



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

INTERIM ORDER MO-1926-I

Appeal MA-040147-1

Ottawa-Carleton Catholic District School Board



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NATURE OF THE APPEAL:

This appeal concerns a decision of the Ottawa-Carleton Catholic District School Board (the Board) made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made the following five-part request for information pertaining to the sale of a school property at a specified address in the city of Ottawa:

1. The Board Report and related memos pertaining to, leading up and following-up to Resolution CW 167-06 on July 2, 2002, regarding the motion on sale of surplus schools.
2. The assessed value of the property at [a specified address] and date of this assessment.
3. The value of the successful bid resulting from the tendering process and date of the bid opening; the amounts and names of the successful bids.
4. The bidder's written submission with respect to the tendering process.
5. The chronology of actions taken and the dates of these actions which demonstrate that the Board complied with Ontario Regulation 444/98 regarding the "Disposition of Real Property".

The Board denied access to records responsive to items 1 and 5 of the request on the basis that they were the subject matter of discussion during *in camera* meetings of the Board. The Board stated that the information responsive to item 2 "is a matter of public record" and suggested that the requester seek the responsive information "from an appropriate source". The Board applied the exemptions found in sections 10(1)(a), (b) and (c) of the *Act* (third party information) to deny access to information responsive to items 3 and 4 of the appellant's request.

The appellant appealed the Board's decision.

During the mediation stage, the Board clarified that with respect to records discussed *in camera*, it is applying the exemption found in section 6(1)(b) of the *Act* (closed meeting) to deny access. Also during mediation, the Board issued a revised decision. The Board agreed to disclose all of the records at issue, with the exception of those discussed *in camera*, upon the appellant paying a fee totaling \$183.00. The Board's fee is not an issue in this appeal.

As a result of the Board's revised decision, the records responsive to items 3 and 4 of the appellant's request and the application of the section 10(1) exemptions to them are no longer at issue. At the conclusion of the mediation stage, the only remaining issue was the application of section 6(1)(b) to the records responsive to items 1 and 5 of the appellant's request.

This issue could not be resolved in mediation and the file was transferred to me for adjudication.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the Board on the application of the section 6(1)(b) discretionary exemption. The Board submitted representations and agreed to share its representations in their entirety with the appellant.

I then sent a Notice of Inquiry along with a copy of the Board's representations to the appellant. The appellant submitted representations in response.

The Board then submitted further correspondence in which it advised that it had reconsidered its position on the disclosure of two records that it had previously withheld. During the course of my inquiry the Board provided me with a copy of a new decision letter sent to the appellant confirming the release of these records to the appellant. Accordingly, these records are no longer at issue in this appeal.

Subsequently, after reviewing the representations submitted by the Board and the appellant and the contents of record 6 I invited an affected party to submit representations regarding this record. The affected party was the purchaser of a school property at a specified address. The affected party submitted representations regarding its position on record 6.

RECORDS:

The following six records remain at issue:

1. Memorandum with attached document entitled "Action Plan - Surplus Schools: Staff Recommendation", dated January 29, 2002 (10 pages)
2. Memorandum entitled "Update on Process of Disposal of Surplus Properties" with the date shown as, "Presented to Board Meeting of May 28, 2002" (2 pages)
3. Memorandum with attachments entitled "Sale of Surplus Schools", with the date shown as, "Presented to In-Camera Board Meeting of July 2, 2002" (4 pages)
4. Memorandum entitled "Sale of Jean XXIII School", dated September 23, 2003 (2 pages)
5. Memorandum entitled "Projects Completed Under Delegated Authority", dated September 23, 2003 (2 pages)
6. Fax transmittal form from the Board to a law firm, dated March 30, 2004, with attached correspondence, dated March 30, 2004, a notice, letter dated July 24, 2002, three facsimile cover forms/notes, dated August 7, 2002, two "Tenderer's Acknowledgement and Agreement" forms and a letter dated August 8, 2002 (11 pages)

DISCUSSION:

CLOSED MEETING

General principles

The Board submits that the records at issue are exempt from disclosure under the discretionary exemption in section 6(1)(b), which reads:

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.

For this exemption to apply, the Board must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Under part 3 of the test

- “deliberations” refer to discussions conducted with a view towards making a decision [Order M-184]
- “substance” generally means more than just the subject of the meeting [Orders M-703, MO-1344]

The parties’ representations

The Board states that the records at issue were presented during *in camera* meetings of the Board pertaining to the disposition of a school site. The Board states that *in camera* Board meetings took place on January 27, 2002, May 28, 2002, July 2, 2002 and September 23, 2003. The Board submits that the disposal of the school site was considered during these meetings and that, as a result, part 1 of the test has been satisfied. The Board has provided our office with the minutes of Board meetings held on January 27, 2002, May 28, 2002 and July 2, 2002.

Regarding part 2 of the test, the Board submits that these *in camera* meetings were authorized by section 207(2)(c) and (e) of its enabling statute, the *Education Act*, which states:

A meeting of a committee of a Board, including a committee of the whole Board, may be closed to the public when the subject matter under consideration involves,

- (c) the acquisition or disposal of a school site;

...

(e) litigation involving the Board.

The Board states that all necessary resolutions were enacted by the Board to hold the meetings in question.

With respect to part 3 of the test, the Board submits that disclosure of the records would “reveal the deliberations of the [Board].” With regard to record 6 specifically, the Board states that disclosure of the documents that comprise this record would reveal the “substance” of those deliberations. The Board states that the records at issue are “in part reports prepared by staff to inform the Trustees of the Board of the disposal and the wide range of issues with respect to the methods and process of sale of the property.” The Board submits that part 3 of the test has been satisfied and it states that its decision to deny access to these records under section 6(1)(b) is supported by Order M-533.

In response, the appellant does not appear to dispute the Board’s contention that the above-mentioned *in camera* meetings occurred or the availability of this exemption to institutions in proper circumstances. Instead, the appellant’s representations focus on the public’s right to the information and the Board’s exercise of its discretion in denying access to this information. The appellant’s concerns can be summarized as follows:

1. whether the Board has acted in good faith by invoking the privilege to conduct *in camera* meetings in this case in order to gain the advantage of the section 6(1)(b) exemption;
2. whether the Board has adequately considered the public’s right to information; and,
3. whether the Board has been reasonable in withholding certain documents using section 6(1)(b).

The appellant states that the information that has been made accessible by the Board has been “extremely valuable to the community” and has helped it “understand the role and process of [its] school boards when schools are sold.” However, he feels that it is “unfortunate that the Board could not be more open and helpful in working with its citizens at the outset.”

With respect to record 6 specifically, the affected party’s legal counsel states that the affected party has no objection to the release of any documents that are part of the public record, are the subject of any tender and/or involve a transaction between the affected party and the Board. The affected party considers this information to be part of the public record, subject to the following two exceptions:

1. Any correspondence from [the affected party] or its solicitors as forwarded to the [Board] that is deemed “Without Prejudice”, “Confidential” or containing any settlement offer; and
2. Any enquiries by other Ottawa-based land or real estate developers as to any documents that relate to confidential financial information contained in documents filed with [the Board]

Analysis and findings

Parts 1 and 2 of the test

The Board has provided the minutes of *in camera* Board meetings held on January 29, 2002, May 28, 2002 and July 2, 2002. Based on my review of these minutes and the corresponding records (records 1, 2 and 3) as well as the Board’s representations, I am satisfied that three *in camera* meetings did take place on January 29, 2002, May 28, 2002 and July 2, 2002. I am also satisfied that statutory authority exists under section 207(2)(c) and (e) of the *Education Act* for the holding of a meeting of this nature in the absence of the public. Accordingly, I find that parts 1 and 2 of the test under section 6(1)(b) have been met with regard to records 1, 2 and 3.

Records 4 and 5 relate to an alleged *in camera* meeting on September 23, 2003. However, the Board has not provided the minutes of a Board meeting on that date or any other evidence to support a conclusion that such a meeting did take place on that date. Therefore, I conclude that part 1 of the test under section 6(1)(b) has not been met for records 4 and 5 and, as a result, these records do not qualify for exemption under section 6(1)(b). As no other exemptions have been claimed, I will order the Board to release records 4 and 5 to the appellant.

Record 6 comprises an assembly of correspondence from a Board staff member to its legal counsel setting out a chronology of events regarding the sale of property to the affected party. The record includes several attachments, which I would describe generally as supporting documentation from the Board or its solicitors that confirms various steps in the sale process. I have not been provided with evidence that the contents of this record was presented at an *in camera* Board meeting. Therefore, I find that record 6 does not meet part 1 of the test under section 6(1)(b) and does not qualify for exemption under section 6(1)(b). In addition, addressing the affected party’s concerns about this record, none of these documents includes “without prejudice” or “confidential” correspondence from the affected party to the Board and there is no evidence before me that this record contains confidential third party information. I am satisfied that neither section 6(1)(b) (the exemption claimed by the Board), nor any other exemption under the *Act*, would apply to the information in record 6. Accordingly, I will order the Board to release its contents to the appellant.

Part 3 of the test

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

In Order MO-1344, Assistant Commissioner Tom Mitchinson addressed the application of section 6(1)(b) as follows:

To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations of this *in camera* meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the **subject** of the deliberations and not their **substance** (see also Order M-703). “Deliberations” in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385).

...

It is clear from the wording of the statute and from previous orders that to qualify for exemption under section 6(1)(b) requires more than simply the authority to hold a meeting in the absence of the public. The *Act* specifically requires that the record at issue must reveal the substance of deliberations which took place at the meeting.

In Order M-184, former Assistant Commissioner Irwin Glasberg made the following comments on 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 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. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case. **[my emphasis]**

The former Assistant Commissioner expanded on his interpretation of section 6(1)(b) in Order M-196 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. **[my emphasis]**

As stated above, the Board relies on Order M-533 to support its decision to deny access to the records at issue under section 6(1)(b). Order M-533 relates to a request for information concerning the selection of a site for a new elementary school. The records at issue in that case consisted of the minutes of five *in camera* meetings of the Carleton Board of Education (the Carleton Board) sitting as a Committee of the Whole and one *in camera* session of the Carleton Board's Corporate Services Committee. Appended to the minutes were staff reports relating to the selection of a site for the new elementary school which were presented and discussed at the meetings. Also at issue were a legal opinion prepared by the Carleton Board's solicitors relating to the site acquisition and two site analysis reports prepared by a consulting firm retained by the Carleton Board to assist in making its decision. Adjudicator Donald Hale found that section 6(1)(b) applied to exempt all of the records at issue in that case from disclosure.

I find Adjudicator Hale's findings in Order M-533 regarding part 3 of the test under section 6(1)(b) relevant to my analysis in this appeal. He states:

I have reviewed the Board's representations and the minutes, the staff reports, the legal opinion and the site analysis reports which were presented to the Board's committees at their *in camera* meetings. I find that the subject matter of each of these records was the acquisition of land for the construction of an elementary school or an examination of the Board's legal position. Further, I find that the disclosure of the information contained in each of the records would reveal the substance of the deliberations of the Board's committees which led to the decision as to the appropriate site for the new school. Accordingly, the third part of the test has also been met and section 6(1)(b) applies to exempt the records at issue in this appeal from disclosure.

While the circumstances in this appeal are not identical to those in Order M-533, I find that there are some notable similarities.

As stated above, I am satisfied that the Board met *in camera* on January 29, 2002, May 28, 2002 and July 2, 2002 to explore issues, to receive and discuss recommendations and to make decisions regarding the proposed sale of properties housing surplus schools. With respect to records 1, 2, and 3, I am satisfied that the subject matter of each of these records was the proposed sale of school properties. I find that the disclosure of the information contained in each of these records would reveal the substance of *in camera* Board deliberations, which led to the decisions to sell the properties. Accordingly, I find that part 3 of the test has been met and section 6(1)(b) applies to exempt records 1, 2 and 3 from disclosure.

I acknowledge the appellant's concerns regarding the public interest in the information, the openness and transparency of this process and the Board's use of the section 6(1)(b) exemption to limit the disclosure of information that it considered. However, the "public interest override" set out in section 16 does not apply to records that are otherwise exempt under section 6 and so I am precluded from considering it in this case. However, section 6(1)(b) is a discretionary exemption and so the manner in which the Board applied this exemption in this case to deny

access to the records at issue is relevant. I will consider this issue below under “exercise of discretion”.

EXERCISE OF DISCRETION

General principles

The section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

- whether the requester has a sympathetic or compelling need to receive the information

The parties' representations

The Board states that its decision to exercise its discretion to deny access to the records at issue "has not been taken lightly". It submits that its refusal to disclose documents dealt with during its *in camera* meetings is based on its "historical approach to such requests". It is concerned about setting a precedent and inviting an "avalanche of requests" if this information is released. In denying access the Board asserts that it is safeguarding to its ability to deal with "private sensitive matters as outlined in section 207 of the *Education Act*." The Board questions the appellant's need for information discussed during *in camera* Board meetings. It believes that the information made available for disclosure is "sufficient to meet the needs of the [appellant]."

In response, as stated above, the appellant submits that the information that has been disclosed has been extremely valuable to the community as it has helped members of the community to better understand a school board's role and the process they follow in disposing of a school site. However, the appellant wishes that the Board could have been more open and helpful with members of the community from the outset of the process. The appellant states that the Board initially responded to his request by denying access to all items requested including basic information such as "the winning bidder's submission, names of other bidders and market value of the property." The appellant also submits that he found the "intimidating tone" used by Board staff "especially frustrating" in addressing the appellant's questions over the telephone. He states that he was told "bluntly and unequivocally that the Board stood firm on its decisions to withhold all information." The appellant states that he was told that "the tendering process would be compromised" if any information was released. The appellant indicates that he found the Board's position "puzzling" since the winning bidder (the affected party) was "already discussing this matter publicly", including at "an open general meeting in January 2004".

Analysis and findings

I acknowledge the Board's concerns regarding the private and sensitive nature of this type of information. In my view, this is a relevant factor in exercising discretion to withhold the record.

However, the Board also states that its decision to deny access to records presented at *in camera* meetings is based on its historical approach to dealing with such requests, and refers as well to its desire to avoid an avalanche of similar requests in the future. In my view, these are not relevant factors. I remind the Board of its responsibility in exercising its discretion to carefully consider each request on its merits and to balance the application of a discretionary exemption in limited and specific circumstances against the principle of making information publicly available.

The appellant has also raised some concerns regarding the handling of his request by Board staff that may point to an inappropriate exercise of discretion by the Board in regard to records 1, 2 and 3.

Accordingly, I will include a provision in this order returning the matter to the Board for a proper exercise of discretion under section 6(1)(b) of the *Act*, to be based on relevant factors, with respect to withheld records 1, 2 and 3.

ORDER:

1. I uphold the Board's decision that records 1, 2 and 3 qualify for exemption under section 6(1)(b) of the *Act*.
2. I order the Board to release records 4, 5 to the appellant in their entirety on or before **June 27, 2005**.
3. I order the Board to release record 6 to the appellant in its entirety no later than **June 27, 2005** but not before **June 21 2005**.
4. In order to verify compliance with provisions 2 and 3, I order the Board to provide me with copies of the material disclosed to the appellant.
5. I order the Board to re-exercise its discretion under section 6(1)(b) of the *Act*, in respect of records 1, 2 and 3, taking into account all of the relevant factors and circumstances of this case and using the above principles as a guide.
6. I order the Board to provide me and the appellant with representations on its exercise of discretion no later than **June 3, 2005**.
7. The appellant may submit responding representations on the exercise of discretion issue no later than **June 17, 2005**.
8. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues arising from this order.

Original Signed by: _____
Bernard Morrow
Adjudicator

_____ May 20, 2005