



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-310**

## **Appeal M-9300181**

### **Belleville Police Services Board**



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# INTERIM ORDER

## BACKGROUND:

The Belleville Police Services Board (the Board) received two requests under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the requester's personal information. In the first request, which is the subject of this appeal, the requester sought access to documents relating to the discussion which took place at several Board meetings in 1992 involving the requester's salary and continued employment by the Board.

The Chairperson of the Board responded by stating that "The Board has taken this under advisement and take the position that we are not obliged to release that information." The requester appealed the Board's decision to the Commissioner's office.

At the request of the Appeals Officer, the Board issued a further decision in which it provided the appellant with an index of the records responsive to the request. The Board then denied access to the responsive records under sections 6(1)(b), 11(e) and 12 of the Act. However, given that the request was for the requester's own personal information, the appeal must be decided under Part II of the Act. Therefore, the exemptions claimed under sections 6, 11 and 12 must be considered in the context of section 38(a) of the Act.

During the mediation stage of the appeal, the appellant clarified that he is seeking access to Records 3, 4, 5 and 9 as listed in the index provided to him by Board.

Further mediation of the appeal was unsuccessful and notice that an inquiry was being conducted to review the decision of the Board was sent to the appellant and the Board. Representations were received from both parties.

## RECORDS:

The four records at issue in the appeal are listed in the index provided to the appellant by the Board, and described as follows:

- Record 3 - Minutes of a meeting of the Belleville Police Services Board held on July 29, 1992.
- Record 4 - Minutes of a meeting between the Chair of the Board and the Chief of Police held on July 30, 1992.
- Record 5 - Minutes of a meeting of the Belleville Police Services Board, including a conference call between the Board and its solicitor, held on September 14, 1992.
- Record 9 - Minutes of a meeting between the Belleville Police Services Board and its solicitor held on October 28, 1992.

**ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. Whether the records qualify for exemption pursuant to the discretionary exemption provided by section 6(1)(b) of the Act.
- C. Whether the records qualify for exemption pursuant to the discretionary exemption provided by section 11 of the Act.
- D. Whether the records qualify for exemption pursuant to the discretionary exemption provided by section 12 of the Act.
- E. Whether the discretionary exemption provided for by section 38(a) of the Act applies to the records.

**SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.**

"Personal information" is defined in section 2(1) of the Act to mean, in part, "recorded information about an identifiable individual".

The four records at issue in this appeal contain information about the appellant's salary and continued employment with the Board. I have examined these documents and the representations provided to me and, in my view, the records contain the personal information of the appellant. Although Records 3 and 9 also contain the personal information of another identifiable individual, this information is not responsive to the request and is, therefore, outside the scope of this appeal.

**ISSUE B: Whether the records qualify for exemption pursuant to the discretionary exemption provided by section 6(1)(b) of the Act.**

The Board has claimed the application of section 6(1)(b) of the Act to Records 3, 4, 5 and 9.

Section 6(1)(b) 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 qualify for exemption under section 6(1)(b), the institution 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. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Order M-64]

In Order M-102, Commissioner Tom Wright held that the first and second parts of the test require that the Board establish that a meeting was held **and** that it was held in camera. He went on to state that "there must exist clear and tangible evidence that the meeting or parts of it were actually held in camera".

I have reviewed Record 4 and in my view, I have not been provided with sufficient evidence to indicate that Record 4 was discussed at a Board meeting or that its disclosure would reveal the substance of deliberations of a Board meeting, within the meaning of section 6(1)(b) of the Act. Rather, Record 4 describes a meeting between the Chair of the Board and the appellant at which time his early retirement was discussed. Accordingly, in my view, Record 4 does not meet the threshold requirements of the test and is not exempt from disclosure under section 6(1)(b) of the Act.

Records 3, 5 and 9 are minutes of meetings of the Board which took place on July 29, 1992, September 14, 1992 and October 28, 1992, respectively. I am satisfied that these meetings did in fact take place and, accordingly, that the first part of the section 6(1)(b) test has been met.

With respect to part 2 of the test, the Board relies on section 35(4)(b) of the Police Services Act as its statutory authority to hold meetings of the Belleville Police Services Board in the absence of the public. This section states that:

The Board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

intimate financial or personal matters or other matters may be disclosed of

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such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

Based on the wording of the above provision, I find that the Board had the requisite statutory authority to hold the three meetings in camera. In addition, I am satisfied that the meetings were actually held in the absence of the public. Accordingly, in the circumstances of this case, the requirements for part 2 of the section 6(1)(b) test have been satisfied insofar as Records 3, 5 and 9 are concerned.

In Order M-184, Assistant Commissioner Irwin Glasberg provided some criteria for the evaluation of part three of the test:

In order for me to address the third part of the test (the disclosure of the record at issue would reveal the actual substance of deliberations of this meeting), I will need to define the term "deliberations". 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 records, I am satisfied that the disclosure of Records 3, 5 and 9 would reveal the actual substance of the discussions conducted by the Board and would thereby reveal its deliberations. On this basis, I find that the Board has satisfied the third part of the section 6(1)(b) test for Records 3, 5 and 9.

Since all three components of the test have been satisfied with respect to Records 3, 5 and 9, I find that these records qualify for exemption 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;

In its representations, the Board states that the subject matter of the deliberations of the in-camera meetings have never been considered in a meeting open to the public. Since I have not been provided with any evidence to the contrary, I find that the section 6(2)(b) exception does not apply in the present case.

Because I have found that Records 3, 5 and 9 qualify for exemption under section 6(1)(b) of the Act, it is not necessary for me to consider the possible application of sections 11 and 12 to these records.

**ISSUE C: Whether the records qualify for exemption pursuant to the discretionary exemption provided by section 11 of the Act.**

The Board submits that section 11(e) of the Act applies to exempt Record 4 from disclosure. This provision states that:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institutions;

For a record to qualify for exemption under section 11(e), the institution must establish that:

1. the record contains positions, plans, procedures, criteria or instructions; **and**
2. the record is intended to be applied to negotiations; **and**
3. the negotiations are being carried on currently or will be carried on in the future; **and**
4. the negotiations are being conducted by or on behalf of an institution or the Government of Ontario.

[Order M-92]

In its representations, the Board states that "although a settlement was reached and a document signed, we are now in litigation over the interpretation of specific wording and its meaning in this document." The Board further indicates that negotiations with the appellant have been completed. In my view, Record 4 does not reveal any plans or instructions to be employed either in negotiation or litigation. I find, therefore, that Record 4 fails to meet the requirements of parts 2 and 3 of the test outlined above and does not qualify for exemption under this section.

**ISSUE D: Whether the records qualify for exemption pursuant to the discretionary exemption provided by section 12 of the Act.**

The Board submits that section 12 of the Act applies to Record 4.

Section 12 states that:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that

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was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Board submits that Branch 1 of the exemption applies to exempt Record 4 from disclosure.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
  - (b) the communication must be of a confidential nature, **and**
  - (c) the communication must be between a client (or his agent) and a legal advisor, **and**
  - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49, M-2 and M-19]

In my view, Record 4 fails to satisfy the requirements for exemption under the first part of the Branch 1 test as the record is not a communication between a client (the Board) and a legal advisor. Rather, Record 4 is a handwritten account of a meeting between the Chair of the Board and the appellant.

As far as the second test in Branch 1 is concerned, the Board has failed to establish that the record was "created or obtained especially for a lawyer's brief", which is a necessary component of the "litigation privilege" part of the exemption. Accordingly, the exemption provided for by section 12 of the Act cannot be relied upon to exempt Record 4 from disclosure.

As no other exemptions have been claimed with respect to Record 4, it should be disclosed to the appellant.

**ISSUE E: Whether the discretionary exemption provided for by section 38(a) of the Act applies to the records.**

Section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of institutions covered by the Act. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access, including section 38(a), which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

[Order P-434]

I found under Issue A that Records 3, 5 and 9 contain the personal information of the appellant. Under Issue B, I found that these records qualify for exemption under section 6(1)(b) of the Act. Because Records 3, 5 and 9 contain the personal information of the appellant, and also qualify for exemption under section 6(1)(b), section 38(a) gives the Board the discretion to release the records regardless of the fact that they are otherwise exempt from disclosure.

It is my responsibility to ensure that the head has properly exercised his or her discretion. However, despite being requested to do so by the Appeals Officer, I find the Board has not met its obligation as it has not provided any representations identifying the considerations which went into the decision to exercise discretion to apply the section 6(1)(b) exemption to not disclose Records 3, 5 and 9.

In my view, without representations from the Board on this issue, I am unable to determine if the Board has exercised its discretion under section 38(a) of the Act in a proper manner. Given the circumstances of this appeal, I order the head of the institution to reconsider the question of the exercise of his discretion under section 38(a).

**INTERIM ORDER:**

1. I order the head to reconsider the exercise of his discretion pursuant to section 38(a) of the Act within fifteen (15) days of the date of this Interim order. I further order the Board to provide me with written representations as to the factors considered in the exercise of discretion within twenty



(20) days of the date of this Interim order.

2. The representations should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
3. I order the Board to disclose Record 4 to the appellant within fifteen (15) days of the date of this Interim order.
4. In order to verify compliance with the provisions of this Interim order, I order the Board to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 3, **only** upon request.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ April 20, 1994