

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3724-F

Appeal MA16-628

City of Vaughan

January 28, 2019

Summary: In Interim Order MO-3668-I, the adjudicator ordered the city to conduct a further search for specific records in its record holdings related to a closed meeting. In this order, the adjudicator finds that the city's further search for these records is reasonable, and she dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56, as amended, section 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 meeting held on April 13, 2016, which a closed meeting investigator found was improperly held in the absence of the public.¹

¹ The closed meeting investigator found that the meeting in question was not authorized to be held in the absence of the public and as a result was contrary to section 239(2)(b) of the *Municipal Act*. She also found that when the city decided to create a new position and appoint an individual, it made a substantive decision it would have not been permitted to make even if the closed meeting was properly closed to the public and made specific recommendations to the city. In Interim Order MO-3668-I, I rejected the city's argument that the closed session records for the April 13, 2016 meeting qualified for exemption under the closed meeting exemption under section 6(1)(b) and ordered the city to disclose the

[2] In Interim Order MO-3668-I, I found that the city's search for responsive records was not reasonable and ordered it to conduct a further search for specific records. I also ordered the city to provide me with an affidavit outlining its further search efforts.

[3] The city subsequently conducted a further search for the specified records and provided nine affidavits to this office outlining its search efforts. The city located additional records, but advised that they were not responsive to the appellant's request because they address administrative matters such as the scheduling of council meetings, as opposed to what was actually discussed in the meeting in question. The city disclosed these records to the appellant and submitted representations in support of its position that its further search did not locate additional responsive records.

[4] The non-confidential portions of the city's representations and affidavits were sent to the appellant who submitted representations in response, which were sent to the city for its reply.

[5] In this order, I find that the city conducted a reasonable further search pursuant to Interim Order MO-3668-I, and I dismiss this appeal.

DISCUSSION:

Did the city conduct a reasonable search in accordance with Interim Order MO-3668-I?

[6] The appellant's original request stated:

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. [part 1 of the request]

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]. [part 2 of the request]

[7] In Interim Order MO-3668-I, I ordered the city to conduct a further search for:

closed meeting records to the appellant. I also ordered the city to disclose the closed meeting records for its April 2, 2016 and April 5, 2016 meetings.

- Records responsive to part 1 of the request in the mayor's and city clerk's offices; and
- Records responsive to part 2 of the request for any communications that were created or exchanged *before* the April 13, 2016 [meeting] 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. [Emphasis mine]

[8] The sole issue to be determined is whether the city's further search for records in response to Interim Order MO-3668-I is reasonable.

Representations of the parties

[9] As noted above, the city's further search located additional records which it advised did not respond to the request because they relate to administrative matters. However, the city indicated that it was prepared to release most of these records to the appellant.

[10] The city submits that its further search for the two categories of records that I ordered it to search for in Interim Order MO-3668-I was reasonable for the following reasons:

- "[R]evised search memos, specifying that all records (including communications, minutes from meetings, lists of attendees, when meetings were held, what discussions took place, etc.) prior to closed meeting of April 13, 2016" were sent to the councillor's offices, including the Mayor, the City Manager, Chief Human Resources Officer and the Office of the City Clerk.
- The city's further search of the City Clerk's records involved an email recovery by its Chief Information Officer.
- The mayor's office was asked to conduct a search for meeting minutes and/or notes taken during the closed meeting on April 13, 2016.
- The city also asked its Office of the Chief Human Resources Officer to conduct a search of "[a]ll records in the custody or control of the City by [the external human resources recruiter] related to the closed meeting of April 13, 2016 ...".

[11] The appellant takes the position that the records the city located and disclosed to her following its further search demonstrate that "many more records" exist. The appellant states:

The search was not properly completed and was inadequate. I asked for all records inside and outside of the closed council meeting because the closed meeting report indicated there were meetings held outside council chambers.

...

The purpose of the FOI was to obtain all records from the closed meetings and there were individuals that were not included in the search that should have been as they were in the closed meeting and/or they participated in the meetings held outside council chambers and information collected, used and disclosed to council in the closed meeting.

[12] As suggested above, the appellant asserts that the city's further searches were not conducted by the correct staff members. The appellant submits that each council member should be required to search their own record holdings and provide sworn affidavits. The appellant also submits that the former City Manager and the Human Resource Director, as well as its external recruiter and closed meeting investigator, should be required to manually search their own records. The appellant made similar arguments in Interim Order MO-3668-I. However, the appellant now also argues that records created by the city's Finance Department should also have been searched. The appellant provided a copy of an email exchange between the city's former City Manager and City Clerk in support of this position, noting that this email is one of the records the city disclosed to her as a result of its further search. The email in question includes a passage about the Chief Financial Officer assuming the responsibility of making adjustments in the budget to accommodate the newly created position.

[13] As noted above, the city was given an opportunity to respond to the appellant's submission that its further search was not reasonable. In reply, the city states:

Repeated requests to release additional records for issues to which the appellant has already received answers borders on a purpose other than to obtain access, especially when the appellant is now dictating who should conduct the additional searches (i.e. specific councillors), even when these same offices were searched twice, and after the adjudicator agreed with the City that the previous searches were appropriately conducted.

The City has complied with the interim order and performed additional searches of the City Clerk and Council offices. The City released additional records that were reasonably related to this request, such as the scheduling of the closed meeting at issue. The City believes that releasing those additional records which are not entirely responsive to her request demonstrates that we have exhausted all avenues in conducting a reasonable search for records.

[14] With respect to the appellant's submission that the city should be required to search its Finance Department, the city states:

The original request was not for budget reports or other financial reports; therefore, these records were not searched. The initial request was

specifically for closed meeting records. Budgetary reports are produced in separate meetings of the Finance, Administration and Audit Committees. The City does not believe that these records should be added [to] the scope of the request at this stage of the appeal. These reports also are publicly available outside of the FOI process through the Council Secretariat section of the Office of the City Clerk.

[15] The city also repeated its arguments made in Interim Order MO-3668-I about it lacking the requisite custody or control of records created by third parties, such as the external recruiter. Finally, the city explained that some of the records, such as copies of emails the city clerk would have sent to city councillors about scheduling meetings, are transitory in nature and thus would not be retained for a significant period of time. In support of its position, the city provided this office with a copy of a transitory records fact-sheet its Records Management Department distributes to staff.

Decision and Analysis

[16] I agree with the city's submission that most of the arguments offered by the appellant were already considered in Interim Order MO-3668-I. It appears that the appellant's main concern is with what individuals the city delegated to conduct various searches. In Interim Order MO-3668-I, I stated:

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.

[17] Another concern raised by the appellant in Interim MO-3668-I, and repeated here, is her assertion that additional records must exist given the investigator's

conclusions in the closed meeting investigation report.² In Interim Order MO-3668-I, I agreed with the appellant's contention that the closed meeting investigation report was relevant and stated:

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".

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.

[18] However, I did not order the city to conduct a further search on this basis and stated:

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.³ **If a record was not created, for example if**

² 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 provided a copy of this report with its representations and the report is also posted on its website.

³ 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

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.⁴ [Emphasis mine]

[19] Instead, I ordered the city to conduct a further search on the basis that there was insufficient evidence before me demonstrating that:

- the Mayor's and City Clerk's office was included in the searches conducted for records responsive to part 1 of the request; and
- the city's search for records responsive to part 2 of the request included records created or exchanged *before* the April 13, 2016.

[20] Though the city's further search did not locate additional records providing insight about the decision-making process regarding Council's April 13, 2016 decision to create a new position, I am satisfied that the city's further search remedied the deficiencies outlined in Interim Order MO-3668-I.

[21] I also find that the city was not required, as part of the terms of Interim Order MO-3668-I, to search the record holdings of its former Chief Financial Officer for records relating to the financial impacts of the city's decision to create a new position, as I conclude that this falls outside the scope of the original request. Accordingly, the appellant would have to file a new request under the *Act* to seek access to this information.

[22] In addition, for the reasons stated in Interim Order MO-3668-I and adopted here, I do not accept the appellant's evidence that the creator of the record is required to conduct the search for any record in question. I am satisfied that the city's further search was directed and conducted by experienced employees, knowledgeable about the subject-matter of the request and the city's record holdings.

[23] I understand the appellant's frustration at not being able to access records which would provide insight behind the city's decision to propose a new staff position in a council meeting designated for another purpose. The appellant states that additional records must exist "because the closed meeting report indicated there were meetings held outside of council chambers". On my reading of the report, however, the closed

councilor was functioning as an "officer" or "employee" of the institution as opposed to "constituent" or "political" business (See, for example, Order MO-3471).

⁴ 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. See Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

meeting investigator did not conclude that such records were, in fact, created. Rather, she found that Council must have made its decision “outside the formal process” as it could not have deliberated on staff reports in less than the eleven minutes the meeting lasted.

[24] As stated above, the *Act* does not require the city to provide with absolute certainty that the records sought by the appellant do not exist. Instead, the city must demonstrate that it has made a reasonable effort to identify and locate records, if they exist. Having regard to the evidence presented by the parties, I am satisfied that the city adduced sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate additional responsive records, including the staff reports the appellant believes should exist.⁵ Accordingly, I find that the city’s further search of its record holdings was reasonable and in compliance with Interim Order MO-3668-I.

ORDER:

I uphold the reasonableness of the city’s further search following Interim Order MO-3668-I, and I dismiss this appeal.

Original signed by: _____
Jennifer James
Adjudicator

January 28, 2019

⁵ Orders P-624 and PO-2559.