



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER M-196**

## **Appeal M-9300081**

### **City of Kingston**



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# ORDER

## BACKGROUND:

The City of Kingston (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a retirement settlement agreement (the agreement) entered into between the City and a former City employee. The City denied access to the agreement in its entirety based on the exemptions contained in sections 6, 10, 12, 13 and 14 of the Act. The requester appealed the City's decision.

After receiving the Confirmation of Appeal notice from the Commissioner's office, the City specified that its decision to withhold the agreement would now be based solely on sections 6(1)(b), 13, and 14(3)(a), (d), (f) and (g) of the Act. Further mediation of the appeal was unsuccessful and notice that an inquiry was being conducted was sent to the City, the appellant and to the former City employee (the affected person). Representations were received from all parties.

In her representations, the appellant indicated that the contents of the record were a matter of compelling public interest and that they should be released pursuant to section 16 of the Act (the so-called public interest override). The appellant also confirmed that she was only seeking access to those portions of the agreement which dealt with the financial compensation offered to the City employee. Consequently, my analysis of the issues raised in the appeal will be restricted to the parts of the record which deal with this subject.

I will first consider the application of section 6(1)(b) of the Act to the portions of the agreement at issue.

In its representations, the City submits that section 6(1)(b) of the Act applies to exempt the record from disclosure in its entirety. This provision reads as follows:

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.

In order for an institution to rely on section 6(1)(b), it must establish that:

1. A meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. A statute authorizes the holding of such a meeting in the absence of the public; **and**

3. The disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102 and M-184]

In addition, since meetings convened in the absence of the public are such a departure from the norm, there must exist clear and tangible evidence that the meeting or parts of it were actually held in camera (Order M-102).

I will now consider whether each part of the section 6(1)(b) test has been established.

Along with its representations, the City has provided the Commissioner's office with a copy of the Minutes of Council which indicate that a special meeting of Council was held on December 14, 1992. The Minutes state that, at the commencement of the session, the following resolution was passed:

That, at the request of the solicitor for [the affected person], and the City Solicitor and pursuant to the Freedom of Information and Protection of Privacy Act, and in accordance with section 58 of the Municipal Act, RSO, the personnel matter be considered at a closed meeting as in the opinion of Council the public interest requires.

Based on the evidence provided to me, I am satisfied that the City did hold a meeting and that this session took place in camera. Thus, the City has satisfied the first part of the section 6(1)(b) test.

With respect to the second part of the test, the City has relied upon section 58 of the Municipal Act as the basis for its statutory authority to hold meetings in camera under certain circumstances. In the alternative, the City also submits that By-law 1 of the City of Kingston allows the City to exclude the public when discussing personnel matters where a named employee is involved. Section 58 of the Municipal Act specifies that:

If there is no by-law or resolution fixing the place of meeting, a special meeting shall be held at the place where the then last meeting was held, and a special meeting may be either open or closed as in the opinion of council, expressed by resolution in writing, the public interest requires.

Section 58 of the Municipal Act accords municipalities considerable discretion in deciding whether a special meeting should either be made open to the public or held in camera. A municipal council can decide to exclude the public based on its opinion that the public interest would be served by such a result. Based on the wide scope of this provision, I find that the City had the requisite authority under section 58 of the

Municipal Act to convene a meeting in camera in order to discuss the terms of the retirement agreement. On this basis, the City has also met part 2 of the section 6(1)(b) test.

With respect to the third and final part of the test (the disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting), the City submits that:

... the retirement agreement at issue in this appeal was the direct consequence of the deliberations of the in camera meeting ... The agreement if disclosed would reveal the actual substance of the deliberations which took place at this meeting and not merely the basis of the discussion. The agreement provides both the subject and the substance of the deliberations.

In her representations, the appellant relies on the distinction drawn in Order M-98. She argues that:

... although the information contained in the record may have been the **subject** of deliberations by the ... board, the record itself does not contain information that would reveal the **substance** of those deliberations."

She also asserts that:

Revealing the outcome of [the] meetings, i.e. how much money councillors decided the city should give [the affected person], would not reveal the substance -- the reasons -- they decided to ask [the affected person] to resign, or, indeed, how council split when voting on the issue.

The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in camera meeting was whether the terms of the retirement agreement were appropriate and whether they should be endorsed.

In Order M-184, which involved a request for a similar type of agreement, I had occasion to interpret the term "deliberations" which is also found in section 6(1)(b) of the Act. I approached this subject in the following fashion:

... In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions conducted by the Board, hence its

deliberations, or would permit the drawing of accurate inferences about the substance of those discussions ...

Based on the meanings which I have ascribed to the words "substance" and "deliberations", I believe that the disclosure of the financial terms of the agreement which is the subject of the present appeal would reveal the actual substance of the deliberations of the in camera meeting. I find, therefore, that the City has established the third part of the section 6(1)(b) test.

Since all three components of the test have been satisfied, I find that the portions of the agreement which remain at issue are properly exempt from disclosure under section 6(1)(b) of the Act.

I must now determine whether the mandatory exception contained in section 6(2)(b) of the Act applies to the facts of this case. This section reads as follows:

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

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.

Since I have not been provided with any evidence to indicate that the subject matter of the deliberations was considered in a meeting open to the public, I find that section 6(2)(b) does not apply in the present case.

Section 6(1)(b) is a discretionary exemption. On this basis, the City has provided specific representations regarding its exercise of discretion in favour of claiming the exemption. I have carefully reviewed these representations and, subject to the general comments made in the postscript to this order, I find nothing improper in the determination which was made.

In her representations, the appellant takes the position that there exists a compelling public interest in the disclosure of the retirement agreement such that section 16 of the Act should apply to the record. This provision states that:

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.

The application of section 16 of the Act is limited to a total of six exemptions contained in the Act. Since section 6(1)(b) is not one of these, I must conclude that the public interest override is not available in a situation where an institution has successfully applied section 6(1)(b) of the Act to withhold a record from disclosure.

Since I have found that section 6(1)(b) of the Act applies to exempt the portions of the agreement from disclosure, it is not necessary for me to address the other exemptions which the City has claimed.

**ORDER:**

I uphold the City's decision.

**POSTSCRIPT:**

This is the second order which I have issued where the subject matter of the appeal involved early retirement agreements entered into between municipalities and senior employees. In Order M-173, I pointed out that such agreements warrant a high degree of public scrutiny for three reasons. First, these agreements involve large sums of public funds. Second, the agreements involve senior municipal employees with a high profile within the community. Third, the current recessionary climate places an unparalleled obligation on officials at all levels of government to ensure that tax dollars are spent wisely.

Where early retirement agreements have been considered in meetings which are closed to the public, municipalities may, under certain circumstances, be permitted to rely on section 6(1)(b) of the Act to withhold access to information contained in these records. It would be unfortunate, however, if institutions began to use this provision to routinely shield the financial terms of such agreements from legitimate public scrutiny.

I would also point out that section 6(1)(b) is a discretionary exemption which means that the head of an institution can choose to release information about a retirement agreement notwithstanding that it was discussed in camera. The disclosure of this information would take place according to the approach outlined in Order M-173. That is, the contents of these agreements should be released except for information whose disclosure would constitute an unjustified invasion of the employee's personal privacy or reveal the name or other identifying information of the employee.

In cases such as these, the Commissioner's office also has the obligation to ensure that, when a head exercises his or her discretion to claim section 6(1)(b), such a decision is based on established legal principles. The Commissioner's office will, thus, carefully scrutinize an institution's representations on the exercise of discretion when section 6(1)(b) is relied upon to withhold agreements of this sort.

Original signed by:  
Irwin Glasberg  
Assistant Commissioner

October 1, 1993