

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3241

Appeal MA14-51

Toronto District School Board

September 17, 2015

Summary: The appellant made a request to the board for records relating to its decision to sever and/or sell board property. The board located responsive records and withheld some of the information under the discretionary exemptions in sections 6(1)(b) (closed meeting) and 11 (economic or other interests) of the *Act*. The appellant raised the issue of whether the board's search for responsive records was reasonable. In this order, the adjudicator upholds the board's decision to withhold information under section 6(1)(b) and allows the appeal of the board's search for records. The adjudicator finds that the board did not meet its obligations to clarify the scope of the request with the appellant under section 17.

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

OVERVIEW:

[1] The appellant submitted a request to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "copies of all records, including drafts thereof, relating to the deliberations and decisions of the Board from December 12, 2012 to the present to sever and/or sell Board property, including, but not limited to, Bannockburn School..." The appellant's request also contained an inclusive list of various records he is seeking.

[2] The board located responsive records and issued a decision that provided him with partial access to them. It denied access to parts of some records under the

discretionary exemption in section 11 (economic and other interests) and the mandatory exemption in section 14(1) (personal privacy) of the *Act*, and also claimed that some information is not responsive to the request. In addition, it denied access to one record in full under the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*.

[3] During mediation, the appellant advised that he is not seeking access to the information in the records that is not responsive to his request or the information withheld under the personal privacy exemption in section 14(1). Consequently, those records are no longer at issue in the appeal. However, the appellant continues to seek access to the information withheld under sections 6(1)(b) and 11. The board confirmed that it was relying on sections 11(c) and (d) of the *Act*, specifically.

[4] The appellant advised the mediator that he believes that additional responsive records should exist, particularly for the period between December 2012 and September 2013. In response, the board conducted a further search for records and located a record titled, "Planning and Priorities Committee Report No. 35 (Private) June 12, 2013." It denied access to this record in full under section 6(1)(b) of the *Act*. The appellant confirmed that he is seeking access to it.

[5] The board stated that no further records exist that are responsive to the appellant's request. The appellant submits that he believes additional responsive records must exist. Accordingly, whether the board conducted a reasonable search for responsive records remains at issue.

[6] During the inquiry into this appeal, the adjudicator sought and received representations from the appellant and the board. In its representations, the board clarified that it was no longer relying on the discretionary exemptions in sections 11(c) and (d). Consequently, those exemptions are no longer at issue in the appeal. The board's representations were shared in accordance with *Practice Direction 7* and section 7 of the IPC's *Code of Procedure*. The file was then assigned to me to dispose of the issues in the appeal.

[7] In this order, I uphold the board's decision to withhold records under section 6(1)(b), but allow the appeal of the board's search for records.

RECORDS:

[8] The records remaining at issue are summarized in the following chart.

General Description of the record	Page numbers	Board's decision	Exemptions claimed
Excerpt from minutes of private	57 – 58 and one	Withheld in full	s. 6(1)(b)

meeting of Committee, June 19 – 20, 2013	unnumbered page		
Planning and Priorities Committee Report No. 35 (Private), June 12, 2013	33 – 34	Withheld in full	s. 6(1)(b)
Three-Year Capital Plan (private session) ¹	1 – 52 (attachment to report)	Withheld in full	s. 6(1)(b)
Email from CEO of Toronto Lands Corporation to board trustee	95, 99	Withheld in part	ss. 11(c) and (d)

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) apply to the records?
- B. Did the board exercise its discretion under section 6(1)(b)?
- C. Did the board conduct a reasonable search for records?

DISCUSSION:

Preliminary Issue

[9] As a preliminary matter, the board states in its representations that it is no longer relying on sections 11(c) and (d), the discretionary economic and other interests exemption. As section 11 is a discretionary exemption and the board has not claimed additional discretionary exemptions for withholding pages 95 and 99 of the records and, no mandatory exemptions apply to these pages, I will order the board to disclose the withheld information.

¹ Index to Committee Report

Issue A: Does the discretionary exemption at section 6(1)(b) apply to the records?

[10] The board submits that it has denied access to the records pursuant to section 6(1)(b) which 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 meeting²

[12] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;³ and
- “substance” generally means more than just the subject of the meeting.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] The appellant’s representations did not address the application of the exemption and I will not be citing them further in this part of the order.

Parts 1 and 2

[15] The board submits that the Committee of the Whole Board held an in camera meeting over June 19 – 20, 2013 pursuant to section 207(2)(c) of the *Education Act* that states:

² Orders M-64, M-102 and MO-1248.

³ Order M-184.

⁴ Orders M-703 and MO-1344.

⁵ Order M-102.

(2) 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;

[16] The board submits that the Committee of the Whole Board considered the Planning and Priorities Committee Report No. 35 and notes that the minutes of the meeting set out that the committee deliberated on surplus board properties and arrangements for their disposition.

[17] The board submits that this office has previously found that issues involving declarations of surplus property properly fall within the ambit of section 207(2), most recently in Order MO-2918. Finally, the board provided an affidavit from its Policy Officer in the Governance, Policy and Risk Management Office for the board who affirmed that she attended the *in camera* meeting.

[18] I find that the Committee of the Whole Board held a meeting on June 19 and 20, 2013. I further find that the Committee was authorized pursuant to section 207(2)(c) of the *Education Act* to hold the meeting in camera. In Order MO-3200, I reviewed Order MO-2918 and found that, the declaration of a school as surplus is a precursor to the sale of that property by the board. Accordingly, I find that parts 1 and 2 for the test under section 6(1)(b) have been met.

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

[19] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision⁶; and
- “substance” generally means more than just the subject of the meeting⁷

[20] 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 deliberations.⁸

⁶ Order M-184.

⁷ Orders M-703, MO-1344.

⁸ Orders MO-1344, MO-2389 and MO-2499-I.

[21] The board submits that the two records are composed of:

- a. The minutes of the June 19 – 20 meeting (specifically item 14) and associated attachment⁹
- b. The “Planning and Priorities Committee Report No. 35” – dated June 12, 2013 and the associated minutes of the in-camera meeting of the same date of the Planning and Priorities committee of the same date.

[22] The board submits that the June 19 – 20 meeting minutes describe, in part, the deliberations of the Committee during the meeting. The report was provided to the Committee of the Whole in order to facilitate their deliberations. The Report itself contains the recommendations for the Committee to deliberate upon, as well as the factual background to the recommendations. The minutes of the prior in-camera meeting of the Planning and Priorities Committee which accompanied the report also contain recommendations for consideration and deliberation by the Committee.

[23] The board argues that the records go beyond just identifying the subject matter for discussion and instead provide details of the substance of the disposition of property issue to facilitate the deliberation of the Committee. Lastly, the board notes that similar documents have been found exempt under section 6(1)(b) by this office.

[24] In the confidential portions of the board’s representations and the affidavit, the board establishes that the contents of both records were considered and discussed by the committee in its decision whether to accept the recommendations. The affiant affirmed that the substance of the in camera meeting was not considered at a public meeting of the board.

[25] Based on my review of the records and board’s representations, I am satisfied that disclosure of the records would reveal the actual substance of the deliberations of the committee’s in camera meeting held on June 19 – 20, 2013. Therefore, I find that the third requirement for the application of section 6(1)(b) has been met. I further find that the exception in section 6(2)(b) does not apply in the circumstances. Accordingly, I find that the records at issue are exempt under section 6(1)(b) and uphold the board’s decision, subject to my consideration of the board’s exercise of discretion.

Issue B: Did the board exercise its discretion under section 6(1)(b)?

[26] 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.

⁹ The board notes that the attachment is an excerpt from the Report No. 35, the second record at issue in this appeal.

[27] 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.

[28] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

[29] The board submits that it exercised its decision to apply section 6(1)(b) reasonably, in the circumstances. It states:

The board agrees that it should be held accountable for the decision it makes, including those related to school closures. However, the board submits that it is extremely important to maintain the ability of individual trustees to deliberate candidly on factors considered relevant by members of the board without fear of reprisal from members of the public in order to achieve results which reflect the best interests of the board and the community as a whole.

[30] I find that the board properly considered the nature of the information at issue and its sensitivity both to the operation of the board, and also to the trustees and their ability to deliberate on the disposition of board properties. I further find that the board considered the principles of the *Act*, including whether disclosure will increase public confidence in the operation of the institution. Based on my review of the board's representations and the records withheld under section 6(1)(b), I find that the board properly exercised its discretion in the circumstances.

Issue C: Did the board conduct a reasonable search for records?

[31] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹² If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[32] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to

¹⁰ Order MO-1573.

¹¹ Section 43(2).

¹² Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.¹³ To be responsive, a record must be "reasonably related" to the request.¹⁴

[33] A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request.¹⁵

[34] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹⁶

[35] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹⁷

[36] The appellant submitted extensive representations on this issue. He notes that in December 2012, the board adopted a comprehensive plan designed to ensure that communities affected by severances and sales of board properties would be consulted in advance of such decisions. To that extent, the appellant mirrored the requirements of the December 2012 policy in his request. I reproduce the appellant's representations here:

December 2012 TDSB policy	MFIPPA request
Therefore, be it resolved:	I request copies of all records, including drafts thereof, relating to the deliberations and decisions of the board from December 12, 2012 to the present to sever and/or sell board property, including but not limited to Bannockburn School, including:
(a) That the Toronto Lands Corporation report to the board in April 2013 on the amount and location of land that they believe it is technically feasible to sever and sell and that the report include the likely revenue that would be generated with each such sale and include any actions that would need to be taken to	1. The report of the Toronto Lands Corporation to the Board on the amount and location of land that they believe it is technically feasible to sever and sell

¹³ Orders P-624 and PO-2559.

¹⁴ Order PO-2554.

¹⁵ Orders M-909, PO-2469 and PO-2592.

¹⁶ Order MO-2185.

¹⁷ Order MO-2246.

maximize revenue from the sale;	
(b) That the Director ensure that all properties being reviewed for severance meet at least the following criteria	2. with respect to Bannockburn School, the Director's records regarding her assessment that:
(i) That the remainder of the school site is not reduced in its capacity to fulfill the operational needs of a school on that site, e.g. building, playgrounds, hard and soft play surfaces, baseball diamond, playfields, etc.	a. the remainder of the Bannockburn School site will not be reduced in its capacity to fulfill its operational needs, e.g. building, playgrounds, hard and soft play surfaces, baseball diamond, playfield, etc.
(ii) That sufficient parking space is preserved for the needs of the school;	b. Sufficient parking space will be preserved for the needs of Bannockburn School;
(iii) That sufficient area be preserved in order to accommodate future potential enrollment increases, due either to demographic changes or grade configuration changes;	c. Sufficient area will be preserved in order to accommodate future potential enrollment increases, due either to demographic changes or grade configuration changes;
(iv) That no more than two sites per ward be considered for severance within a capital year;	d. No more than two sites per ward be considered for severance within a capital year;
(v) That the review of property include reporting on access to green space and recreation facilities in the surrounding community;	e. The review of property include reporting on access to green space and recreation facilities in the surrounding community;
(vi) That the review of property include reporting on the use of the property for outdoor programs, such as but not limited to the Board's Nature Study Areas program and sporting events;	f. The review of property include reporting on the use of property for outdoor programs, such as but not limited to the Board's Nature Study Areas program and sporting events;
(c) That, following a technical feasibility for severance report and prior to any public consultation or decision by the Board to sell severed property, that staff, including planning, facilities and environmental staff as well as the local superintendent, consult with local trustee	3. The technical feasibility for severance report; 4. Records of Board staff, including planning, facilities and environmental staff as well as the local superintendent, regarding consultations with [named

<p>for input regarding the proposed severance sites within the trustee's ward;</p> <p>(d) That trustee commentary from consultation with staff be attached as part of any subsequent reports on the property considered for severance</p>	<p>trustee], including members of his staff or office, for input regarding the proposed severance sites within [named trustee's] ward (which was required to take place following a technical feasibility for severance report and prior to any public consultation or decision by the Board to sell severed property);</p> <p>5. All trustee commentary from consultation with staff that was attached as part of any subsequent reports on the severance of properties including but not limited to the Bannockburn School field;</p>
<p>(e) That, following a technical feasibility for severance report and following consultation with the local trustee of the property being considered for severance, the local community be consulted on the proposed severance, including:</p>	<p>6. Records relating to consultations with the local community on the proposed severance (which was required to occur following a technical feasibility for severance report and following consultation with [the named trustee]), including:</p>
<p>(i) That information on the proposal for severance be given to and feedback sought from the local community, including local school parents, local school staff, where applicable neighbourhood child care, where applicable, the local councillor, local resident associations, as well as the general public;</p>	<p>a. Information on the proposal for severance that was given to, and feedback received from the local community, including local school parents, local school staff, the local councillor, local resident associations, as well as the general public;</p>
<p>(ii) That the reason for severance to fulfill capital needs of the Board be shared with the community;</p>	<p>b. Records provided to the community showing the reason for severance was shared with the community;</p>
<p>(iii) That the proposed amount and location of property to be severed be discussed</p>	<p>c. Records demonstrating that the proposed amount and location of property to be severed was discussed with local community;</p>
<p>(iv) That the community be invited to propose alternatives to severance that</p>	<p>d. Records demonstrating that the community was invited to propose</p>

<p>will still meet the capital needs of the Board</p>	<p>alternatives to severance that will still meet the capital needs of the Board and any response thereto;</p>
<p>(v) That the community be informed of the steps taken by the Board that will occur in the process to sever and sell land within the community;</p>	<p>e. Records demonstrating that the community was informed of the steps taken by the Board that will occur in the process to sever and sell properties of the Board including but not limited to the Bannockburn School property;</p>
<p>(vi) That the role of the City of Toronto and City processes, should the land be approved for severance also be outlined to the community as part of the information provided during consideration of and prior to any approval for severance</p>	<p>f. Records demonstrating that the role of the City of Toronto and City processes were outlined to the community as part of the information provided during consideration of and prior to any approval for severance;</p>
<p>(f) That, following a technical feasibility for severance report and consultation with the local community, the Director present a report on what might be done to return benefit to the local community in which a sale of land is being proposed;</p>	<p>7. the Director's report on what might be done to return benefit to the local community surrounding the Board's properties including but not limited to the Bannockburn School property (which is required to be prepared following a technical feasibility for severance report and consultation with [named councillor] and the local community surrounding Bannockburn School);</p>
<p>(g) That, following consultation with the local community, subsequent reports to trustees on a proposal for severance from the Director include a listing of alternatives to severance proposed by the local community</p>	<p>8. Any subsequent reports to trustees on a proposal for severance from the Director that include a listing of alternatives to severance proposed by the local community.</p>
<p>(h) That, if needed, an ad hoc Severance Committee with trustee members only be formed in order to determine additional criteria for severance or to detail any of the above criteria</p>	<p>N/A</p>

[37] The appellant submits that each of the seven items above in items (a) through (g) contemplates the preparation of some kind of document, report, consultation or analysis. He states:

With the exception of an information meeting held in October 2013 at Ledbury Park Elementary and Middle School, three months after the decision was made in June 2013 to sever and sell the Bannockburn Green Space, there is no evidence that any of those aforementioned reports or assessments or consultations took place.

...

At a minimum, I expected to receive a copy of the April 2013 TLC report, and materials that were used in the Director [of] Education's assessment of the properties that were being examined for severance. No such materials were provided. Nor were any similar materials identified but withheld.

[38] The appellant argues that the board's search was not reasonable because it adopted a very narrow interpretation of his request:

Paragraph 3 of the [board coordinator's] affidavit omits one very important word from the original request:

I request copies of all records, including drafts thereof, relating to the deliberations and decisions of the Board from December 12, 2012 to the present to sever and/or sell Board property, including but not limited to Bannockburn School, including:

[emphasis in original]

[39] As the appellant notes, the board provided an affidavit from its Freedom of Information Coordinator who affirmed that the appellant asked for:

..all records including drafts relating to deliberations and decisions by the Board from December 12, 2012 to the date of the request (November 12, 2013) involving the severance/sale of Board property including but not limited to Bannockburn School.

[40] The affiant goes on to depose the following about the search for responsive records:

In the course of my search, I became aware that the Board deliberated upon the disposal of Board property at its meeting of June 19 – 20, 2013 at an in-camera session of the Committee of the Whole Board.

...

I am aware that the Board did not deliberate upon these matters in public session during the applicable period. Moreover, a review of the in-camera sessions of the Board while in Committee of the Whole Board reveal that these matters were not deliberated at any other in-camera sessions of the Board during the applicable period.

For the sake of clarity, I note that a Board sub-committee, the Planning and Priorities Committee, had considered the issue of the disposal of Board property at its meeting of June 12, 2013. However, I note that this sub-committee does not constitute "the Board" nor are its deliberations equivalent to "Board" deliberations. Sub-committees are comprised of subsets of Board trustees. They do not have authority to act as the Board. The Board is comprised of the entire group of elected trustees.

As noted above, the Board conducts its deliberations and makes its decisions while in-camera when it is constituted as the Committee of the Whole Board.

[41] In reply to the appellant's representations about the narrowing of his request, the board noted that the scope of the appellant's request was very clear and that it was not necessary to contact him to clarify his request. Furthermore, it states:

To the Institution's knowledge, any of the other records described by the Requester, to the extent they exist, were not provided to the Trustees at the June 19 – 20, 2013 meeting. The Requester has provided no evidence or support to support a finding that Trustees had been provided the records described in his submissions.

The Board submits that in order for a record to relate to the deliberations/decisions to sell/sever a Board property there must be (a) evidence of deliberations/decisions and (b) some connection between the records to the deliberations. Such a connection arises where records are provided to Trustees. The Requester has not identified any connection between the records and the deliberations/decisions of the Trustees at the June 19 – 20, 2013 meetings. The Board submits that any such records, to the extent that they exist, cannot relate to the deliberation of the Board if the records were not provided, in whole or in part to the deliberating parties.

[42] The board also distinguishes between the December 12, 2012 meeting where a policy document was created to establish a process to allow the board to deliberate and make decisions about the sale or severance of board properties at a later date and the later meeting of June 19 – 20, 2013 where the board actually deliberated about the sale

and/or severance of board property.

[43] Finally, the board disputes the appellant's interpretation of the meaning of "including" in his request and submits that the appellant is attempting to expand the scope of his request.

[44] As the parties have identified, in order for me to determine the issue of whether the board conducted a reasonable search in the circumstances of this appeal, I must determine the scope of the appellant's request.

[45] In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive". She went on to state:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

[46] Similarly, this office has held in past decisions, that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹⁸

[47] While the board argues that the appellant's request was clear in scope and that it did not need to clarify it, I find that it unilaterally narrowed the scope of his request. The appellant's request is a type-written, single spaced document over a page in length, yet the board's interpretation of it is limited to only one sentence, specifically: "all records, including drafts thereof, relating to the deliberations and decisions of the Board from December 12, 2012 to the present to sever and/or sell Board property, including but not limited to Bannockburn School".

[48] It is arguable that the first part of the appellant's request was clear and detailed; providing sufficient detail for the board to conduct its search. However, I find that it was unclear whether the appellant understood or was even aware that an *in camera* meeting of the board is "the Committee of the Whole Board" or even how the board considered the sale or severance of board property. While the board is in a position to make the distinction about deliberations of the Committee of the Whole Board versus records put before a board sub-committee, the appellant may not have known this distinction when making his request. I find that it is the board that was in the best position to inform the appellant of these distinctions and to help the appellant

¹⁸ Orders P-134 and P-880.

determine the scope of his appeal based on this information.

[49] Despite the board's argument about the dictionary definition of "including" used in the appellant's request, I find the request was sufficiently ambiguous in its breadth to require that the board contact him and to clarify whether the appellant was indeed only seeking the records deliberated on by the Committee of the Whole Board or whether he sought the specific records, reports and information considered by the board and detailed in the rest of his request. I find that it would have been reasonable for the board to clarify the appellant's request on this point and not to have unilaterally narrowed his request to that single sentence. Again, the board could have interpreted any ambiguity in the appellant's favour and done a search for additional records responsive to the rest of his request.

[50] I find that the board improperly narrowed the scope of the appellant's request and in doing so limited the scope of its search for responsive records. The board's representations in favour of its search rest solely on its own definition of the scope of the request and it has not provided me with sufficient evidence to establish that it properly searched for all records reasonably relating to the appellant's request. I find that the board's search for records was not reasonable in the circumstances and I allow this aspect of the appeal. I will order the board to contact the appellant and offer assistance in reformulating or clarifying his request in order that it can conduct a search for responsive records, as is required under section 17.

ORDER:

1. I uphold the board's decision to withhold the records at issue from disclosure under section 6(1)(b) of the *Act*.
2. I order the board to disclose pages 95 and 99 of the record as it no longer claims the information is exempt under section 11.
3. I allow the appeal of the board's search for responsive records and order the board to contact the appellant to clarify the scope of his request and conduct a search for responsive records based on the clarified request treating the date of this order as the date of the request.
4. I remain seized of any issues arising out of this order.

Original Signed by: _____
Stephanie Haly
Adjudicator

September 17, 2015