> This Code is to be broadly interpreted in the public interest in order to secure the most just, expeditious and least expensive determination on the merits of every appeal.
>
> The IPC may in its discretion depart from any procedure in this Code where it is just and appropriate to do so.

[14] The parties were therefore asked to consider the following with respect to both sections 11.01 and 11.02:

1. Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption or exemptions.

2. Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal.

3. By allowing the institution to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process be compromised in any way.

[15] The town provided a history of the request and appeal as follows:

- 30 days after receiving the request, the town issued a fee estimate and a request for a deposit. It also advised the appellant that no further work

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[3] *Ontario (Ministry of Consumer and Correctional Services) v. Fineberg*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[4] Order MO-1832.
[5] Orders PO-2113 and PO-2331.

would be completed until the deposit was received, as it had received legal advice that the 30 day period would resume once the fee was received;

- Approximately 30 days after issuing the fee estimate, the town was advised by an analyst with this office that an appeal had been filed and that the town's request for funds did not delay the 30 day response to the request. The town then issued a decision letter, claiming the application of section 12 to record 4.[6] The town states that it now believes that the analyst was incorrect in his statements regarding the 30 day time period;

- The town then received notification that an appeal of its access decision had been filed, followed by a Notice of Mediation. The parties participated in mediation with a mediator with this office;

- The town then received a Mediator's Report from the mediator approximately 54 days after receipt of the Notice of Mediation;

- Approximately 35 days after the Mediator's Report was issued, the town issued a revised decision letter to the appellant, claiming the application of only section 6(1)(b) to all of the records, including record 4. The town states that it did so "as a result of a recommendation made by the mediator;"

- Approximately 30 days after issuing the revised decision letter, the town received a Revised Mediator's Report, which stated that the town was claiming the application of section 6(1)(b) to all the records.

[16] The town goes on to state:

> In the present case, if the "new" discretionary exemption for record number 4 is not permitted pursuant to its revised decision . . ., then the Town should be permitted to deny access to all of the records based upon all of the sections it referenced in its initial Decision . . ., including section 12 and 14(1)(a) of the *Act*. The Town, in following a recommendation made by the mediator, should now not be penalized by not having any sections of the *Act* upon which to rely in relation to record number 4.
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> There would be extreme prejudice to the Town if section 6(1)(b) of the Act were not allowed to apply, especially if the earlier defence of section 12 was similarly removed as a result of the Town's revised Decision . . . If

[6] As set out previously, once the decision letter was issued, the first appeal file was closed.

> that were the case, presumably the Town would have no other option but to release record 4 in its entirety, which the Town is seeking to avoid.

[17] Lastly, the town argues that the appellant would not be prejudiced by allowing the late raising of section 6(1)(b), as it was originally claimed for the other records at issue and is therefore "hardly" new or novel in the present circumstance.

[18] The appellant submits that the town should not be allowed the late raising of section 6(1)(b) to record 4, as it was advised by the Notice of Mediation that it was not permitted to claim any new discretionary exemptions, as this appeal is as a result of a decision arising out of a deemed refusal appeal. The appellant also states that he would be prejudiced by the late raising, as the "statute of limitations" is approaching and that his access request was made in 2012. Lastly, the appellant advises that he is of the view that record 4 contains incorrect information.

[19] In Order MO-2070, Adjudicator Catherine Corban explained the purpose of this office's policy on the late raising of discretionary exemptions. She stated:

> Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject, of course, to a consideration of the particular circumstances of each case.
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> The objective of the policy is to provide government institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant in the release of the information prejudiced. In my view, the objective of the policy is applicable to this situation. This approach was upheld by the Divisional Court in the case of *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg.*[7]
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> In adjudicating the issue of whether to allow the City to claim this discretionary exemption at this time, I must weigh the balance between maintaining the integrity of the appeals process against any evidence of extenuating circumstances advanced by the City.[8] I must also balance the relative prejudice to the City and the appellant in the outcome of my ruling.

[7] (21 December 1995) Toronto Docket 220/89.
[8] Order P-658.

. . .

> Earlier identification of an exemption claim permits the appellant time to consider and reflect on its application, consult on the issue if it deems it necessary and gives the appellant an opportunity to address the exemption claim in mediation. In some situations, as well, failure to claim a discretionary exemption in a timely manner may have an effect on whether all relevant evidence or information is retained by the appellant for use in the appeal. In my view, these considerations relate to the overall integrity of the appeals process and must be taken into account by an Adjudicator in deciding whether to grant a request for the late raising of a new discretionary exemption.

[20] I adopt Adjudicator Corban's approach to this office's policy on the issue of late raising of discretionary exemptions. In addition, although the Notice of Mediation states that no additional discretionary exemptions may be claimed where a decision letter arises from a deemed refusal appeal, I do have the discretion to depart from that policy where it is just and appropriate to do so.

[21] I have decided to permit the town to claim section 6(1)(b) with respect to record 4, because the town raised the exemption with respect to the other records at issue and provided the appellant with a revised decision letter during the mediation of the appeal. I am not satisfied that any of the factors identified above as supporting the application of the policy are present in this case. Most importantly, I have also concluded that the appellant will not be prejudiced by the late raising of section 6(1)(b), as he has been given an opportunity to address the exemption claim both in mediation and during this inquiry, and no delay has resulted from the additional claim. Accordingly, I will allow the town's claim that the discretionary exemption at section 6(1)(b) applies to record 4.

[22] However, although I am allowing the late raising of this exemption, I must comment on some of the statements made by the town in its representations on this issue. First, the town's position that an access decision does not have to be issued until the fee deposit is received is incorrect. An access decision must be made within 30 days after a request is received.[9] The exceptions to this are if the head provides a requester with written notice of a time extension,[10] or is notifying an affected person.[11] In taking the position that an access decision does not have to be made until the fee deposit is received, it would appear that the town is confusing access to the record itself with the access decision.

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[9] See section 19 of the *Act*.
[10] See section 20 of the *Act*.
[11] See section 21 of the *Act*.

[23] Second, I note from my review of the appeal file that after the town received the first mediator's report, it contacted the mediator and advised her that it was now claiming section 6(1)(b), and not section 12 with respect to record 4. There is no evidence in the file that the mediator recommended that the town claim one exemption over another, or that it was precluded from claiming both.

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

[24] 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,
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> (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 where 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;

[25] 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.

[26] 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]

[27] 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]

[28] The town submits that the records do not contain the appellant's "personal information" as defined by section 2(1) of the *Act* because the records relate to the appellant in a professional, official or business capacity. In response, the appellant states that the records concerning him should be disclosed to him. In reply, the town argues that to qualify as personal information, the information must be about the individual in a personal capacity. The records, the town states, are about the appellant in a professional, official or business capacity and not in a personal capacity.

[29] I have reviewed the records at issue and I agree with the town's position that the records do not contain personal information. While the records refer to the appellant and his company, the information solely relates to him in his professional and business capacity. Further, there is nothing in the records that would reveal something of a personal nature about the appellant. Consequently, I find that the records do not contain the appellant's personal information and the discretionary exemption in section 38(a) does not apply. The town has claimed the application of the discretionary exemption in section 6(1)(b) to the records, which I will consider below.

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[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.

C. Does the discretionary exemption at section 6(1)(b) apply to the information at issue?

[30] 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.

[31] 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.[14]

[32] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[15]

[33] With respect to the first and second parts of the test for exemption, the town was asked in the Notice of Inquiry to provide answers to the following questions:

1. Did a council, board, commission or other body, or a committee of one of them, hold a meeting? If so, was the meeting held in the absence of the public? Please explain.

2. What is the statute and specific section that authorizes the holding of the meeting in the absence of the public? Was there a resolution closing the meeting to the public? Please explain, and provide a copy of the section and/or resolution.

3. Has a procedural by-law been passed under section 238(b) of the *Municipal Act* or any applicable analogous provision? Does the by-law include requirements for closed meetings? Please describe any

[14] Orders M-64, M-102 and MO-1248.
[15] Order M-102.

such requirements and provide a copy of the by-law. Do these requirements pertain to the type of closed meeting that occurred in this case?

4. Were all required conditions for holding a closed meeting met? Were all required notices for holding a closed meeting provided to those entitled to notice? Please explain, and provide any relevant documentation.

[34] The town was also asked in the Notice of Inquiry:

> In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?[16]

[35] The town provided representations in response to the questions posed in the Notice of Inquiry, stating:

> . . . Records 4, 8, 11 and 12 reveal the substance of deliberations of a meeting of council that was authorized by statute to be held in the absence of the public (see section 239 of the *Municipal Act, 2001*). They were presented and discussed at council meetings in closed sessions on October 24, 2012 and November 26, 2012 (the "In-Camera Meetings"). The Town's legal counsel was even present at its meeting on October 24, 2012. All procedural requirements were met in relation to the In-Camera Meetings.
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> Enclosed as Appendix 'C' please find the Town's Procedural By-Law which provides Notice of meetings (s. 238 (2.1) "The procedural by-law shall provide for public notice of meetings.").

[36] The appellant submits that the *in camera* portion of the Council meeting of October 24, 2012 was not duly constituted under the *Municipal Act* because:

- Public notice of the meeting was not given until eight hours after the meeting started;
- The meeting was never open to the public, as the doors to the council chamber were never opened to allow the public to attend;

[16] *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

- No special council meeting notice was posted on the door to the council chamber;

- There was no Clerk present at part of, or all of the meeting;

- By-laws were passed in closed session, which is contrary to the provisions in the Municipal Act;

- The agenda for the council meeting was issued two days after the meeting was held; and

- The minutes of the meeting were approved by the Deputy Clerk the day before the meeting was held.

[37] In addition, the appellant's representations allude to an investigation that was conducted in response to a complaint he filed regarding this council meeting. The appellant refers to the investigation as "flawed."

[38] With respect to the second *in camera* meeting, the appellant states that it was held on November 22, 2012. In addition, the appellant argues that statements that are contained in record 11 were also made in an open session of council on February 19, 2013. Therefore, the appellant submits, if the subject matter of deliberations is later considered in an open meeting, the exemption in section 6(1)(b) no longer applies, owing to the operation of section 6(2)(b).

[39] In reply, the town advises that the appellant filed a complaint with the closed meetings investigator, the matter was investigated, and a report was issued to the Town Council and to the public which found that the *in camera* Council meeting was properly called. The town also confirmed that there was no Council meeting on November 22, 2012, but that there was a Council meeting on November 26, 2012. The town also states that it doesn't know how the appellant would know about the content of a record to which access was denied.

[40] There seems to be no dispute among the parties that two closed sessions of Council took place in which the records at issue were considered by Council.[17] I conclude therefore, that the first part of the test in section 6(1)(b) has been met.

[41] The second part of the test in section 6(1)(b) is that a statute authorizes the holding of the meeting in the absence of the public. The town is relying on section 239 of the *Municipal Act*, 2001 which provides, in part:

[17] The appellant may have made an error regarding the date of the second meeting, but does not dispute that two closed sessions took place.

(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;

(b) personal matters about an identifiable individual, including municipal or local board employees;

(c) a proposed or pending acquisition or disposition of land by the municipality or local board;

(d) labour relations or employee negotiations;

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

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

(g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.

(3) A meeting shall be closed to the public if the subject matter relates to the consideration of a request under the Municipal Freedom of Information and Protection of Privacy Act if the council, board, commission or other body is the head of an institution for the purposes of that Act.

(3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:

1. The meeting is held for the purpose of educating or training the members.

2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially

> advances the business or decision-making of the council, local board or committee.
>
> (4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,
>
> (a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or
>
> (b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject matter and that it be closed under that subsection.

[42] The town provided a copy of it procedural by-law 3511, which essentially replicates the content of some of the subsections of section 239 of the *Municipal Act, 2001*. Section 13.2 of the by-law also states that:

> Meetings closed to the public must be closed by a motion to "Proceed into Closed Session" with the said motion, duly seconded and passed, stating the general nature of the matter(s) to be considered at the Closed Session.

[43] Based on the evidence before me, I am unable to conclude that the town has met part two of the test in section 6(1)(b), which is that a statute authorizes the holding of the meeting in the absence of the public. As set out in both the *Municipal Act, 2001* and the town's own procedural by-law, the town is required, if going into a closed session, to close the meeting to the public by a motion, stating the general nature of the matter(s) to be considered in the closed session. Perhaps the town did just that. However, in both sets of representations submitted by the town to this office in response to the specific questions posed in the Notice of Inquiry and in response to the appellant's representations, it did not provide copies of these motions, nor did it indicate what the general nature of the matters to be considered was. I accept that the records at issue were reviewed during the closed sessions. I accept that legal counsel was present at the meeting in October, 2012. However, I have not been provided with any information about the subject matter of the meetings and I am not prepared to speculate. The town has not provided documentary evidence that Town Council went *in camera* and for what reason, which are the basic requirements of part two of the test in section 6(1)(b).

[44] In addition, the town states that the appellant filed a complaint with the closed meetings investigator, the matter was investigated, and a report was issued to the

Town Council and to the public which found that the *in camera* Council meeting was properly called. However, the town did not provide a copy of this report to this office, or provide an internet link to the report. I conducted a search on the town's website and was unable to find this report. Therefore, on the basis of insufficient evidence provided by the town, I am unable to verify the content of and conclusions drawn in this report.

[45] As set out in the Notice of Inquiry, under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. As I have not been provided with sufficient evidence to satisfy part two of the test in section 6(1)(b), I do not uphold the application of the exemption in section 6(1)(b). As no other exemptions have been claimed with respect to the records at issue, I order the town to disclose all of the records to the appellant.

D. Did the town conduct a reasonable search for records?

[46] 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.[18] 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.

[47] 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.[19] To be responsive, a record must be "reasonably related" to the request.[20]

[48] 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.[21]

[49] 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.[22] 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.[23]

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[18] Orders P-85, P-221 and PO-1954-I.
[19] Orders P-624 and PO-2559.
[20] Order PO-2554.
[21] Orders M-909, PO-2469 and PO-2592.
[22] Order MO-2185.
[23] Order MO-2246.

[50] The town was asked to provide a written summary of all steps taken in response to the request; in particular, it was asked to answer the following questions:

> 1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
>
> 2. If the institution did not contact the requester to clarify the request, did it:
>
> (a) choose to respond literally to the request?
>
> (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
>
> 3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
>
> 4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[51] The town submits that it conducted a reasonable search for records. It states that the search was conducted by the Town Clerk and all senior management team members[24] who could potentially have any documents pertaining to the request, as well as a former employee. In particular, emails and notes of any kind were searched, as well as the agendas and minutes of Town Council meetings. The town provided an affidavit sworn by the Town Clerk,[25] who advises that she is an experienced employee knowledgeable in the subject matter of the request and that she undertook a

[24] Including the Interim Chief Administrative Officer, the Director of Operations, the Director of Finance, the Director of Parks and Recreation, the Fire Chief, the Acting Director of Development and Communication and the former Chief Administrative Officer.
[25] The Town Clerk is also the Head for purposes of the *Act*.

"significant effort" in coordinating the town's search for records which were reasonably related to the request. In addition, the town argues that the appellant has not provided a reasonable basis for concluding that additional records exist.

[52] The appellant advises that he submitted the same access request to Oxford County (the county) and that, in response, the county disclosed many responsive records between it and the town. These records, the appellant submits, were not disclosed to him by the town, nor were they listed in the town's index of records. In particular, the appellant provided copies of some of the records he obtained from the county, and submits that the town has not identified as responsive:

- a letter on town letterhead sent from the town to the county regarding software issues on which the appellant was copied;[26]
- town emails that the appellant was copied on;
- project reports to Council and the Ministry of Agriculture and Rural Affairs in regard to a project that the appellant and his company was involved; and
- emails between town and county staff regarding information technology issues.

[53] In reply, the town argues that the records the appellant refers to in his representations do not relate to his access request made to the town, do not relate to him or his companies and/or would not have been responsive to his request. The town then reiterates the content of its original representations.

[54] For ease of reference, I will reproduce the appellant's request, in part, which was for access to:

> . . . copies of all entries in any notebooks, notepads etc. used and maintained by (named employee) or (named employee) that relate to (the requester and identified company) or notes, reports about IT or Information Technology reports, staff reports or notes read to or presented to Town Council relating to (the requester and identified company) or other notes about IT or Information Technology that he or she made before, during or after any meetings, including closed sessions of Council, or conversations concerning the above including all notes, records, emails etc.

[26] In his representations, the appellant states that he did not receive a copy of this letter at any time from the town.

[55] The letter which the appellant provided to this office is from the town to the county on town letterhead, and was authored by one of the employees named in the appellant's request. The letter indicates that the appellant was copied on it, and the subject matter of the letter concerns software applications. The author of the letter is one of the employees identified by the town as having conducted a search for records.

[56] The appellant's request was quite broad. Given the breadth of the request and the factual information about the letter the appellant provided to this office, I am of the view that this letter is responsive to the appellant's request. As this letter was disclosed to the appellant by the county, and not by the town in response to the same request, I find that the appellant has provided a reasonable basis for concluding that additional records exist and that the town's search was not reasonable, despite the fact that the town conducted one search after the request and a second search during the mediation of the appeal. Consequently, I order the town to conduct a further search for records responsive to the appellant's request and provide him with a decision once that search is completed.

E. Should the fee be upheld?

[57] According to its revised decision letter, the town charged a fee of $949.60, which the appellant had already paid. However, the appellant has appealed this fee, as he is of the view that he was overcharged. Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[58] More specific provisions regarding fees are found in section 6 of Regulation 823. Those sections read, in part:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

[59] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[27] On my review of the evidence and the arguments of the town regarding the components of its fee, I am prepared to uphold the town's fee, only in part. I make this finding based on the insufficiency of evidence provided to me by the town during this inquiry.

[60] For photocopying the records that were disclosed to the appellant, the town charged 20 cents per page, which is in accordance with the fee provisions of the *Act* and section 6 of Regulation 823. Therefore, I uphold the photocopying fee. The remaining fee is for search time for which the town charged $7.50 for each 15 minutes of search time, which is also in accordance with the fee provisions in the *Act*. The town states that it did not charge the appellant for the costs of preparing the records for disclosure, computer or other costs in locating, retrieving or processing the records, shipping costs or any other costs incurred in responding to a request for access. The town also states that its fee was "more than reasonable given the circumstances."

[61] As the base rate charged for the search is compliant with the fee provisions of the *Act* and section 6 of Regulation 823, the sole issue for me to determine is whether the search time was reasonable and should be upheld. The town advises that it spent 31.5 hours searching for responsive records. The appellant's position is that the town has not provided a sufficiently detailed breakdown of the search and that it essentially, picked the "numbers from a hat."

[62] With respect to search time under section 45(1)(a) of the *Act*, I find the figure of 31.5 hours to search for responsive records to be excessive, based on the information I have before me. As previously stated by the town, seven employees and one former employee were involved in the search for records. However, the town has provided only the total hours involved in the search. The town has not provided further details about the search, such as the amount of time each employee spent searching, what systems and locations were searched, how the records are kept and maintained, and what percentage of the records are stored in electronic versus hard copy format. The only information provided was that the town searched for emails and notes of any kind, agendas and minutes of Town Council meetings.

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[27] Orders P-81 and MO-1614.

[63] The records cover a relatively short period of time in 2012, which I consider to be of recent origin. In my view, it is reasonable to expect that town records from this time period of the nature described above should be kept in a consistent and easily searchable manner. For example, emails are searchable electronically, as are Town Council agendas and minutes. Further, I note that the appellant received approximately 20 pages of records, and that there are 16 pages of records remaining at issue. In my view, a 31.5 hour search for approximately 36 pages of records is excessive and the town has not provided sufficiently detailed evidence to support its claim.

[64] Consequently, I find that the search time is excessive and that the town has not provided adequate evidence to satisfy me that the search time was reasonable. I disallow the search time and order the town to refund the appellant $945.00, which was the fee charged for the search.

[65] In sum, I find that the records do not contain personal information. While I allow the late raising of the discretionary exemption in section 6(1)(b), I do not uphold the application of the exemption. I order the town to disclose the records to the appellant. I do not find the town's search to be reasonable and order it to conduct a further search for records responsive to the request. Lastly, I find that the fee for search time was unreasonable, and order the town to refund that amount to the appellant.

ORDER:

1. I order the town to disclose the records to the appellant by **August 29, 2014** but not before **August 25, 2014**.

2. I order the town to conduct a further search for records relating to the appellant's request.

3. If, as a result of this further search, the town identifies additional records responsive to the request, I order it to provide a decision letter to the appellant regarding access to these records in accordance with section 19 of the *Act*, treating the date of this order as the date of the request. I also order the town to provide me with a copy of any new decision letter that it issues to the appellant.

4. I disallow the fee for search and order the town to refund the appellant $945.00.

5. I reserve the right to require the town to provide me with copies of the records it disclosed to the appellant.

Original signed by: July 24, 2014
Cathy Hamilton
Adjudicator