

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3328

Appeal MA15-5

City of St. Catharines

June 29, 2016

Summary: The appellant made a request to the city pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the city's sale of a parcel of land. The city located responsive records and granted partial access to them, withholding an *in-camera* report and an Offer to Purchase on the basis of the discretionary exemption for closed meetings at section 6(1)(b). The appellant appealed the application of section 6(1)(b) to the records, and also raised the reasonableness of the city's search for responsive records. In this order, the adjudicator upholds the city's application of section 6(1)(b) to the *in-camera* report and the Offer to Purchase. Further, the adjudicator upholds the city's search as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 6(1)(b).

Orders Considered: Order M-241.

BACKGROUND:

The appellant made a request to the City of St. Catharines (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All minutes from any meetings; legal documents pertaining to the sale or transfer; other legal documents; any other reference to the sale and/or

transfer or consideration of the sale and/or transfer of [a specified parcel of land], or any part of [the land]. [The land] is situated in the Port Dalhousie ward, St. Catharines.

The city sought clarification of the request from the appellant, and in subsequent correspondence the city described the clarified request in the following terms:

1. A copy of the agreement for the sale of [the specified parcel of land] to [a named company].¹
2. Information with respect to the sale of the property by the “restricted” method.
3. Transfer [of] title of [the specified parcel of land] from [the named company] to another developer.

The city identified two records as responsive to the request and issued a decision addressing the three parts of the clarified request.

The city advised that one record, an *in-camera* report, was responsive to Part 1 of the request. The city denied access to this record pursuant to the discretionary exemption found at section 6(1)(b) of the *Act* which exempts from disclosure records that would reveal the substance of a closed meeting.

The city located minutes of a public council meeting that it found were responsive to Part 2 of the request. The city advised that the property was publicly declared surplus at the meeting, and provided a copy of the minutes to the appellant.

The city advised that no responsive records pertaining to Part 3 of the request exist.

The appellant appealed the city’s decision.

During mediation, the appellant advised the mediator that he believed that further records with respect to the city’s decision to restrict the sale of the land ought to exist. The appellant also advised the mediator that he felt that there should be an agreement that sets out the terms of the sale of the property. The mediator relayed the appellant’s concern to the city, which then located and identified an Offer to Purchase as a responsive record.

After notifying an affected party, who objected to the disclosure of the Offer to Purchase, the city issued a decision denying access to it, relying on the discretionary exemption for closed meetings at section 6(1)(b) of the *Act*, the mandatory exemption for third party information at section 10(1), and the discretionary exemption for the economic interests of an institution at section 11(e).

¹ As will be seen below, while the city and a purchaser did reach an agreement for the purchase and sale of the land, the transaction has not yet closed and the property is still in the possession of the city.

The appellant maintained his position that he should have access to both the *in-camera* report and the Offer to Purchase, and also took the position that there is a public interest in disclosure, thereby raising the public interest override found at section 16 of the *Act*. The appellant also confirmed that he believes that there exist further records responsive to his request. As such, the reasonableness of the city's search is also at issue in this appeal.

As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator invited representations from the city, the affected party and the appellant. The city and the appellant filed representations; the affected party did not. The appeal was then transferred to me for a decision.

In its representations, the city referred to a further record relating to the sale of the land, an "Amendment of Offer to Purchase", and provided a copy of it to this office. The "Amendment of Offer to Purchase" post-dates the date of the appellant's request for records.

In this order, I uphold the city's decision that the records are exempt pursuant to section 6(1)(b) of the *Act*. I also uphold the city's search as reasonable.

RECORDS:

The records at issue are a "Report to Staff and General Committee in Camera" (the *in-camera* report) and an Offer to Purchase.

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) apply to the records?
- B. Did the city conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the discretionary exemption at section 6(1)(b) apply to the records?

Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of

them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.²

Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;³ and
- “substance” generally means more than just the subject of the meeting.⁴

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*.⁵

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

Parts 1 and 2 of the section 6(1)(b) test: in-camera meeting

The city submits that City Council (in General Committee) held an *in-camera* meeting on June 15, 2009 to consider the confidential staff report (the *in-camera* report). It submits that the meeting was closed in accordance with section 239(2)(c) of the *Municipal Act, 2001*, which provides:

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

² Orders M-64, M-102 and MO-1248.

³ Order M-184.

⁴ Orders M-703 and MO-1344.

⁵ Order M-102.

⁶ Orders MO-1344, MO-2389 and MO-2499-I.

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

The city has provided a copy of council's resolution authorizing the closure of the meeting for this purpose. The city also refers to section G5.3(c) of its Procedural By-law 2007-311, which regulates council meetings, and which mirrors the language of section 239(2)(c) of the *Municipal Act, 2001*.

The city advises that during the closed meeting, city staff received direction from council concerning the proposed sale of land, and that no votes were taken at the closed meeting. Following the adjournment of the meeting, council returned to the open public meeting and in open session voted and passed resolution 289 to approve the recommendations contained in the *in-camera* report.

The appellant does not dispute that a closed meeting was held, but submits that an additional vote should have been taken to determine under which process the sale of the land would proceed.

Having reviewed the city's representations and the attached by-laws and resolutions, I am satisfied that a closed meeting of council took place on June 15, 2009, and that the meeting was held to consider a proposed disposition of land by the city, thereby falling under section 239(2)(c) of the *Municipal Act, 2001*. I conclude that the meeting was properly held *in camera*.

Part 3: substance of the deliberations

The city submits that disclosure of either of the records at issue would reveal the substance of the deliberations of council which took place *in camera*. It submits that the *in-camera* report provides staff advice and recommendations to council, in confidence, regarding the proposed sale of city land and the proposed terms and conditions of the purchase, which were deliberated by council *in camera*. It submits, further, that the Offer to Purchase was subsequently prepared in accordance with those deliberations, and that disclosing it would reveal the substance of the *in-camera* deliberations regarding negotiations with the purchaser.

The appellant's representations do not address the issue of whether disclosure of the records would reveal the substance of the council's *in-camera* deliberations. Instead, his representations focus on the procedure by which the sale of land was to occur, and the public interest in disclosure of the records. I address these matters separately below.

Having reviewed the city's representations, including resolution 289 indicating that the *in-camera* report was considered at the council meeting on June 5, 2009, I find that disclosure of the *in-camera* report would reveal the substance of the deliberations at the June 5, 2009 closed meeting. While I do not have the minutes of the closed meeting before me, I note that the motion in question was that the recommendation in the report be approved, with a modification. I am satisfied, therefore, that council

deliberated on the content of the *in-camera* report, and that the disclosure of the *in-camera* report would, therefore, reveal the substance of the deliberations of a closed meeting.

I also find that disclosure of the Offer to Purchase would reveal the substance of the deliberations at the council meeting on June 5, 2009. A comparison of the Offer to Purchase and the *in-camera* report reveals significant overlap in their content. As noted above, the *in-camera* report discusses the terms to be included in an Offer to Purchase. The terms of the Offer to Purchase reflect those discussed in the report.

I conclude, therefore, that section 6(1)(b) applies to both the *in-camera* report and the Offer to Purchase.

Section 6(2)(b)

Section 6(2)(b) of the *Act* sets out an exception to section 6(1)(b). It reads:

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

- (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; or

As noted in the city's representations, following the adjournment of the closed meeting, council returned to the open public meeting and in open session voted and passed resolution 289 to approve the recommendations contained in the *in-camera* report.

In Order M-241, Adjudicator Donald Hale found that an Executive Committee Report was exempt from disclosure under section 6(1)(b) as its disclosure would reveal the substance of deliberations at a closed meeting. The report had subsequently been adopted by a vote of council in a public meeting.

Adjudicator Hale then went on to consider whether the subject matter of the deliberations at the closed meeting had been considered in an open meeting for the purposes of section 6(2)(b). In finding that it had not, Adjudicator Hale stated:

On May 29, 1991, in a public meeting, a recorded vote was taken in which the City Council adopted the Executive Committee Report, as amended, without further discussion. In my view, the Council's *adoption* of a report, without discussion in a public meeting, cannot be characterized as the *consideration* of the subject matter of the *in camera* deliberations as contemplated by section 6(2)(b) of the *Act*. (emphasis in original)

I agree with Adjudicator Hale's reasoning and adopt it for the purposes of this appeal. In my view, council's passing of a resolution to approve the recommendations

contained in the *in-camera* report does not amount to “consideration” of the subject matter of council’s deliberations for the purposes of section 6(2)(b). I find, therefore, that section 6(2)(b) does not apply to either the *in-camera* report or the Offer to Purchase. As a result, both records are exempt from disclosure pursuant to section 6(1)(b).

However, the section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, takes into account irrelevant considerations, or fails to take into account relevant considerations. In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁷ This office may not, however, substitute its own discretion for that of the institution.⁸

The city submits that the proposed sale of land is still pending and has not been completed, and that at this time it is unknown if the transaction will close with the purchaser, since the Offer to Purchase contains conditions which have not yet been satisfied. It submits that it is possible that the Offer to Purchase could expire without being completed, in which case the city may, at a future time, conduct a new set of negotiations with a different purchaser. The city submits that it does not wish to release sensitive commercial and financial information prior to the closing of the transaction. The city is concerned that disclosure could negatively affect its bargaining position and economic interests in subsequent negotiations.

While the appellant disputes that any future negotiations would be negatively affected by the terms of the Offer to Purchase being made public, I accept that there is some sensitivity to the terms of the Offer to Purchase given that the transaction has not yet closed. In my view, this was a relevant factor that the city appropriately considered in deciding to withhold the records (including the *in-camera* report, which sets out staff’s recommendations with respect to the terms of the Offer to Purchase). There is also no evidence that the city exercised its discretion in bad faith or for an improper purpose, that it took into account irrelevant considerations, or that it failed to take into account relevant considerations.

Therefore, I uphold the city’s exercise of discretion in withholding the records pursuant to section 6(1)(b).

I find, further, that the public interest override raised by the appellant is inapplicable. Section 16 of the *Act* states:

⁷ Order MO-1573.

⁸ Section 43(2).

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

Since section 6 is not one of the sections listed in section 16 for which the public interest override is available, I cannot consider whether the records should be disclosed in the public interest.

As I have found the records to be exempt under section 6(1)(b), I do not need to consider whether the exemptions at sections 10(1) and/or 11(e) also apply.

Issue B: Did the city conduct a reasonable search for records?

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.⁹ 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.

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.¹⁰

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.¹¹

Representations

As noted above, the appellant's clarified request was for the following information:

1. A copy of the agreement for the sale of [the specified parcel of land] to [a named company].
2. Information with respect to the sale of the property by the "restricted" method.
3. Transfer [of] title of [the specified parcel of land] from [the named company] to another developer.

During mediation, the appellant expressed the view that more records responsive to each aspect of the request should exist. When the file moved to adjudication, the previous adjudicator sent a Notice of Inquiry to the city that asked it to provide a

⁹ Orders P-85, P-221 and PO-1954-I.

¹⁰ Orders M-909, PO-2469 and PO-2592.

¹¹ Order MO-2185.

written summary of all steps taken in response to the request.

In response, the city provided the following representations with respect to each part of the appellant's clarified request:

Part 1 of the Request - Agreement for the Sale of [the land]

It is the City's understanding that the Requester is satisfied that with the identification of [the Offer to Purchase] the search for responsive records to this part of his request is complete.

Part 2 of the Request - Information related to method of sale

The Requester believes that there should be more records relating to deliberations concerning the process used for the sale of the property - specifically related to the use of the open market method of sale as opposed to the process applicable to the sale of land to abutting property owners. (What the requester refers to as the "restricted method").

In his clarified request, the Requester stated: "I would like information with respect to who made the determination that the sale would be by the "restricted" method; who approved the determination; and, who was aware of that determination."

The difficulty with the Requester's expectation that such records exist is that it appears to be based upon a misunderstanding of the City's sale of land policy, or disagreement with the City's interpretation of the policy.

Notwithstanding the Requester's understanding and belief, his opinion is not the interpretation of the policy applied by City staff involved in the processes for the sale of land, including this property. All records related to the Offer to Purchase have been identified by the property management division and other relevant departments and provided to the Head for review. The deliberations that the Requester presumes occurred never in fact occurred because from the City perspective the method of sale suggested by the Requester was simply not applicable. Again from a City perspective this is plain and obvious and did not require any "determination"; accordingly there are no records relating to the "determination" of the sale method apart from [the *in-camera* report] which is only implicit in this regard, the subject matter of [the *in-camera* report] being the sale of the land to an abutting property owner. No amount of further searching will uncover any records regarding an "open sale" of the land as this process was not applicable for this property and never considered.

The responsiveness of [the *in-camera* report] to the Requester's narrowed request is in fact questionable as it relates to the terms and conditions of the Offer to Purchase between the City and [the purchaser], not the sale process per se; whereas the Requester seems to be requesting records related to other options. However, it has been identified for the purposes of this request and appeal as a responsive record to either Part 1 or Part 2 of the request. Additional records identified during the search relate only to the negotiations with [the purchaser] and are not responsive to the clarified request.

The Requester has previously been provided publically available records regarding the process used to declare [the land] surplus, which is the first step in the sale of land process. These public staff reports are in fact the records that are responsive to the questions posed by the Requester in Part 2 of his request.

Part 3 - Transfer of Title to another developer

The Requester is requesting records that do not exist based on the Requester's misunderstanding of the status of the property and the changes in ownership of the Affected Party ([the purchaser]).

First, the land ... is still owned by the City. The transaction which is the subject matter of the Offer to Purchase has in fact never closed because the development to which the transaction relates has not yet proceeded. The Offer to Purchase remains a valid and binding agreement, but no sale of the land has occurred. No sale to any other party has occurred. This was explained at the mediation stage of this appeal.

As explained to the Requester and the IPC, what has happened since the Offer to Purchase was executed is that the beneficial purchaser ... under the agreement has been sold to another company. The new owner of [the purchaser] is another company.... This has no impact on the Offer to Purchase. The beneficial purchaser and party to the Offer to Purchase is still [the purchaser] which continues to be an operating company. No sale to [the purchaser] or to anyone else has occurred. The Offer to Purchase has not been assigned or otherwise transferred to any other party by either the City or [the purchaser].

...

News reports have inaccurately described the corporate change as a sale of the "property" to [the new owner of the purchaser] when it would be more accurately described as a sale of the "project". The need to re-send the Notice [under section 21] and the news reports have likely fostered

the Requester's belief that [the land] has been sold, and sold to a party other than [the purchaser]. As indicated this was addressed at the mediation stage but not apparently resolved.

Accordingly no further search will identify records related to Part 3 of the Requester's request. The request is based on a mistake of fact.

Also in its representations, the city has referred to and provided a copy of an "Amendment of Offer to Purchase", which post-dates the date of the appellant's access request.

The appellant submits that further records should exist. He responds to the city's representations on each part of his request as follows:

1. While I am satisfied that ... the Offer to Purchase has been identified, the existence of an Amended Offer to Purchase should be confirmed and subject to my request for disclosure.

2. By-law 2007-309 establishes procedures for the sale and disposition of land.... The procedure under which the land was sold and offered for sale is important. Since there are at least three [3] processes that could have been adhered to under the By-law, I do not understand how the procedure followed could have been agreed to without some discussion and a vote as to the agreed procedure. Even if the staff report identified as Report 1 included a recommended procedure under the By-law, I would expect that a vote was necessary for Council to accept the recommended process. In my opinion, there may be other documents with respect to the procedure adopted for the sale. In addition, there may be other documents and correspondence leading to the Amended Offer.

3. The issue of the possible transfer of title to another developer is a significant reason that the details of the Offer, Amended Offer and sales procedure should be made public.

The fact that [the land] is still owned by the City is not widely understood. The fact that the Offer to Purchase has not been completed is not widely understood. The fact that an Amended Offer to Purchase was agreed to in June 2015 is not widely understood.

It was widely reported at the time of the Offer to Purchase that if the [purchaser's] proposal did not proceed, [the land] would revert to public ownership.

It is quite clear that the original...proposal will not proceed. While the new beneficial owner may propose some development, it is abundantly clear that it will not be the original ... proposal. Whether this could result in

the...land reverting to public ownership can only be determined from a review of any and all legal documents.

If it was the intention of the City that [the purchaser] be able to acquire the...land provided they proceeded with their original proposal and that [the land] not be sold by [the purchaser], the original Offer to Purchase would have included clauses restricting the sale of the ... land by [the purchaser], and clauses restricting changes in the control and ownership of [the purchaser]. A genuine effort by the City to ensure that the ... land was used by [the purchaser] in the original ... development proposal would have prohibited the sale of the land by [the purchaser]; and, would have prohibited changes in the control, ownership and beneficial control and/or ownership of [the purchaser] itself.

Analysis and findings

The *Act* does not require an 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.¹² To be responsive, a record must be "reasonably related" to the request.¹³

In this case, the city provided little in the way of detail about the searches it undertook to locate responsive records. However, based on my review of the request, the parties' representations and the records themselves, I find that there is no reasonable basis for concluding that further responsive records exist beyond those already identified by the city. 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.¹⁴ For the following reasons, I find that there is no such basis for concluding that further records exist that are responsive to Parts 1, 2 or 3 of the request.

With respect to Part 1 of the request, the appellant states that the Amendment of Offer to Purchase should be identified as a record responsive to his request. However, the Amendment post-dates the date of the appellant's access request and is therefore not a record responsive to the request. Should the appellant wish to pursue access to it, he would need to submit a new access request to the city.

I also see no reasonable basis for concluding that any other records exist that are responsive to Part 1 of the request. My review of the Offer to Purchase along with the Amendment of Offer to Purchase leads me to conclude that there is no reason to believe that further agreements or amendments exist. Therefore, I will not order any

¹² Orders P-624 and PO-2559.

¹³ Order PO-2554.

¹⁴ Order MO-2246.

further searches for records responsive to Part 1 of the request.

With respect to Part 2 of the request, the appellant is concerned that the process of the sale was what he refers to as the "closed" method (where the land is not advertised publicly for sale) as opposed to what he terms the "open" method (where the land is advertised publicly for sale). He submits that there must have been a vote to determine which sale process would be invoked, and that there may be other documents with respect to the procedure adopted for the sale. The city's explanation is that no documents exist with respect to which procedure should be adopted for the sale of the land, because the procedure was plain and obvious to the city given that the prospective purchaser was an abutting property owner.

In stressing the significance of the fact that the purchaser is an abutting property owner, the city appears to be referring to By-law No. 2007-309, which establishes procedures for the sale and disposition of city land. That By-law states in part:

2.1 This By-law shall apply to the sale of real property by the Corporation except as may otherwise be provided herein.

4.6 Before real property is sold The Regional Municipality of Niagara, District School Board of Niagara and Niagara Catholic District School Board shall be notified by prepaid ordinary mail or otherwise as may be directed by the Council of the opportunity to purchase the real property.

4.7 If the real property is not sold after such notice of opportunity to purchase has been given then the real property shall be posted with a "For Sale" sign.

4.7(a) In the event a sale has not been made within three (3) months after a "For Sale" sign has been erected, staff are hereby authorized to list the subject real property for sale with the President of the St. Catharines District Real Estate Board, for nominal consideration, with the understanding that the City shall pay to the selling broker of such property, real estate commission equivalent to three per cent (3%) of the purchase price upon completion of the transaction. The above provision shall not apply to commercial/industrial lands, specific council authorization is required prior to listing any commercial/industrial property.

4.8 The surplus real property shall be advertised for sale at least once in a newspaper with general circulation in the locality in which the real property is located and advertised on the City's website and in such other media as may be considered appropriate and as otherwise specified by Council from time to time. Further, "For Sale" signs shall be posted on surplus real property.

Surplus municipal property which is not developable in isolation and therefore only of value to the abutting property owners shall not be subject to the provisions of 4.7 and 4.8. However, notice of the potential disposition of the said property shall be delivered to all abutting property owners to provide an opportunity to purchase the property at fair market value as determined by an independent appraiser.

Having reviewed the records at issue, as well as By-law No. 2007-309, I accept that the city felt that the sale process was clear and that, therefore, there was no explicit determination made with respect to the choice of sale process. I conclude, therefore, that there is no reasonable basis for believing that further records exist with respect to the choice of sale process, and I will not order any further searches for records relating to Part 2 of the request.

With respect to the Part 3 of the request, I accept that the land was not transferred to another developer and that, in fact, title has never transferred from the city to the purchaser. While the Offer to Purchase is still a valid agreement, the sale has not closed because the conditions for closing stipulated in the Offer to Purchase have not as yet been fulfilled. The purchaser itself has been bought by a third party, but the original purchaser is still the party to the agreement, and the property remains that of the city pending the fulfillment of the conditions stipulated in the Offer to Purchase. I am satisfied, therefore, that there is no reasonable basis for concluding that any records exist pertaining to the transfer of title the land from the purchaser to another developer. Therefore, I will not order any further searches for records relating to Part 3 of the request.

ORDER:

1. I uphold the city's decision that the records at issue are exempt from disclosure pursuant to section 6(1)(b) of the *Act*.
2. I uphold the city's search for records as reasonable.

Original Signed by: _____
Gillian Shaw
Adjudicator

_____ June 29, 2016