

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2726

Appeal MA11-35

Township of Georgian Bay

April 27, 2012

Summary: The appellant requested a copy of the minutes of an in-camera meeting of the council of the township. The township claimed that the record was exempt under the discretionary exemptions in section 6(1)(b) (in-camera minutes) and sections 8(1)(a), (b) and (c) (law enforcement). The possible application of the mandatory exemption in section 14(1) (personal privacy) was also raised. The appellant argued that he ought to have access to the record under the *Act* because he was a member of council at the time of the meeting, and attended the meeting to which the minutes relate. The township's decision to deny access to the record is upheld, and the township properly exercised its discretion to deny access to the record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 6(2)(b).

Orders and Investigation Reports Considered: MO-2519.

OVERVIEW:

[1] The Township of Georgian Bay (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the minutes of a closed session of council of the township held on November 15, 2010.

[2] In response to the request, the township advised that it was denying access to the requested record pursuant to the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*.

[3] The appellant appealed the township's decision.

[4] During mediation, the township issued a supplementary decision letter in which it indicated that it was also denying access to the record on the basis of the discretionary exemptions in sections 8(1)(a), (b) and (c) (law enforcement) as well as section 11(d) (economic and other interests) of the *Act*.

[5] Also during mediation the appellant indicated that, because he was a member of township council on November 15, 2010, he was in attendance at the in-camera meeting, and ought to have access to the minutes of that meeting. The township took the position that, although the appellant was at the meeting, a new council had subsequently been voted in, and the appellant was not part of the council meeting when the requested minutes were distributed as part of the meeting agenda.

[6] In addition, during mediation the appellant questioned the ability of the township to claim additional discretionary exemptions after the initial decision was issued. As a result, the issue of the late raising of a discretionary exemption was identified as an issue in this appeal.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*.

[8] After reviewing the file, including the record at issue, I noted that the record may contain the personal information of an identifiable individual. As a result, the possible application of the mandatory exemption in section 14(1) was identified as an issue in this appeal.

[9] I sent a Notice of Inquiry identifying the facts and issues in this appeal to the township, initially. The township provided representations to me. I then sent a revised Notice of Inquiry to the appellant, along with the portion of the representations of the township that relate to section 6(1)(b), and invited the appellant to address the possible application of section 6(1)(b) and whether the township properly exercised its discretion to apply the exemption. The appellant provided representations to me, and asked me to also consider certain correspondence sent by him to this office in the earlier stages of this appeal as part of his representations.

[10] In this order, I find that the record qualifies for exemption under section 6(1)(b), and that the township properly exercised its discretion to apply that exemption. As a result of this finding, it was not necessary for me to review the other issues raised in this appeal.

RECORDS:

[11] The record at issue is a copy of the minutes of the closed session of council of the township held on November 15, 2010. It consists of three pages.

DISCUSSION:

Does the record qualify for exemption under section 6(1)(b) of the *Act*?

[12] The township takes the position that the record is exempt under section 6(1)(b). That section states:

A head may refuse to disclose a record,

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

[13] 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]

[14] I will review each part of this three-part test to determine whether the record qualifies for exemption under this section.

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

[15] In support of its position that the record qualifies for exemption under section 6(1)(b) of the *Act*, the township states that it held a council meeting in the absence of the public on November 15, 2010. Attached to the township's representations is a copy of the Council Agenda for that date, and a copy of the motion passed in open session authorizing the meeting to be closed to the public. The appellant does not dispute that the meeting was held. In the circumstances, I am satisfied that the meeting did take place, and that Part 1 of the three-part test under section 6(1)(b) has been met.

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

[16] In support of its position that this part of the three-part test is established, the township provides the procedural by-law enacted at the time of the meeting, which provides for council meetings to be held in the absence of the public. It also identifies that the basis for proceeding in-camera is section 239(2) of the *Municipal Act*, and the attachments to its representations refer specifically to sections 239(2)(b) and (f) which read:

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;

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

[17] As indicated above, attached to the township's representations is a copy of the motion to go in-camera, which states that council went into closed session on November 15, 2010. This motion also indicates that it went into closed session to address matters under sections 239(2)(b) and (f) of the *Municipal Act*. The appellant does not take issue with this position and, in fact, confirms that the meeting was a properly held in-camera meeting.

[18] Upon my review of the record and the township's representations, I am satisfied that the township was authorized by sections 239(2)(b) and (f) of the *Municipal Act* to hold a meeting in the absence of the public, and to consider the matters discussed in that in-camera meeting. Accordingly, I find that Part 2 of the test under section 6(1)(b) of the *Act* has been established.

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

[19] Under Part 3 of the test set out above, previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]
- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

[20] The township's representations on this part of the test state that the record at issue contains information that would reveal the substance of the deliberations of a meeting of council. It states that this is:

[e]videnced in the record by detailed discussions and deliberations, held in the absence of the public, and to which identifiable individuals were named in the subject of those deliberations.

[21] The appellant's representations appear to support the position that the record would reveal the substance of the deliberations, but he also argues that he, as an attendee at the meeting, ought to have access to the record to confirm that it accurately reflects the deliberations. I address this issue below.

[22] Based on my review of the representations and the record at issue, I am satisfied that the disclosure of the record would reveal the substance of the deliberations of the in-camera meeting of November 15, 2010. The record contains a written account of the matters that were discussed at the in-camera meeting, and disclosure would therefore reveal the substance of the deliberations that took place. As a result, I find that the third requirement for the application of section 6(1)(b) has also been met.

Section 6(2)(b)

[23] The appellant takes the position that the exception to section 6(1)(b) found in section 6(2)(b) applies, and that the record therefore does not qualify for exemption under section 6(1)(b). Section 6(2)(b) states:

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;

[24] The appellant provides a lengthy review of the circumstances which resulted in the discussion in the closed meeting of November 15, 2010. The appellant begins by identifying that, during an open council meeting in May of 2010, certain matters were brought to council's attention. He reviews how these matters were addressed and dealt with by council over the subsequent months, and also how a number of concerns relating to these matters were brought to the public's attention during that time. The appellant also states that the public became aware of these matters because certain councillors had discussed them in public through the summer and fall of 2010. The appellant provides a significant amount of material, including newspaper articles and web pages, which confirm that the public was aware of the general nature of these

matters and some of the questions that had been raised in the course of discussing them.

[25] The appellant also indicates that these matters, and specific questions about particular actions the township council ought to take, were again dealt with by council in an open meeting in August of 2010 (although the appellant suggests that these matters ought not to have been raised in an open meeting). The appellant then states that a vote on whether or not to proceed in a particular direction was taken at the August, 2010 meeting, and that the decision was made not to proceed in a particular direction.

[26] It is the appellant's position that, because this matter was previously discussed in open meetings, and was known to the public, the exception found in section 6(2)(b) applies, and that the exemption in section 6(1)(b) cannot be claimed by the township. He states:

From [the date of the May, 2010 meeting] on, it is my submission that all future discussions on the matter in closed session may not be exempted from disclosure.

[27] I have carefully reviewed the appellant's representations on the possible application of the exception to the section 6(1)(b) exemption found in section 6(2)(b). In particular, I have reviewed the material provided by the appellant, including the newspaper articles and web pages, as well as the specific record at issue in this appeal. I note that the materials provided by the appellant all relate to public information discussed through the summer and fall of 2010, prior to the in-camera meeting of November 15, 2010.

[28] On my review of the material provided by the appellant, I am not satisfied that the exception in section 6(2)(b) applies in the circumstances of this appeal. Although I accept the appellant's position that the public was generally aware of the nature of some of the matters which resulted in the discussion at the November 15th meeting, and that specific questions about a particular action the township council ought to take were dealt with at an earlier open meeting, I am not satisfied that these meetings or disclosures satisfy the requirement that "the subject matter of the deliberations has been considered in a meeting open to the public."

[29] The fact that the public was aware of the general issue resulting in the in-camera meeting does not mean that the subject matter of the meeting had been considered in a meeting open to the public. This determination must be made on an examination of the specific subject matter of the in-camera meeting, and it is not sufficient that the general nature of the issue is known to the public. In the circumstances of this appeal, I find that the specific issues discussed at the November 15, 2010 meeting relate to a different decision regarding specific courses of action to be taken or not taken by the

township, and am not satisfied that the subject matter of the in-camera meeting was considered in a meeting open to the public.

[30] As all three requirements for the application of section 6(1)(b) have been met and the exception in section 6(2)(b) does not apply, I find that the record is exempt pursuant to section 6(1)(b). However, I must now review whether the township properly exercised its discretion to apply this exemption to the record at issue.

EXERCISE OF DISCRETION

[31] 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.

[32] 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.

[33] 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)].

Relevant considerations

[34] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific

- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[35] The appellant provides two main arguments in support of his position that the township did not properly exercise its discretion in deciding to withhold the record under section 6(1)(b).

[36] The appellant's first argument is that he was in attendance at the November 15th in-camera meeting (because he was a member of council at the time of the meeting) and that, therefore, the record ought to be disclosed to him.

[37] The appellant's second main argument is connected to the first, and relates to the appellant's concern that, because the November 15th meeting was held a few weeks prior to the change in office of a number of individuals (resulting from the November, 2010 municipal elections), only one of the individuals who attended the November 15th meeting was in attendance at a subsequent council meeting at which the minutes of the November 15th meeting were approved. The appellant states that the procedure in practice for the four years prior to this meeting was that minutes of closed meetings were reviewed by council at subsequent meetings to "correct the record as witnessed by those in attendance at each respective meeting." The appellant states:

It is the duty of the participants in Closed Session meetings to review previous meeting minutes to ensure accuracy of the transcript. This

essential step legitimizes the record and promotes continuity and coherency in the governance of a municipality.

[38] The appellant states that this review did not take place for the minutes of the November 15th meeting, and states:

There is no check and balance on how these minutes read. As I understand it, the Minutes have subsequently been received by the new Council, all but one of which was not entitled to be at the meeting of 15 November, 2010. In summary those who were at the meeting have not seen the minutes; those who were not entitled to be at the meeting have seen the minutes.

[39] I note that the appellant also states that, following the meeting of November 15th, there were 15 days remaining in the terms of the members of council who attended the meeting. The appellant states that council had the authority to call a special meeting to approve the minutes of the November 15th meeting, but that this was not done.

[40] In its representations the township does not provide specific information on the issue of the exercise of its discretion; however, the township has referred to certain factors it considered in exercising its discretion to apply the exemption at section 6(1)(b). As indicated above, during mediation, it stated that it specifically considered the fact that the appellant was at the November 15th meeting, and stated that it decided to apply the section 6(1)(b) exemption because, although the appellant was at the meeting, a new council had subsequently been voted in, and the appellant was not part of the council meeting when the requested minutes were distributed as part of the meeting agenda.

[41] In addition, in the course of this appeal the township also claimed that the discretionary exemptions in sections 8(1)(a), (b) and (c) (law enforcement) apply to the record at issue. Although I do not review the possible application of these exemptions to the record at issue in this order, the township clearly considered the possibility of on-going law enforcement matter relating to the content of the record as a factor in exercising its discretion not to disclose the record.

Findings

[42] I have considered the issue of whether the township properly exercised its discretion to apply the exemption in section 6(1)(b) to the record at issue. I have also considered the factors raised by the appellant, particularly that the appellant was in attendance at the specific in-camera meeting of November 15th. In the circumstances, I am satisfied that the township properly exercised its discretion to apply the section 6(1)(b) exemption.

[43] With respect to the appellant's argument that he was on council at the time of the meeting, and therefore ought to have access to the record, I note that, in Order MO-2519, I considered a similar argument, and found that withholding the minutes of a meeting which the appellant himself attended would, in that instance, lead to an absurd result. I note, however, that there are significant differences in the circumstances resulting in Order MO-2519, and the circumstances of this appeal. In MO-2519, the sole reason for the committee to proceed in-camera was to discuss a personal matter relating directly to the appellant, and the record at issue in MO-2519 contained the appellant's (and only the appellant's) personal information. In those circumstances I found that applying the section 6(1)(b) exemption would lead to an absurdity.

[44] In this appeal, however, the record does not contain the personal information of the appellant. The appellant was involved in this matter in his professional capacity as a member of council. The only personal information that the record may contain is information that may be the personal information of other identifiable individuals.

[45] In my view, as a general proposition, the fact that an individual attended an in-camera meeting as a member of council does not mean that he is entitled, under the *Act*, to a written copy of the in-camera minutes of a meeting after he is no longer on council. I note that in MO-2519 the point was made that although council members and staff of the municipality are governed by confidentiality clauses for discussions that are held in-camera, members of the public have no such constraints. In this appeal, the appellant seeks access to the record through the *Act* simply because he was in attendance at the in-camera meeting. It is well established that access under the *Act* means "access to the world." Absent other considerations, the fact that an individual was at a meeting in a particular capacity does not mean he is entitled to access to confidential records under the *Act*.

[46] The appellant does raise another consideration in this case, namely, that because of the change in council, only one individual was in attendance at a subsequent meeting where the minutes were approved. However, I note that the appellant himself indicates that the *Municipal Act* provides that special meetings can be called in circumstances where there is a change in council. Although it appears that no such meeting was held in this case, I find that the failure of the members of township council (which included the appellant) to hold such a meeting and approve the minutes of the November 15th meeting is not a significant factor that the township ought to have considered in exercising its discretion in the circumstances of this appeal. Having regard to the record at issue, in my view, the procedural issues raised by the appellant relating to the approval of in-camera meeting minutes do not impact access under the *Act* in the circumstances of this appeal.

[47] Accordingly, I am satisfied that the township properly exercised its discretion to apply section 6(1)(b), and did not take into account irrelevant considerations or fail to

take into account relevant considerations in exercising its discretion. As a result, I uphold the township's decision to apply section 6(1)(b) to the record.

ORDER:

I uphold the township's decision, and dismiss the appeal.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ April 27, 2012