

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2745

Appeal MA11-355

City of Windsor

May 30, 2012

Summary: The appellant requested records relating to the “business case/plan for the construction of the hangar at the Windsor International Airport.” The city identified five responsive records, and denied access to two of them (council reports) based on the discretionary exemptions in section 6(1)(b) (in-camera minutes) and section 12 (solicitor-client privilege). The city’s decision to deny access to the two records on the basis of the exemption in section 6(1)(b) is upheld.

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

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, reversing 2007 ONCA 32, which reversed (2004) 70 O.R. (3d) 332 (Div. Ct.); *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div.Ct.).

OVERVIEW:

[1] The City of Windsor (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the “business case/plan for the construction of the hangar at the Windsor International Airport.”

[2] The city issued an access decision in which it stated that the city’s “Business Case for the Service Hangar at the Windsor International Airport” is in the form of

several council reports. It then indicated that there were five records responsive to the request, and that access was granted to two of them. Access was denied to the remaining three records on the basis of the exemptions in sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Act*. Along with the decision letter, the city enclosed an index of records.

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

[4] 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*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the city, initially, and the city provided representations in response. In its representations the city indicated that it was granting access to one of the three records remaining at issue, and that record is no longer at issue in this appeal. I then sent the Notice of Inquiry to the appellant and shared the city's representations with him in accordance with this office's *Practice Direction 7*. The appellant provided brief representations in response.

[5] As a preliminary observation, I note that the appellant's representations focus primarily on his view that the public ought to be provided with the "business plan" for the construction of the hangar at the airport, as the city has proceeded with implementing the plan, and it is affecting city residents. I note that many of the appellant's arguments focus on the "public interest" in the subject matter of the records. The *Act* does contain a "public interest override" in section 16; however, that section reads as follows:

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.

[6] As is clear from the wording of section 16, it does not apply to the exemption in section 6(1).¹

[7] Some of the appellant's arguments also relate to the manner in which the city exercised its discretion, and I review that issue later in this order.

[8] In this order, I find that the two records at issue qualify for exemption under section 6(1)(b) of the *Act*.

¹ See also *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, reversing 2007 ONCA 32, which reversed (2004) 70 O.R. (3d) 332 (Div. Ct.).

RECORDS:

[9] The records remaining at issue consist of two reports, each with various attachments. The two reports are described by the city as follows:

- In-Camera Report dated October 28, 2010 (Record No. 3)
- In-Camera Report dated February 28, 2011 (Record No. 4)

DISCUSSION:

Do the records qualify for exemption under section 6(1)(b) of the *Act*?

[10] The city takes the position that the records are 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.

[11] 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]

[12] I will review each part of this three-part test to determine whether the records qualify for exemption under this section.

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

[13] In support of its position that the records qualify for exemption under section 6(1)(b) of the *Act*, the city states:

Records 3 and 4 are reports that were submitted to Council at in-camera meetings held on November 1, 2010 and March 1, 2011, respectively.

The meetings were closed to the public pursuant to the provisions of s. 239(2) of the *Municipal Act, 2001*.

[14] The appellant does not dispute that the two referenced in-camera meetings were held. In the circumstances, I am satisfied that the meetings 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

[15] In support of its position that this part of the three-part test is established, the city refers to the fact that the meetings on November 1, 2010 and March 1, 2011 were closed to the public under the provisions of section 239(2) of the *Municipal Act, 2001*. In other material provided, references are made to subsections (c) and (f) of section 239(2), which read:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(c) a proposed or pending acquisition or disposition of land by the municipality or local board;

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

[16] The city then states:

The meetings were held in accordance and compliance with the provisions of the *Municipal Act, 2001* and Windsor's notice by-law (By-Law 46-2003) and procedural by-law (By-Law 420-2001) in effect at the time

A motion was made in public to close the meetings to the public and to move in camera to discuss in-camera matters, including [the records at issue].

[17] Attached to the city's representations are copies of the specific by-laws which it refers to, as well as the motions to close the meetings to the public. These documents indicate that council went into closed session on November 1, 2010 and March 1, 2011.

[18] The appellant does not take issue with the city's position.

[19] On my review of the records and the city's representations, I am satisfied that the city was authorized by section 239(2)(f) of the *Municipal Act, 2001* to hold the two meetings in the absence of the public, and to consider the matters discussed in those

in-camera meetings. It is clear from the representations and the records at issue that the matters considered at each of the meetings included advice that is subject to solicitor-client privilege. The city specifically refers to this in other portions of its representations (relating to the solicitor-client privilege), where the city discusses the specific portions of the two reports (as well as the attachments) that reproduce or contain the actual legal advice received. I note that both of the records include attachments which clearly contain solicitor-client privileged information, and that some of this information is also reproduced or referenced in the records themselves. As a result, I am satisfied that the city was authorized by section 239(2)(f) of the *Municipal Act, 2001* to hold the two meetings in the absence of the public.²

[20] 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

[21] 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]

[22] The city’s representations on this part of the test state that the records at issue contain information that would reveal the substance of the deliberations of the in-camera meetings. In support of that position, the city has provided confidential handwritten notes of the two meetings, which were taken at those meetings by the city clerk. The city then provides representations which describe in detail its position that disclosure of each of the records would reveal the substance of the deliberations of the respective in-camera meetings.

[23] With respect to Record 3, the city refers to the confidential handwritten notes of the November 1, 2010 meeting, and states:

... While some matters referred to in the notes go beyond what is included in [Record 3], it is beyond dispute that [Record 3] is the foundation for the deliberations that took place at the meeting of November 1, 2010, and conversely, those deliberations as recorded in the Clerk’s notes reflect the content of [Record 3].

² See *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div.Ct.) which discusses the application of section 6(1)(b) to records where the *Municipal Act, 2001* authorizes a meeting to be closed to the public.

[24] The city then provides confidential representations in which it refers to the handwritten notes and identifies the portions of Record 3 that were "directly discussed" at the meeting. It then states:

A review of the Clerk's hand-written notes of the meeting at which [Record 3] was presented confirms that all of the issues discussed in [Record 3] were the subject of deliberations at the meeting.

[Record 3] is detailed. It does not merely raise an issue for potential discussion by Council. It provides in-depth opinion related to the issues and is not superficial. A review of the Clerk's notes in their entirety will conclude that [Record 3] reveals the actual substance of the deliberations of the meeting. ...

The Clerk's notes confirm that [Record 3] set the groundwork for the deliberations. Council deliberated the issues raised by [Record 3] and discussed in [it]. The Clerk's notes reflect that the important and significant issues raised and discussed in [Record 3] were deliberated by Council. Therefore, disclosure of the record would reveal the actual substance of the deliberations at the meeting.

[25] With respect to Record 4, the city refers to the confidential handwritten notes relating to the March 1, 2011 meeting, and states that the notes relate to Record 4. It identifies the general nature of the information contained in Record 4, and provides confidential representations which refer to specific information. It then states:

... the disclosure of [Record 4] would reveal the substance of the deliberations of the meeting. The hand-written notes should be considered in their entirety. It is beyond dispute that [Record 4] is the foundation for the ensuing meeting deliberations.

The deliberations match issue for issue the matters raised and discussed in [Record 4] ...

... The Clerk's notes reflect that the important and significant issues raised and discussed in [Record 4] were deliberated by Council. Therefore, disclosure of the record would reveal the actual substance of the deliberations at the meeting.

[26] The appellant's representations do not address this issue directly.

[27] On my review of the records at issue and the representations of the city, I am satisfied that the disclosure of Records 3 and 4 would reveal the actual substance of the deliberations of the in-camera meetings of November 1, 2010 and March 1, 2011,

respectively. The city has provided copies of the clerk's detailed, handwritten notes which recorded the actual deliberations of those two meetings. The city has also provided detailed confidential representations which identify the specific information in the handwritten notes and match it to the information in the records. Based on the information provided by the city, and on my review of the records, I am satisfied that the disclosure of the two records would reveal the actual substance of the deliberations of the in-camera meetings, and I find that the third requirement for the application of section 6(1)(b) has also been met.

[28] Having found that all three parts of the three part test in section 6(1)(b) are met, I find that the records qualify for exemption under that section. In addition, the city has stated that none of the exceptions set out in section 6(2) apply to the subject matter of the deliberations, and the appellant has not addressed this issue. Based on my review of the records, I agree that the exception in section 6(2)(b) does not apply in the circumstances of this appeal.

Exercise of discretion

[29] 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.

[30] 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.

[31] 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)].

[32] 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.

[33] As identified above, the appellant's representations focus primarily on the "public interest" in the subject matter of the records; however, some of his representations touch on the manner in which the city exercised its discretion. The appellant reviews the history of a number of the decisions that were made by the city in 2011 regarding the service hangar at the airport, and suggests that a "complete and detailed" business plan ought to have been made public. He also refers to issues that have arisen since March of 2011, and suggests that these issues have increased the public's interest in access to a detailed "business plan." Lastly, the appellant questions the motives behind the city's decision to deny access to a "business plan."

[34] Although the city does not provide specific information on the issue of the exercise of its discretion in its representations, the city does provide background information regarding how it came to the decision about a service hangar at the airport, and the processes used by the city. It also states:

The usual method of advising council ... is by a Council report. The *Municipal Act, 2001*, recognizes that some topics are sensitive and deserve the opportunity for deliberation in the absence of the public. The issues in this matter pertain to in-camera deliberations ...

[35] In addition, as identified above, the city also claims that the solicitor-client exemption in section 12 applies to the two records remaining at issue. Although I do not review the possible application of this exemption to the records at issue in this order, the city clearly considered the possibility that the solicitor-client privilege applied to the records as a factor in exercising its discretion not to disclose the records.

[36] On my review of the manner in which the city exercised its discretion to apply the exemption in section 6(1)(b) to the record at issue, I have considered the factors raised by the appellant and the matters referred to by the city. In the circumstances, I am satisfied that the city properly exercised its discretion to apply the section 6(1)(b) exemption.

[37] Although the appellant believes that access to a complete "business plan" ought to be provided, and questions the reasons why the city chose to deny access to the record, I have not been provided with evidence suggesting that the city has exercised its discretion in bad faith or for an improper purpose, nor that it took into account irrelevant considerations or failed to take into account relevant considerations. In its decision letter the city stated that its business case for the construction of the hangar is "in the form of several council reports," and I have found that the two records remaining at issue qualify for exemption under section 6(1)(b). As also indicated above, the "public interest override" in section 16 does not apply to section 6(1). Although the appellant argues that the public ought to have access to these records, I have not been provided with sufficient evidence to satisfy me that the city improperly exercised its discretion to deny access to the records.

[38] Accordingly, I am satisfied that the city 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 city's decision to apply section 6(1)(b) to the record.

ORDER:

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

Original Signed by: _____
Frank DeVries
Adjudicator

_____ May 30, 2012