

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2932

Appeal MA12-561

Town of Midland

August 12, 2013

**Summary:** The town received a request for a Staff Report which was adopted at a closed meeting of a Council committee. The town denied access to the responsive records on the basis of the discretionary exemption in section 6(1)(b) (closed meeting). The town's decision to deny access to the record (with attachments) on the basis of the exemptions in sections 6(1)(b) and 38(a) (discretion to deny requester's own information) 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); *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, section 239(2)(e).

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

### OVERVIEW:

[1] The Town of Midland (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for an identified staff report, which was adopted at the Planning and Development Committee of Council meeting on November 7, 2012.

[2] In response to the request, the town issued a decision denying access to the record on the basis of the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*. The town also referred to section 239(2)(e) of the *Municipal Act, 2001* as the statutory authority under which it held the in-camera meeting.

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

[4] During mediation, the town issued a further decision, in which it stated that access to the record was also denied on the basis of the discretionary exemption in section 12 (solicitor-client privilege) of the *Act*.

[5] Also during mediation, the appellant indicated that he was concerned that attendees at the in-camera meeting discussed his property and made a decision without allowing him to be present. In response, the town advised that the appellant's property was not the subject of discussion at the in-camera meeting, and no decision regarding the appellant's property had been made.

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

[7] I also noted that some of the records at issue may contain the personal information of the appellant and/or other identifiable individuals, and invited the parties to address whether the records contain personal information and, if so, whether the exemptions in section 38(a) (discretion to deny requester's own information), 38(b) and/or 14(1) (personal privacy) apply.

## **RECORD:**

[8] The record at issue is a Staff Report, including attachments.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the information in the records qualify for exemption under section 6(1)(b) and/or 38(a) in conjunction with section 6(1)(b) of the *Act*?

## **DISCUSSION:**

### **A. Do the records contain "personal information" as defined in section 2(1)?**

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1). That section reads:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[10] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>1</sup>

[11] As indicated above, the record at issue is an identified Staff Report, which includes a number of attachments. On my review of the record and the attachments, I note that one of the attachments contains a brief reference to the personal information of the appellant, as it contains his name along with other personal information relating to him (paragraph (h) of the definition). The other records at issue, (the staff report and the other attachments) do not contain the personal information of the appellant.

[12] I also note that some portions of the record and the attachments contain the personal information of other identifiable individuals. However, as a result of my findings below, for the purposes of this appeal it is not necessary for me to identify precisely which information relates to other individuals.

**B. Does the information in the records qualify for exemption under section 6(1)(b) and/or 38(a) in conjunction with section 6(1)(b) of the Act?**

[13] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[14] Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

[15] The town 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.

[16] 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

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<sup>1</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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.<sup>2</sup>

[17] 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***

[18] The town indicates in its representations that the meeting of November 7, 2012 was an in-camera meeting of the Planning and Development Committee, and that no members of the public were in attendance during the closed meeting.

[19] The appellant does not dispute that the in-camera meeting was held. In the circumstances, I am satisfied that the meeting took 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***

[20] In support of its position that this part of the three-part test is established, the town states that the meeting of November 7, 2012 was closed to the public in accordance with the provisions of section 239(2)(e) of the *Municipal Act, 2001*, which reads:

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

litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

[21] The town states that there was a resolution closing the meeting to the public pursuant to section 239(2)(e) of the *Municipal Act, 2001*, being "litigation or potential litigation," and provides a copy of the resolution which was passed prior to moving into the closed meeting. The town also provides a copy of its procedural by-law which outlines the closed meeting requirements, and states that all of the required conditions to allow the in-camera meeting to be held were met. It also states that the Ombudsman conducted an investigation into this specific closed meeting, and found

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<sup>2</sup> Orders M-64, M-102, MO-1248.

that the committee was permitted to discuss the matter under consideration in a closed meeting.

[22] The appellant does not directly address this part of the test.

[23] In the circumstances of this appeal, and based on the representations of the town, I am satisfied that the subject-matter under consideration at the in-camera meeting involved "litigation or potential litigation" within the meaning of section 239(2)(e) of the *Municipal Act, 2001*. Accordingly, I am satisfied that a statute authorized 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.

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

[24] 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]

[25] The town'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 the in-camera meeting. It states that if the record (with the attachments) were disclosed:

... it contains not only a history regarding the situation, it also provides a letter that would be considered Solicitor Client Privilege, and the various options that are available to the Committee. The substance of the discussion at the meeting was a direct result of reviewing the documents provided. As noted above the reason this meeting was held in Closed Session was due to potential litigation.

[26] The appellant's representations do not directly address this issue, but focus more on the reasons why he believes he ought to have access to the records. I address these submissions in my discussion of the town's exercise of discretion, below.

[27] Based on the town's representations and my review of the record (with attachments) at issue, I am satisfied that the disclosure of the record (with attachments) would reveal the actual substance of the deliberations of the in-camera meeting of November 7, 2012. The record at issue deals directly with the subject matter under discussion at the meeting, and I find that disclosure of the Staff Report

(with attachments) would reveal the substance of the deliberations of the in-camera meeting.

[28] I have also considered whether any portions of the records could reasonably be severed without disclosing the information that falls under the exemption in section 6(1)(b).<sup>3</sup> I note in particular that the appellant indicated an interest in the records as they relate to his property.

[29] The decision of the Divisional Court in *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*<sup>4</sup> has confirmed 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. However, on my review of the records, I find that they relate directly to the subject matter considered at the in-camera meeting. I also note that the town advised the appellant that the appellant's property was not the subject of discussion at the in-camera meeting, and no decision regarding the appellant's property had been made. In the circumstances, I find that the records cannot reasonably be severed without disclosing the information that falls under the exemption in section 6(1)(b).

[30] As a result, I find that all three parts of the three-part test in section 6(1)(b) are met. Accordingly, I am satisfied that the record (with attachments) that do not contain the personal information of the appellant qualify for exemption under section 6(1)(b) of the *Act*. With respect to the one attachment that contains the personal information of the appellant, I find that it qualifies for exemption under section 38(a), read in conjunction with section 6(1)(b). These findings are subject to my review of the town's exercise of discretion, below.

### ***Exercise of discretion***

[31] As noted above, sections 6(1)(b) and 38(a) are discretionary exemptions. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the record at issue. On appeal, the Commissioner may determine whether the institution failed to do so.<sup>5</sup>

[32] 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 consideration,
- it fails to take into account relevant consideration.

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<sup>3</sup> See section 4(2) of the *Act* which deals with the severability of a record.

<sup>4</sup> 2011 ONSC 2346 (Div.Ct.).

<sup>5</sup> Orders PO-2129-F and MO-1629.

[33] In such circumstances, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>6</sup> This office, may not, however, substitute its own discretion for that of the institution.<sup>7</sup>

[34] In its representations on the exercise of discretion, the town refers to the fact that the subject matter of the record and the attachments to it relates to potential litigation and the options available to the council. It also confirms that this matter was not discussed in an open meeting. The town refers to the nature of a number of the records, and suggests that they are solicitor-client privileged records. In addition, the town refers to section 38 and its relationship to the other discretionary exemptions under the *Act*, including section 6(1)(b). It states that it considered these exemptions in exercising its discretion to deny access to the record. It also states that it considered the discretionary nature of the exemptions and the relevant factors in good faith, and decided to apply the exemptions.

[35] The appellant's representations relate primarily to the reasons why he believes he ought to have access to the information. These include:

- that the town's actions relating to the zoning of certain properties have impacted the value of his property and his enjoyment of it;
- that the town has failed to take appropriate action with respect to certain zoning issues;
- that the town has in the past failed to advise him of certain Official Plan Amendments which have had an impact on his property;
- the appellant disputes the town's stated position on the zoning of certain properties, and identifies concerns about the actions of town staff;
- that the town has failed to provide him with relevant documentation in a timely manner in the past; and
- that the town has provided the appellant with inaccurate information in the past.

[36] The appellant also states that he has provided the town with a great deal of information relating to the actions of certain other property owners, but that he is unable to receive certain information about the town's activities or decisions regarding these actions. He states that he raised these concerns with the town "long before" any "pending litigation." He believes the town is using the exemptions in the *Act* to continue to deny him access to information about a situation which is having a negative impact on him and his property. He ends his representations by requesting that this office "encourage the town to engage in open discussion with him" with respect to the status of the property issues, and review possible alternatives to resolve this matter.

[37] I have reviewed the circumstances of this appeal and the records at issue. I note that the issue before me is whether the town properly exercised its discretion in

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<sup>6</sup> Order MO-1573.

<sup>7</sup> Section 43(2).



applying the exemptions to the record at issue. As set out above, the record is a staff report relating to potential litigation, and includes a number of attachments. I have found that the records relate directly to the subject matter considered at the in-camera meeting. I have also considered the fact that one of the attachments contains the appellant's personal information, as it contains a brief reference to him. I note that this reference to the appellant is very brief and relates more generally to background information provided to the Council committee. Based on my review of the records and the evidence provided by the town, I am satisfied that the town properly exercised its discretion to apply the exemptions to the record (with attachments).

[38] I understand the appellant's stated frustration regarding his inability to access records about a matter which he believes has a direct impact on him and his property, and his interest in knowing about the town's discussions and decisions regarding this matter. However, I have found that the town was authorized to consider the matter in a closed meeting. I also note that the subject matter relates to litigation or potential litigation, and that decisions regarding whether or not to engage in litigation eventually become public information.

[39] In summary, I have found that the record (with attachments) qualifies for exemption under section 6(1)(b) and 38(a). I have also found that the town has not erred in exercising its discretion not to disclose to the appellant the information contained in the records.

[40] As I have found that the information at issue is exempt under sections 6(1)(b) and/or 38(a), it is not necessary for me to determine whether the other exemptions relied on by the town apply to the records or portions of the records.

**ORDER:**

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

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ August 12, 2013