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

# ORDER MO-2499-I

## Appeal MA08-425

## Toronto Catholic District School Board

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## NATURE OF THE APPEAL:

The Toronto Catholic District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a member of the media for access to the following information:

> [All] documentation regarding any payments or agreements made between the TCDSB and [identified Trustee] or her legal counsel, within the last year. Please include any correspondence between the TCDSB and [identified Trustee]'s legal counsel. Also any motions approved by the board related to [identified Trustee]'s departure.

The Board issued a decision granting access to portions of some records and denying access in full to the remainder. Its decision letter stated, in part:

> We are providing access to the Board minutes from the Human Resources, Program and Religious Affairs Committee of February 11, 2008, which were adopted that evening at the special meeting of the Board, containing the motion formally declaring that [identified Trustee] had vacated her seat. Also provided is a news release dated February 12, 2008 outlining the same.

The letter also stated that access to the remaining records was denied pursuant to sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege). Subsequently, in a separate letter to this office, the Board explained that the exemption in section 6(1)(b) of the *Act* applied to all of the withheld records but that the exemption in section 12 applied to the records identified below as Records 1, 6-11, 13-15, 17, 18, 19-24, 26, 27, 29 and 31-33, only.

The requester (now the appellant) appealed the Board's decision.

During mediation, the appellant indicated that the withheld portions of the Board minutes and all of the other records that were withheld in their entirety are at issue in this appeal. With respect to the partially disclosed minutes, the Board advised that it only severed information which was not responsive to the request. The appellant accepted that position and agreed that the withheld portions of the Board minutes are no longer at issue in this appeal. In addition, the appellant stated that there is a public interest in the disclosure of the records and that section 16 (public interest override) applies. As a result, I made section 16 an issue in this appeal.

Included in the group of records provided to this office at the intake stage of the appeal process was a document entitled "Index of Records" (the Index), which the Board refused to disclose to the appellant. During mediation, the appellant stated that it took issue with the Board's refusal to share the Index, and with the fact that the Board has not provided a description of the withheld records other than to state that they consist of 33 documents comprised of 108 pages. It stated that it was not prepared to disclose the Index to the appellant because it was initially prepared for a private session which post-dated the access request, and, for this reason, the Board initially took the position that it is not a responsive record. The Board also stated that the Index is privileged.

In the Mediator's Report, the mediator stated that the Board's refusal to disclose the Index to the appellant raised an issue about the adequacy of the Board's decision and its obligations pursuant to sections 19, 22(1) and 22(3.1) of the *Act*. However, following the transfer of this file to the adjudication stage of the appeal process, the Board stated that it was prepared, for the purposes of this appeal, to treat the Index as a responsive record and it agreed to submit representations on the possible application of any exemptions. The Index is identified as Record 34 below. As a result, the adequacy of the Board's decision and its obligations under sections 19, 22(1) and 22(3.1) are no longer at issue.

Given that some of the responsive records appeared to contain the personal information of an individual, section 14(1) was raised by the mediator as a possible issue in this appeal. I agreed with the mediator's assessment and I made section 14(1) an issue.

The records provided to this office by the Board at the intake stage of this appeal also included a copy of a legal opinion dealing with the application of the *Act* to some of the responsive records. This opinion is identified as Record 24 in the table below. As it appeared possible that this record could contain privileged information about issues before me in this appeal, I did not review it, but rather, arranged for it to be placed in a sealed envelope and returned to the Board.

I began my inquiry into this matter by sending a Notice of Inquiry to the Board inviting it to submit representations on the facts and issues in this appeal. I received representations from the Board. With respect to Record 24, the Board provided an affidavit describing its contents. The Board took the position that its representations and affidavit were confidential, but eventually agreed to severed versions being shared with the appellant.

I then sent a Notice of Inquiry to the appellant inviting it to submit representations on the facts and issues set out in the notice, and in response to the non-confidential portions of the Board's representations and affidavit. I received representations from the appellant.

In its representations, the appellant revised the scope of the request by stating that it was only seeking access to information relating to the dollar amount of any payout that may have been made to the identified Trustee.

I decided that the Board should be given the opportunity to reply to the appellant's representations. I sent a complete copy of the appellant's representations to the Board and invited the Board to submit reply representations. In my letter to the Board, I also asked it to identify which records would be responsive to the revised request and to submit representations on the scope of the request/responsiveness of the records. I received reply representations from the Board.

## RECORDS:

The records initially identified as responsive to the request consist of emails, correspondence and minutes of meetings. Following is a table setting out a description of the records provided to this office at the intake stage and the exemptions claimed by the Board for each of the records.

| Record Number | Page Number | Description | Exemption |
|---|---|---|---|
| 1 | 1-9 | Email from Board counsel to the Board with attached correspondence | 6(1)(b), 12 |
| 2 | 10-11 | Minutes of Committee of the Whole Board/Private | 6(1)(b) |
| 3 | 12-13 | Correspondence | 6(1)(b) |
| 4 | 14 | Correspondence | 6(1)(b) |
| 5 | 15 | Email | 6(1)(b) |
| 6 | 16-17 | Email to Board counsel from the Board with attached email | 6(1)(b), 12 |
| 7 | 18-21 | Email to Board counsel from the Board with attached correspondence and emails | 6(1)(b), 12 |
| 8 | 22-23 | Correspondence | 6(1)(b), 12 |
| 9 | 24-26 | Email from Board counsel to the Board with attached correspondence and draft motion | 6(1)(b), 12 |
| 10 | 27-30 | Email from Board counsel to the Board with attached correspondence | 6(1)(b), 12 |
| 11 | 31-33 | Email from Board counsel to the Board with attached correspondence | 6(1)(b), 12 |
| 12 | 34-36 | Correspondence | 6(1)(b) |
| 13 | 37-38 | Correspondence | 6(1)(b), 12 |
| 14 | 39 | Correspondence | 6(1)(b), 12 |
| 15 | 40-42 | Correspondence | 6(1)(b), 12 |
| 16 | 43-45 | Memorandum | 6(1)(b) |
| 17 | 46-48 | Email from Board counsel to the Board with attached email exchange | 6(1)(b), 12 |

| | | | |
|---|---|---|---|
| 18 | 49-51 | Email to Board counsel from the Board with attached email exchange | 6(1)(b), 12 |
| 19 | 52 | Email | 6(1)(b), 12 |
| 20 | 53-54 | Email | 6(1)(b), 12 |
| 21 | 55 | Email from Board counsel to affected party's counsel | 6(1)(b), 12 |
| 22 | 56-71 | Email between various Board counsel with attached power point presentation | 6(1)(b), 12 |
| 23 | 72 | Internal Memo | 6(1)(b), 12 |
| 24 | 73-82 | Correspondence from Board counsel to the Board | 6(1)(b), 12 |
| 25 | 83-85 | Email with attached handwritten notes | 6(1)(b) |
| 26 | 86-88 | Correspondence | 6(1)(b), 12 |
| 27 | 89-90 | Email from Board counsel to the Board with attached email | 6(1)(b), 12 |
| 28 | 91-92 | Minutes of Committee of Whole Board/Private | 6(1)(b) |
| 29 | 93 | Correspondence | 6(1)(b), 12 |
| 30 | 94-95 | Email with attached correspondence | 6(1)(b) |
| 31 | 96-97 | Email from Board counsel to the Board | 6(1)(b), 12 |
| 32 | 98-104 | Correspondence with attachments and emails | 6(1)(b), 12 |
| 33 | 105-108 | Correspondence with attachments | 6(1)(b), 12 |
| 34 | | Three page "Index of Records" | 6(1)(b), 12 |

## DISCUSSION:

### SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

As noted above, the appellant revised the scope of its request in its representations. It stated:

> As we understood it, [the identified Trustee], an elected public official was removed from office by the TCDSB for cause under the Education Act and received a payout from the board.
>
> Simply stated, we are requesting the dollar amount of that payout.

In its reply representations, the Board took the position that there are no records responsive to this request. In the alternative, the Board then went on to submit reply representations regarding the application of the claimed exemptions to Records 32 and 33 as identified in the table above.

In my view, the Board's interpretation of the appellant's revised request is not reasonable and is not consistent with its obligations to interpret the request in a liberal manner having regard to the purpose and spirit of the *Act*. Although the appellant uses the words "payout" and "removal for cause" in his revised request, it is clear, on a liberal interpretation of the request, that the appellant seeks access to information regarding the financial particulars of any arrangements that may have been made with the Trustee at the time that her position with the Board came to an end.

I adopt this interpretation of the request and I find that information responsive to the request is contained in Records 32 and 33. Although these records include some information which is not responsive, they also include information that on a fair, reasonable and liberal construction of the request would be considered responsive to the revised request. In particular, I find that pages 98 to 104, and part of page 106, are responsive. However, my conclusion that responsive information exists in the records must not be taken as confirmation that a financial settlement

was reached between the Board and the Trustee. Rather, on a large and liberal reading, there is information in these pages of the records that is reasonably related to the request.

As all of the other records provided to this office at the initial stages of the appeal are non-responsive to the appellant's request, that is sufficient to dispose of the access issues relating to those records and I will not consider them further.

**CLOSED MEETING**

I will now turn to consider the Board's claim that Records 32 and 33 are exempt pursuant to section 6(1)(b). That section 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.

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]

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). As applicable to section 6(1)(b), it states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> …
>
> (b) 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; or

(c) the record is more than twenty years old.

The Board states that there were meetings of Board Committees which were held in the absence of members of the public on January 23, 2008, February 11, 2008, March 5, 2008 and March 26, 2008. It also states that the Board was authorized to hold these meetings in the absence of the public pursuant to section 207(2) of 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,
>
> (a) the security of the property of the board;
>
> (b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;
>
> (c) the acquisition or disposal of a school site;
>
> (d) decisions in respect of negotiations with employees of the board; or
>
> (e) litigation affecting the board.

The Board submits that the meetings were properly constituted as meetings closed to the public under section 207(2) of the *Education Act* due to the subject matter under consideration. Parts of the Board's representations were confidential. The appellant did not submit any representations that touch on parts one and two of the test for the application of section 6(1)(b).

I find that the four *in camera* meetings referred to by the Board took place on the dates indicated above. Although I was only provided with minutes of two of the meetings, I am satisfied that the representations and the other records provided to me support a finding that meetings did take place on those dates, meeting the first requirement under section 6(1)(b).

Turning to the second requirement, I note that the term "personal information" is not defined in the *Education Act*. Prior orders of this office have found that the term "personal matters" as used in the *Municipal Act* (also frequently referenced in connection with section 6(1)(b) of the *Act*) is analogous to the term "personal information" used in the *Act* (Orders MO-2473 and MO-2368). In Order MO-2473, Adjudicator Colin Bhattacharjee stated the following in regard to section 239(2)(b) of the *Municipal Act*:

> In my view, the purpose of section 239(2)(b) is to provide a municipal council, board or committee with the discretion to close a meeting or part of a meeting to the public to protect the privacy of an identifiable individual, but only if "personal matters" relating to that individual is the subject matter actually being considered.

I agree with Adjudicator Bhattacharjee's reasoning and apply it here. I am satisfied from the representations taken as a whole, and the records that were provided to this office at the intake stage of this appeal, that the Board's *in camera* meetings were properly constituted under section 207(2)(b) because they involved intimate, personal or financial information in respect of a member of the Board.

In arriving at this finding, I have relied, in part, on the confidential portions of the representations of the Board which I cannot set out in this order. I have also taken into account previous orders of this office dealing with records about the termination of a person's employment or office (see Orders MO-1269, M-978, M-736, M-273, M-184 and M-47).

The only issue remaining is whether the disclosure of these records would reveal the substance of the deliberations at these meetings. Under part 3 of the test set out above, previous orders have found that:

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344 and MO-2337]

- "deliberations" refer to discussions conducted with a view towards making a decision [Orders M-184, MO-2337, MO-2368, and MO-2389]

The Board states:

> Each of the documents at issue in this appeal was created leading into or out of one of these meetings. They reflect the ongoing discussions between Board staff, Board internal counsel, Board external counsel, and those representing [the named Trustee]. The documents detail the thinking of the Board and directions received from the Board during these Board meetings around the evolving status of [the named Trustee].

The Board states that Records 32 and 33 are related to the meeting of March 26, 2008 because they relate to decisions adopted by the Board at that meeting. It submits that disclosure of these records would reveal the nature and content of Board deliberations regarding the Trustee and the resolution of issues regarding the Trustee's status. It also states that none of the exceptions in section 6(2) apply.

The appellant states that the Board's arguments are overly broad and they "serve only to muddy the waters." It adds that if the Board objects to the disclosure of documents "from closed meetings" then it would be satisfied with the disclosure of a one page summary of the information it is now requesting.

In reply, the Board disputes the suggestion that its representations are overly broad and states that it has the right to "exert privilege." Regarding the appellant's request for a one page summary of responsive information, the Board states, and I agree, that the *Act* does not oblige it to create a record.

I have carefully reviewed all of the records provided to me, including the minutes of the *in camera* meeting of the Committee of the Whole Board dated March 26, 2008 (which, as already noted, were removed from the scope of the appeal during mediation). Although the records that remain at issue in this appeal (Records 32 and 33) were prepared following that meeting, I have concluded, for the reasons that follow, that the disclosure of these records would reveal the substance of the deliberations of the Board at that meeting because they reveal substantive details of the discussions that were held and decisions that were made at the meeting.

The question of what information would "reveal the substance of deliberations" of a closed meeting has been discussed in a number of previous decisions of this office and of other access-to-information commissioners.

In Order MO-1344, former Assistant Commissioner Tom Mitchinson addressed the application of part 3 of the test in section 6(1)(b) to the minutes of a closed meeting held by a school board. With respect to part 3 of the test, he stated:

> 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). "[D]eliberations" 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. The Board voices no concern that the actual negotiation strategy would be identified through disclosure of the record. In fact, the Board itself disclosed its strategy two days after adopting it at the November 9, 1998 meeting. Rather, the Board objects to the fact that disclosure of the record would reveal information not previously disclosed.

In Order MO-2337, Assistant Commissioner Brian Beamish dealt with a request for information about the theft of a fire truck that led to disciplinary action that was reflected in Minutes of Settlement. In that case, the Assistant Commissioner found that the evidence was not sufficient to establish that disclosure would reveal the substance of deliberations that took place at the closed meeting. The records only included a general reference to the disciplinary matter, and all decisions regarding the matter had been made before the closed meeting was held.

In reaching this finding, Assistant Commissioner Beamish referred to Order M-1169, in which former Assistant Commissioner Mitchinson considered the application of section 6(1)(b) to handwritten notes and minutes of an in camera meeting where fully executed Minutes of

Settlement relating to a complaint against the Chief of Police under the *Ontario Human Rights Code* were reviewed. The former Assistant Commissioner stated:

> In my view, these two records deal with the subject of the human rights complaint and the outcome of the mediation exercise, but not the substance of any deliberations about this matter. The terms of settlement were simply reported to the Board at the January 20 meeting. The Board did not, and it would appear did not have authority to, discuss these terms with a view to approving or making a decision about them. Therefore, I find that the third requirement has not been established for these two records, and that they do not qualify for exemption under section 6(1)(b).

Both Order MO-2337 and M-1169 are distinguishable from the facts of the appeal before me. In each of those cases, the decisions in question had been made before the closed meeting took place, so their contents were not the substance of deliberations undertaken with a view to reaching a decision. In the appeal before me, the situation was different. In this case, the Board's approach to the issues pertaining to the Trustee had not been previously decided, and did form the substance of deliberations with a view to making a decision.

Relevant considerations in assessing whether records would reveal the substance of deliberations in a particular case were canvassed by former British Columbia Information and Privacy Commissioner David Loukidelis in Order 00-14, which addressed the equivalent exemption in British Columbia's *Freedom of Information and Protection of Privacy Act*. The case involved the decision by a local Police Board to deny access to the entire minutes of certain *in camera* meetings. The former Commissioner stated:

> Section 12(3)(b) does not necessarily allow the Board to refuse to disclose records because they "refer to matters discussed" *in camera*. Nor does s. 12(3)(b) allow a local public body to "withhold *in camera* records", whatever they may be. The section does not create a class-based exception that excludes records of, or related to, *in camera* meetings. …
>
> In this case, certainly, s. 12(3)(b) does not authorize the Board to refuse to disclose the meeting minutes in their entirety. The Board withheld every iota of information, right down to the names of the Board members attending each meeting, the dates and times of each meeting, the location of each meeting, and so on. Disclosure of the identities of those attending a meeting, or details as to its time and location, would not - absent evidence to the contrary in a given case - reveal the "substance" of the "deliberations" of the meeting.
>
> Nor would disclosure of the subjects dealt with at the Board meetings here in question - regardless of whether a matter was presented to the Board for information or for discussion and action - reveal the substance of the Board's deliberations on those subjects. There may be cases where disclosure of a subject of an *in camera* meeting would, of itself, reveal the substance of the deliberations of the governing body. It may be possible, for example, to combine knowledge of

> the subject matter with other, publically available, information, such that disclosure of the subject matter itself amounts to disclosure of the "substance of deliberations". The Board has not supplied any evidence or argument that would permit me to decide that this is the case here.
> ...
>
> Apart from the scheduling, attendance and subject matter information discussed above, however, the information in the records qualifies for protection under s. 12(3)(b). The balance of the information conveys which Board members made what motions, the debate on various matters, and the Board's decisions on specific issues. The rest of the records would, if disclosed, clearly reveal the "substance of deliberations" of the *in camera* meetings. ...

In this case, the appellant's revised request pertains to substantive matters, not to who was in attendance at the meeting or other information identified as not exempt in the cases I have just mentioned.

As well, previous orders of this office have consistently found that discussions about the termination of a person's employment or office properly considered at *in camera* meetings are exempt pursuant to section 6(1)(b) (see Orders M-184, M-196, MO-1269, MO-1248 and MO-1676). In Order MO-1676, Adjudicator Donald Hale stated:

> In Orders M-184 and M-196, former Assistant Commissioner Irwin Glasberg reviewed the operation of section 6(1)(b) in situations where a board of education and a municipal council reviewed and approved proposed severance agreements with former senior employees at meetings held in the absence of the public. In each case, section 6(1)(b) was found to apply as the former Assistant Commissioner held that the disclosure of the record would "reveal the substance of deliberations" of the decision-making body.
>
> In the present appeal, the Police Services Board was charged with making a decision on whether to approve the Minutes of Settlement negotiated between counsel for the former Chief and the Police. I accept the evidence of the Police that, following a discussion, the Board accepted the financial terms of settlement reflected in the first four paragraphs of the Minutes and "signed off" on them. I agree with the characterization by the Police of the remainder of the Minutes as "boiler plate" and find that the substance of the deliberations of the Board focussed on those financial aspects of the settlement which are reflected in paragraphs 1 to 4. Insofar as the remainder of the Minutes is concerned, however, I am not satisfied that its disclosure would serve to "reveal the substance of the Board's deliberations", as is required by section 6(1)(b).

Applying this approach and having regard to the evidence that is before me, I find that the disclosure of the records at issue would reveal the substance of the deliberations at the *in camera* meeting as they reveal a recommended course of action that was the very substance of the

discussions that took place. Therefore, the third requirement for the application of section 6(1)(b) has been met.

I have reviewed the exceptions to the exemption set out in section 6(2) and find that none is established in the circumstances of this appeal.

As all three requirements for the application of section 6(1)(b) have been met and the exception does not apply, I find that the records are exempt pursuant to section 6(1)(b).

Given my findings regarding the application of section 6(1)(b), it is not necessary for me to consider whether the other exemption claimed for these records applies. However, I must go on to review the Board's exercise of discretion and consider the appellant's claim that the public interest override in section 16 applies.

**EXERCISE OF DISCRETION**

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.

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 Board states that it properly exercised its discretion by taking into account the following factors:

- the confidential nature of the information,
- the Board's previous practice of withholding materials or minutes relating to *in camera* meetings,
- the sensitivity of the issue and the potential unjustified invasion of privacy that would result from disclosure of the records,
- its view that the issues are no longer of relevance to the public, and
- its view that the records were also exempt pursuant to section 12.

Other factors were considered by the Board and were set out in the confidential portions of its representations. As I stated previously, I am not able to disclose the confidential information in this order, but I have considered these portions in arriving at my decision below.

The appellant states:

> It is irrelevant whether the "actions and involvement" of [the named Trustee] with the board have "long since been aired and dealt with in the public domain." In fact, the amount of the settlement has not been revealed nor has the existence of a settlement been categorically confirmed.

> As recently as Oct. 2, an article appeared in the Toronto Star hinting at this payout and quoting an anonymous source within the board. The source confirmed "trustees had approved a payout for [the Trustee] after she was removed from office in February for missing too many board meetings." (Appendix C)
>
> Neither is it correct or relevant whether any other media outlet has requested the information or whether, in the board's opinion, release of the information would provide a "pretext to rehash old issues."
>
> We respectfully argue such biased, unjustified allegations demonstrate the board has acted in bad faith in its exercise of discretion.

In reply, the Board states that it believes that it acted honourably and reasonably in exercising its discretion. It disputes the appellant's claim that the Toronto Star article "hints at a payout," disputes the appellant's quotes from an "anonymous source," and states that it can find no references in the article referred to by the appellant to support these assertions.

In my view, the Board's exercise of discretion, as explained above, did not adequately consider the transparency purpose of the *Act* or the fact that information about the terms on which the holder of a public office ceased to hold such an office is, inherently, a matter of some public interest. That interest is not circumscribed by the extent of recent media discussions of the issue. The Board also failed to take account of the fact that, in the absence of a claim under section 6(1)(b), a significant amount of information about the termination of public offices or employment with public bodies is often ordered disclosed. (See, for example, Orders MO-2293, MO-2174 and MO-1469.)

I also note that, in Order M-196, former Assistant Commissioner Irwin Glasberg dealt with a retirement settlement agreement, and concluded that it was exempt under section 6(1)(b). He added a postscript to the order, in which he stated:

> Where early retirement agreements have been considered in meetings which are closed to the public, municipalities may, under certain circumstances, be permitted to rely on section 6(1)(b) of the Act to withhold access to information contained in these records. It would be unfortunate, however, if institutions began to use this provision to routinely shield the financial terms of such agreements from legitimate public scrutiny.
>
> I would also point out that section 6(1)(b) is a discretionary exemption which means that the head of an institution can choose to release information about a retirement agreement notwithstanding that it was discussed in camera. …

Again, in this order I am not confirming whether any financial settlement was reached between the Board and the Trustee, but the fact remains that the termination of public officials is a matter that attracts public scrutiny.

In this case, a new decision by the Board to disclose the responsive records would require notice to the Trustee because of the possible application of the mandatory exemption at section 14(1). Nevertheless, in the circumstances, I have decided to require the Board to re-exercise its discretion because I do not believe the transparency purpose of the *Act* has been given sufficient consideration in the Board's initial exercise of discretion.

**PUBLIC INTEREST OVERRIDE**

Section 16 states:

> 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.

I have found above that the information requested by the appellant is exempt pursuant to section 6(1)(b). An examination of section 16 indicates that section 6 is not an exemption that may be overridden by a compelling public interest in disclosure.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.), the Ontario Court of Appeal found that sections 14 and 19 of the *Freedom of Information and Protection of Privacy Act* (equivalent to sections 8 and 12 of the *Act*) should be "read into" the public interest override found at section 23 of that statute (equivalent to section 16 of the *Act*). The remedy of reading in was granted by the Court to cure what it found to be an an infringement of the guarantee of freedom of expression found at section 2(b) of the *Canadian Charter of Rights and Freedoms*.

However, no similar finding has been made in connection with section 6(1)(b) of the *Act*. The appellant has not argued that section 6(1)(b) should be read into section 16. In order to make such an argument, a Notice of Constitutional Question pursuant to section 12 of this office's *Code of Procedure* and section 109 of the *Courts of Justice Act* would be required, and no such notice has been served.

The result is that section 16 can not be applied to override section 6(1)(b).

In summary, I find that the information to which the appellant seeks access in this appeal is exempt from disclosure pursuant to section 6(1)(b) and the public interest override in section 16 cannot apply to override the Board's claim that the information is exempt.

## ORDER:

1. I order the Board to re-exercise its discretion in relation to its decision to rely on section 6(1)(b) to withhold information responsive to the revised request, and to advise me, and the appellant, of the results of this re-exercise not later than **March 18, 2010**. In the event that the Board decides not to claim discretionary exemptions, it will be required to comply with the notice provisions found in section 21 of the *Act*, treating the date of this

order as the date of the request, and to issue a new access decision. For greater certainty, the responsive information consists of pages 98 through 104, in their entirety, and the parts of page 106 that are highlighted on a copy of that page which I am sending to the Board with this order.

2. I remain seized of this appeal to deal with the Board's re-exercise of discretion and any associated issues that may arise.

Original signed by: February 25, 2010
John Higgins
Senior Adjudicator

**POSTSCRIPT:**

I have found that the public interest override in section 16 of the *Act* does not apply in this case because it does not identify section 6 as an exemption that can be overridden. I would observe, however, that the omission of section 6(1)(b) from the public interest override in section 16 is problematic for essentially the reasons articulated by former Assistant Commissioner Glasberg in his postscript to Order M-196, from which I quoted in the discussion of "Exercise of Discretion," above.

In this order, I am expressly *not* ruling on whether there is a compelling public interest that would outweigh the purposes of the claimed exemptions. But it is unfortunate that deliberations of a closed meeting may be withheld from disclosure even when such an interest exists.

There is no exact equivalent to section 6(1)(b) in the *Freedom of Information and Protection of Privacy Act*. The ability to claim this exemption under the *Act* results in potentially different outcomes for information about the termination of public offices, depending on whether or not the matter was discussed at a closed meeting, and on whether the institution receiving the request is covered by the *Act* or, alternatively, by the *Freedom of Information and Protection of Privacy Act*.

In my view, it would be advisable for the Legislature to consider amending the *Act* to add section 6 as an exemption that can be overridden under section 16.