

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2918

Appeal MA12-328

Toronto District School Board

July 23, 2013

Summary: The board received a request for records of a board meeting which dealt with a particular property that was leased to the appellant. The board denied access to the responsive records on the basis of the discretionary exemption in section 6(1)(b) (closed meeting). The board's decision to deny access to the two responsive 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, sections 6(1)(b), 6(2)(b); *Education Act*, R.S.O. 1990, c. E.2, as amended, section 207(2)(c).

Orders Considered: MO-2816-I

Cases Considered: *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div.Ct.).

OVERVIEW:

The Toronto District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a private school (the appellant) for access to "information ... related to the property we lease at [a named address]." The request indicated that the appellant had been notified that its

lease from the board would not be renewed upon its expiry because the board "requires this facility in an operational capacity." The request then stated that this decision was made at a trustee meeting of February 8, 2012, and then stated:

... It is our contention that the portion of the meeting related to our site be released to us under [the provisions of the *Act*], or failing that, under the general provision of fairness to us as existing tenants of the board. We have an innate and significant interest in what was discussed and how this decision was reached by the trustees. We have been, to date, unsuccessful in obtaining any explanation or details surrounding this decision or finding out what the intended use of our site is by [the board].

In response to the request, the board issued a decision in which it stated that access to the records was denied on the basis of the exemption in 6(1)(b) of the *Act* (closed meeting).

The appellant, through its representative, appealed the board's decision. In this order, all references to the appellant will refer to the private school and/or its representative.

During mediation, the parties agreed that the records at issue in this appeal are the minutes of a meeting dated February 8, 2012 and the related report (which consist of pages of the Agenda Record relating to this matter).

Also during mediation the appellant confirmed that he was not seeking access to information in the records that was identified by the board as not responsive, and those portions of the records are not at issue in this appeal.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the board, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the board's representations, to the appellant, who also provided representations in response.

RECORDS:

The records remaining at issue consist of the responsive portions of the minutes of the February 8, 2012 meeting, and the related pages of the Agenda Record (which consist of 6 pages of records).

DISCUSSION:

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

The board 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.

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.¹

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

The board indicates in its representations that the meeting of February 8, 2012 was an in-camera meeting of the Committee of the Whole Board, and supports this assertion by affidavit evidence of an individual who attended the meeting.

The appellant does not dispute that the referenced in-camera 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.

¹ Orders M-64, M-102, MO-1248.

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

In support of its position that this part of the three-part test is established, the board states that the meeting of February 8, 2012 was closed to the public under the provisions of section 207(2)(c) of the the *Education Act*, which reads:

A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,

(c) the acquisition or disposal of a school site;

The board states:

The Board was authorized under section 207(2)(c) to hold in-camera meetings on the aforementioned dates where the subject matter under consideration involve respectively the "acquisition or disposal of a school site."

As noted in [the attached affidavit of the Senior Manager of Board Services], the Committee of the Whole Board was considering recommending the rescission of a surplus declaration of [the identified] property. There is a facility on the property which historically housed [an identified public school]. A surplus declaration is a condition precedent to the sale of a property. By rescinding a surplus declaration a school property ceases to be subject to the disposition process.

It is clear on the face of the published recommendation that the subject matter involved the "acquisition or disposal" of a school site. In this instance, the subject matter involved consideration of the disposal of a school site or, more specifically, consideration of a previous declaration to dispose of the site.

Attached to the board's representations is a copy of the referenced affidavit of the Senior Manager of Board Services, in which the affiant confirms the information set out above relating to the surplus declaration.

The appellant argues that section 207(2)(c) of the the *Education Act* does not authorize the holding of the February 8, 2012 meeting in the absence of the public. In support of

his position, the appellant provides some additional background information relating to the actions concerning this property.² He states:

[The board], in approximately June of 2011, declared a 1.5 acre portion of the subject property to be surplus to their needs, not the entire site. The [identified site] was, in fact, declared as a core holding and not subject to disposal at any time. ... There was a public meeting in October 2011 held to discuss the proposed severance and sale of the 1.5 acre portion of the land The [board subsequently] delayed the order to sell the property until it could be discussed at a meeting of trustees in February 2012. This meeting took place and the portion of the meeting related to [the identified site] was done in private.

The appellant then states:

It is our contention that section 207(2)(c) of the *Education Act* does not apply to this portion of [the meeting] as [the board] discussed neither the acquisition nor disposal of a school site. The trustees discussed rescinding an order to sell a portion of the site, they did not discuss acquiring a site or selling a site.

The appellant also argues that he is particularly interested in any portions of the records or in-camera discussion which deal with his tenancy and the reasons for the non-renewal of his tenancy.

Analysis and findings

To begin, I note that the appellant takes the position that he ought to have access to portions of the records that relate to his tenancy, and thereby raises the possibility that portions of the record could be severed and provided to him.

The decision of the Divisional Court in *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*³ (*St. Catharines*) reviewed the approach to take in determining whether records or portions of records qualify for exemption under section 6(1)(b). The court determined that, if a portion of a record contains material which an institution is authorized to consider *in-camera*, that complete record can be considered at an *in-camera* meeting. In other words, the possible severing of a record is not done on the basis of deciding which portions of a record relate to the material which an institution is authorized to consider *in-camera*. However, the Divisional Court proceeded to affirm that, even if a full record could be considered *in camera*, severance could be made, and

² I note that in this appeal I did not seek reply representations from the board, and the board has not had the opportunity to comment on the information provided by the appellant.

³ 2011 ONSC 2346 (Div.Ct.).

portions disclosed, based on whether disclosing those portions would reveal the substance of the deliberations of the *in-camera* meeting. I will apply this approach to the records at issue, and address this issue under part 3 of the test, below.

The appellant's two other arguments appear to be that the board was not authorized to hold a closed meeting under section 207(2)(c) of the *Education Act* because 1) the subject matter of the meeting was the rescinding of a surplus declaration order and 2) the meeting only dealt with a portion of a school site.

With respect to the appellant's first argument, I accept that the subject matter of the meeting was the rescinding of a surplus declaration. However, as noted by the board, a surplus declaration is a condition precedent to selling a property and, by rescinding the surplus declaration, the property ceases to be subject to the disposition process. In these circumstances, I am satisfied that the board's decision to rescind the surplus declaration was a decision in which the subject-matter under consideration involved the disposal (or, in this case, the decision not to dispose) of a school site.

Regarding the appellant's second argument, the appellant's position is that section 207(2)(c) of the *Education Act* does not apply as the decision in this case related to a portion of a school property and not a "school site."

This office has addressed the issue of the application of section 207(2)(c) on a number of occasions. Most recently, in Order MO-2816-I, adjudicator Haly had to determine whether the decision to lease the rooftops of board-owned schools to allow solar panel systems to be built on them constituted the "disposal" of a school site. The relevant portion of that order reads:

Regarding paragraph (c) of section 207(2), the board submits that the records also relate to the disposal of the board's school sites. The board states:

As noted ..., the board's proposed model for the project was to lease out a portion of the affected school sites, on the roof tops, to the successful bidder who would place solar panel arrays, to be owned by the bidder, on the roof.

The board notes that the *Education Act* equates the term "disposal" with the leasing of part of a school site in s. 194(3) of the *Act* which reads in part:

(3) Subject to subsections (3.3) and (4), a **board has power to sell, lease or otherwise dispose of** any school site or part

of a school site of the board or any property of the board, [emphasis in original]

The board submits that in both cases, the subject matter of the *in camera* sessions dealt with the proposal and thus related to ... the disposal of a school site and fell within the provision of section 207(2).

Having reviewed the records and the board's representations, I am satisfied that the meetings were properly held *in camera* pursuant to section 207(2) of the *Education Act*. Prior decisions of this office have found that the term of "disposal" is also used in Ontario Regulation 444/98 where the term "disposition" is used in the context of sale, lease or "other disposition", such as the granting of an easement.⁴ In Order MO-1558-I, Adjudicator Laurel Cropley found the following in regard to the term "disposition":

In essence, this term is used to denote some form of transfer of ownership or use of the property. In my view, both terms should be similarly characterized to relate to the purchase, sale, lease or other similar transfer of rights of use of the property (land and/or premises).

I adopt this approach in the current appeal and find that the subject matter of the records relates to the leasing of a portion of the school sites. Thus, in keeping with the findings in these earlier decisions, the meetings were in relation to the disposal of school sites and thus the board was within the ambit of section 207(2) of the *Education Act* when it went *in camera* for the two meetings. Accordingly, I find the board has met part two of the test for the application of section 6(1)(b).

I note that the decision in Order MO-2816-I dealt with the decision to lease out a portion of the school sites (portions of the rooftops), and that this constituted the "disposal" of a school site for the purpose of section 207(2)(c) of the *Education Act*.

I adopt the analysis from Order MO-2816-I and apply it to the circumstances of this appeal. As a result, I am satisfied that the decision to dispose of (or, in this appeal, not to dispose of) a portion of a school site means that the subject-matter under consideration involved the disposal of a school site for the purpose of section 207(2)(c) of the *Education Act*. Accordingly, I am satisfied that a statute authorizes the holding of the meeting in the absence of the public, and that Part 2 of the test under section 6(1)(b) of the *Act* has been established.

⁴ Orders MO-1558-I and MO-1590-F.

I also note the discussion in MO-2816-I suggests that the leasing of a school site would also constitute the "disposal" of a school site for the purpose of section 207(2)(c). I will, nonetheless, review the appellant's concerns about the possible severing of information relating to the lease, below.

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

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]

The board'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 board states:

... in the case of the February 8, 2012 meeting, the contents of the responsive record provided the subject matter of deliberations of the Committee of the Whole Board at its in camera session.

The attached affidavit, sworn by the Senior Manager of Board Services who attended the meeting, states:

The content of the document formed the basis for the Committee's deliberations with respect to determining whether or not to recommend rescinding the original surplus declaration.

In the confidential portions of the board's representations and the attached affidavit, the board references some of the specific information contained in the records that was discussed in the in-camera meeting.

The appellant states:

... the discussion also considered our tenancy at [the identified location] and the renewal of our lease of the premises which was going to come up for renewal The discussions related to our tenancy and the reasons for non-renewal of our tenancy are the discussions that we are particularly interested in having disclosed. These discussions do not relate to the acquisition or disposition of a school site. ...

Based on the board's representations and my review of the records at issue, I am satisfied that the disclosure of the records at issue would reveal the actual substance of the deliberations of the in-camera meeting of February 8, 2012. The board's affidavit, sworn by an individual who attended the meeting, confirms that the Agenda Record formed the basis for the committee's deliberations about rescinding the surplus declaration decision. The minutes of the meeting reflect those deliberations. In addition, the content of the records relates directly to this matter. Based on my review of the records and the board's representations and affidavit, I am satisfied that the disclosure of the records would reveal the actual substance of the deliberations of the in-camera meeting, and I find that the third requirement for the application of section 6(1)(b) has also been met.

I have also considered the appellant's position that any discussions in the records relating directly to the board's decision regarding the appellant's tenancy ought to be severed from the record and disclosed to the appellant. On my review of the records, I note that they relate directly to the decision to rescind the surplus declaration. Accordingly, I find that the records cannot reasonably be severed without disclosing the information that falls under the exemption in section 6(1)(b).⁵

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, subject to my review of the exception in section 6(2)(b), and of the board's exercise of discretion.

Section 6(2)(b)

Section 6(2)(b) is an exception to section 6(1)(b), and 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;

The board addresses the possible application of this exception in its representations by stating:

The Board notes that in the case of the February 8, 2012 meeting, the contents of the responsive record provided the subject matter of deliberations of the Committee of the Whole Board at its in camera session. These matters were not considered in a public meeting of the board.

⁵ See section 4(2) of the *Act* which deals with the severability of a record.

While the Committee did publish its recommendation with respect to the rescission of the surplus declaration, the IPC has previously determined that an adoption of a recommendation does not reveal the substance of deliberations for the purposes of section 6(2)(b) [referring to Order M-385].

In the affidavit attached to the board's representations, the Senior Manager of Board Services states:

The subject matter of these detailed discussions has not been considered in a meeting open to the public. ...

Ultimately, the Committee of the Whole voted on a motion to recommend rescinding the declaration. A recommendation supporting the rescission of the surplus declaration was published by the Board However as noted above, the detailed discussions and deliberations were never considered in a meeting open to the public.

The appellant argues that the exception in section 6(2)(b) applies. He states:

... the affidavit states the subject matter of these detailed discussions has not been considered in a meeting open to the public. The subject matter was, in fact, subject to a community meeting to discuss the proposed severance and sale of the subject lands in October 2011. It is our contention that any subsequent discussion related to this sale is a continuation of the discussions that took place at that community meeting in October 2011.

Analysis and findings

The appellant's position is that the subject matter of the deliberations was considered in a meeting open to the public because the planned severance and sale of the land was the subject of a community meeting open to the public. This public meeting of October, 2011 appears to have been held by the board to inform the local community of the decision to sell the portion of land in question.

On my review of the material provided by the parties, 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 made aware of the earlier decision to sell a portion of the property, as it was the subject of a public meeting held in October, 2011, the records at issue in this appeal were prepared in 2012 and contain additional information. I have found above that the Agenda Record, which references this additional information, formed the basis for the committee's in-camera deliberations of February 8, 2012. In these circumstances, I find that the public meeting in October of

2011 to advise the public of earlier decisions made by the board is not sufficient to trigger the application of the exception in section 6(2)(b), as I am not satisfied that the subject matter of the committee's deliberations at its February 8th, 2012 meeting with respect to the Agenda Record at issue was considered in an open meeting.⁶

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 records are exempt pursuant to section 6(1)(b), subject to my review of the board's exercise of discretion.

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.⁷ This office may not, however, substitute its own discretion for that of the institution.⁸

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁹

- the purposes of the *Act*, including the principles that
 - information should be available to the public

⁶ See the approach to this issue taken in order MO-2572-I, MO-2914 and order MO-2425-I, upheld on judicial review in *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div.Ct.).

⁷ Order MO-1573.

⁸ Section 43(2) of the *Act*.

⁹ Orders P-344, MO-1573.

- 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.

Although the board does not provide specific information on the issue of the exercise of its discretion in its representations, it does refer to the application of the exemption to records, and also confirms that the committee did publish the recommendation regarding the rescission of the surplus declaration. The appellant does not address this issue.

On my review of the manner in which the board exercised its discretion to apply the exemption in section 6(1)(b) to the records at issue, and considering the circumstances of this appeal, I am satisfied that the board properly exercised its discretion to apply the section 6(1)(b) exemption. It 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 board's decision to apply section 6(1)(b) to the records.

ORDER:

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

Original Signed by: _____
Frank DeVries
Adjudicator

_____ July 23, 2013