

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3668-I

Appeal MA16-628

City of Vaughan

October 5, 2018

Summary: The appellant made an access request to the city for records relating to council meetings. The city granted the appellant partial access to three records claiming that the withheld information qualified for exemption under section 6(1)(b)(closed meeting). The appellant appealed the city's access decision and reasonableness of its search for records. In this order, the adjudicator finds that the exemption at section 6(1)(b) does not apply to the withheld records and orders the city to disclose the records to the appellant. The adjudicator also orders the city to conduct further searches for specific records contained in its record holdings.

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

OVERVIEW:

[1] The appellant filed a request to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a closed meeting held on April 13, 2016.

[2] The city located responsive records and granted the appellant partial access. The city claims that the withheld portions of the records qualify for exemption under section 6(1)(b) (closed meeting).

[3] The appellant appealed the city's decision to this office and a mediator explored settlement with the parties. During mediation, the appellant questioned the

reasonableness of the city's search efforts and reasonable search was added as an issue to the appeal.

[4] Settlement was not possible and the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry. During the inquiry the parties exchanged the representations they provided this office. In its representations, the city made reference to the possible application of the personal privacy provisions under section 14(1). However, based on my review the records I have concluded that the records do not contain the "personal information" of any identifiable individual as described in section 2(1). Accordingly, section 14(1) cannot apply to the records.

[5] The city also makes a cursory reference in its representations to the exclusion in section 52(3)3 (labour and employment records).¹ I have decided not to address this issue in this order taking into consideration the fact that the city already issued an access decision granting the appellant partial access to the records. Furthermore, the brevity of the city's submission did not go as far as taking the position that the records are excluded from the scope of the *Act* under section 52(3)3. Instead, the city appears to suggest that it could be weighed as a factor to be considered in my review of its exercise of discretion. The city also did not provide evidence in support of its position.

[6] Finally, in her representations, the appellant requests copies of records relating to the processing of her request. In my view, the appellant's request for these documents expands the scope of her request.² Accordingly, if the appellant continues to seek access to this information she should file a new request under the *Act*.

[7] In this order, I find that the closed meeting exemption under section 6(1)(b) does not apply to the records and order the city to disclose the records to the appellant. I also order the city to conduct a search for specific records in its custody or control.

RECORDS:

[8] The records at issue in this appeal consist of the following documents:

- Closed Session Record of Committee of the Whole (Closed Session) Meeting, April 2, 2016 and April 5, 2016 (2 pages);

¹ In support of its position that it properly exercised its discretion in applying section 6(1)(b) to the records, the city submits that the records contain information which relate to meetings, consultations, discussions or communications about labour relations or employment-related matters.

² The appellant states that she would like a copy of "the HR consultant's statements, notes, meetings dates she attended, who was present at the meetings and all other notes". The appellant also seeks access to "a copy of the access request referred to in the City's response, who the request was sent to and their responses".

- Closed Session Record of Committee of the Whole (Closed Session) Meeting - April 13, 2016 (2 pages); and
- Confidential Extract, Special Council (Closed Meeting), April 13, 2016

ISSUES:

- A. Did the city conduct a reasonable search for responsive records?
- B. Do the records qualify for exemption under section 6(1)(b)?

DISCUSSION:

A. Did the city conduct a reasonable search for responsive records?

[9] 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.

[10] 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

[11] 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

[12] 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

[13] 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.⁸

[14] The city received the following two-part request from the appellant:

³ Orders P-85, P-221 and PO-1954-I.

⁴ Orders P-624 and PO-2559.

⁵ Order PO-2554.

⁶ Orders M-909, PO-2469 and PO-2592.

⁷ Order MO-2185.

⁸ Order MO-2246.

The FOI is for the full minutes (including notes) from the closed meeting held on April 13, 2016. The meeting was found to be illegal and the minutes are not protected and must be made public.

The second part of this FOI is for [a] copy of deliberations that were held prior to the closed meeting and outside of council chambers. This includes any communications, minutes from meetings, who attended the meetings, when the meetings were held and what deliberations or discussions were held. This includes all third parties, and including the [HR consultant], the city manager and the previous city manager, all members of council and [the City Clerk].

Representations of the parties

[15] The Notice of Inquiry sent to the city asked it to provide a written summary of all steps in response to the appellant's request. In response, the city submitted representations and affidavits from eight executive assistants employed by the city. The city's search for copies of the minutes of the April 13, 2016 closed meeting (part one of the request) located two closed session records for meetings held on April 2, 2016 and April 5, 2016 along with one confidential extract of the April 13, 2016 meeting.

[16] The city did not locate any records responsive to the second part of the request.

[17] The city submits that its search for responsive records was reasonable for the following reasons:

- The city determined that responsive records may be located in the offices of the mayor, council members, city manager and city clerk. The searches were conducted by eight executive assistants who work in the identified offices.
- Each office was sent an "Access Request Search Memo" which identified the search terms stated in the request. However, the city did not seek affidavits from specific individuals who are no longer in their employ.
- The eight individuals conducting the search "expended a reasonable amount of effort to locate the records based on their knowledge and experience within their job responsibilities".
- The executive assistant to the city manager searched the city manager's office for paper or electronic records of the April 13, 2016 meeting and found no records. She also conducted search for the "full minutes and notes taken by the [former City Manager]" and "searched [his] office for any paper notes and the corporate drive for electronic notes that were taken from the Closed Meeting of April 13, 2016". However, no paper or electronic "notes" were located.
- The seven remaining executive assistants search the offices of local and regional councillors but located no responsive records, beyond the official agenda and

minutes relating to the April 13, 2016 meeting in the city's paper and electronic record-holdings.

[18] The appellant asserts that the meetings in question are "illegal" and provided a copy of an investigation report⁹ prepared in response to a formal complaint the city received about its April 13, 2016 being held in the absence of the public.

[19] The appellant submits that the city failed to conduct a reasonable search for responsive records and raised questions about the knowledge and experience of the individuals who conducted the search. In support of this position, the appellant states:

The search was not properly conducted. The employees of members of council that provided affidavits have no knowledge of the closed meetings held in chambers or outside of chambers. The responses requested were directly from members of council and the previous city clerk, previous city manager, HR consultant and all people who actually knowledge of the records, meetings etc and are noted in the closed meeting report.

...

The search should have included all people identified in the FOI request and specifically members of council, HR consultant, previous city clerk, previous city manager, and internal HR director and all people who has access to records, etc.

None of the people who provided affidavits were in the meetings and conducting a search with individuals who have no access to these records and no knowledge of the records are conducting the search in bad faith.[Emphasis in the original]

[20] In addition, the appellant asserts that:

- The city's present clerk should have access to the previous clerk's record holdings and this individual was not asked to conduct a search;
- The city's present city manager should have access to the previous city manager's record holdings. In addition, given the fact that the city manager was present at the April 13, 2016 meeting and was interviewed by the closed meeting investigator, he should have been asked to conduct a search for records;
- The city failed to conduct a search for records in the record holdings of the "legal representative, internal HR director, external HR consultant" who were present at

⁹ Report to the Corporation of the City of Vaughan Regarding the Investigation of a Complaint Regarding the Special Meeting of Committee of the Whole for the City of Vaughan in Closed Session on April 13, 2016. The city also provided a copy of this report with its representations which is posted on its website.

the April 13, 2016 meeting and were referenced in the closed meeting investigator report.

Decision and Analysis

[21] I agree with the appellant's submission that the closed meeting investigation report should be considered in the circumstances of this appeal. The closed meeting investigator found that notice was "duly given" that a Special Meeting of Council would take place on April 13, 2016 for the purpose of "Recruitment of city manager". However, the investigator found that the Special Committee Meeting went beyond discussing the candidates for the position of city manager and added an item relating to the organizational structure of the city. The investigator found that the addition was not accompanied by "any staff report or recommendations but seemed to have been 'brokered' by members of council prior to the meeting".

[22] The investigator concluded:

[i]t would strain credibility to believe that nine members of council could make such a substantive decision, with significant budget and human resources implications, in less than eleven minutes, in the absence of a professional and comprehensive staff report, unless the decision was effectively made outside the formal process.

[23] The appellant's submissions can be synthesised into two main arguments. First, the city should be ordered to conduct a further search for records responsive to part 1 of the request taking into consideration the appellant's objections of the individuals tasked with carrying out the searches.

[24] Second, additional records responsive to part 2 of the request should exist given the investigator's conclusion that it appeared that the reorganization decision was discussed outside council chambers before it was introduced at the April 13, 2016 council meeting.

[25] Having regard to the submissions of the parties, I am satisfied that the searches conducted by the city were completed by experienced employees knowledgeable in the subject matter of the request. Barring any evidence to the contrary, I also am satisfied that the eight individuals who conducted the search expended a reasonable effort to locate responsive records. In my view, the appellant's concerns about who conducted the search are without merit. The appellant identified a number of individuals she believes should be required to manually conduct the searches given their attendance at council meetings or involvement with the closed meeting investigation. While it appears that the individuals identified by the appellant participated in the council sessions in question or were interviewed by the investigator, there is no evidence that the individuals who conducted the searches are less familiar with the city's electronic and paper record holdings or lack the necessary access to search the city's record holdings, including the record-holdings of the former city employees.

[26] The appellant appears to take the position that her request under the *Act* would capture all the information and documentation that was made available to the closed meeting investigator. However, the closed meeting investigator obtained information by way of interviews and the cooperation of external and internal parties. A freedom of information request differs in that it is a request to access records in the custody or control of an institution.¹⁰ If a record was not created, for example if no notes were made during a verbal discussion, then no record would exist in the institution's record holdings. Similarly, if a record was created by an external party but not provided to the institution, the record would not be subject to the *Act* unless the institution could exert control over the record.¹¹

[27] Having regard to the above, I am satisfied that the individuals who conducted the searches are experienced employees knowledgeable in the subject matter of the request.

[28] However, I have decided to order a further search of the mayor's and city clerk's office as there is insufficient evidence before me demonstrating their offices were included in the searches conducted. In making this decision, I note that none the affidavits provided indicate that the mayor's or city clerk's office were searched. Instead, it appears that the offices of the city manager in addition to the offices of local and regional councillors were searched.

[29] I have also decided to order the city to conduct a further search for records responsive to part 2 of the request. In my view, there is insufficient evidence demonstrating that all of the affiants conducted a search for records responsive to part 2 of the request. I note that 4 of 8 affidavits provided to this office confirm that the search encompassed records created *before* the April 13, 2016 meeting. However, it appears that the remaining searches sought only to search for records responsive to part 1 of the request. Most notably, is the affidavit prepared by Executive Assistant to the City Manager which indicates that a search was conducted for the actual notes taken by the former City Manager at the April 13, 2016 meeting. Without having the benefit of reviewing the Access Search Memo the city submits it provided to staff responsible for carrying out the searches it would appear that there was some ambiguity in the search terms communicated to staff. Accordingly, I find that the city's search for records responsive to part 2 of the request was not reasonable and order the city to conduct a further search for records in its custody or control created *before* the April 13, 2016 of any staff, council members any third parties who attended the meeting in question.

¹⁰ In this appeal, there does not appear to be a dispute that the Mayor's and councilor's records responsive to the request are under the custody or control of the city. Previous decisions from this office have established that a councilor's records are not in the custody or control of an institution unless the councilor was functioning as an "officer" or "employee" of the institution as opposed to "constituent" or "political" business (See for example Order MO-3471).

¹¹ A record will be subject to the Act if it is in the custody OR under the control of an institution; it need not be both. (Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

B. Do the records qualify for exemption under section 6(1)(b)?

[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 meeting¹²

Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;¹³ and
- “substance” generally means more than just the subject of the meeting.¹⁴

[32] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.¹⁵

Parts 1 and 2 – council held a meeting authorized by statute to be held in the absence of public

[33] 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*.¹⁶

[34] The city takes the position that the council meetings in question were properly held in the absence of the public. In support of its position, the city submits:

¹² Orders M-64, M-102 and MO-1248.

¹³ Order M-184.

¹⁴ Orders M-703 and MO-1344.

¹⁵ Order MO-1344.

¹⁶ Order M-102.

- The meetings that took place on April 2, 2016, April 5, 2016 and April 13, 2016 constituted special council meetings permitted under section 6.2 of the City of Vaughan By-Law Number 7-2011¹⁷;
- The meetings were held in the absence of the public to discuss personal matters relating to identifiable individuals, including employees as permitted under section 239(2)(b)¹⁸ of the *Municipal Act*.

[35] As mentioned previously in this order, the appellant submits that the meetings in question were held “illegally” and refers to the closed meeting investigation report in support of her position.

Decision and analysis

[36] I have reviewed the records along with the representations of the parties and find that part 1 of the test in section 6(1)(b) has been met as I am satisfied that council held meetings on the days in question. However, I am not satisfied that the content of the records establish that the April 2, 2016, April 5, 2016 and April 13, 2016 meetings were authorized by statute to be held in the absence of the public.

[37] In determining whether there was statutory authority to hold a meeting in camera under part two of the test, I must determine whether the purpose of the meeting addressed the specific subject matter described in the statute authorizing the holding of a closed meeting.¹⁹

[38] The city submits that 239(2)(b) of the *Municipal Act* authorized it to close its April 2, 2016, April 5, 2016 and April 13, 2016 meetings to “discuss employment matters related to identifiable individuals”. This section of the *Municipal Act* states:

239 (1) Except as provided in this section, all meetings shall be open to the public.

Exceptions

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

¹⁷ Section 6.2 of the Bay-law number 7-2011 provides that the mayor, at any time, (or the deputy mayor in emergency situations) may summon a special meeting of Council and that the only business to dealt with at the special meeting is that what is listed in the notice of the meeting.

¹⁸ The city’s representations also reference sections 239(2)(e) and (f) which allow municipalities to close otherwise public council meetings to discuss litigation matters or receive advice that is subject to solicitor-client privilege. However, it appears that these sections were referenced in error as the city’s evidence does not assert that the subject-matter of the meetings in question related to such matters or that any litigation was being contemplated.

¹⁹ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

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

[39] The city submits that disclosing the withheld portions of the records would reveal the names of the individuals being considered for employment. The city states:

... the sole purpose of the meeting was to discuss employment matters related to identifiable individuals. Disclosure of the full record would ultimately reveal the name of those individuals being considered, which would also reveal the substance of the meeting.

[40] I have reviewed the records and note that though the records identify the subject-matter of the meetings as "City Manager Recruitment", the withheld portions of the records do not identify any individuals being considered for the city manager position. Instead, the individuals identified in the records are individuals acting in their professional or official capacity as employees or council members.²⁰

[41] In addition, there is no evidence suggesting that these individuals are being considered as candidates for the city manager position or that the information contained in the records reveals something of a personal nature about the individuals.²¹

[42] The records do not identify the individuals being considered for the City Manager position. However, various stages of the recruitment process are identified in the records and the April 13, 2016 closed session record indicates that an unnamed candidate was selected. However, no list of candidates or the name of the final candidate is contained in the closed session records for the meetings in question. In addition, I note that the records also do not contain any information of a personal nature, such as salary expectations or benefits that could be connected with the individual who was eventually appointed as the new city manager.

[43] I also reviewed the Closed Meeting Investigation Report provided by the appellant in support of her position that the meetings in question were not properly held in the absence of the public. The investigation report concluded that the council meeting which took place on April 13, 2016 was not authorized to be a closed session under section 239(2)(b). The investigator stated the following in the report:

... Council for the City of Vaughan was not properly in closed session as Committee of the Whole (Closed Session) on April 13, 2016 under section [239(2)(b)] of the *Municipal Act* when it decided to create a new position of Deputy City Manager for Legal and Human Resources and appoint an

²⁰ 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 (See Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225).

²¹ Previous decisions from this office have found that information relating to an individual's professional or official capacity can take on a more personal nature if it relates to that individual's performance or conduct (See for example Orders PO-1772, PO-2477 and PO-2976)

individual into that position immediately. Moreover, it made substantive decisions while in closed session on the matter which it would not have been permitted to make in a closed session even if the meeting had properly been closed to the public. Further, Council breached its own Procedure By-Law by not following the correct processes for giving notice about agenda items, adding new item by unanimous consent only, and for going into closed session by an applicable, specific resolution on the new matter in accordance with legislative requirement ...

[44] Based on my review of the investigation report, it appears that the investigator concluded that council decided a matter at the April 13, 2016 meeting which was not listed as a matter to be discussed at the special meeting. The investigator stated that:

[the special committee] went beyond discussing the candidates for the position of City Manager and, instead, added an item relating to the organizational structure of the City.

...

Organizational restructuring, to add brand new position to a municipal structure, is not a matter which attracts the exception to the open meetings rule dealing with personal information about an identifiable individual. [Emphasis in the original]

[45] Based on my review of the record, I find that the April 2, 2016, April 5, 2016 and April 13, 2016 closed meeting records do not contain information which relates to personal matters about an identifiable individual. My findings are corroborated by the closed meeting investigator's findings relating to the April 13, 2016 meeting.

[46] Having regard to the above, I find that there is insufficient evidence to demonstrate that the meetings in question were authorized by statute to be held in the absence of the public as required by part 2 of the test.

[47] Though I am satisfied that council meetings took place on April 2, 2016, April 5, 2016 and April 13, 2016, thus meeting part 1 of the test, I find that part 2 of the test has not been met.

[48] Since all three parts of the section 6(1)(b) test must be met for the exemption to apply, it cannot apply in the circumstances of this appeal.

ORDER:

1. I order the city to disclose the records to the appellant by **November 5, 2018**.
2. I order the city to conduct a further search for records responsive to part 1 of the request in the mayor's and city clerk's office. I also order the city to conduct a search for records responsive to part 2 of the request for any communications

that were created or exchanged *before* the April 13, 2016 regarding the organizational restructuring decision made on April 13, 2016 in its custody or control of any staff, council members or third parties who attended the April 13, 2016 meeting.

3. I order the city to issue an access decision to the appellant regarding access to any records located as a result of the searches ordered in provision 2, in accordance with the *Act*, treating the date of this order as the date of the request.
4. The city shall send their representations on the new search referred to in provision 2 and to provide me, by **November 5, 2018**, an affidavit outlining the following:
 - a. the names and positions of the individuals who conducted the searches;
 - b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;
 - c. the results of the search; and
 - d. details of whether the record could have been destroyed, including information about record maintenance policies and practices such as retention schedules.

The city's representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The city should indicate whether it consents to the sharing of their representations with the appellant.

5. I remain seized of this appeal in order to deal with any other outstanding issues arising from order provisions 1 and 2 in this interim order.

Original Signed by: _____
Jennifer James
Adjudicator

_____ October 5, 2018