



**Information and Privacy  
Commissioner/Ontario**  
**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER M-703**

**Appeal M\_9500603**

**City of Etobicoke**



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## **NATURE OF THE APPEAL:**

The appellant in this case was a member of the Etobicoke Public Art Advisory Committee. As a result of a report from the Chair of the Etobicoke Municipal Arts Commission dated August 15, 1995 (which I will refer to as “the report” throughout this order), the appellant’s appointment to the Etobicoke Public Art Advisory Committee was rescinded by Etobicoke City Council. This decision was conveyed to the appellant by letter. The letter indicated that Council was adopting the recommendation in the report.

After she received this letter, the appellant submitted a request to the City of Etobicoke (the City) pursuant to the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for a copy of the report.

The City denied access to the report, relying on the following exemptions in the Act:

- closed meeting - section 6(1)(b)
- advice or recommendations - section 7(1).

The report is the only record at issue in this appeal.

The Commissioner’s office sent a Notice of Inquiry to the City and the appellant. In addition, the Notice of Inquiry was also sent to the members of the Etobicoke Public Art Advisory Committee and the Chair of the Etobicoke Municipal Arts Commission (collectively called “the affected persons”) to give them an opportunity to comment on the issues in this appeal.

Because the report appeared to contain the appellant’s personal information, and also information which might be construed as personal information of the affected persons, the Notice of Inquiry raised the possible application of sections 38(a) and (b) of the Act. Section 38(a) permits the City to deny access to a record containing the requester’s own personal information where certain specified exemptions, including sections 6(1)(b) and 7(1), would otherwise apply. Section 38(b) permits the City to deny access to a record containing the requester’s own personal information where disclosure would be an unjustified invasion of the personal privacy of another individual or individuals.

In response to the Notice of Inquiry, only the appellant and the City submitted representations.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual, including the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed the report to determine whether it contains personal information, and if so, to whom the personal information relates.

In my view, the report contains the personal information of the appellant, and also of members of the Etobicoke Public Art Advisory Committee. Although the members of this committee are not identified by name, their views as recorded in the report are said to be “unanimous”, so these views can be associated with identifiable individuals.

## **DISCRETION TO REFUSE REQUESTER’S OWN INFORMATION**

I have found that the report contains the appellant’s personal information. Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the City has the discretion to deny access to an individual’s own personal information in instances where certain exemptions would otherwise apply to that information. Section 38(a) states 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. (emphases added)

In order to determine whether the exemption provided by section 38(a) applies to the record, I will begin by considering the City’s claim that it qualifies for exemption under sections 6(1)(b) and 7(1), which are referred to in section 38(a).

## **CLOSED MEETING**

This exemption is found in section 6(1)(b) of the Act, which states:

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)

The first and second parts of the test for exemption under section 6(1)(b) require the City to establish that a meeting was held **and** that it was held in camera. (Order M-102)

The City's representations establish that a meeting of the City's Administration Committee was held in camera on August 28, 1995. They also indicate that at this meeting, the Administration Committee discussed the report, and recommended that its contents be adopted. The City submits that section 55(5)(b) of the Municipal Act, as amended, provides authority for holding this meeting in the absence of the public. This section authorizes a meeting to be held in the absence of the public if the subject matter is "personal matters about an identifiable individual ...". I am satisfied that the removal of a member of the Etobicoke Public Art Advisory Committee would qualify as a "personal" matter pertaining to the appellant. Therefore, I find that parts 1 and 2 of the test have been met with regard to the meeting of the Administration Committee.

Under the third part of the test, disclosure would have to reveal the "substance" of deliberations. In Order M-98, Assistant Commissioner Tom Mitchinson, in discussing the application of section 6(1)(b) of the Act, made the distinction between a record being the **subject** of deliberations and a record containing information which would reveal the **substance** of those deliberations. He held that a record would not satisfy the third part of the test if it contained information which was merely the **subject** of deliberations. To satisfy the third aspect of the test, therefore, the record must also contain information which would reveal the **substance** of those deliberations.

In the circumstances of this appeal, it is clear that the report, which was prepared prior to the meeting, was the **subject** of the committee's discussions. However, I am not persuaded that this disclosure would reveal the **substance** of deliberations by the committee. I have not been provided with any information about the contents of the deliberations which took place, and so I am unable to evaluate whether there is any overlap between those deliberations and the contents of the report.

Section 42 of the Act indicates that the burden of proving that the exemption applies to the report falls on the City. In my view, the lack of information to connect the contents of the report with the committee's deliberations means that this burden has not been met. I find that the application of section 6(1)(b) to the report has not been established.

### **ADVICE OR RECOMMENDATIONS**

This exemption is found in section 7(1) of the Act, which states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The author of the report is the Chair of the Etobicoke Municipal Arts Commission. It is clear that the report contains a recommendation which would be revealed by disclosure, pertaining to the rescission of the appellant’s appointment to the Etobicoke Public Art Advisory Committee. This recommendation appears at the beginning of the report. The exact text of this recommendation, and the fact that it appeared in a report submitted by the Chair of the Etobicoke Municipal Arts Commission, are set out in the City’s letter to the appellant dated September 6, 1995.

I find that, other than this recommendation, the report does not reveal a suggested course of action, and for this reason, the balance of the report does not qualify for exemption under this section.

Given that the only part of the report containing a recommendation has been previously disclosed to the appellant by the City, I am of the view that no purpose would be served by exempting it at this stage. Although I believe this would be a sufficient reason for not upholding the application of this exemption, the City’s claim under section 7(1) fails for an additional reason.

Section 7 applies to “... advice or recommendations **of an officer or employee of an institution or a consultant retained by an institution.** I have not been advised as to whether the recommendation emanates from the Etobicoke Municipal Arts Commission, or from its Chair, and in my view, the report itself is ambiguous in this regard. Nor have I been provided with any information about whether the Chair or the members of the Commission qualify as officers or employees of the City (or any information to suggest that they acted as consultants). As with section 6(1)(b), the burden of proving that the exemption applies falls on the City. Given the lack of information provided to establish this fundamental requirement of the exemption (i.e. that the source of the recommendation is an officer, employee or consultant), I find that this burden has not been met and the application of this exemption is not established.

Since the report does not qualify for exemption under either section 6(1)(b) or section 7(1), I find that section 38(a) does not apply.

## **INVASION OF PRIVACY**

I have found, above, that the report contains the personal information of the appellant, and also of members of the Etobicoke Public Art Advisory Committee.

As previously noted, section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found 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 where 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 contained 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 considerations that are relevant in the circumstances of the case.

The City argues that it would be a presumed unjustified invasion of privacy to release the "recommendations and complaints" of the members of the Etobicoke Public Art Advisory Committee about the appellant. This argument appears to refer to the part of the report which reveals the views of the members of this committee about working with the appellant.

This appears to be a reference to section 14(3)(g) of the Act, which applies to "personal recommendations or evaluations, character references or personnel evaluations". In my view, the "recommendations and complaints" of the committee members do not constitute the type of information intended to be covered by this section. Moreover, previous orders indicate that any recommendations or evaluations covered by this presumption must be made "according to measurable standards" (Orders P-447 and P-470), and this criterion is not met in the circumstances of this appeal. Therefore, I find that section 14(3)(g) does not apply to the views of the committee members about working with the appellant, nor to any other information in the report.

The City did not make any further arguments to support the application of the exemption provided by section 38(b).

In order for this exemption to apply, it must be established by the City or the affected persons that disclosure of the record would constitute an unjustified invasion of personal privacy. Although the Notice of Inquiry in this appeal was sent to the affected persons (including all the members of the Etobicoke Public Art Advisory Committee), none of them submitted representations.

Accordingly, I find that the City and the affected persons have not established that disclosure of the report would be an unjustified invasion of personal privacy. I have also reviewed the record itself to see whether any of the other presumptions or factors favouring privacy protection apply, and I find that the record does not suggest or support the application of any such presumptions or factors.

I am therefore unable to conclude that disclosure of the report would be an unjustified invasion of personal privacy, and the exemption in section 38(b) does not apply.

**ORDER:**

1. I order the City to disclose the report by sending a copy to the appellant by **March 14, 1996** but not before **March 11, 1996**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
John Higgins  
Inquiry Officer

\_\_\_\_\_ February 8, 1996