



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-241

Appeal M-9300255

City of North York



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ORDER

BACKGROUND:

The City of North York (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the Management Agreement between The North York Performing Arts Centre Corporation (the Corporation) and The Live Entertainment Corporation of Canada (Live Entertainment) for the operation of the North York Performing Arts Centre. The Corporation was established pursuant to the City of North York Act in 1988. All of the members of the Board of Directors of the Corporation are "appointed by or under the authority of the Council of the City of North York", and so, for the purposes of the Municipal Freedom of Information and Protection of Privacy Act, the Corporation is deemed to be "a part of the municipal corporation".

The City denied access to the record pursuant to sections 6(1)(b), 8(1)(i), 10(1)(a), 10(1)(b), 10(1)(c), 11(a), 11(c), 11(d), 11(f) and 12 of the Act. The requester appealed the decision of the City to deny access.

Mediation was not successful and notice that an inquiry was being conducted to review the City's decision was sent to the City, the appellant and Live Entertainment (the affected party). Representations were received from all of the parties. In its representations, the City stated that it was no longer relying upon the exemption contained in section 12 of the Act.

The record at issue in this appeal is the 58 page Management Agreement and 12 schedules which are appended thereto.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemption provided by section 6(1)(b) applies to the record.
- B. Whether the discretionary exemption provided by section 8(1)(i) applies to the record.
- C. Whether the mandatory exemptions provided by sections 10(1)(a), (b) and (c) apply to the record.
- D. Whether the discretionary exemptions provided by sections 11(a), (c), (d) and (f) apply to the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 6(1)(b) applies to the record.

The City submits that section 6(1)(b) of the Act applies to the record. This provision states that:

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 to rely on section 6(1)(b), the City 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-219]

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

In its representations, the City indicates that the Management Agreement was discussed in a number of in camera meetings. At an in camera meeting of the Board of Directors of the Corporation on May 28, 1991 a synopsis of the Management Agreement was discussed. An in camera meeting of the Executive Committee of the Council was held on May 29, 1991 at which time the provisions of Clause 1 of Executive Committee Report 20A, which included all of the salient terms of the Management Agreement and was marked "Confidential", were finalized with the addition of an amendment to a specific term of the Management Agreement. At an in camera meeting of the Committee of the Whole of the Council of the City of North York held on May 29, 1991 the Management Agreement was again discussed, amendments were proposed and debated and its provisions, as contained in the Executive Committee Report, were approved by the Committee of the Whole. I have reviewed the minutes of each of these meetings and am satisfied that they occurred and that these sessions took place in camera. The first part of the test has, accordingly, been met.

[IPC Order M-241/January 5,1994]

The City relies on section 55 of the Municipal Act as the basis for its statutory authority to hold meetings of the Executive Committee and of the Committee of the Whole in the absence of the public. The City also relies upon sections 8(2)(c) and (d) of the City of North York Act which provide that the Board of Directors of the Corporation may hold meetings closed to the public "during discussion of proposed or actual contracts with individuals, organizations and corporations and the financial results thereof" or "during discussion of any other matter which the Board in its discretion determines as appropriate for private discussion". As the scope of these provisions is very broad, I find that the City and the Board of Directors of the Corporation had the requisite statutory authority to hold meetings in camera in order to discuss the terms of the management agreement. The City has, therefore, met part 2 of the section 6(1)(b) test.

In its representations, the City submits that "the Minutes of the NYPAC meetings indicate that the substance of the deliberations focused on the terms of the Management Agreement and which deliberations were to be kept confidential." It goes on to add that, "At a closed meeting of the Committee of the Whole of Council of the City of North York on May 29, 1991 Clause 1 of Executive Committee Report No. 20A (Confidential), found in Tab E herewith which dealt with the North York Performing Arts Centre, was discussed. The Report and schedule (the Management Agreement) was adopted by Council, with amendments." The City further submits that, as evidence of the fact that discussion of the substantive terms of the agreement took place, amendments to the draft Management Agreement were proposed and adopted by the Executive Committee and the Committee of the Whole of Council. It states that "the amendments reflect the discussion which took place both at the Executive Committee and at the Committee of the Whole in camera." For this reason, the City submits, disclosure of the Management Agreement will reveal the substance of the deliberations.

In Order M-196, Assistant Commissioner Irwin Glasberg considered the meaning of the words "substance" and "deliberations" in the context of the interpretation of section 6(1)(b) of the Act. He held as follows:

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 retirement agreement, Assistant Commissioner Glasberg had occasion to interpret the term "deliberations" which is also found in section 6(1)(b) of the Act. He stated:

... 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 ...

I adopt Assistant Commissioner Glasberg's reasoning for the purposes of this appeal. Having reviewed the representations of the parties, the Management Agreement itself and the minutes of pertinent meetings which have been provided by the City, I find that in the circumstances of this appeal, the disclosure of the record at issue would reveal the substance of deliberations of in camera meetings, held in accordance with the City of North York Act and the Municipal Act, and that the third part of the test has been met.

Since all three components of the test have been satisfied, I find that the Management Agreement is 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;

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.

In his representations, the appellant makes reference to a public meeting of the North York City Council which took place on May 30, 1990 at which time, he states, the substance of a document referred to as the "Heads of Agreement" between the City and Live Entertainment was discussed. The Management Agreement differs in many significant respects from the document referred to by the appellant. The "Heads of Agreement" document does, however, contain a number of provisions which were later incorporated into the formal Management Agreement which is the record at issue in this appeal.

I have not been provided with any evidence as to the nature of the discussion which took place at the public meeting on May 30, 1990, particularly, the extent to which the contents of the "Heads of Agreement" were made public. As the Management Agreement had yet to be negotiated at that time, I am unable to agree that the subject matter of Council's deliberations on May 30, 1990 relate to a sufficient degree to the subject matter of Council's deliberations on May 29, 1991. I find, therefore, that the exception provided by section 6(2)(b) of the Act does not apply to the Management Agreement which is the subject of this appeal.

Section 6(1)(b) is a discretionary exemption. The City has provided specific representations regarding the exercise of its discretion in favour of claiming the exemption. I have carefully reviewed these representations and find nothing to indicate that the exercise of discretion was improper and I will not alter this determination on appeal.

Since I have found that section 6(1)(b) of the Act applies to exempt the Management Agreement from disclosure, it is not necessary for me to address the other issues raised in this appeal.

Had I not found that the exemption provided by section 6(1)(b) of the Act applied to the record at issue, I would have concluded that the substantive terms of the Management Agreement would have qualified for exemption from disclosure under section 10 of the Act. Based on the representations made by the affected party, I find that the disclosure of the commercial information contained therein could have significantly prejudiced the competitive position of the affected party to the appeal .

ORDER:

I uphold the decision of the City.

Original signed by: _____
Donald Hale
Inquiry Officer

January 5, 1994