

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3171

Appeal MA13-572

The Corporation of the City of Oshawa

March 25, 2015

Summary: The appellant sought access to records related to the appraisal of a specified property that was purchased by the city. The city located four responsive records and issued a decision denying access to them. The city relied on the discretionary closed meeting exemption in section 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* to deny access. The appellant appealed the decision of the city. The city's decision is upheld.

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

Orders and Investigation Reports Considered: Orders M-184, M-196 and MO-1248.

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

OVERVIEW:

[1] The Corporation of the City of Oshawa (the city) received a request for access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the following real estate appraisal records related to a specific property:

1. The draft appraisal dated July 6, 2012, prepared by a named realty appraisal and consulting firm (Firm 1).

2. The final appraisal by Firm 1.
3. The review of the final appraisal by a second realty appraisal and consulting firm (Firm 2).
4. The review of the final appraisal by a third realty appraisal and consulting firm (Firm 3).
5. Any other documents related to the appraisal of the property provided to Council by the City Clerk on March 26, 2013.

[2] The city located four records that were responsive to the request and denied access to them in their entirety. The city relied on the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act* to withhold the responsive records.

[3] The appellant appealed the city's decision to this office. A mediated resolution was not possible and the appeal was transferred to the adjudication stage of the appeal process for a written inquiry under the *Act*.

[4] During my inquiry, I identified a number of pages that related to the real estate appraisal of a property other than the one specified by the appellant in his request. Specifically, pages 23 through 27 in both records 1 and 2 as well as two pages in the "ADDENDA" section of records 1 and 2. This information was communicated to the appellant who confirmed that he is not interested in pursuing access to the portions of the records relating to this second property. Accordingly, these pages are no longer at issue in this appeal and I will not address them further in this order.

[5] I sought and received representations from the parties and shared these in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[6] In this appeal, I uphold the city's decision.

RECORDS:

[7] The records at issue in this appeal are the following:

1. The final appraisal by Firm 1 dated July 6, 2012, excluding the non-responsive pages 23 to 27 and two pages in the ADDENDA.
2. The draft appraisal by Firm 1 dated July 6, 2012, excluding the non-responsive pages 23 to 27 and two pages in the ADDENDA.

3. The review by Firm 2 dated July 18, 2012.
4. The review by Firm 3 dated September 11, 2012.

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) apply to the records?
- B. Did the city 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) apply to the records?

[8] The city claims that the records are exempt under section 6(1)(b) of the *Act*, 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.

[9] In order for the records to qualify for exemption under section 6(1)(b), the city 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

[10] 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*.² In determining whether there was statutory authority to

¹ Orders M-64, M-102 and MO-1248.

² Order M-102.

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 meeting.³

[11] With respect to the third requirement set out above, section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. Rather, it 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.⁴ Previous orders of this office have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;⁵ and
- "substance" generally means more than just the subject of the meeting.⁶

[12] Section 6(2) of the *Act* sets out exceptions to section 6(1). 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.

[13] 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 held and was it authorized by statute?

[14] The city states that on March 20, 2013, city council (Council) held a closed meeting to discuss Confidential Report CM-13-29 and a proposed acquisition of land. It relies on section 239(2)(c) of the *Municipal Act, 2001*,⁷ which provides Council with the authority to hold closed meetings if the subject matter being considered is:

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

³ *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div. Ct.).

⁴ Orders MO-1344, MO-2389 and MO-2499-I.

⁵ Order M-184.

⁶ Orders M-703 and MO-1344.

⁷ S.O. 2001, c.25. (*Municipal Act*)

[15] The city also relies on section 10A(1)(c) of its By-Law 126-75, which mirrors section 239(2)(c) of the *Municipal Act*, and section 10A(2) of the By-Law, which states:

10A(2) Before holding a meeting or part of a meeting that is closed to the public, a resolution shall be passed stating the fact that a closed meeting is to be held and giving the general nature of the matter to be considered at the closed meeting.

[16] The city explains that in accordance with section 7(8)(1) of the By-Law, the City Clerk delivered written notice of the closed meeting scheduled for March 20, 2013, at 1:30pm on March 15, 2013, and it attaches a copy of this "Notice/Agenda for Special Meeting of City Council" to its representations. It further explains that prior to closing the March 20th meeting to the public, Council passed a resolution permitting it to close the meeting under section 239(4) of the *Municipal Act* and section 10A(2) of By-Law 126-75.

[17] In his representations, the appellant does not dispute the city's statutory authority to close the March 20th meeting to the public. He accepts that the March 20th closed meeting was held in accordance with the applicable statute and regulation.

[18] Based on the evidence before me, including the copy of By-Law 126-75 provided by the city, I am satisfied that Council held a closed meeting on March 20, 2013, for the purpose of considering the proposed acquisition of land, as it was authorized to do under section 239(2)(c) of the *Municipal Act* and sections 10A(1)(c) of By-law 126-75, and in satisfaction of the notice requirement under section 7(8)(1) of the By-Law. While the city did not provide me with a copy of the resolution passed by Council on March 20th permitting Council to close the meeting, I accept that Council passed such a resolution, and that the city has established parts 1 and 2 of the test under section 6(1)(b). I now turn to the sole disputed issue in this appeal: whether disclosure of the records at issue would reveal the substance of the closed meeting deliberations.

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

The city's representations

[19] The city states that during the course of Council's deliberations of Confidential Report CM-13-29 at the closed meeting of March 20, 2013, the issue of any assessments and appraisals related to the proposed acquisition of land was raised and discussed. It explains that at the closed meeting, Council members asked city staff, including the City Manager, the Commissioner, Community Services, and the Auditor General, questions about any assessments and appraisals obtained by them in relation to the proposed acquisition of land, as the relevant assessments and appraisals were

not attached to Confidential Report CM-13-29 reviewed at the closed meeting. The city submits that in order to clarify any issues related to the assessments and appraisals of the lands proposed to be acquired, Council directed the City Clerk to provide Council members with all relevant assessments and appraisals. The city states that as a result, all assessments and appraisals, including the records at issue in this appeal, were circulated to councilors under the cover of a confidential memorandum dated March 26, 2013 (the March 26 memorandum).

[20] The city submits that in deliberating Confidential Report CM-13-29 at the closed meeting, and specifically the proposed acquisition of land, Council, through its questioning of city staff, deliberated the contents of the assessments and appraisals that form the substance of the March 26 memorandum. The city asserts that the records at issue were discussed with a view toward making a decision with respect to the proposed acquisition of land, and it relies on Order MO-1248 in support of its position. It also cites the following passages from Orders M-184 and M-196 respectively, in which former Assistant Commissioner Irwin Glasberg commented on the term "deliberations":

In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those discussions. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case.⁸

...

The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in-camera meeting was whether the terms of the retirement agreement were appropriate and whether they should be endorsed.⁹

⁸ Order M-184, pages 2 and 3.

⁹ Order M-196, page 3.

[21] The city submits that the records at issue are intrinsically linked to Council's deliberations during the March 20th meeting; they address solely the appraised values of the lands proposed to be acquired by it and they form the basis for both its approach to acquiring certain lands, as well as the deliberations of the March 20th meeting. It states that the "theme or subject" of the closed meeting was the proposed acquisition of land by it and the records at issue form the crux of Council's deliberations. The city adds that on June 10, 2013, Council directed that a series of confidential reports, including CM-13-29, be made available to the public, however, Council did not direct that the March 26 memorandum be made publicly available.

[22] With respect to the section 6(2) exceptions to the exemption, the city notes that on March 20, 2013, Council directed among other things, that "pursuant to Confidential Report CM-13-29 dated March 15, 2013, staff be directed to proceed with the potential acquisition of land as set out in the report." It continues that its intention is to construct a centralized operations depot on the land assessed and appraised in the records at issue. The city adds that while the proposed and now ongoing construction of the depot has been discussed in meetings open to the public, the records at issue, including the value and attributes of the land and the city's considerations in relation to their potential purchase, have never been specifically considered in a meeting open to the public.

The appellant's representations

[23] The appellant challenges the city's argument that the substance of the deliberations would be revealed if the records at issue were disclosed. He asserts that he has requested a technical evaluation and reviews of the evaluation that informed the discussion at a meeting. The appellant argues that the orders relied on by the city, M-196, M-184 and MO-1248, are distinguishable because the records at issue in those appeals were settlements in personnel matters and minutes of settlement. He states that personnel matters were discussed in the closed meeting at issue in Orders M-196 and M-184, while minutes of settlement in a personnel matter were at issue in Order MO-1248. He notes that Order M-184 which is cited in Order MO-1248, states that deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view to making a decision.

[24] The appellant also challenges the city's assertion that the records were the theme or subject of the closed meeting; rather, he argues, they were one small piece of information supplied to Council in support of an extensive order of business. The appellant contends that the city has made the records "secret" by including them in the March 26 memorandum which is a confidential memorandum to itself. He does not accept that the records are confidential simply because the city says they are. He also accuses the city of inappropriately protecting the interests of the real estate firms who offered wildly different valuations of the property, which in turn, has created

controversy and mistrust in the community. The appellant states that the *Act* is not intended to protect errant business practices.

The city's reply representations

[25] Replying to the appellant's representations, the city states that in citing previous orders of this office, it did not intend to liken the records at issue in this appeal to minutes of settlement or other personnel documents, but to rely on statements made and positions taken by adjudicators in previous appeals in relation to sections of the *Act*.

[26] To support its submission that disclosure of the records would reveal the substance of Council's closed meeting deliberations the city provides confidential reply representations that address the substance of Council's deliberations on March 20, 2013, as they relate to the records at issue. The city sets out a specific position and issues put forward and deliberated during the closed meeting, and it explains the connection between these deliberations and the records at issue.

Analysis and findings

[27] Under part three of the test, I must determine whether disclosure of the records at issue would reveal the actual substance of Council's deliberations during the *in camera* meeting. The city has the onus of establishing how disclosure of the records would reveal the actual substance of the deliberations at the meeting and not merely the subject of the deliberations.

[28] The evidence before me is that Council discussed the acquisition of land during its closed meeting and that the deliberations on this issue included questions from Council members to city staff about the appraisals and assessments obtained. The records address the appraised value of the land proposed to be acquired by the city in the form of an official appraisal and two reviews of the appraisal; thus, I accept the city's submission that the records form both the subject and substance of and are intrinsically linked to Council's deliberations of March 20th on the proposed acquisition of land. The appellant acknowledges in his representations that the acquisition of land formed part of Council's deliberations; however, he points out that it was merely one part of a more extensive order of business. While this may be accurate, it does not detract from Council's authority to go *in camera* to discuss the acquisition of land which I have upheld above, nor does it have a bearing on the third part of the test under section 6(1)(b).

[29] I accept the city's position that the records form the basis for both its approach to acquiring the land and for the deliberations of the March 20th meeting which were conducted with a view toward deciding whether or not to complete the acquisition of land at issue. The city's submissions that the records contain information that city staff

provided to Council during the closed meeting of March 20th to inform Council's deliberations about the identified property, and that Council had some discussion about the appraisal and the reviews of the appraisal as they relate to the acquisition, are supported by: the Notice of the March 20th meeting which identifies a decision on the potential acquisition of land as the first item for discussion; and the fact that Council directed during the March 20th meeting that staff provide the records to it. In addition, the city's confidential representations demonstrate how disclosure would reveal the substance of Council deliberations by describing specific information on the position taken by a staff member, and an appraisal-related issue that Council debated at the closed meeting.

[30] Having reviewed all of the materials and submissions before me, including the city's confidential representations, I accept the city's assertion that disclosure of the records could be expected to reveal the issues that were identified by Council with respect to the proposed acquisition of land and the substance of Council's deliberations on the appraisal process, including the merits of the valuations. In this regard, I find the city has provided me with sufficient evidence to conclude that disclosure of the records would permit the drawing of accurate inferences about the substance¹⁰ of Council's discussions.

[31] I find that the city has established that disclosure of the records would reveal the substance of the deliberations of Council at the March 20, 2013, closed meeting. Accordingly, subject to my consideration of the city's exercise of discretion below, I find that the records qualify for exemption under section 6(1)(b) of the *Act*.

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

[32] The section 6(1)(b) exemption is discretionary and permits the city 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.

¹⁰ Orders M-184 and M-196.

[33] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹² Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹³

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether 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.

[34] The city submits that it exercised its discretion under section 6(1)(b) to withhold the records. It states that it did so on the basis that the records were provided to Council members at the direction of Council during the course of a meeting closed to the public, in the form of a confidential memorandum from the City Clerk to Council members. It adds that Council, despite making several reports public, specifically did not direct that the March 26 memorandum appending the records be made public. The city states that the records do not contain personal information of the appellant or any other individual, but rather, contain commercial information relating to the proposed acquisition of land by the city. It adds that in exercising its discretion to withhold, it considered the nature of the records along with the wording of the exemption and the interests section 6(1)(b) seeks to protect. The city concludes that since Council received the records confidentially pursuant to its direction during a closed meeting and has not directed that the records be made public, it is appropriate to withhold the records under section 6(1)(b) of the *Act*.

¹¹ Order MO-1573.

¹² Section 43(2) of the *Act*.

¹³ Orders P-344 and MO-1573.

[35] The appellant argues that the city has not identified the interests the city seeks to protect in exercising its discretion and suggests that the city is inappropriately protecting the interests of the firms who prepared “wildly differing valuations” of the property. He asserts there is a public interest in understanding the process by which the property was appraised and the potential for error in that process, and this can best be served by disclosing the records. The appellant argues that the fact that the real estate transaction was between two public institutions and that it has been completed should justify public scrutiny.

[36] In reply, the city states that it considered the totality of the information already publicly available, including the reports made public through a direction of Council on June 10, 2013.

Analysis and findings

[37] I find that the city exercised its discretion under section 6(1)(b) of the *Act* in denying access to the records. I am satisfied the city took into account relevant factors, including the wording of the section 6(1)(b) exemption and the interests that the exemption seeks to protect. While I agree with the appellant’s points that there is some public interest in disclosure of the records, I am satisfied that the city adequately considered this in exercising its discretion by turning its mind to the volume of information already publicly available on the acquisition of land at issue and the overall project. The evidence I have before me is that Confidential Report CM-13-29 which was before Council at the March 20th meeting and which dealt extensively with the proposed acquisition of land, was subsequently published by the city in its entirety. Confidential Report CM-13-29 contains a statement of the Auditor General which sets out his position on the proposed acquisition of land. It also contains the full report to Council from the City Manager and the Commissioner, setting out the recommendation of city staff on the entire project, the financial implications of the project, the purchase and sale agreements relating to the land proposed to be acquired and other information about the overall project to construct a centralized operations depot. This is a significant amount of information.

[38] I acknowledge the appellant’s point that disclosure of the records would increase transparency on the acquisition between two public institutions, particularly now that the acquisition has been completed. The city could have decided to disclose the records and add to the transparency it has already shown by publishing a considerable amount of information on the overall project. However, the city exercised its discretion to withhold the records as it was entitled to do under the *Act* and I have found that the records properly qualify for exemption. There is no evidence that the city exercised its discretion in bad faith or for an improper purpose or that it took into account irrelevant considerations. For these reasons, I uphold the city’s exercise of discretion.

ORDER:

I uphold the decision of the city to withhold the records under section 6(1)(b) and dismiss the appeal.

Original signed by: _____
Stella Ball
Adjudicator

_____ March 25, 2015