



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2392

Appeal MA07-352

City of Ottawa



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BACKGROUND TO THE APPEAL:

The Office of the Auditor General for the City of Ottawa (the City) conducted an audit of its Parks and Recreation Branch. Included in the scope of the audit was a review of the City's relationship with various community associations providing significant programming out of City facilities.

The audit specifically dealt with a particular community association as a result of information received through the City's Fraud and Waste Hotline. The audit is posted on the City's website. Under the heading "Observations", the audit reads:

Our recommendations on how to proceed with respect to the [community association] are based on the following observations:

- A long history of poor working relationships;
- Harassment towards City staff by [the community association's] staff;
- [The community association's] sense of entitlement over City facilities;
- Complaints received regarding the [community association]; and,
- Difficulties in negotiating a Program Agreement with terms acceptable to the City.

Under the heading "Management Response", the audit, reads in part:

Based on advice from the City Solicitor's Office, the Community and Protective Services Department elected to bring this issue before Council given the potential financial impact relating to not recovering the full \$300,000 the Association had committed to the Community Centre expansion project. This issue was considered by City Council on July 9, 2007, and the following direction was provided:

- In order for the [community association] to continue to deliver programming, that the Deputy City Manager of Community and Protective Services meet with [their] Executive and provide [them] an opportunity to renew its Board such that the restructured organization addresses the concerns raised in the Auditor General's Interim Report.
- Should the [community association] not be prepared to make the necessary governance changes, that the Deputy City Manager be delegated the authority to issue a notice for termination for the management agreement with [them].

This appeal deals with the community association's request for a copy of the Report considered by Council on July 9, 2007.

NATURE OF THE APPEAL:

The City received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

Copy of the staff report and all related documentation presented to council members at their July 9, 2007, meeting to deal with the item identified in the meeting's minutes as [the community association] program management - In Camera

The City conducted a search for records and identified a document entitled, Report to Community and Protective Services Committee, dated June 24, 2007 as responsive to the request. The City denied the requester the entire record pursuant to the discretionary exemptions at sections 6(1)(b) (closed meeting), 11(d) (economic and other interests) and 12 (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed the City's decision to this office.

Mediation did not resolve this matter. Accordingly, the file was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. This office commenced its inquiry by sending a Notice of Inquiry to the City. The Notice of Inquiry set out the facts and issues of the appeal and invited the City's representations.

The City's representations indicate that it now also relies on the exemption at section 11(e) (economic and other interests) to deny the appellant access to the record at issue. The confirmation of appeal this office sent to the City indicated that it had a specified time in which to raise any new discretionary exemptions. The City failed to raise the possible application of section 11(e) within the specified time period. Therefore, the late raising of this discretionary exemption was added as an issue to this appeal.

The non-confidential portions of the City's representations were sent to the appellant, along with a Notice of Inquiry. In response, the appellant provided representations which indicated that it is not taking issue with the late raising of section 11(e). Accordingly, this question is no longer an issue in this appeal.

The City was given an opportunity to reply to the appellant's representations, which it declined.

RECORD AT ISSUE:

The record the City identified as responsive to request consists of two documents, namely:

- Report to Community and Protective Services Committee, dated June 24, 2007 (the Report), 5 pages; and

- Program Management Agreement between the City and the community association, dated May 19, 2004, (the Agreement) attached to the Report, 4 pages

Having regard to the wording of the request, I have determined that the Program Management Agreement between the City and the community association is not responsive to the request. In any event, the appellant did not request a copy of the agreement.

In my view, the Report is the only record at issue. Accordingly, I will go on to determine whether the exemptions claimed by the City apply to this record.

DISCUSSION:

CLOSED MEETING

Section 6(1)(b) 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 institution 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]

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].

Section 6(2) of the *Act* sets out exceptions to section 6(1)(b). The appellant does not claim that any of the exceptions at section 6(2) apply to this appeal and I am satisfied that none apply.

I will now consider each part of the three part test to determine whether section 6(1)(b) applies to the withheld record.

Part 1 – meeting or council, board, commission or other body, or a committee of one of them

The City submits that the Community and Protective Services Committee of Council (the Committee) met on July 9, 2007. In support of its position, the City provided a copy of the Committee's public meeting minutes for July 9, 2007.

The appellant does not dispute that a meeting took place and I am satisfied that the City has provided sufficient evidence to demonstrate that on July 9, 2007, a meeting of the Committee took place. Accordingly, I find that part 1 of the test has been met.

Part 2 – statute authorizes the holding of the meeting in the absence of the public

The City submits that the meeting was held in camera in accordance with sections 239(2)(a), (d) and (f) of the *Municipal Act*. These sections read:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (a) the security of the property of the municipality or local board;
- (d) labour relations or employee negotiations;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

The City submits that the withheld record itself makes it clear that it is the property owner of the facility and that it has entered into a Program Management Agreement with the community association to manage the facility. The non-confidential portions of the City's representations indicate which portions of the record it argues relate to the subject matters identified in sections 239(a), (d) and (f) of the *Municipal Act*.

The appellant questions whether the City had proper authority to hold a closed meeting. The appellant's representations state that "... a report on the Community Association would not have involved security of property or labour relations or employee negotiations."

Having regard to the record itself and the representations of the parties, including the confidential portions of the City's representations, I am satisfied that the City was authorized by sections 239(2)(a), (d) and (f) of the *Municipal Act* to hold a meeting in the absence of the public to discuss the issues under consideration. Though I cannot refer to the confidential portions of the City's representations in this order, I can make reference to the information the City posted on its website about its working relationship with the community association. As previously noted, the "Observations" section of the audit describes the relationship between the parties as poor and advises that City staff hold the view that they have been harassed by the community association's staff. I also note that the "Management Response" section of the audit, clearly indicates that the City Solicitor's advice was sought as a result of the issues relating to the City's and community association's working relationship.

Having regard to the above, I am satisfied that the meeting was held in the absence of the public to discuss property management issues that could potentially affect the security of the facility taking into consideration the type of relationship that existed between the parties at the time of the meeting. In my view, the subject of this meeting met the criteria for section 239(2)(a) of the *Municipal Act*. I am also satisfied that the meeting was held in the absence of the public to discuss issues relating to employment-related issues relating to the community association's staff (section 239(2)(b)), along with the legal advice obtained by the City Solicitor (section 239(2)(c)) of the *Municipal Act*.

Accordingly, I find that part 2 of the test has been met.

Part 3 – disclosure of the record would reveal the actual substance of the deliberations of the meeting

The City's representations state, in part:

In regards to the third prong of the three-part test, due to the fundamental nature of the recommended changes to the management and operations at the Centre, the City submits that disclosure of two recommendations contained in the Report and the substance contained in the body of the Report would reveal the substance of the deliberations of the matter decided on by the Committee of Council.

...

... the Committee Report (Report 11A) was placed on the agenda of a Special Council meeting on July 9, 2007 for its deliberation and decision. Item 2 of Report 11A, the Report, was amended by a motion moved by [a named Councillor] and seconded by [another named Councillor]. This motion was

placed before Council in open session. The motion was not debated and was adopted on consent by Council. The motion was judged by the City Clerk to have replaced [confidential portion representations] of the Report in its entirety. Item 2 of Report 11A was then carried, as amended by the [names of the two Councillors] motion, by Council on consent. However, it is the City's position that the Report remains confidential and still benefits from the closed meeting exemption to disclosure.

The appellant's representations did not specifically address the evidence provided by the City. Rather, the appellant submits that that the City routinely reveals the subject matter of its deliberations in the public minutes of its meetings.

The City's representations indicate that it has not provided written minutes of its proceedings for several years but that the webcast of its Council meetings are available on its website. The City's representations provided the website information required to access the webcast of the July 9, 2007 meeting. The City also provided a copy of the Disposition Report for the July 9, 2007 meeting.

I reviewed the relevant portions of the webcast and the Disposition Report and am satisfied that the Committee's deliberations relating to the July 9, 2007 closed session are not contained in either the webcast or Disposition Report. Though the appellant argues that the Council often reveals its deliberations after their meetings, there is no evidence that this occurred in this instance. In any event, the issue to be determined under part 3 of the test is whether disclosure of the record would reveal the actual substance of the deliberations of the meeting. As noted above, "deliberations" refer to discussions conducted with a view towards making a decision and "substance" generally means more than just a statement of the subject of the meeting.

I carefully considered the representations of the City and the record itself and am satisfied that disclosure would reveal the substance of the Committee's deliberations or would reveal the subject matter of the discussions that took place at the closed session. In making my decision, I also compared the information contained in the withheld record with the information posted on the City's website about the direction the Committee provided Council at the conclusion of the closed session. This information was previously mentioned in this order and is found under the heading "Management Response" in the audit posted on the City's website. The City submits, and I agree, that the direction the Committee provided Council after its deliberation, replaced specific items contained in the withheld record.

Having regard to the above, I find that, if disclosed, the withheld record would reveal the substance of the Committee's deliberations or reveal the subject matter of discussions that took place at the closed meeting. Accordingly, I find that part 3 of three-part test has been met.

As I have found all three parts of the three-part test have been met, I find that the withheld record qualifies for exemption under section 6(1)(b). Given my finding that the withheld record is exempt under section 6(1)(b), it is not necessary for me to consider whether the exemptions at

section 11(d), 11(e) and 12 also apply to this record. However, I must go on to consider whether the City properly exercised its discretion to withhold the record pursuant to section 6(1)(b).

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, this office may determine whether the institution failed to do so.

In addition, this office 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)].

The City submits that it acted in good faith and took into consideration relevant factors in the exercise of its discretion to deny the appellant access to the record. The City argues that section 6(1)(b) was claimed to “safeguard the confidentiality and integrity of its deliberations and communications between elected officials, Legal Counsel and other staff”. The City also submits that its decision to deny the appellant access to the record protects the City’s ability to maintain its relationship and address programming issues with the community association.

The appellant’s representations state:

The information requested is specific to our organization, and not to an outside party. The purpose of the [Act] includes the principle that information should be available to the public. This becomes significantly more important when the information being requested is information relating specifically to the requester.

We believe that the institution did exercise its discretion in denying the request and that it did so in bad faith and for an improper purpose. We suspect that the institution was aware that information and representations presented to committee members were inaccurate and biased, and that the institution is denying the request to prevent this from becoming public.

Having regard to the parties representations, I am satisfied that the City has properly taken into account only relevant factors, and not irrelevant ones, in exercising its discretion to withhold the record I found exempt under section 6(1)(b). In particular, it appears that the City took into consideration the confidential nature of the directions and advice set out in the withheld record, which was considered by the Committee during their decision-making and deliberation process.

In making my decision, I also took into consideration that the purposes of the *Act* include the principle that information should be available to the public and that requesters should have a right of access to their own information. The appellant asserts that the record at issue should be released to the community association on the basis that the information contained in the record at issue relates to them. However, the information contained in the record does not wholly relate to the community association. Rather, the information relating to the community association is intertwined with specific directions and advice the Committee was to consider with a view of making a decision about how to manage the City's relationship with the community association. In my view, the nature of the information and sensitivity of it outweighs the principle that requesters should have a right to access their own information in the circumstances of this appeal.

Having regard to the above, I find that the appellant failed to adduce sufficient evidence to support a finding that the City's decision to exercise its discretion to withhold the record in the circumstances of this appeal was done so in bad faith or for an improper purpose. Accordingly, I find that the City properly exercised its discretion under section 6(1)(b).

ORDER:

I uphold the City's decision.

Original Signed by: _____
Jennifer James
Adjudicator

_____ February 13, 2009