

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2914

Appeal MA12-452

City of Peterborough

July 17, 2013

Summary: The requester sought access to the notes and a report pertaining to two closed session meetings of the City of Peterborough's Committee of the Whole and City Council. The city initially denied access to the records in their entirety, based on the discretionary exemption in section 6(1)(b) (closed meetings). It subsequently issued a revised decision disclosing portions of the notes, maintaining its decision to withhold the remaining portions, as well as the report. In this order, the adjudicator upholds the city's decision to deny access to the remaining records under section 6(1)(b), and finds that the city properly exercised its discretion under that section.

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); *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, sections 239(2)(a) and (c).

Orders and Investigation Reports Considered: Order MO-1344.

Cases Considered: *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 211 ONS 2346 (Div. Ct.).

OVERVIEW:

[1] The City of Peterborough (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

- the minutes of the closed session of the Committee of the Whole on the dates of July 23 and 30 that refer to the demolition of the house at [an identified address];
- any direction, additions or revisions arising from [numbered report] since June 29, 2009

[2] The city issued a decision, advising the requester that access had been denied pursuant to section 6(1)(b) (closed meeting) of the *Act*.

[3] The requester (now the appellant) appealed the city's decision to this office. During mediation, the city issued a revised decision to the appellant, granting partial access to some of the records. The city continued to withhold portions of the records pursuant to section 6(1)(b) of the *Act*. As mediation did not resolve all issues, the appeal was referred to me for adjudication. During my inquiry, I invited and received representations from the city and the requester.

[4] As background, in 2009, the city adopted a recommendation from its Senior Director of Corporate Services (the Director) to sell or demolish a house owned by the city. This recommendation was considered in a closed session of the Committee of the Whole, adopted in an open session of the Committee of the Whole, and then approved by Council in an open meeting.

[5] The background for the city's decision is outlined in a report from the Director dated June 29, 2009. The report that was put before in the open session of the Committee of the Whole was made available to the public, and outlines the reasons for the Director's recommendations.

[6] Following the city's decision to sell or demolish the house, City Council received a further report on the matter from the Director, and held further closed session discussions about the house, on July 23 (Committee of the Whole) and July 30 (City Council), 2012. Following these discussions, the matter was not returned to City Council in open session and it appears that the 2009 decision has not been re-visited at any open session of the Committee or of Council.

[7] In this order, I find that the withheld portions of the minutes of two closed session meetings and the related report of July 23, 2012, are exempt from disclosure under the discretionary exemption in section 6(1)(b) of the *Act*. I also uphold the city's exercise of discretion in applying section 6(1)(b) to the records.

RECORDS:

[8] The records at issue consist of withheld portions of the notes of a closed session Committee of the Whole meeting on July 23, 2012 and a closed session City Council

Meeting on July 30, 2012, and a numbered report from the City's Senior Director of Corporate Services dated July 23, 2012, including an Appendix.

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) of the *Act* apply to the records?
- B. Did the institution exercise its discretion under section 6(1)(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 6(1)(b) of the *Act* apply to the records?

[9] Section 6(1)(b) reads:

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.

[10] 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. the disclosure of the record would reveal the actual substance of the deliberations of the meeting.¹

[11] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision²; and
- "substance" generally means more than just the subject of the meeting³.

¹ Orders M-64, M-102 and MO-1248.

² Order M-184.

³ Orders M-703, MO-1344.

[12] 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.⁴

[13] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*⁵.

[14] In determining whether there was a statutory authority to hold a meeting *in camera* under part two of the test, the question to ask is whether the purpose of the meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting⁶.

[15] With respect to the third requirement set out above, 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 institution's *in camera* meeting, not merely the subject of the deliberations⁷.

[16] Section 6(2) of the *Act* sets out exceptions to section 6(1)(b). It reads, in part:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

(b) 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.

[17] In determining whether the records at issue qualify for exemption under section 6(1)(b) of the *Act*, I will consider the three part test set out above.

Parts 1 and 2 – was an in camera meeting of council, board, commission or other body, or a committee of one of them held and was it authorized by statute?

⁴ Order MO-1344.

⁵ Order M-102.

⁶ *St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.).

⁷ Orders MO-1344, MO-2389 and MO-2499-I.

[18] The city relies on sections 239(2)(a) and (c) of the *Municipal Act, 2001*, S.O. 2001, c. 25, providing it with authority to hold closed meetings if the subject matter being considered is:

(a) the security of the property of the municipality or local board;

...

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

[19] The city explained that closed meetings were held by the Committee of the Whole on July 23, 2012 and by Council on July 30, 2012. In the case of the July 23, 2012 meeting, the city states that a motion was made to move into closed session to discuss six items under section 239(2)(c) (proposed or pending acquisition or disposition of land). The city notes that the July 23, 2012 report to the Committee identified section 239(2)(a) (security of the property of the municipality) as the governing section with respect to the property identified in the request. In any event, the city states that the property at issue was one of the items referred to in the motion to close the meeting.

[20] In the case of the July 30, 2012 meeting, the city states that a motion was made to move into closed session to discuss two items under section 239(2)(a) (security of the property of the municipality). The city states that the property at issue in the appellant's request was one of those two items.

[21] Sections 239(2)(a) and 239(2)(c) of the *Municipal Act* are mirrored in section 16.4.11 of the city's Procedural By-laws.

[22] The city also refers to section 16.4.12 of its Procedural By-laws, which states that "[p]rior to holding a meeting, or part of a meeting, which is closed to the public, Council or the Committee shall pass a resolution stating the fact of the holding of the closed meeting and including the general nature of the matter to be considered at the closed meeting."

[23] The city submits that all required conditions for holding a closed meeting were met.

[24] The appellant submits that the city's representations about the basis for closing the meetings should be carefully scrutinized. She makes a number of additional submissions on the application of the section 6(1)(b) exemption, which relate to the third part of the test, and are discussed below.

[25] Based on the submissions before me and my review of the records at issue, I am satisfied that the first two parts of the section 6(1)(b) test have been met. I accept that the city held *in camera* meetings on the dates identified above, and that these

meetings were authorized by section 239(2) of the *Municipal Act*. Given the subject matter under consideration at these meetings, the sale or demolition of the house, I am satisfied that section 239(2)(a) and/or (c) authorized holding these meetings *in camera*.

Part 3 – would disclosure of the records reveal the actual substance of the deliberations of the meetings?

[26] With regard to the minutes of the two closed session meetings, the city states that, upon review of IPC orders, it decided to provide partial access to the records at issue. Thus, it has disclosed portions of the minutes providing information about the persons in attendance, start and end times, motions to move into closed session, and declarations of conflict of interest. The city states that it withheld those parts that would reveal the substance of the deliberations that took place at the meetings.

[27] The city submits that it withheld certain portions of the meeting notes containing the identities of individuals moving and seconding a motion under section 6(1)(b) of the *Act*. In doing so, it had regard to the findings of former B.C. Privacy Commissioner David Loukidelis, adopted by the IPC in Order MO-1344, which found that this information would disclose the fact that these individuals' active support was part of the deliberations which took place at a meeting.

[28] The city submits that while it is not the historic practice of the city to release the minutes of *in camera* deliberations, it is committed to the principles of openness and accountability, and in that spirit, decided to provide partial access to the appellant, while maintaining its ability to protect the interests of the city.

[29] With regard to the numbered report at issue, the city states:

The disclosure of this record would reveal the substance of the deliberations that took place during the July 23, 2012 Closed Meeting and Closed Meeting of July 30, 2012. On these two occasions, members of [Committee of the Whole] and Council engaged in the very discussion and debate required for the application of section 6(1)(b). The meetings were conducted with a view to holding discussions regarding confidential information on the property. The record at issue was drafted specifically to address the subject of the disposition and as such, contained the background and analysis necessary to allow members of the committee to consider the same. To release the record would thus clearly reveal the substance of the meeting deliberations. We submit the requested record contains the exact type of information, which the Information and Privacy Commissioner has previously determined to qualify, in light of in-camera discussions, as information, which would reveal the substance of deliberations.

[30] The city also notes that the 2009 report which came before an open session of Council outlines the factors considered in making the decision to demolish the property in question. It states:

The fact of the matter is that the decision to demolish the property at [identified address] was made back in 2009, and the Open Session report from 2009 outlines the factors that were considered in making that decision. The appellant can readily access [numbered report] if she wants to understand what factors were considered in making the decision about the disposition of [identified address].

[31] In the confidential portions of its representations, the city describes the sections of the 2012 report that contained the background and analysis that directly informed the *in camera* deliberations of the Committee of the Whole and Council on the two dates in question.

[32] The city also reviewed the exceptions to the exemption listed in section 6(2) of the *Act*, and submits that none apply. The city indicates that there was no public discussion or disclosure of the matter at an open meeting of Council or one of its Committees.

[33] In her representations, the appellant submits that the records should not be withheld from disclosure. The appellant states that the city has been inconsistent in its treatment of the 2009 report and the 2012 report. She notes that the 2009 report was disclosed to the public and submits that it is not clear why an additional report was created and is now being withheld. The appellant submits that any new factual information that is contained in the report should be disclosed. In support of her position, the appellant relies on section 7(2) of the *Act* (referencing its provincial equivalent, section 13(2)).

[34] The appellant submits that she does not seek the disclosure of the substance of the deliberations, but rather the supporting documentation that councillors read before the *in camera* meeting. She also submits that, not having attended the meetings in question, it is impossible for her to know if the report would reveal the substance of deliberations. In any case, the appellant suggests that the councillors could not have debated every part of the report and it is hard to believe that all of it would be exempt from disclosure. The appellant maintains that she has a right of access to the factual information on which the decision was based and submits that there is a public interest in the disclosure of the records.

Analysis

[35] Under this part of the three-part test, I must determine whether disclosure of the information at issue would reveal the actual substance of the deliberations of the *in camera* meetings.

[36] The decision of the Divisional Court in *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*⁸ 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*.

[37] However, the Divisional Court proceeded to affirm that, even if a full record could be considered *in camera*, severance could be made, and portions disclosed, based on whether disclosing those portions would reveal the substance of the deliberations of the *in camera* meeting.

[38] I will apply this approach to the records at issue, all of which I have found were properly considered in *in camera* meetings, to determine whether disclosure of the portions of the records at issue would reveal the substance of the deliberations of the *in camera* meetings.

[39] There are three records at issue in this appeal: the withheld portions of the notes of the closed session Committee of the Whole meeting held July 23, 2012; the withheld portions of the notes of the closed session Council Meeting held on July 30, 2012; and the numbered report bearing a meeting date of July 23, 2012, including an Appendix.

[40] With regard to the withheld portions of the meetings notes, I find that, if disclosed, they would reveal the substance of the deliberations that took place during the two closed meetings. In Order MO-1344, former Assistant Commissioner Tom Mitchinson addressed the application of part 3 of the test in section 6(1)(b) to the minutes of a closed meeting held by a school board. With respect to part 3 of the test, he stated:

To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations of this *in camera* meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the subject of the deliberations and not their **substance** (see also

⁸ 211 ONS 2346 (Div. Ct.).

Order M-703). “[D]eliberations” in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385).

...

It is clear from the wording of the statute and from previous orders that to qualify for exemption under section 6(1)(b) requires more than simply the authority to hold a meeting in the absence of the public. The *Act* specifically requires that the record at issue must reveal the substance of deliberations which took place at the meeting.

[41] Applying this approach and having reviewed the notes at issue, I find that disclosure of the withheld portions of the notes would reveal the substance of the deliberations at the *in camera* meeting. I note that in its revised decision, the city decided to disclose information revealing that the home in question was discussed at the closed sessions. As indicated, the city also disclosed the names of the individuals that attended the meetings and the dates, times and locations of the meetings.

[42] With regard to the numbered report and accompanying Appendix, I find that section 6(1)(b) applies to the entire record. The numbered report contains information that was provided to *in camera* meeting participants to inform their deliberations about the identified property. I have examined the record at issue along with the notes from the closed session and the representations of the parties. On my review, I am satisfied that the city has provided me with sufficient evidence to support its position that disclosure of the report would reveal the substance of deliberations on the matter.

[43] Ultimately, these deliberations did not lead to any consideration of the issue at an open session, or another vote on the matter of the sale or demolition of the house. The subject matter of the specific deliberations at these meetings was therefore not discussed or disclosed at any subsequent open meeting. In effect, the 2009 decision was neither re-visited nor revoked by Council as a result of these additional discussions.

[44] The appellant has suggested that it is inconsistent for the city to provide access to information informing deliberations about the house in 2009, while withholding the information about the house in 2012. While I appreciate the appellant’s wish to have more information about the deliberations during the closed meetings of July 23, and 30, 2012, the *Act* permits a municipality or its committees to have such closed deliberations, in the circumstances described in section 6(1).

[45] I have considered whether the open session meetings in 2009 establish that the “subject matter” of the 2012 closed session deliberations was “considered in a meeting open to the public” within the meaning of section 6(2). On review of the material before me, including a comparison of the 2009 and 2012 reports, I am satisfied that,

although related to the same house, the report which was the subject of the 2012 closed session deliberations is different from the report informing the 2009 discussions and contains additional information. The nature of the deliberations was different, given intervening events. I conclude that the "subject matter" of the deliberations in 2012 has not been considered in a meeting open to the public, within the meaning of section 6(2)(b).

[46] I therefore find that the third requirement for the application of section 6(1)(b) to the numbered report has been met, and none of the exceptions in section 6(2) apply.

[47] As indicated above, the appellant submitted that the city is required to disclose "factual information" contained in the records under section 7(2) of the *Act*. This section, however, does not apply as it is an exception to the exemption in section 7(1) of the *Act* (advice or recommendations). It does not serve to override section 6(1)(b), where the requirements for that exemption are established.

[48] As all three requirements for the application of section 6(1)(b) have been met and no exception applies, I find that the records at issue are exempt pursuant to section 6(1)(b).

B. Did the institution exercise its discretion under section 6(1)(b)? If so, should this office uphold the exercise of discretion?

[49] 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, this office may determine whether the institution failed to exercise its discretion.

[50] The IPC 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

[51] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations⁹. This office may not, however, substitute its own discretion for that of the institution¹⁰.

⁹ Order MO-1573.

¹⁰ Section 43(2).

[52] The city submits that it properly exercised its discretion by taking into account relevant considerations, including:

- the requester is not seeking her personal information;
- the requester has no sympathetic or compelling need to have access to the information contained within the records in question;
- the requester has no relationship with the tenants of the identified property;
- it has not been the historic practice of the city to release records that would reveal the substance of deliberations of closed meetings;
- there is already a significant amount of information in the public realm about the identified property;
- the city submits that safeguarding the interests designed to be protected by the exceptions in sections 239(2) of the *Municipal Act*, must take priority over the principles of transparency and accountability in this case.

[53] Other factors were considered by the city and were identified in the confidential portions of its representations. I am not able to disclose the confidential information in this order, but have considered these portions in arriving at my decision below.

[54] In her representations, the appellant submits that the city did not properly exercise its discretion. The appellant also submits that the City Council decision is of great public interest as is demonstrated by the media coverage of the demolition of the identified property.

[55] Section 16 of the *Act* provides a “public interest override” that allows for disclosure of a record otherwise found exempt if a “compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.” The public interest override does not apply to the section 6(1) exemption. However, the public interest may be a factor to consider when an institution is exercising its discretion in deciding whether or not to apply an exemption¹¹.

[56] In this case, I find that the city has provided me with evidence demonstrating that it properly exercised its discretion in applying section 6(1)(b) to the records at issue. It did not take into account irrelevant considerations or fail to take into account relevant considerations in exercising its discretion. With respect to the appellant’s arguments about the public interest, the city reasonably considered that there is already significant information about this property in the public realm and, in particular, that release of the 2009 open session report provided information about the basis of the city’s decision-making about the property in question.

¹¹ See *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.).

[57] I therefore uphold the city's decision to apply section 6(1)(b) to withhold the remaining portions of the records at issue.

ORDER:

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

Original Signed By: _____
Sherry Liang
Senior Adjudicator

July 17, 2013 _____