



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

ORDER MO-2512

Appeal MA09-216

City of Waterloo



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NATURE OF THE APPEAL:

The City of Waterloo (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a record prepared by the City's Director of Economic Development that related to the requester's attempt to purchase certain City lands. The requester referred to the record as being "reviewed and relied upon" by City Council at an *in camera* session held on September 22, 2008.

The City identified a three-page "In Camera Report" dated July 29, 2008 and issued a decision denying access pursuant to sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege).

The requester, now the appellant, appealed the City's decision to this office. Efforts to resolve this appeal by mediation were not successful and it was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry. I sought representations from the City, initially. In the representations submitted, the City abandoned its claim of section 12 to deny access to the record. Next, I invited the appellant to provide representations on the possible application of section 6(1)(b) and provided a complete copy of the City's representations. Upon review of the appellant's representations, I sought and received reply representations from the City.

DISCUSSION:

CLOSED MEETING

The City claims that the record is exempt pursuant to section 6(1)(b), which states:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the City is required to 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].

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

The City and the appellant appear to be in agreement that the first two parts of the test are established with respect to the *in camera* portion of the City Council meeting that was held on September 22, 2008. Based on my review of the representations, the record and a copy of the *in camera* meeting minutes provided during the mediation stage of this appeal, I agree, for the following reasons.

In its representations, the City referred to section 239 of the *Municipal Act, 2001* as authorizing the holding of the meeting in the absence of the public, but it did not identify the specific clause upon which it had relied to go *in camera* nor did it provide me with documentary evidence respecting the meeting itself during this inquiry. However, the copy of the *in camera* meeting minutes provided during mediation stage of the appeal confirms that on September 22, 2008, City Council held a closed meeting for the purpose of considering the acquisition or disposition of land. Section 239(2)(c) of the *Municipal Act, 2001* permits *in camera* consideration of “a proposed or pending acquisition or disposition of land by the municipality or local board,” and I find, therefore, that the first and second requirements of the test have been established.

Respecting the third requirement of the test for exemption under section 6(1)(b) of the *Act*, the City begins its submissions by disputing the characterization of the exemption put forward by the appellant in his letter of appeal to this office. The appellant had stated that the exemption “was not intended to extend to reports and other factual material which may have been prepared to assist Council in those deliberations.” The City submits that:

Deliberations do not arise in a vacuum, but rather “refer to discussions which were conducted with a view to making a decision” (Order M-184) and “substance” relates to the theme or subject of the meeting (Order M-196...). In Order MO-1248 the IPC determined that a record should not be released where it described the context that led to the decision that was the subject of the meeting.

In this case, the meeting was held to consider a request by the appellant ... The Record was drafted specifically to address the subject of the request and as such contained the background and analysis necessary to allow Council to make a decision on same. To release the Record would thus clearly reveal the substance of the meeting deliberations. The third part of the test has therefore been met by the City.

In further representations provided regarding its exercise of discretion, the City submits that:

As that report specifically addressed the subject matter of the appellant's query, to release it would clearly reveal the substance of the meeting deliberations which were confidential and sensitive in nature.

The appellant seeks to distinguish Order MO-1248 from the circumstances of the present appeal based on the timing of the preparation of the report. The appellant argues that:

... [A] record which **pre-dates** deliberations (discussions) can in no way reveal the substance of subsequent deliberations (discussions). Unless clairvoyant, the author of a record, the preparation of which **pre-dates** deliberations, does not have and cannot have any information at the time of the preparation of the record as to what would actually be discussed at the subsequent meeting other than the mere "subject of the meeting" [Orders M-64, M-102, MO-1248]. Accordingly, the instant case is clearly distinguishable from the decision in MO-1248 in which the operative part of the record (the Minutes of Settlement) **post-dated** the deliberations and was capable of "reveal[ing] the actual substance of the deliberation."

The appellant argues in the alternative that even if the City has met the third requirement for exemption under section 6(1)(b), its exercise of discretion was improper. Specifically, the appellant states that it received a letter from the City, dated three days after the closed meeting that "actually disclosed the deliberations of Council" at the *in camera* meeting. The appellant provided this office with a copy of the September 25, 2008 letter written by the City's Director of Economic Development. The letter identifies and describes Council deliberations related to the appellant's proposal. According to the appellant, the City's "voluntary" disclosure of the deliberations vitiates any justification under the *Act* for refusing to disclose the record.

In its reply representations, the City disputes the appellant's assertion that the September 25, 2008 letter to the appellant amounts to disclosure of the record. The City submits that if it had wanted to exercise its discretion to disclose in this instance, it would have attached the record to the September 25, 2008 letter. The City also notes that the *Act* only requires disclosure where the record at issue "has been considered in a meeting open to the public" under section 6(2)(b), which has not happened in this case.

Findings

The wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the City's *in camera* Council meeting on September 22, 2008, not merely the subject of the deliberations (Orders MO-1344, MO-2389 and MO-2499-I). This is noted in the third requirement relating to this exemption, as set out above.

It is important to note that the record at issue in this appeal is a three-page report provided to Council along with two schedules in the form of correspondence submitted by the appellant respecting the proposed development in the City's core. The first page includes descriptive information such as the date of the report, the title, the author, the department, and the two attached schedules (from the appellant), as well as sections titled "Recommendations," "Executive Summary," and "Background," the latter of which relates to the appellant's correspondence (schedules). The "Background" section continues onto the second page and finishes at the bottom of it. The third page merely specifies the reasons for holding the closed meeting in a check box format and the names and positions of the staff who were to attend the closed meeting.

As stated previously, the City, in seeking to rely on the exemption in section 6(1)(b), must provide sufficient evidence of a connection between the actual content of the record at issue and the substance of the deliberations. In this context, I reject the appellant's argument that the fact of the record's preparation pre-dating the deliberations removes it from the possible reach of the exemption due to the impossibility of predicting the substance of the subsequent deliberations. Rather, the application of the exemption is dependent on there being a line drawn by the evidence in each case between the record's contents and the substance of the deliberations, regardless of the timing of its preparation. However, the appellant's submissions raise an interesting point about the application of section 6(1)(b) that merits further review.

In Order MO-1344, former Assistant Commissioner Tom Mitchinson reviewed an order of the B.C. Information and Privacy Commissioner relating to the decision of a police board to deny access to the minutes of *in camera* meetings in their entirety under the B.C. equivalent to section 6(1)(b) of the Ontario Act (Order 00-14). The corresponding provision in the B.C. *Freedom of Information and Protection of Privacy Act* is section 12(3)(b) which states:

12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal

- (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

Order MO-1344 sets out the following discussion by former B.C. Commissioner David Loukidelis in Order 00-14 regarding the meaning of the phrase the "substance of deliberations" in section 12(3)(b) of British Columbia's *Freedom of Information and Protection of Privacy Act*:

The discretionary s. 12(3)(b) exception is not as broad as the Board would have it. It protects only information - not "records" - the disclosure of which would reveal the "substance of deliberations" of an *in camera* Board meeting. 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. There is a clear distinction between “information” and the “records” in which information is found. The duty under s. 4(2) of the Act to sever records, and disclose information not covered by one of the Act’s exceptions, applies to records which contain information protected by s. 12(3)(b).

...

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.

In Order MO-1344, former Assistant Commissioner Mitchinson also had the following to say about the wording of the B.C. provision versus the Ontario one:

Although section 12(3)(b) of the British Columbia statute refers to the non-disclosure of “information” that would reveal the substance of the deliberations, and section 6(1)(b) of the Act refers to the non-disclosure of a “record”, it is important to consider the section 6(1)(b) exemption claim in the context of the severance requirements of section 4(2) of the Act, which reads as follows:

4(2) Where 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. (emphasis added)

The effect of section 4(2) of the Act is to require the Board to deny access only to the information which falls under the exemption in section 6(1)(b) of the Act, and for this reason the findings of Commissioner Loukidelis are relevant. The Board in this appeal must review the record and determine what information would reveal the substance of the deliberations and, subject to the other requirements being met, it may exclude those portions from disclosure. The Board may not, however, apply the exemption to information which does not disclose the substance of the deliberations.

I agree with the reasoning outlined by the former B.C. Commissioner in Order 00-14, and as it was adopted in Ontario Orders MO-1344 and, recently, MO-2499-I. I have applied these principles in the present appeal.

I have carefully reviewed the entire record and the evidence provided to me by the parties. In the circumstances of this appeal, and based on the discussion above, I find that there is insufficient

evidence before me to establish that disclosure of the descriptive information on part of page 1 and on page 3 of the record would reveal the substance of the Council's deliberations. As I identified above, this information includes the date of the report, the title, the author, the department, and the titles of the two attached schedules, and I find that it does not qualify for exemption under section 6(1)(b).

The remaining portions of the record at issue include part of the first page under the headings "Recommendations," "Executive Summary," and a lengthier section titled "Background" that starts on the first page and is completed on the second page. As indicated above, I also have before me two other documents which relate to the *in camera* meeting of September 22, 2008. These other two documents consist of the confidential minutes of the *in camera* meeting, which were provided to this office during the mediation stage of this appeal, and the letter sent to the appellant from the City's Director of Economic Development dated September 25, 2008, which specifically refers to the matters discussed during the Council deliberations.

I have carefully examined the remaining portion of the record at issue along with the other two documents identified above, as well as the representations of the parties. I find that the City's evidence respecting the *in camera* portion of the City Council meeting on September 22, 2008 is insufficient to support its position that disclosure of the remainder of the record would reveal the substance of Council's deliberations on the subject. Although I accept that Council's discussion may have followed review of the record, the City's representations fail to draw a meaningful connection between the record and the substance of Council's deliberations. The City's representations on this issue are relatively general, asserting that due to the nature of the information, releasing the record would "clearly reveal" the substance of the closed meeting deliberations. I do not accept the City's position. On my review, the remaining portions of the record appear to contain a more general summary of information related to certain issues respecting development of the City's core that are known by, or otherwise available to, the public.

Furthermore, the September 25, 2008 letter sent to the appellant contains information which actually describes the substance of the deliberations of the September 22nd meeting; this letter does not, in my view, support the position taken by the City. In fact, to the extent that the September 25th letter reveals the actual deliberations of Council, it supports the finding that the portions of the record remaining at issue would *not* reveal the substance of deliberations, since it refers to issues deliberated by Council which are not contained in the record. Moreover, when I provided the City with the opportunity to address the issue of the content of the September 25, 2008 letter in its reply representations, the City declined to provide further evidence, essentially arguing without elaboration that sending the letter did not amount to release of the record.

Given the record's content, and the surrounding circumstances, I am not satisfied by the evidence that disclosure of the record would reveal the substance of Council's deliberations at the closed meeting of September 22, 2008. Accordingly, I find that the record does not qualify for exemption under section 6(1)(b), and I will order it disclosed to the appellant.

ORDER:

1. I order the City to disclose the record to the appellant by sending him a copy by **April 27, 2010**.
2. In order to verify compliance with Provision 1 of this Order, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant.

Original Signed by: _____
Daphne Loukidelis
Adjudicator

_____ April 6, 2010