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

ORDER MO-2621

Appeal MA10-100

City of Ottawa

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BACKGROUND:

In 2009, Ottawa City Council approved a payment to reimburse a senior employee of the municipality to account for a shortfall resulting from the transfer of that individual's pension from the federal government to the city's pension plan, the Ontario Municipal Employees Retirement System (OMERS). Ottawa's Meetings Investigator[1] received a number of complaints about two meetings regarding this matter that were held *in camera* in August and September 2009, and subsequently conducted an investigation into the propriety of these closed meetings. The Meetings Investigator released his report on April 30, 2010. [2]

NATURE OF THE APPEAL:

Contemporaneously with the meetings investigation, an individual submitted the following request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the:

> Report from CAO [regarding a named employee's specified] payment. Has any person in the employ of the city … received payment of the employee part of their OMERS pension? If the answer is affirmative – how many? If any person has received income tax relief for OMERS[?] If affirmative, how many[?]

The city identified one record as responsive to all parts of the request: a 10-page document titled "Corporate Services and Economic Development Committee [CSEDC] Confidential Report 46A" (9 September 2009). In the initial decision issued by the city access to the record was denied in its entirety, pursuant to the exemptions in sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Act*.

Upon appeal of the city's decision to this office, a mediator was appointed to explore resolution of the issues. During mediation, the city issued a supplementary decision letter to the appellant claiming additional exemptions to deny access, namely sections 7(1) (advice or recommendations) and 14(1) (personal privacy). When contacted by the mediator, the city employee identified in the record (the affected party) declined to provide consent to the disclosure of the record. The appellant raised the possible application of the public interest override in section 16 of the *Act*.

A mediated resolution of this appeal was not possible, and it was transferred to the adjudication stage of the appeals process where it was assigned to me to conduct an inquiry. I sent a Notice of Inquiry outlining the facts and issues to the city and to the affected party, initially, seeking representations from them, which I received. Issues related to the confidentiality of the city's representations were resolved through minor modifications to the text of those representations,

[1] The position of Meetings Investigator is appointed pursuant to the *Municipal Act, 2001*.

[2] As excerpted from *Report to the Council of the City of Ottawa Regarding In Camera Corporate Services and Economic Development Committee Meeting of August 31, 2009 and the Council Meeting of September 9, 2009*, by Douglas R. Wallace, Meetings Investigator. This report is publicly available on the city's website at http://www.ottawa.ca/city_hall/mayor_council/accountability/investigator/2009_aug_sep/index_en.html.

which I accepted. Next, I shared the non-confidential portions of the city's representations with the appellant for response, receiving his submissions in due course.

SUMMARY OF FINDINGS:

In this order, I find that section 6(1)(b) applies to the responsive record, and that the city's exercise of discretion in withholding it should not be disturbed on appeal. Further, the public interest override in section 16 cannot apply to section 6, and I therefore uphold the city's decision to deny access to the record. In the circumstances, it is unnecessary for me to consider the city's other exemption claims under sections 7(1), 12 or 14(1).

ISSUES:

1. Would disclosure of the record reveal the substance of deliberations at a closed meeting authorized by statute, thereby exempting the record under section 6(1)(b)?
2. If the answer is yes, did the city properly exercise its discretion in withholding the record under section 6(1)(b)?
3. Does the public interest override in section 16 of the *Act* apply?

DISCUSSION:

WOULD DISCLOSURE REVEAL THE SUBSTANCE OF DELIBERATIONS AT A CLOSED MEETING AUTHORIZED BY STATUTE?

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 and MO-1248).

In determining whether section 6(1)(b) of the *Act* applies to the record, I will review this three-part test.

Before reviewing the evidence provided by the parties in the context of the test for exemption under section 6(1)(b), I would note that a considerable portion of the appellant's submissions deal with concerns related to the process followed by the city in approving the pension payment to the identified city employee.

It is worth emphasizing, in my view, that my jurisdiction is limited to a review of the city's denial of access to the responsive record under the *Municipal Freedom of Information and Protection of Privacy Act*. This office has no general authority or mandate to review the propriety of a municipal council (or its committee) holding a meeting in the absence of the public. That is the mandate of the meetings investigator, or the ombudsman in the case of a municipality that has not appointed its own meetings investigator under the *Municipal Act*. In the more limited context of reviewing the denial of access to a record under section 6(1)(b), an adjudicator from this office reviews whether a statute *authorizes* the holding of the meeting in the absence of the public to determine whether the second requirement of the three-part test for the exemption is met.[3]

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

In order to satisfy the first part of the test for exemption under section 6(1)(b), the city must demonstrate that it held a meeting (Order M-102).

The city submits that the content of the record at issue, as well as publicly available agendas, confirm that a meeting of council or one of its committees took place. Specifically, the city points to the CSEDC meeting of August 31, 2009.

The appellant's representations do not directly address this part of the test for exemption under section 6(1)(b).

That the CSEDC, a committee of Ottawa city council, held a meeting on August 31, 2009 and that Ottawa City Council also held a meeting on September 9, 2009 is, in my view, uncontroverted. I find, therefore, that the first part of the test under section 6(1)(b) is met.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

The second part of the test for exemption under section 6(1)(b) requires the city to establish that the meeting was properly held *in camera, i.e.*, that a statute authorized the closed meeting. Given the city's position in this appeal that the meeting was authorized under section 239(2)(b) of the *Municipal Act*, I must determine whether the purpose of the meeting was to deal with a personal matter about an identifiable individual.

As stated, the city submits that section 239(2)(b) of the *Municipal Act* authorized the holding of this meeting in the absence of the public. The relevant portions of the *Municipal Act* state:

[3] This approach to reviewing an institution's exemption claim under section 6(1)(b) was recently confirmed by the Ontario Divisional Court in *City of St. Catharines v. Information and Privacy Commissioner of Ontario*, 2011 ONSC 346.

> 239 (1) Except as provided in this section, all meetings shall be open to the public.
>
> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is …
>
> (b) personal matters about an identifiable individual, including municipal or local board employees…

According to the city, the CSEDC minutes of August 31, 2009[4] indicate that the committee moved *in camera* pursuant to section 239(2)(b) to consider "personal matters about an identifiable individual, including staff." The city adds that "the discussions contained personal information about the affected party."

Further, the city submits that the record:

> … included a CSEDC recommendation that Council direct staff in respect to the same matter. This direction to staff was carried on consent at Council on September 9, 2009 … On August 31, 2009, CSEDC remained *in camera* to give directions to staff that pertained to the request of the affected third party. Pursuant to subsection 239(6)(b) of the *Municipal Act*,[5] Council is authorized to consider a direction to staff *in camera*. As this direction pertained to the same personal matters about the affected third party, the City submits that the content of the staff direction was properly considered *in camera*.

The appellant expresses the view that although section 239(2) of the *Municipal Act* provides for seven exceptions to the rule that all meetings shall be open to the public, the city could have chosen not to "invoke" an exception. The appellant's representations do not otherwise address section 239 of the *Municipal Act* and the authorization for holding the meeting, or meetings, identified in this appeal in the absence of the public.

On my review of the record and the city's representations, I am satisfied that the city was authorized by section 239(2)(b) of the *Municipal Act*, with reference to section 239(6)(b), to hold the meetings in the absence of the public, and to consider the personal matters related to the identified municipal employee *in camera*. In the circumstances, I find that the city was authorized by statute to hold these meetings in the absence of the public, thereby satisfying part 2 of the three-part test under section 6(1)(b) of the *Act*.

[4] The city's submissions actually refer to August 31, 2010, but I take this to be a mistaken reference.

[5] Section 239(6) states: "Despite section 244, a meeting may be closed to the public during a vote if, … (b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board."

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

Regarding part 3 of the test, previous orders have found that "substance" generally means more than just the subject of the meeting (Orders M-703 and MO-1344) while "deliberations" refer to discussions conducted with a view towards making a decision (Order M-184). Indeed, the wording of the provision and previous decisions 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* meetings of August 31 and September 9, 2009, not merely the subject of the deliberations.[6]

The city takes the position that the record is directly connected to the *in camera* discussions and confidential staff direction. Further, the city submits that:

> The factual circumstances including personal information of the affected third party contained in the Report reveal the substance of the discussions at CSEDC. The personal information contained throughout the Report is the precise reason CSEDC went *in camera* and the Report was never made public.

The appellant suggests that the record could have been severed to "minimize the harm to the individual claimed under the exception, so as to permit discussion [in] open session."

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 content of the record at issue and the substance of the deliberations. In Order M-1169, former Assistant Commissioner Mitchinson also drew a distinction between material that is simply reported to an *in camera* meeting of a municipal body, and one where a municipal body has the authority to discuss the matter "with a view to approving or making a decision about [it]."[7]

Based on my review of the evidence provided, as well as the record itself, I am satisfied that the city has drawn a meaningful connection between the record and the substance of the CSEDC's and council's deliberations. Specifically, I accept that the committee and council deliberated over the substance of the record with a view to recommending or making a decision regarding the proposed pension reimbursement, which constituted a personal matter about an identifiable municipal employee. Accordingly, I find that the third requirement for the application of section 6(1)(b) has been met.

All three requirements for the application of section 6(1)(b) have been met. Section 6(2) of the *Act* sets out exceptions to the exemption at section 6(1)(b). The appellant does not claim that any of the exceptions at section 6(2) apply and the city argues in its representations that none of them do. In the circumstances of this appeal, I am similarly satisfied that none apply. Furthermore, I also find, based on my consideration of the record, that it would not be reasonable to sever the

[6] Orders MO-1344, MO-2389 and MO-2499-I.
[7] See also Orders MO-2499-I and MO-2536-I.

record.[8] Accordingly, I find that the record is exempt pursuant to section 6(1)(b), subject to my review of the city's exercise of discretion in applying this exemption to the record.

SHOULD THE CITY'S EXERCISE OF DISCRETION BE UPHELD?

Section 6(1)(b) is a discretionary exemption 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 (or her delegate) may determine whether the institution failed to do so. The Commissioner may also 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; or it fails to take into account relevant considerations.

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

The city submits that it properly exercised its discretion by taking into account the following factors:

- The purposes of the *Act*, including the principle that information should be available to the public, subject only to limited and specific exemptions;
- The public interest in accessing "all manner of information about the expenditure of public funds";
- The unique set of circumstances surrounding this matter that "resulted in the need to consider the application of the privacy principle of the *Act* to the information at issue rather than simply the general transparency purposes";
- The fact that the record at issue "contained the personal information of the affected party throughout."

The appellant did not make any specific representations on the city's exercise of discretion to exempt the record under section 6(1)(b) of the *Act*, although his representations generally suggest that the city should have chosen to disclose the information to "restore public confidence in our system and our elected officials." I note that in its representations on the public interest override, the city identifies factors that address this "public confidence" concern raised by the appellant. These factors include the fact that certain information is already in the public domain, as well as the fact that the propriety of the *in camera* meetings is addressed generally in the Meetings Investigator's report.

This type of request, involving issues that attract the public's attention and its scrutiny, serve to highlight the transparency purposes of the *Act*. In reviewing an institution's exercise of its discretion in such situations, therefore, I must be satisfied by the evidence as a whole that the institution considered the guiding principle that information should be available to the public.

[8] Section 4(2) of the *Act* states: 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].

However, as previously suggested, there can also be a co-existing concern for privacy protection that must be considered along with the right of access to government-held information.

In my view, the evidence provided to me supports a finding that the city considered relevant factors and appropriately balanced the transparency and privacy considerations inherent in the purposes of the *Act* in its exercise of discretion in this matter. Accordingly, in light of the evidence and the circumstances surrounding this matter, I am satisfied that the city appropriately exercised its discretion to withhold the record under the exemption at section 6(1)(b). I find, therefore, that the city's exercise of discretion was proper, and I will not disturb it on appeal.

As I have found that the record is properly exempt under section 6(1)(b), it is not necessary for me to consider whether the exemptions at sections 7(1), 12 or 14(1) apply.

DOES THE PUBLIC INTEREST OVERRIDE APPLY?

The appellant argues that the public interest in the matter should trigger the application of the public interest override in section 16. The appellant submits that:

> Citizens have the right to know how tax dollars are being spent and the reasons behind the decisions. This is what democracy and accountability is all about.… I believe citizens have the right to ascertain whether the City and its politicians are being generous or foolish with our tax dollars.… Thus, to restore public confidence in our system and our elected officials the public needs access to the entire scenario.

Regarding the public interest, the city submits that transparency regarding the expenditure of public funds "constitutes the sole potential compelling public interest" in disclosing the record. The city argues that the public interest is diminished in this case because there have been other processes[9] to which the public had access and "which address the public interest considerations arising out of this appeal."

Although the submissions of the parties on the public interest are more detailed than set out above, a review of the wording of section 16 provides the explanation for their brevity here. 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 that the responsive record is exempt pursuant to section 6(1)(b) of the *Act*. As is evident from review of section 16, however, section 6 is not identified as one that may be overridden by a compelling public interest in disclosure. Recent orders of this office have

[9] For example, the city's representations describe in greater detail the meetings investigator's process and report, the "wide coverage" in the media and the availability of the "approximate amount of expenditure of funds" for the pension reimbursement under the *Public Sector Salary Disclosure Act*.

commented on this situation. In a postscript to Order MO-2499-I, where section 6(1)(b) was also found to apply, Senior Adjudicator John Higgins stated 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.

I agree with Senior Adjudicator Higgins' comments. Presently, however, given the circumstances before me and the wording of the provision, section 16 cannot be applied to override section 6(1)(b) and the record is exempt from disclosure.

ORDER:

I uphold the city's decision to withhold CSEDC Report 46A (9 September 2009) under section 6(1)(b) of the *Act*.

Original signed by: May 11, 2011
Daphne Loukidelis
Adjudicator