



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-380

Appeal M-9400119

Ottawa Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Ottawa Police Services Board (the Board) received a request under the Act for all records, tape recordings, proceedings and minutes of a meeting of the Board held on December 20, 1993 (the meeting). The purpose of the meeting was to determine the Board's response to an incident involving a named Ottawa City councillor who was also a member of the Board (the councillor). The request was made by a newspaper reporter (the appellant), who has been represented by counsel throughout these proceedings.

The following records remain at issue in this appeal: Pages 28B, 29, 30, 31 (minutes of the meeting) and three audio tapes of the meeting. Pages 30 and 31 are duplicates except for a handwritten correction on Page 30, which is incorporated into the text as it appears on Page 31.

The Board relies on the following exemptions in denying access to these records:

- closed meeting - section 6(1)(b)
- invasion of privacy - section 14(1).

A Notice of Inquiry was provided to the appellant's solicitor, the Board and the councillor. Representations were received from the appellant's solicitor and the Board.

DISCUSSION:

CLOSED MEETING

In order to qualify for exemption under section 6(1)(b) of the Act, 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.

Previous orders have established that the first and second parts of the test for exemption under section 6(1)(b) require the Board to establish that a meeting was held **and** that it was held in camera.

The Board has provided an affidavit sworn by the recording secretary of the meeting, which provides evidence that the meeting was in fact held (which satisfies part one of the test) and that it took place in camera.

With respect to part two of the test, the Board relies upon the provisions of section 35(4)(b) of the Police Services Act (the PSA) as its statutory authority for holding this meeting in the absence of the public. This section states:

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 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.

In effect, this section gives the Board the discretion to exclude the public from all or part of a meeting if it "is of the opinion that" the criteria mentioned in the section are met.

The appellant submits that the requirements for holding a meeting in the absence of the public under this section were not met because intimate financial or personal matters were not to be disclosed in the meeting. Alternatively, the appellant submits that, "having regard to the circumstances", the meeting ought not to have been conducted in camera.

I do not agree with these submissions. In my view, the Board exercised its discretion reasonably, based upon relevant factors. The meeting was held to consider the appropriateness of the councillor's actions in connection with the incident, together with possible disciplinary action against him. In my opinion, this qualifies as an "intimate personal matter" within the meaning of section 35(4)(b) of the PSA. This section also makes reference to "the circumstances". In my view, it is a relevant circumstance that the Board issued a statement of its decision in this matter including background information and a detailed account of the incident, which provided an appropriate degree of public disclosure. Accordingly, I find that section 35(4)(b) of the PSA authorized the meeting to be held in the absence of the public.

The appellant's solicitor has also made a related argument with respect to section 2(b) of the Canadian Charter of Rights and Freedoms (the Charter). He submits that this section of the Charter required the meeting to be held in public. This section states:

Everyone has the following fundamental freedoms:

freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

It has been previously established that the Commissioner and his delegates have the authority to deal with Charter issues in matters properly before them (Order P-254).

I have considered whether the appellant's submission with respect to the Charter affects a matter which is "properly before me". In my view, the only matter "properly before me" which could be affected by this submission is whether a statute authorized the holding of the meeting in the absence of the public (i.e. part two of the test). The statute in question is the PSA.

The appellant has not submitted that section 35(4)(b) of the PSA is inconsistent with section 2(b) of the Charter. Rather, this submission, which is not clearly expressed, appears to suggest either:

- (1) that subsections 35(3) and (4), including subsection 35(4)(b), should be construed and applied in light of section 2(b) of the Charter so as to require the meeting of December 20, 1993 to have been held in public; or
- (2) that the action of the Board in exercising its discretion under section 35(4)(b) to exclude the public from the meeting of December 20, 1993 is contrary to section 2(b) of the Charter.

However, the appellant has not provided any representations which specifically address these points. Beyond his broad assertion that the meeting was required to be held in public, he has not provided any argument to support his submission with respect to the Charter. Consequently, I find that the appellant's Charter argument has not been substantiated.

Accordingly, part two of the test has been met. I will now turn to the part three of the test.

In Order M-196, Assistant Commissioner Irwin Glasberg considered the meaning of the words "substance" and "deliberations" in 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, Assistant Commissioner 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.

I agree with these interpretations and adopt them for the purposes of this appeal. Having carefully reviewed the contents of the records, and considering that the records consist of minutes and audio recordings of the meeting in question, subject to two exceptions I find that the disclosure of the records would reveal the actual substance of discussions conducted by the Board with a view towards making a decision and would thereby reveal its deliberations. Subject to these exceptions, therefore, the records meet part three of the test.

The exceptions to this finding are the portions of the records which relate to the appellant's solicitor's brief attendance at the meeting to present a submission that the meeting should be open to the public, and the Chair's response to that submission. In my view, these portions of the records do not disclose the Board's deliberations as required by part three of the section 6(1)(b) test.

Accordingly, I find that the records, aside from the exceptions noted in the preceding paragraph, have met all three parts of the test, and are exempt from disclosure under section 6(1)(b) of the Act.

I have considered whether any of the exceptions in section 6(2)(b) of the Act apply to the parts of the records which I have found to qualify for exemption under section 6(1)(b). I find that, in the circumstances of this appeal and based upon the submissions and evidence presented, section 6(2)(b) has no application to these portions of the records.

INVASION OF PRIVACY

In order for section 14 of the Act to apply to a record, it must first be established that the record contains personal information. "Personal information" is defined in section 2(1) of the Act, in part, as recorded information about an identifiable individual.

The portion of the minutes of the Board's meeting which I found not to be exempt under section 6(1)(b) does not, in my opinion, contain personal information. The names of the appellant and his solicitor found in this portion of the minutes appear in the context of their professional capacities. A number of previous orders indicate that information provided by, or relating to an individual in a professional capacity or in the execution of employment responsibilities is not "personal information". Under these circumstances, these names are not personal information.

I have also reviewed the portion of the audio tapes which I have found not to be exempt under section 6(1)(b), and I find that only the references to the councillor qualify as personal information. This is the case because the matter discussed relates to actions of the councillor in the context of possible disciplinary action against him.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

As noted above, the parts of the tapes which I have not found to be exempt under section 6(1)(b) consist of the appellant's solicitor's submission to the Board and the Board's response. References to the councillor in this part of the record were provided by the appellant's solicitor, speaking on behalf of the appellant. I find that in the particular circumstances of this appeal, because this information was provided on behalf of the appellant, its disclosure to the appellant would not constitute an unjustified invasion of the personal privacy of the councillor (Order P-205).

The Board has not claimed other discretionary exemptions with respect to the portions of the records which I have found not to be exempt under sections 6(1)(b) or 14 of the Act and, in my view, no mandatory exemptions apply to them. Accordingly, these portions of the records should be disclosed to the appellant. I have attached to the Board's copy of this order, the highlighted portion of the Board's minutes which I have found **not to be exempt** from disclosure. With respect to the audio tapes, the Board will be ordered to provide the appellant with a copy of that portion of the tape which records the appellant's solicitor's submission and the Board's response.

PUBLIC INTEREST IN DISCLOSURE

The appellant has raised the possible application of section 16 of the Act to the records. That section reads as follows:

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 only exemption I have applied in this appeal is that provided by section 6(1)(b). Because section 6 is not one of the exemptions listed in section 16, the latter section cannot operate to negate the application of this exemption despite any public interest which might exist in the disclosure of these records.

ORDER:

1. I order the Board to disclose the highlighted portion of the minutes of the Board's December 20, 1993 meeting on the copy of the record which is being forwarded to the Board's Freedom of Information and Privacy Co-ordinator with a copy of this order. I further order the Board to disclose the portions of the audio tape which contain the appellant's solicitor's submission and the Board's response.
2. I uphold the Board's decision with respect to the remainder of the records.
3. I order the Board to disclose the portions of the records described in Provision 1 within thirty-five (35) days after the date of this order, but not earlier than the thirtieth (30th) day after the date of this order.

4. I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
John Higgins
Inquiry Officer

_____ August 26, 1994