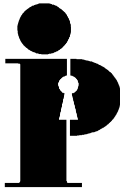

INTERIM ORDER MO-2511-I

Appeal MA08-387

City of Toronto

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NATURE OF THE APPEAL:

On August 26, 2008, the Treasurer for the City of Toronto (the City) submitted a staff report to City Council's Government Management Committee entitled, "Largest Property Tax Debtors with Tax Arrears Greater than $500,000 as at June 30, 2008." The report contains two attachments:

- Attachment 1, which is publicly available, is a chart listing 20 properties owned by named corporations with tax arrears of $500,000 or more.

- Attachment 2, which is not publicly available, is a chart that lists one property with tax arrears of $500,000 or more that is owned by a named individual "in trust."

Both attachments contain information under the following headings: Assessed Address, Ward, Mailing Address, Ownership Information, Property Classification, Outstanding Taxes, CVA 2007 (current value assessment in 2007), Comments & Collection Efforts Taken, and Use of Bailiff for the Arrears.

A journalist then submitted a request to the City under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "[a]ll individuals who are in arrears of their property taxes in excess of $500,000, including property address and outstanding amount." In short, the journalist is seeking access to the information in Attachment 2.

The City located records responsive to the request, which consist of Attachment 2 and an accompanying cover memorandum that the City Treasurer submitted to a closed meeting of the Government Management Committee. The City then issued a decision letter to the requester, denying access to these records pursuant to the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*. In addition, it denied access to Attachment 2 pursuant to the mandatory exemption in section 14(1) (personal privacy), read in conjunction with the presumptions in sections 14(3)(e) and (f) of the *Act*.

The requester (now the appellant) appealed the City's decision to this office. During the mediation stage of the appeal process, the appellant claimed that there is a compelling public interest in disclosure of the records at issue. Consequently, the public interest override in section 16 of the *Act* is at issue in this appeal.

This appeal was not resolved during mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by sending a Notice of Inquiry to the City, which submitted representations in response. I then sent the same Notice of Inquiry to the appellant, along with a severed copy of the City's representations. I withheld limited portions of the City's representations from the appellant because they fall within this office's confidentiality criteria for the sharing of representations. In response, the appellant submitted representations to this office.

Next, I decided to seek representations from an affected party, whose name "in trust" appears in Attachment 2. I sent a Notice of Inquiry to this individual, along with a complete copy of the City's representations and a severed copy of the appellant's representations. In response, the affected party submitted representations. At the same time, I provided the City with a copy of the appellant's representations and invited it to respond. The City submitted reply representations to this office.

Finally, I decided to seek supplementary representations from all three parties. I received supplementary representations from the City, but not from the appellant or the affected party.

RECORDS:

The following records are at issue in this appeal:

Title/description	Page number	City's decision	Exemptions claimed
Memorandum from Treasurer to Government Management Committee, dated August 26, 2008	1	Withheld in full	Section 6(1)(b)
Attachment 2: Chart – Property with tax arrears greater than $500,000 owned by an individual, as of June 30, 2008	2	Withheld in full	Section 6(1)(b) Section 14(1)

DISCUSSION:

PERSONAL INFORMATION

The City claims that Attachment 2 qualifies for exemption under the personal privacy exemption in section 14(1) of the *Act*. However, section 14(1) only applies to "personal information." Consequently, it is necessary to determine whether this record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (h) the individual's name if 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;

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

In Order M-800, former Assistant Commissioner Tom Mitchinson faced a similar situation to the one in this appeal. The City of Ottawa had received a request from a journalist for a list of all properties whose municipal taxes were in arrears, as well as the amounts owing, the term, the property owner, and any other information about arrears that would be recorded on title. The information in the listings held by the City that was responsive to the journalist's request included the name of the registered owner of the property, the property address, the "balance" (amount of arrears), the current year, and other information.

With respect to individual property owners, former Assistant Commissioner Mitchinson found that the names and other information in the listings fell within paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*. He stated:

> Where a listing indicates that the property is owned by an individual or individuals, I find that the names, property addresses and associated entries for these listings qualify as personal information for the purposes of section 2(1) of the *Act*. Unlike other circumstances where the owner of a property may not be responsible for activities involving a property, municipal property taxes are the responsibility of the property owner, and if there are arrears it is always the owner whose name would appear on any arrears listing.

However, the information at issue in the appeal before me is distinguishable in one important respect from the information at issue in Order M-800. As noted above, the property that is subject to tax arrears is not simply owned by an individual, but by a named individual "in trust." This suggests that the property is held in some type of trust arrangement.

In *The Law of Trusts; A Contextual Approach*, 2d ed., (Toronto: Edmond Montgomery Publications Ltd., 2008, p. 5) Mark Gillen and Faye Woodman define a "trust" as follows:

> [T]he relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one,

> and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

The City, which is attempting to collect the tax arrears owing on the property, submits that the affected party is a "successor trustee" who was named to carry out the instructions of her husband's will, and she is therefore the trustee or executrix of her late husband's estate. The affected party herself states that she is a widow but submits that the property was purchased "in trust" by her husband. This seems to suggest that the property was purchased in trust while her husband was still alive and she was named as the trustee at that time.

In short, the parties have provided conflicting information about the nature of the trust. However, regardless of the type of trust that exists, there is sufficient evidence before me to find that the affected party is a "trustee" who is holding real property with municipal tax arrears of more than $500,000.

Sections 2(2.1) and (2.2) of the *Act* exclude certain information from the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

Moreover, this office has found that to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225]. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

This raises the question of whether the information in Attachment 2 identifies the affected party, who is acting as a trustee, in a business, professional or official capacity or in a personal capacity. As noted above, Attachment 2 contains information about the property for which tax arrears are owed under the following headings: Assessed Address, Ward, Mailing Address, Ownership Information (i.e, name of affected party), Property Classification, Outstanding Taxes, CVA 2007, Comments & Collection Efforts Taken, and Use of Bailiff for the Arrears. Consequently, it must be determined whether the information under the headings "Ownership Information" (i.e., name of affected party) and "Mailing Address" (i.e., contact information) falls within the ambit of the sections 2(2.1) and 2(2.2) exclusions.

The law of trusts generally provides that trustees act in a capacity distinct from their personal capacity.[1] Liability associated with a trust, including for tax arrears and court costs, attaches to the trust, not to a trustee, unless the trustee commits misconduct such as fraudulent or dishonest breach of trust in which case the trustee may be liable in his or her personal capacity.[2]

In addition, there are statutory rules governing liability for tax arrears as between the trust and the trustee. For these purposes, section 17(2) of the *Assessment Act* treats a trustee as if he or she was not acting in a representative capacity, while protecting that individual from unlimited personal liability. Section 17(2) states that:

> Land held by a person as a trustee, guardian, executor or administrator shall be assessed against the person as owner in the same manner as if the person did not hold the land in a representative capacity, but the fact that the person is a trustee, guardian, executor or administrator shall, if known, be stated in the roll, and the person is only personally liable when and to the extent that the person has property as trustee, guardian, executor or administrator, available for payment of the taxes.

The City submits that the affected party has been identified in her personal capacity as trustee or executrix of her late husband's estate and not in a business, professional or official capacity, as contemplated by section 2(2.1) of the *Act*. It further submits that even if it could be said that the affected party is acting in a business, professional or official capacity, the disclosure of her identity would reveal something of a personal nature about her (i.e., that she is the spouse of a deceased individual and that as the trustee of the property in question, she is "responsible" for tax arrears of more than $500,000). Consequently, the information in Attachment 2 would qualify as the affected party's "personal information."

Neither the appellant nor the affected party provided representations specifically directed to this issue. However, the affected party submits that Attachment 2 contains her "personal information."

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[1] *Gordon v. Roebuck* (1992), 9 O.R. (3d) 1, 1992 CarswellOnt 1719, Krever J.A., Labrosse J.A., McKinlay J.A. (C.A.) reversing in part (1989), 71 O.R. (2d) 201, 1989 CarswellOnt 870, Fitzpatrick J. (H.C.) and see *Ruff v. Murchison* (2007), 310 N.B.R. (2d) 349, 2007 CarswellNB 31, 2007 CarswellNB 30, J.T. Robertson J.A., J.Z. Daigle J.A., W.S. Turnbull J.A. (N.B.C.A.) reversing in part (2006), [2006] N.B.J. No. 98, 2006 CarswellNB 124, Clendening J. (N.B. Q.B.); and see *Operating Engineers' Pension Plan v. Commercial Union Assurance Co. of Canada*, 1989 CarswellBC 256, 48 B.C.L.R. (2d) 60 (B.C.C.A.).

[2] *Outset Media Corp. v. Stewart House Publishing Inc.*; 2002 CarswellOnt 4556 at para. 39; 30 B.L.R. (3d) 198; Ontario Superior Court of Justice; and see *Ingram v. Minister of National Revenue*; 1992 CarswellNat 294 at para. 38; [1992] 1 C.T.C. 2741, 92 D.T.C. 1458; Tax Court of Canada; and *Baxted v. Warkentin Estate* (2007), 217 Man. R. (2d) 1, 31 B.L.R. (4th) 185, 34 E.T.R. (3d) 213, [2007] 10 W.W.R. 521, 2007 MBQB 160, 2007 CarswellMan 271, McCawley J. (Man. Q.B.) additional reasons to (2006), 33 E.T.R. (3d) 106, 23 B.L.R. (4th) 193, 2006 MBQB 214, 2006 CarswellMan 342, (sub nom. Warkentin Estate, Re) 210 Man. R. (2d) 22, [2007] 3 W.W.R. 531, McCawley J. (Man. Q.B.)

I have carefully considered the parties' representations and reviewed the information in Attachment 2. In my view, any assessment of whether a trustee is identified in a record in a business, professional or official capacity as opposed to a personal capacity, as contemplated by the exclusions to the definition of "personal information" in sections 2(2.1) and 2(2.2), must be done on a case-by-case basis. Although the law of trusts generally provides that trustees act in a capacity distinct from their personal capacity and tax arrears attach to the trust, not the trustee, there are clearly both common-law and statutory exceptions to these general rules.

Of particular significance is section 17(2) of the *Assessment Act*. In providing that "land held by a person as a trustee … shall be assessed against the person as owner in the same manner as if the person did not hold the land in a representative capacity," this section makes it clear that trust property is assessed against the trustee as if he or she held the land personally. At the same time, the provision is equally clear that: (i) "the fact that the person is a trustee … shall, if known, be stated in the roll"; and (ii) "the person is only personally liable when and to the extent that the person has property as trustee… available for payment of the taxes."

In my view, the consequence of this provision is that even if a trustee otherwise acts in a business, professional or official capacity in carrying out his or her trust duties with respect to real property, section 17(2) generally shifts that individual's role into a personal capacity for the purpose of assessment and payment of property taxes. It may be that other factors might tend to shift the analysis back to suggest that a trustee is acting in a business, professional or official capacity for the purposes of sections 2(2.1) and 2(2.2) of the *Act* with respect to a property that is in arrears, but none of the parties have raised or identified such factors.

In the circumstances of this appeal, Attachment 2 identifies a named individual "in trust" as owing more than $500,000 in tax arrears for a specific property. Given the existence of property tax arrears, I find that the affected party's name (ownership information) and contact information (mailing address) in this particular record identify her in a personal capacity and not a business, professional or official capacity. Consequently, this information does not fall within the ambit of the sections 2(2.1) and 2(2.2) exclusions.

Moreover, I agree with the City that even if I were to find that this information identifies the affected party in a business, professional or official capacity, it would still qualify as her "personal information," because disclosing it would reveal something of a personal nature about her. In particular, it would reveal that she is personally liable, to an extent, for more than $500,000 in property tax arrears. To summarize, I find that that the affected party's name and mailing address qualify as "personal information," as that term is defined in section 2(1) of the *Act*.

However, the affected party's name and mailing address are not the only information in Attachment 2. This record also contains information under the following headings: Assessed Address, Ward, Property Classification, Outstanding Taxes, CVA 2007, Comments & Collection Efforts Taken, and Use of Bailiff for the Arrears.

Some of this remaining information, on its own, would clearly not constitute "personal information." However, all of the information in Attachment 2 is currently linked with the name of an identifiable individual. In Order M-800, former Assistant Commissioner Mitchinson found that the property owner's name, the property address, the "balance" (amount of arrears), the current year, and other information relating to municipal property tax arrears qualifies as "personal information" for the purposes of section 2(1) of the *Act*.

I agree with former Assistant Commissioner Mitchinson's finding. In summary, for the purposes of this appeal, I find that all of the information in Attachment 2, when linked with the name of an identifiable individual, constitutes "personal information," as that term is defined in section 2(1) of the *Act*. As will be explained in the next section of this order, however, if the affected party's name, her mailing address, the assessed property's address and the property's current value assessment are severed from the record, the remaining information is no longer personally identifiable.

PERSONAL PRIVACY

I will now determine whether the personal information in Attachment 2 qualifies for exemption under the personal privacy exemption in section 14(1) of the *Act*.

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In my view, the only possible exception that could apply in the circumstances of this appeal is paragraph (f) of section 14(1), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

The City submits that the presumptions in sections 14(3)(e) and (f) apply to the personal information in Attachment 2. These provisions state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (e) was obtained on a tax return or gathered for the purpose of collecting a tax;

> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

Neither the appellant nor the affected party specifically address whether any of the presumptions in section 14(3) apply to the information in Attachment 2. However, the appellant submits that she is only seeking the identity of individuals who owe more than $500,000 in property tax arrears, which she characterizes as a "reasonable threshold." In contrast, the affected party submits that disclosing this information would be an invasion of her personal privacy.

I agree with the City's submissions with respect to the presumptions in section 14(3). In my view, the personal information in Attachment 2 was clearly gathered for the purpose of collecting municipal property taxes and therefore falls within the section 14(3)(e) presumption. In addition, some of the information describes the affected party's "finances" and "liabilities" and therefore falls within the section 14(3)(f) presumption. There is nothing in the wording of sections 14(3)(e) and (f) to suggest that these presumptions can be disregarded if the amount in outstanding property taxes reaches a "reasonable threshold." Consequently, I find that disclosing this personal information is presumed to constitute an unjustified invasion of the affected party's personal privacy.

The Divisional Court has stated that if any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In my view, the personal information in Attachment 2 does not fall within any of the paragraphs in section 14(4). In addition, as will be explained later in this order, the public interest override at section 16 does not apply to the personal information at issue. Consequently, at first glance, the entire record would appear to qualify for exemption under section 14(1).

However, where a record contains exempt information, section 4(2) of the *Act* requires an institution to consider whether it can "reasonably be severed" to facilitate the disclosure of information. This provision states, in part:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15 … the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

In Order 43, former Assistant Commissioner Sidney Linden stated the following with respect to the purpose of section 10(2) of the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent to section 4(2):

> The inclusion of subsection 10(2) in the *Act* has significant implications regarding the nature of a record which has met one of the criteria for exemption. By properly discharging the obligation to sever an exempt record under subsection 10(2), a head, in many instances, will alter the record in such a way that it no longer meets the requirements of the exemption. In other words, a record considered in its entirety may be exempt, but the same record, properly severed, may be eligible for release.
>
> In my view, the purpose of subsection 10(2) is to require institutions to try, wherever possible, to sever records so as to remove them from the scope of the exemptions under sections 12 to 22. I feel that this interpretation is consistent with one of the fundamental purposes of the *Act*, that information should be available to the public, and that necessary exemptions from the right of access should be limited and specific.

In Order M-800, former Assistant Commissioner Mitchinson found that much of the information in the property tax arrears listings could be rendered non-identifiable by severing the names and addresses of the property owners from the remaining information, such as the amount in tax arrears owing. He stated:

> Before finalizing my discussion of section 14, I want to turn to the issue of severability. If it is possible to remove all personal identifiers from the listings which I have found to satisfy the requirements of section 14(3)(f), then these listings would no longer qualify as "personal information" and therefore no longer meet the requirements for exemption under section 14(1) (Order 43). In my view, this can be achieved in the circumstances of this appeal, by separating the names and addresses of individual property owners from the remaining information associated with these listings. Once the names and addresses are severed, the remaining information is no longer personally identifiable and does not qualify for exemption under section 14(1) of the *Act*.

A similar severing process can be applied to Attachment 2. The information that falls under the following headings in Attachment 2 clearly constitutes the affected party's "personal information": Mailing Address and Ownership Information (i.e., the affected party's name). In addition, given the fact that the property assessment rolls and land registry information in Ontario are open for public inspection and can be easily searched, I find that it is reasonable to expect that the affected party may be identified if the information that falls under the following headings in Attachment 2 is disclosed: Assessed Address and CVA 2007. I find that all of this information constitutes the affected party's "personal information" under section 2(1) of the *Act* and for the reasons cited above, I find that it qualifies for exemption under section 14(1).

However, once this information is severed from Attachment 2, the remaining information is no longer personally identifiable. It does not constitute "personal information" under section 2(1) of the *Act* and cannot, therefore, qualify for exemption under section 14(1). This information appears under the following headings in Attachment 2: Ward, Property Classification, Outstanding Taxes, Comments & Collection Efforts Taken, and Use of Bailiff for the Arrears.

This office has held that a record should not be severed where to do so would reveal only "disconnected snippets," or "worthless," "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663 and PO-1735 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

The City submits that "[a]ny further release of information through the application of severances would be unreasonable, as it would constitute only the release of various disconnected words or phrases with no useful meaning or value." In my view, this is not the case. Severing the record in the above manner would provide the appellant with coherent information, including the total amount in arrears owing and the City's efforts to collect these arrears. Such information does not constitute "disconnected snippets," or "worthless," "meaningless" or "misleading" information. In addition, I am satisfied that the appellant could not ascertain the content of the withheld information from the information disclosed.

I will now consider whether both the memorandum and Attachment 2 qualify for exemption under section 6(1)(b) of the *Act*.

CLOSED MEETING

The City claims that the discretionary exemption in section 6(1)(b) of the *Act* applies to both the memorandum and Attachment 2. Section 6(1)(b) 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]

In determining whether the records qualify for exemption under section 6(1)(b) of the *Act*, I will consider the three-part test set out above.

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

To satisfy the first requirement of the three-part test for the section 6(1)(b) exemption, the City must establish that one of the above bodies held a meeting.

The City states that the Treasurer submitted the records to the Government Management Committee for its meeting on September 17, 2008. The agenda for this meeting identifies this matter as Item GM17.8. The City further states that consideration of this "report" (i.e., the records) was deferred to the subsequent meeting of the Government Management Committee on October 21, 2008. The agenda for this meeting identifies this matter as Item GM18.7.

The appellant does not dispute that a meeting or meetings took place.

I am satisfied that Government Management Committee held a meeting. Consequently, I find that the City has met the first requirement of the three-part test for the section 6(1)(b) exemption.

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

To satisfy the second requirement of the three-part test for the section 6(1)(b) exemption, the City must establish that a statute authorized the holding of the Government Management Committee's meeting in the absence of the public.

As noted above, at its meeting on September 17, 2008, the Government Management Committee deferred its consideration of the records to its next meeting on October 21, 2008, where it moved into a closed meeting to consider the records. Consequently, it must be determined whether a statute authorized the Government Management Committee to close a part of its meeting of October 21, 2008 to the public.

The City submits that sections 190(2)(a) (security of the property) and (b) (personal matters about an identifiable individual) of the *City of Toronto Act* authorized the Government Management Committee to hold a closed meeting to consider the records.

Section 190(1) of the *City of Toronto Act* requires that all meetings be open to the public, subject to the exceptions and other criteria and conditions set out in sections 190(2), (3) and (3.1). Sections 190(2)(a) and (b) state:

> 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 City or local board;
>
> (b) personal matters about an identifiable individual, including a city employee or a local board employee;

I would note that section 190(2) uses the word "may" and therefore contains discretionary exceptions to the general rule that meetings must be open to the public. It allows a meeting or part of a meeting to be closed to the public if the requirements of those exceptions are met. However, City council, a local board or a committee still has the discretion to hold such meetings in public, even if the requirements of sections 190(2) are met. In deciding whether to close a meeting in such circumstances, these bodies would presumably weigh the principles of transparency and public accountability against the interests designed to be protected by the exceptions in section 190(2).

Section 190(2)(a) (security of the property)

I will first determine whether section 190(2)(a) of the *City of Toronto Act* authorized the Government Management Committee to close part of its meeting of October 21, 2008 to consider the records. Section 190(2)(a) allows City council, a local board or a committee to close a meeting or part of a meeting to the public if the subject matter being considered is "the security of the property of the City or local board."

The City submits that the term "security of the property" in section 190(2)(a) should be interpreted in a broad manner that includes security or protection of its "financial and economic interests" and its "assets." In particular, it asserts the following:

> The [records were] submitted as an in camera report since disclosure of this information could potentially harm the City's financial and economic interests by jeopardizing its ability to obtain favourable, or reasonable, recovery of the outstanding amounts owed by the individual taxpayer. In order to protect the security of its property as set out in section 190(2)(a) of the *City of Toronto Act, 2006*, the City submitted the report in camera.
>
> When the City negotiates a commercial transaction, such as the seizure or sale of assets and services of a third party, and disclosure of the City's positions, plans and strategies for the negotiations could jeopardize the City's ability to properly negotiate a favourable arrangement, then such information is clearly the security of the property of the municipality. The City submits in the present case, the disclosure of the Report could reasonably be expected to prejudice the economic or competitive interests of the City or be injurious to its financial interests. The City submits that "security of the property" includes security or protection of financial and economic interest and this position is supported by examples provided by M. Rick O'Connor in his book Open Local Government.

In my view, the City is asking me to adopt a broad and sweeping interpretation of the term "security of the property" that does not accord with its ordinary meaning. The issue of whether this term is broad enough to encompass protection of the City's financial and economic interests was extensively canvassed and firmly rejected by Adjudicator Laurel Cropley in Order MO-2468-F. She found that the term, "security of the property of the municipality" in section 239(2)(a) of the *Municipal Act* should be interpreted in accordance with its plain meaning, which

is the protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety in relation to this property.

I agree with Adjudicator Cropley's reasoning and find that that the term "security of the property" in section 190(2)(a) of the *City of Toronto Act* is only intended to cover protection of the City's property from physical loss or damage and the protection of public safety in relation to such a property. It does not include security or protection of the City's "financial and economic interests" in relation to its property.

More importantly, however, section 190(2)(a) only applies to the "security of property *of the City or local board*." The property that is the subject of the records that was placed before the Government Management Committee is not owned by the City or a local board. It is owned by a private citizen in "trust." The City cannot close a meeting pursuant to section 190(2)(a) if the subject matter of the meeting concerns property owned by someone else and not the City or a local board, which is the case here.

Based on the foregoing analysis, I find that section 190(2)(a) of the *City of Toronto Act* did not authorize the Government Management Committee to close part of its meeting of October 21, 2008 to consider the records.

Section 190(2)(b) (personal matters)

I will now determine whether section 190(2)(b) of the *City of Toronto Act* authorized the Government Management Committee to hold a part of its meeting of October 21, 2008 in the absence of the public. Section 190(2)(b) allows City council, a local board or a committee to close a meeting or part of a meeting to the public if the subject matter being considered is "personal matters about an identifiable individual, including a city employee or a local board employee."

The City submits that section 190(2)(b) provides the Government Management Committee with the authority to hold meetings closed to the public where the subject matter pertains to the "personal information" of identifiable individuals. In particular, it points out that the records include personal information, such as the amount owing by a named individual "in trust," this individual's mailing address and the City's collection efforts to date. It further submits that the records were considered at a closed meeting because disclosure of the personal information in Attachment 2 could lead to an unjustified invasion of personal privacy.

As noted above, section 190(2)(b) refers to "personal matters about an identifiable individual." The term, "personal matters," is not defined in the *City of Toronto Act*, but in analyzing the equivalent provision in section 239(2)(b) of the *Municipal Act*, this office has found that "personal matters" is analogous to the term, "personal information" in the *Municipal Freedom of Information and Protection of Privacy Act* [Order MO-2368]. In my view, the purpose of section 190(2)(b) is to provide City council, a local board or a 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 are the subject matter actually being considered.

The Government Management Committee closed part of its meeting on October 21, 2008 to consider the records. The memorandum from the Treasurer provides a description of Attachment 2 and explains why this record is subject to the "privacy provisions" in the *Act*. Earlier in this order, I found that Attachment 2 itself contains the "personal information" of the individual named in "trust" who owns a property for which more than $500,000 in tax arrears are owing. In addition, I found that the affected party's name, her mailing address, the assessed property's address and the property's current value assessment qualify for exemption under section 14(1) of the *Act* because disclosing this information would constitute an unjustified invasion of the affected party's personal privacy.

Given my findings in this order, I am satisfied that "personal matters" relating to the affected party was the subject matter under consideration at the part of the Government Management Committee's meeting of October 21, 2008 that was held in the absence of the public. The purpose of closing this meeting was to protect the privacy of this individual, whose "personal information" qualifies for exemption under section 14(1) of the *Act*. Consequently, I find that section 190(2)(b) of the *City of Toronto Act* authorized the Government Management Committee to hold this part of its meeting in the absence of the public.

In summary, I find that the City has met the second requirement of the three-part test for the section 6(1)(b) exemption.

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

To satisfy the third requirement of the three-part test for the section 6(1)(b) exemption, an institution must establish that disclosure of the records would reveal the substance of the deliberations of the closed meeting. In the circumstances of this appeal, the City must establish that disclosure of the records would reveal the substance of the Government Management Committee's deliberations in its closed meeting on October 21, 2008.

In Order MO-1344, former Assistant Commissioner Mitchinson stated the following with respect to the meaning of the third requirement of the section 6(1)(b) test:

> 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 on 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.

The City states that it disagrees with this office's jurisprudence on part 3 of the section 6(1)(b) test and suggests that these orders impose an "improper" high standard. However, it further states that in the present case, it has met this part of the test. It submits that the Government Management Committee went into a closed meeting to "discuss" the contents of the records and that disclosing these records would reveal the substance of the Committee's deliberations. In particular, it states:

> One will note from the minutes of the September meeting of [the] Government Management Committee, that the Committee moved … to defer the [records] to the October [meeting] for the purpose of debate and consideration. The disclosure of the record would reveal both the personal information of an identifiable individual, and the reasons why the decision was made to not publicly disclose the personal information. The City submits, therefore, that the disclosure of the [records] would reveal the actual deliberations of [the] Government Management Committee's in camera meeting and therefore, the third part of the test has been met.

The appellant submits that section 6(1)(b) should not be construed as an "automatic exemption" simply because a matter is discussed in a closed meeting. She submits that this would enable municipalities to "dodge" disclosure of information by simply closing a meeting. She further suggests that the third requirement of the section 6(1)(b) test is not met if no discussions took place at a closed meeting.

In its reply representations, the City states that City Council and its committees use a "consent agenda" model in their meetings. In particular, city councillors may adopt a report that is submitted for their consideration in the following ways:

- Councillors state that they have made a decision to take the course of action articulated in the report; or

- Councillors state that they require further discussion because they do not agree with the contents of the report and further action is required.

The City then reiterates that the Government Management Committee "engaged in the very discussion and debate required for the application of section 6(1)(b) ..." It states:

> … the requested [records] contain a detailed description of the personal information, the various issues surrounding confidentiality, and the particulars of the matters concerning collection activities. The City submits that this is the exact type of information, which the IPC has previously determined to qualify, in light of in-camera discussions, as information, which would reveal the substance of deliberations.

I am satisfied, based on the representations provided by the City, that disclosure of the records would reveal the substance of the Government Management Committee's deliberations in its closed meeting of October 21, 2008. The City specifically states that the Committee went into a closed meeting to "discuss" the contents of the records. These discussions touched on "personal matters" relating to the affected party and were conducted with a view to making a decision about whether to approve the course of action set out in the records with respect to the outstanding property tax arrears. In my view, disclosing these records would reveal the substance of the Committee's deliberations with respect to these matters.

For these reasons, I find that the City has met the third requirement of the three-part test for the section 6(1)(b) exemption.

Section 6(2)(b) – exception

Section 6(2)(b) of the *Act* sets out an exception to section 6(1)(b). It reads:

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

There is no evidence to suggest that the subject matter of the Government Management Committee's deliberations in its closed meeting of October 21, 2008 was considered in a meeting open to the public. Consequently, I find that the section 6(2)(b) exception does not apply.

Conclusion

I conclude that the City has established that the discretionary exemption in section 6(1)(b) of the *Act* applies to the records.

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 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 its decision to withhold the records under section 6(1)(b) was exercised in good faith and it took into account all relevant considerations, including the following:

- The purposes of the *Act*;
- The wording of the relevant exemptions and the interests the exemptions seek to protect;
- The fact that the appellant is not seeking what may be considered to be their personal information;
- The fact that there is no sympathetic or compelling need for the appellant to receive the information;
- Disclosure will not increase public confidence in the operation of the City and will likely decrease public confidence in the operation of the City;
- The relationship between the parties affected by disclosure and the appellant;
- The nature of the information and the extent to which it is significant and/or sensitive to the City, the appellant and the affected person;
- The age of the information; and
- The historic practice of the City in relation to the requested materials.

The City states that there is a need to balance the interests intended to be protected in section 6(1)(b) and the public interest in disclosure of information concerning the operation of municipal institutions. It further submits that it discloses considerable amounts of information relating to outstanding tax arrears to allow "meaningful public discourse," while withholding personal information relating to the finances of identifiable individuals.

The appellant does not directly address whether the City exercised its discretion properly in applying the section 6(1)(b) exemption to the records. However, she states the following with respect to the transparency interests at stake in this appeal:

> The public has a right to know how the City has or has not worked to collect money owed to the City. Also included should be details about the property, whether it is residential or industrial, and how long the owner has been in arrears. As well, I believe there is an overwhelming right to know what efforts the City has taken to recoup what is owed, including any consideration to seize the

> property. If this information is not disclosed, then how can residents be assured that the City has acted in the best interest of its citizens?

In assessing whether the City has exercised its discretion properly in applying the section 6(1)(b) exemption, it is useful to reiterate what information the City discloses to the public and what information it withholds with respect to large property tax arrears. Attachment 1, which is not at issue in this appeal, is a chart listing 20 properties owned by named corporations with tax arrears of $500,000 or more. Attachment 2, which is one of the records at issue in this appeal, is a chart that lists one property with tax arrears of $500,000 or more that is owned by a named individual "in trust."

The City has disclosed, in its entirety, the chart containing information relating to the tax arrears owed by 20 corporations (Attachment 1). Consequently, the public can access the names of those corporations who owe more than $500,000 in tax arrears, the addresses of the assessed properties, and the efforts the City has taken to collect the outstanding arrears. In contrast, the City has withheld, in its entirety, the chart containing information relating to the one property with tax arrears of $500,000 or more that is owned by a named individual "in trust" (Attachment 2).

The purposes of the *Act*, which are set out in section 1, are two-fold. The first purpose, which is set out in section 1(a) and can characterized as the transparency purpose of the *Act*, is to provide the public with a right to access to information under the control of institutions. The second purpose, which is set out in section 1(b) and can be characterized as the privacy protection purpose of the *Act*, is to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

In my view, the City's exercise of discretion with respect to the application of section 6(1)(b) did not adequately consider and balance the transparency and privacy purposes of the *Act*. In particular, it did not adequately consider whether Attachment 2 can be severed in a manner that fulfils both purposes of the *Act*.

In the "Personal Privacy" discussion earlier in this order, I found that the information that falls under the following headings in Attachment 2 qualifies for exemption under section 14(1) of the *Act*: Assessed Address, Mailing Address, Ownership Information (i.e., name of affected party) and CVA 2007. However, I then found that severing this information means that the remaining information, which appears under the following headings, is no longer personally identifiable: Ward, Property Classification, Outstanding Taxes, Comments & Collection Efforts Taken, and Use of Bailiff for the Arrears.

In my view, severing Attachment 2 in this manner would fulfill both the transparency and privacy protection purposes of the *Act*. The majority of the City's individual property owners pay their taxes in full and on time and have a right to expect some transparency from the City with respect to properties owned by other individuals for which significant tax arrears are owing. I have found that the personal privacy exemption in section 14(1) of the *Act* precludes the public from accessing the affected party's personal information, but I agree with the appellant that the

public should have the right to access information that is not personally identifiable, including the ward in which the property is located, the type of property (residential, commercial, industrial, etc.), the amount in tax arrears that are owing, and most importantly, what efforts the City is making to collect these arrears.

With respect to the latter information, the City discloses its collection efforts in full with respect to named corporations who owe more than $500,000 in property tax arrears. This information appears under the headings "Comments and Collections - Efforts Taken" and "Use of Bailiff for the Arrears" in the record for corporations (Attachment 1). In the interests of transparency, the City should consider disclosing the same information relating to the property owned by the affected party "in trust," as long as her name, mailing address, the assessed property's address and the current value assessment are severed from Attachment 2.

In summary, I find that the City has not taken all relevant factors into account in exercising its discretion to apply the section 6(1)(b) exemption to Attachment 2. Specifically, it did not adequately consider whether this record can be severed in a manner that fulfils both the transparency and privacy protection purposes of the *Act*. As noted above, this office may not substitute its own discretion for that of the institution. However, I do have the authority to order the City to re-exercise its discretion based on proper considerations, and I will do so.

PUBLIC INTEREST OVERRIDE

The appellant submits that there is a compelling public interest in disclosure of the records that outweighs the exemptions claimed by the City. Section 16 of the *Act* 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 that the information under the following headings in Attachment 2 is exempt from disclosure under section 14(1) of the *Act*: Assessed Address, Mailing Address, Ownership Information (i.e., name of affected party) and CVA 2007. Section 14 is listed in the wording of section 16 as one of the exemptions that can be overridden if there is compelling public interest in disclosure that clearly outweighs the purpose of the exemption.

If section 14(1) was the only exemption that applied in the circumstances of this appeal, I would have the authority to determine whether there is a compelling public interest in the disclosure of Attachment 2 that clearly outweighs the purpose of the section 14(1) exemption.

However, I have found that the discretionary exemption in section 6(1)(b) applies to both the memorandum and Attachment 2. Section 16 does not identify section 6 as an exemption that can be overridden. In Order MO-2499-I, Senior Adjudicator John Higgins stated the following with respect to this issue:

> 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 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.

In a postscript to Order MO-2499-I, Senior Adjudicator Higgins went on to state the following:

> 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.
>
> ….
>
> 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.

Although the records at issue in Order MO-2499-I raise different considerations than the records at issue in this appeal, I agree with Senior Adjudicator Higgins' general analysis and find that the same reasoning applies here. Section 16 does not identify section 6 as an exemption that can be overridden. In addition, the appellant has not argued that section 6(1)(b) should be read into section 16. In such circumstances, I find that the public interest override in section 16 cannot override the City's claim that the records are exempt under section 6(1)(b) of the *Act*.

ORDER:

1. I uphold the City's decision to withhold the following information from Attachment 2 under the personal privacy exemption in section 14(1) of the *Act*: Assessed Address, Mailing Address, Ownership Information and CVA 2007. I do not uphold the City's decision to withhold the remaining information from this record under section 14(1): Ward, Property Classification, Outstanding Taxes, Comments & Collection Efforts Taken, and Use of Bailiff for the Arrears.

2. I uphold the City's decision to deny access to the Treasurer's memorandum to the Government Management Committee under section 6(1)(b) of the *Act*. However, I order the City to re-exercise its discretion with respect to its decision to rely on section 6(1)(b) to withhold Attachment 2.

3. I order the City, in re-exercising its discretion under section 6(1)(b), to consider whether the information in Attachment 2 can be severed in a manner that fulfils both the transparency and privacy protection purposes of the *Act*.

4. I order the City to advise both the appellant and myself in writing of the results of its re-exercise of discretion no later than **April 23, 2010**. If the City decides, after re-exercising its discretion, to disclose information to the appellant, it must issue a new access decision in accordance with sections 19, 20, 21 and 22 of the *Act*, treating the date of this interim order as the date of the request. If the City decides, after re-exercising its discretion, to continue withholding some or all of the information in Attachment 2 under section 6(1)(b), and the appellant wishes to respond, she must do so within 14 days of the date of the City's correspondence, by providing me with written representations.

5. I remain seized of this appeal to deal with the City's re-exercise of discretion and any related issues that may arise.

_______________________________   March 31, 2010

Colin Bhattacharjee
Adjudicator