Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3200

Appeal MA13-626

Toronto District School Board

May 19, 2015

Summary: The appellant made a request to the board for records relating to the purchase and sale of a specified school building. The board denied access to the responsive records on the basis of the discretionary exemptions in sections 6(1)(b) (closed meeting) and 11(c) and (d) (economic or other interests). The board's decision to deny access to one record on the basis of the exemption in section 6(1)(b) is upheld, and the other two response records are ordered disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 11(c), (d); *Education Act*, R.S.O. 1990, c. E.2, as amended, section 207(2)(c).

Orders and Investigation Reports Considered: MO-1935, MO-2060-R, MO-2918, P-1022.

OVERVIEW:

[1] The appellant made a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> All Purchase & Sale documents and any agreements relating to the sale of Arlington Senior Public School (Arlington Middle School) at 501 Arlington Avenue (in the former City of York) to Leo Baeck Day School (a private

> school) including documents relating to the original purchase of Arlington Senior Public School by the Catholic (French) Board and documents relating to the use of land & amenities by Leo Baeck Day School in Cedarvale Park to which the school adjacent [*sic*].

[2] Upon receipt of the request, the city transferred that part relating to "purchase and sale documents" to the Toronto District School Board (the board). The board conducted a search in response to that part of the request and located responsive records. The board issued a decision to the appellant, advising that it denied access to the responsive records under the discretionary exemptions in section 6(1)(b) (closed meeting) and 11(c) and (d) (economic and other interests of the institution).

[3] In the appellant's appeal letter to this office she claimed that there is a public concern and interest in the disclosure of the requested records, thereby raising the possible application of the public interest override in section 16 of the *Act*.

[4] During the inquiry, the adjudicator sought representations from the appellant, the board and the Leo Baeck Day School (affected party). Only the appellant and the board provided representations. Representations were shared in accordance with section 7 of the *IPC's Code of Procedure* and *Practice Direction 7*. The appeal was then transferred to me to complete the order.

[5] In this decision, I uphold the board's decision, in part.

RECORDS:

[6] The records at issue in this appeal consist of the following:

Record 1: Minutes of the Committee of the Whole (11 pages)

Record 2: Agreement of Purchase and Sale, dated June 7, 2011 (36 pages)

Record 3: Lease Agreement (19 pages)

ISSUES:

A. What is the scope of the request?

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

C. Does the discretionary exemption at section 11(c) and/or (d) apply to the records?

D. Was the board's exercise of discretion proper in the circumstances?

DISCUSSION:

A. What is the scope of the request?

[7] The board identified that portions of Record 1, the minutes of the Committee of the Whole, are not responsive to the appellant's request. Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[8] 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.[1]

[9] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[10] The board submits that the portions it has identified as not responsive to the request relate to board matters that were dealt with at the same meeting where the Arlington School surplus declaration was discussed and fall outside the scope of the subject matter of the appellant's request. As stated above, the appellant's request relates to the purchase and sale of Arlington Middle School, only.

[11] The information identified as not responsive to the appellant's request does not relate to Arlington Middle School in any way. I find that this information does not "reasonably relate" to the appellant's request and even a liberal interpretation of the appellant's request would not include the severed information.

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

[12] Accordingly, I uphold the board's decision that this information is not responsive to the request. However, the remaining portions of the minutes designated as Record 1 relate to the sale of the Arlington school and are, accordingly, responsive to the request.

B. Does the discretionary exemption at section 6(1)(b) apply to Record 1?

[13] The board claims that section 6(1)(b) applies to exempt Record 1 from disclosure.[3] This 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.

[14] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting[4]

Parts 1 and 2

[15] The board submits that the Committee of the Whole held an in-camera meeting on September 7, 2010. Furthermore, the Committee made a decision to hold the meeting in-camera pursuant to section 207(2)(c) of the *Education Act* which states:

> (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;

[3] In its representations, the board clarified that it no longer relied on section 6(1)(b) to exempt Records 2 and 3.
[4] Orders M-64, M-102 and MO-1248.

[16] The board submits that the subject matter under consideration at the meeting was the "acquisition or disposal of a school site" and that Record 1 relates to the board's disposal of a board school site. Furthermore, the board notes that the *Education Act* defines the term "disposal" to include the sale of a school site in section 194(3) which reads, in part:

> Subject to subsections (3.3) and (4), a **board has power to sell, lease or otherwise dispose of** any school site of the board or any property of the board, [emphasis in original]

[17] The board states:

> Following the board's declaration that the Arlington Middle School site was surplus to its needs, the site was sold as evidenced by the Record 2 in this matter which constitutes the purchase and sale of the property.
>
> The board submits that the declaration of the school site as surplus to its needs is an integral and necessary step in the disposal process and therefore the in camera meeting considering the proposed declaration properly fell within the provisions of s. 207(2)(c).

[18] 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 MO-2918. Lastly, the board provided an affidavit of its Senior Manager for Board Services where the affiant confirms the deliberation of the meeting relating to the surplus declaration.

[19] The appellant's representations do not address the application of section 6(1)(b).

Findings

[20] I find that the Committee of the Whole Board held a meeting on September 7, 2010. I further find that the Committee of the Whole Board was authorized pursuant to section 207(2)(c) of the *Education Act* to hold the meeting in camera.

[21] In Order MO-2918, Senior Adjudicator Frank Devries considered whether deliberations of the board about the "rescinding of a surplus declaration" met the meaning of "disposal" for the purposes of the *Education Act*. In finding that it did, Senior Adjudicator Devries states:

> However, as noted by the board, a surplus declaration is a condition precedent to selling a property and, by rescinding the surplus declaration, the property ceases to be subject to the disposition process. In these circumstances, I am satisfied that the board's decision to rescind the

> surplus declaration was a decision in which the subject-matter under consideration involved the disposal (or, in this case, the decision not to dispose) of a school site.

[22] I adopt this rational for the purposes of this appeal. In the present appeal, the Committee of the Whole Board was considering whether to declare Arlington Road Middle School as surplus. This, as stated above, is a precursor to the board selling the property, which, as the other records at issue reveal, it did.

[23] Accordingly, I find that the board has met both parts 1 and 2 for the test under section 6(1)(b).

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

[24] Previous orders 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]

[25] 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.[7]

[26] The board submits that the contents of Record 1 would reveal the substance of the deliberations of the September 7, 2010 meeting about the surplus declaration of the Arlington Middle School. As stated above, the board provided with its representations an affidavit from the Senior Manager of Board Services and the Freedom of Information Coordinator for the board.

[27] In the confidential portions of the board's representations and the affidavit, the board establishes that the contents of Record 1 were considered and discussed by the committee in its decision whether to accept the recommendations. The affiant also

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[5] Order M-184.
[6] Orders M-703, MO-1344.
[7] Orders MO-1344, MO-2389 and MO-2499-I.

affirmed that the substance of the in camera meeting was not considered at a public meeting of the board.

[28] Based on my review of the board's representations, the affidavit and Record 1, I am satisfied that disclosure of Record 1 would reveal the actual substance of the deliberations of the committee's in camera meeting held on September 7, 2010. Therefore, I have found that the third requirement for the application of section 6(1)(b) has been met. Furthermore, I find that the exception in section 6(2)(b) does not apply in the circumstances. Accordingly, I find Record 1 to be exempt under section 6(1)(b) subject to my consideration of the board's exercise of discretion.

[29] While the appellant claimed the application of section 16 to the records, section 6 is not one of the exemptions subject to the public interest override. Thus, I will not be considering the application of section 16 in this order.

C. Does the discretionary exemption in sections 11(c) and (d) apply to the records?

[30] In its representations, the board withdrew its reliance on section 6(1)(b) to exempt Records 2 and 3 from disclosure. Instead, the board submits that sections 11(c) and (d) apply to these records. These sections state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[31] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[32] For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[8]

[33] The board submits that disclosure of the terms of the sale and lease back agreement which comprises Record 2 and the signed copy of the lease agreement which forms Record 3 could reasonably be expected to prejudice the economic interests and financial interests of the board. The board submits that disclosure of its position and the terms it was prepared to accept, as set out in Records 2 and 3, would impact future negotiations between the board and other parties. This would detrimentally affect the board in the future sale and lease of its property.

[34] The board submits that this office has recognized this problem and upheld a decision to deny access to records which would reveal bargaining positions to opposing parties in Order P-1022.

[35] In Order P-1022, Adjudicator Anita Fineberg considered whether 18(1)(c) (the provincial equivalent to section 11(c)) applied to exempt records relating to Ontario Hydro's negotiations with the Corporation for Non-Utility Generation (NUG). The records at issue did contain the agreement. In finding that section 18(1)(c) applied the records, Adjudicator Fineberg states:

> The only information which has been withheld from these documents consists of the specific "percentage" rate component as well as the terms and conditions of the power purchase, include the rates and charges for capacity power.
>
> Hydro states that it is currently negotiating with other NUG projects and will shortly negotiate with Renewable Energy Technology (RET) projects for the purchase of electricity. Hydro submits that disclosure of the information contained in Records 35-39 could place Hydro in an unfavourable bargaining position. It claims that other NUG's and RET's could negotiate with Hydro on the basis of the terms and conditions so disclosed, rather than on the basis of their own site specific costs and profit components. Hydro submits that this could result in its having to pay higher costs for the purchase of power and its economic interests would thus be harmed.

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[8] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[36] In the present appeal, both Records 2 and 3 have been withheld in full. The board did not identify particular information or terms whose disclosure would specifically give rise to either economic prejudice or injury to its financial interests. The board has not provided me with evidence to establish that disclosure of the Agreement of Purchase and Sale (Record 2) and the lease agreement (Record 3) could reasonably be expected to either result in prejudice to its economic interests or its competitive position. Also, I find that the board has not established that disclosure of Records 2 and 3 could reasonably be expected to be injurious to its financial interests.

[37] The board has not provided me with evidence similar to that which Hydro provided in Order P-1022 that disclosure could prejudice "current negotiations" between itself and either current purchasers and/or leasers of board property. Instead, both Records 2 and 3 are agreements that are now more than four years old. I find the circumstances in this appeal to be more similar to that in Orders MO-1935 and MO-2060-R where Adjudicator Donald Hale found that sections 11(c) and (d) did not exempt lease agreements between two school boards. In finding that these sections did not apply, Adjudicator Hale stated the following:

> Specifically, the TDSB has failed to demonstrate how disclosure of the terms of a lease agreement that is now 18 years old could reasonably be expected to prejudice in any real way its economic or competitive interests, as is required by section 11(c). It is difficult to imagine how information as outdated as this could be of any current use to a competitor.

[38] In the present appeal, Records 2 and 3 are now more than four years old. The board has not identified any current negotiations between itself and other potential purchasers or leasers of board property. I find that the board has not provided sufficiently detailed and convincing evidence to establish how disclosure of these past agreements could reasonably be expected to prejudice its economic or competitive interests. Nor has the board established that disclosure of this information could be injurious to its financial interests.

[39] Accordingly, I find that sections 11(c) and (d) do not apply to Records 2 and 3 and I will order these records disclosed.

D. Was the board's exercise of discretion proper in the circumstances?

[40] 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.

[41] 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.

[42] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[9] This office may not, however, substitute its own discretion for that of the institution.[10]

Relevant considerations

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[11]

- 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 the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

[9] Order MO-1573.
[10] Section 43(2).
[11] Orders P-344, MO-1573.

- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[44] The board did not specifically address its exercise of discretion in deciding to apply section 6(1)(b) to Record 1. However, I have considered the manner in which the board applied section 6(1)(b) to the responsive records, as well as its consideration that the appellant is seeking the records for her personal interests and purposes. I find that the board properly exercised its discretion to apply the section 6(1)(b) exemption and it did not take into account any irrelevant considerations. As a result, I uphold the board's decision to exempt Record 1 under section 6(1)(b).

ORDER:

1. I uphold the board's decision to deny access to Record 1.

2. I order the board to provide the appellant with a copy of Records 2 and 3 by **June 23, 2015** but not before **June 18, 2015**.

3. In order to verify compliance with order provision 2, I reserve the right to require the board to provide me with a copy of the records sent to the appellant.

Original Signed by: May 19, 2015
Stephanie Haly
Adjudicator