Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3228

Appeal MA14-227

Toronto District School Board

August 11, 2015

Summary: The appellant made a request to the Toronto District School Board (the board) for access to a copy of the board's Focus on Youth 2012 audit report. The board denied access to the audit report on the basis of the discretionary exemption for records whose disclosure would reveal the substance of deliberations of a closed meeting of a committee of the board (section 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*)). The appellant appealed. The board argued that section 6(1)(b) applied because the subject matter of the meeting was the security of the property of the board, and, as such, the meeting was authorized to be closed pursuant to section 207(2)(a) of the *Education Act.* In this order, the adjudicator finds that "security of the property of the board" is distinguishable from a mere financial interest in the matters discussed in the record and that, as a result, section 207(2)(a) of the *Education Act* does not apply. Accordingly, she does not uphold the board's application of the closed meeting exemption at section 6(1)(b) of the *Act* and orders it to disclose the audit report to the appellant.

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

Orders and Investigation Reports Considered: Orders MO-2468-F and MO-2683-I.

Cases Considered: *Miller Transit Ltd. v. Ontario (Information and Privacy Commissioner),* 2013 ONSC 7139 (Div. Ct.); *Vaughan (City) v. Ontario (Information and Privacy Commission),* 2011 ONSC 7082 (Div. Ct.).

OVERVIEW:

[1] The appellant made 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 the following information:

> …a copy of the Toronto District School Board's Focus On Youth 2012 internal audit report [dated] May 2013

[2] The board issued a decision advising that the responsive record (the audit report) is exempt from disclosure pursuant to the discretionary exemption at section 6(1)(b) of the *Act* for records whose disclosure would reveal the substance of deliberations of a closed meeting, as well as the discretionary exemption found in section 7(1) of the *Act* for records containing advice or recommendations. The appellant appealed the board's decision to this office. In her appeal letter, the appellant also raised the application of the public interest override provision at section 16 of the *Act*.

[3] As the parties were unable to resolve the issues under appeal through mediation, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the board, followed by the appellant, and then the board in reply. The parties' initial representations were shared in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*, with some portions of the board's representations withheld as their disclosure would reveal the substance of the record at issue.

[4] The board advised in its representations that it no longer relies on the application of the section 7 exemption for advice and recommendations. The sole exemption remaining at issue, therefore, is the discretionary exemption at section 6(1)(b) of the *Act* for records that would reveal the substance of deliberations of closed meeting. Since the section 6(1)(b) exemption is not one of the exemptions in respect of which the public interest override at section 16 is available, the application of section 16 to the audit report is no longer an issue in this appeal.

[5] In this order, I find that the audit report is not exempt from disclosure under section 6(1)(b) of the *Act*, and I order the board to provide a copy of it to the appellant.

RECORDS:

[6] The record at issue is the Toronto District School Board's Focus on Youth 2012 internal audit report dated May 2013 (the audit report).

ISSUE:

[7] The sole issue to be decided in this appeal is whether the discretionary exemption at section 6(1)(b) of the *Act* applies to the audit report and if so, whether I should uphold the board's exercise of discretion in withholding it.

DISCUSSION:

[8] The board runs a summer program entitled Focus on Youth Toronto. According to the board's website, the objective of the program is to provide high quality summer program opportunities for children and youth in Toronto's urban inner city areas by:

- offering free use of school space for organized community-based programs, and
- providing employment opportunities and leadership activities for the youth of these communities.[1]

[9] An audit of the 2012 Focus on Youth program was conducted in 2013. The resulting audit report is the subject of this appeal.

[10] The board argues that it was entitled to withhold the audit report on the basis that it falls within the exemption at section 6(1)(b) of the *Act*, which reads as follows:

> 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] Previous orders of this office have held that, 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.[2]

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[1] http://www.tdsb.on.ca/Community/CommunityUseofSchools/FocusonYouth.aspx
[2] Orders M-64, M-102, MO-1248.

[12] I review the first two parts of this three-part test below. As will be seen, it is not necessary for me to consider Part 3 of the test.

Part 1: A council, board, commission or other body, or a committee of one of them, held a meeting

[13] The board submits that an *in camera* meeting of the committee of the whole board was held on December 11, 2013. It submits that the audit report was distributed to trustees at the *in camera* session and formed the subject matter of discussion amongst the trustees. The appellant does not dispute that a meeting was held on that date, referring to the board's publicly-available minutes for its regular meeting of that date. She also acknowledges that those minutes refer to the meeting going *in camera* for a period of time.

[14] Based on the evidence before me, I am satisfied that the *in camera* meeting did take 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

[15] The board relies on section 207(2) of the *Education Act*,[3] which provides:

> 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,
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> (a) the security of the property of the board;
>
> (b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;
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> (c) the acquisition or disposal of a school site;
>
> (d) decisions in respect of negotiations with employees of the board; or
>
> (e) litigation affecting the board.

[3] R.S.O. 1990, c. E.2, as amended.

[16] The board relies, in particular, on paragraph (a), which it submits applies because the subject-matter of the meeting involves the security of the property of the board. Under the second part of the section 6(1)(b) test, therefore, I must determine whether the audit report that was discussed at the closed meeting involves the "security of the property of the board."

The board's representations

[17] The board submits that the *Education Act* does not limit or qualify the definition of "security of the property of the board". It notes that, in the family law context, the Supreme Court of Canada has adopted a broad definition of the term "property" to include intangible personal property rights, in that case a spouse's pension rights.[4] It submits, further, that the Shorter Oxford English Dictionary defines "security" in part to include "a thing which protects or makes safe a thing or person". In the confidential portion of it representations, the board identifies the subject matters addressed in the audit report.

[18] The board also relies on Order MO-2918, arguing that the records at issue in that appeal, where the section 6(1)(b) exemption was upheld, are similar to the record at issue in this appeal.

The appellant's representations

[19] The appellant submits that she is at a disadvantage in making arguments as to whether or not the meeting was legitimately closed. She questions whether there would have been a real risk to the property or assets of the board if the audit report had been considered in a public meeting rather than a closed one, or whether the only potential risk was to the board's public reputation, which is not a legitimate reason for an item to be referred to an *in camera* meeting.

[20] The appellant also submits that it is her understanding that the audit report addresses concerns around procurement processes and the administration of the Focus on Youth program's payroll. She questions whether these are issues that are legitimately considered *in camera*.

The board's reply representations

[21] In its reply representations, the board submits that section 207(2)(a) of the *Education Act* does not limit itself to the security of a particular class of assets, and further, that the section does not require an assessment of any current risk with respect to assets or the level of such risk. In fact, the board argues, the section does not

[4] *Clarke v. Clarke*, [1990] 2 S.C.R. 795.

mandate that any "risk" be present in order to justify the non-publication of materials deliberated upon *in camera*.

Analysis and findings on Part 2 of the section 6(1)(b) test

[22] As mentioned above, the board relies on Order MO-2918, arguing that the records at issue in that appeal, where the section 6(1)(b) exemption was upheld, are similar to the record at issue in this appeal. From the description of the record in Order MO-2918 and my review of the record at issue in this appeal, I find that the records in the two appeals deal with different subject matters. Also, in the appeal leading to Order MO-2918, the board argued in favour of the application of a different section of the *Education Act*, section 207(2)(c) (acquisition or disposal of a school site). Order MO-2918 does not consider section 207(2)(a) or the phrase "security of the property of the board" and is therefore of limited relevance to this appeal.

Previous orders' interpretation of "security of the property"

[23] The interpretation of "security of the property" has been considered in only a few previous orders of this office. Order MO-2468-F examined in considerable detail the interpretation of the phrase "security of the property" in the context of the analogous provision in the *Municipal Act, 2001*. In that appeal, the City of Toronto argued that the report at issue was submitted as an *in camera* report because disclosure of the information contained in it could potentially harm the City's financial and economic interests by jeopardizing its ability to obtain favourable, or reasonable, terms and conditions in its future negotiations with a third party. However, Adjudicator Laurel Cropley found that "security of the property of the municipality" concerns the "protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety in relation to this property." In examining this issue, the adjudicator noted that other Ontario statutes "use the word 'security' in relation to individuals in the sense of keeping them safe from harm, and in relation to property in the sense of taking measures to prevent loss or damage to it."

[24] In a later order, Order MO-2683-I, Senior Adjudicator Frank DeVries distinguished Order MO-2468-F. He noted that the adjudicator in Order MO-2468-F was only considering whether "security of the property" includes protecting the city's bargaining power when it negotiates the sale of its property. He noted that the adjudicator's findings in Order MO-2468-F do not recognize "security of the property" as including the "protection of the financial and economic interests and assets of a municipality", that is, the city's financial interests *vis-à-vis* its negotiation strategy. Senior Adjudicator DeVries went on to address the City of Toronto's argument in the appeal before him that "property" includes both "corporeal" and "incorporeal" property. He concluded that it does, as both corporeal and incorporeal property are clearly recognized at law as "property interests." Accordingly, he found that if the subject matter being considered in a meeting is the "security" (in the sense of taking measures

to prevent loss or damage to it) of the property of the city or local board, the *City of Toronto Act* authorizes holding the meeting *in camera*. He concluded that, in order to establish that the requirements of section 190(2) of the *City of Toronto Act* apply, the city must establish that:

- it owns identified property (corporeal or incorporeal); and
- the subject matter being considered in the meeting is the security (in the sense of taking measures to prevent loss or damage to it) of that property.

[25] In finding that the second part of the section 6(1)(b) test had been met, Senior Adjudicator DeVries determined that the record at issue in the appeal before him:

> ...addresses the taking of measures to prevent loss or damage to the property [identified elsewhere in the order as being an encumbrance, a type of incorporeal property]. Although the report relates to a commercial transaction, it also specifically pertains to the preservation of the property, in the sense of identifying specific risks to it and taking measures to prevent loss or damage to it. I note that this protection issue identified in the record is distinguishable from a mere financial interest in negotiating strategies.

[26] I agree with Senior Adjudicator DeVries' conclusion regarding the elements necessary to establish the requirements of section 190(2) of the *City of Toronto Act*, and adopt them for the purpose of determining whether section 207(2)(a) of the *Education Act* applies in the circumstances of this appeal.

[27] For the following reasons, I also agree with the finding in Orders MO-2468-F and MO-2683-I that the protection issue identified in the record must be distinguishable from a mere financial interest in the matters discussed in the record.

Purposive interpretation of section 207 of the Education Act and section 6(1)(b) of the Act

[28] The board urges that I adopt a broad interpretation of the term "security of the property of the board". I cannot be more specific about the board's submission in this regard, because to do so would involve referring to the confidential portions of its representations and to the content of the record.

[29] In order to determine what the legislators intended by "security of the property of the board", I have considered the purpose of sections 207 of the *Education Act*. Section 207(1) of the *Education Act* provides that, subject to section 207(2), the meetings of a committee of the board, including a committee of the whole board, shall be open to the public.

[30] In *Freedom of Information in Local Government in Ontario*,[5] the 1979 research publication commissioned by the Williams Commission, the authors considered both the question of access to municipal records and the question of open meetings. In regard to both, they stated:

> Democracy may be served by openness but sometimes the public has a great interest to be served in deliberations being made free from public knowledge or the pressure of public opinion.

[31] In regard to open meetings, they stated:

> Another area where a strong argument can be made for closed meetings or restrictions on information is one where premature publicity would be detrimental to the interests of the community. The most common example of this occurs where a body is contemplating a land acquisition and does not wish disclosure to affect the price of the property. Another example is the negotiating of a collective agreement with employees where undue public pressure affects the local decision makers; public discussion also allows the employees to discover the negotiating strategy of the authority.[6]

[32] In my view, these considerations apply equally in the context of the *Education Act*. In enacting section 207(2) of the *Education Act*, it would appear that the legislature sought to give school boards the opportunity to prevent harms that can reasonably be expected to result if certain types of meetings are held in public. In particular, section 207(2)(a) would seem to be designed to allow boards to conduct closed meetings where an open meeting could result in the board's property (corporeal or incorporeal) being put at risk.

[33] In Order MO-2468-F, Adjudicator Cropley offered the following reasons in favour of not taking an overly broad interpretation of the "security of the property of the municipality" exception to the open meeting provision in the *Municipal Act*:

> In my view, an interpretation of section 239(2)(a) that is consistent with the access and transparency purpose of the *Act*, is also arguably more consistent with the purpose of the *Municipal Act, 2001* than the broad interpretation supported by the City.
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> In their text, *The Ontario Municipal Act: A User's Manual – 2009*, George Rust-D'Eye and Ophir Bar Moshe discuss section 239 at p. 300:

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[5] Makuch, Stanley M. and John Jackson, *Freedom of information in local government in Ontario*, (Toronto: Commission on Freedom of Information and Individual Privacy, 1979)
[6] *Ibid* at pp. 12-21.

> The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.
> …
> *This open meeting requirement … reflects a clear legislative choice for increased transparency and accountability* in the decision-making process of local governments. [Emphasis added].

Similarly, the authors of the *Annotated Municipal Act*, second edition, state at MA6-45:

> The underlying purpose of the open meeting requirement in s.239 is to foster democratic values, to enhance the responsiveness of government, to enhance public confidence, and to increase transparency.

This relationship between section 239 and the overall purpose of the *Municipal Act, 2001* and the consequent requirement to interpret the exceptions to openness in section 239(2) in a manner consistent with increased transparency and accountability, have been strongly affirmed by the Supreme Court of Canada recently in *London (City) v. RSI Holdings Inc.* [2007] 2 SCR 588. On behalf of a unanimous Court, Charron J. stated, at para. 4:

> The open meeting requirement reflects a clear legislative choice for increased transparency and accountability in the decision-making process of local governments.

Citing the 1984 Ontario Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information, the Williams Commission Report, and the Ontario Ministry of Municipal Affairs white paper, *Open Local Government* (1992), Charron J. went on to say at paras. 18 and 19:

> In the hope of thereby fostering democratic values, and responding to the public's demand for more accountable municipal government, these reports recommended compulsory open meetings of municipal councils and committees, subject to *narrow exceptions*. [Emphasis added].

> …
> In *Freedom of Information in Local Government in Ontario*, a background paper prepared in 1979 for the Williams Commission, the authors discuss and recommend an open meetings law for municipalities, subject to exceptions. At page 65, they identify three types of matters – personnel, legal and property – as the ones which many municipalities considered to be legitimate topics for *in camera* discussions. The opinion of the authors was that, "These exemptions are valid if they are *narrowly construed* exceptions to a general right to information". [Emphasis added].

As indicated by the Supreme Court decision cited above, further evidence that the exemptions from the open meeting requirement in the *Municipal Act, 2001* are intended to be limited and specific is found in Ontario Ministry of Municipal Affairs, *Open Local Government*, 1992. This discussion paper proposed to amend municipal legislation "to enhance accountability and openness of local government by:

> …2) establishing clear principles of openness for all municipal council and committee meetings, and for meetings of local boards, with *exceptions which are limited and specific*;" [Emphasis added].

In my view, therefore, the argument that section 239(2)(a) should be interpreted in a manner that is limited and specific in order to foster openness, both in relation to municipal meetings and access to information that was generated by such meetings, which has been explicitly accepted by the Supreme Court of Canada, is a very strong argument against giving the phrase "security of the property of the municipality" in that subsection an artificially extended meaning.

[34] In my view, the argument stated by Adjudicator Cropley – that "security of the property" should be interpreted in a manner that is limited and specific in order to foster openness – applies equally to the interpretation of that phrase as it appears in section 207(2)(a) of the *Education Act*. As democratic institutions, the activities of school boards should be open and transparent.

[35] Generally speaking, an audit report would be expected to address many aspects of the program being audited, including financial aspects of that program. However, I find that to interpret "security of the property" to include simply ensuring that funds are spent appropriately would be to stretch that phrase beyond what was intended by the drafters of the legislation. If the legislature had intended for school boards to have the power to close meetings whenever the subject matter touches on the board's finances,

it could have done so in much more explicit language. In my view, while "property" includes incorporeal property, the meaning of "security of the property" does not extend in this context to include simply reviewing how funds have been spent and recommending how they ought to be spent in the future.

[36] The board argues that section 207(2)(a) can apply regardless of whether or not disclosure of the record in question presents a "risk". As I have found above, however, generally speaking, the exceptions in section 207(2) were enacted in order to prevent certain harms that could result from holding meetings publicly, and that this fact weighs against adopting an overly broad interpretation of "security of the property" for the purposes of section 207(2)(a).

[37] I also find that to interpret section 207(2)(a) of the *Education Act* in the broad manner urged by the board would be at odds with the purposes of the *Municipal Freedom of Information and Protection of Privacy Act*, which are:

> (a) To provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific,
> …
>
> (b) To protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[38] The courts have held that exceptions from the general purpose of making government-held information available to the public are to be construed narrowly.[7]

[39] The Ontario Divisional Court has found that accountability for expenditures of public funds requires access to information in contracts entered into by government institutions with third parties.[8] Similarly, in my view, public access to information about school boards' spending on their programs is essential to the boards' accountability for expenditures of public funds. To adopt an interpretation of "security of the property" that allows school boards to meet *in camera* when considering general financial aspects of its programs would seriously undermine the purpose of the *Act* as described in paragraph (a) above.

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[7] See *Miller Transit Ltd. v. Ontario (Information and Privacy Commissioner),* 2013 ONSC 7139 at para 45.
[8] *Ibid* at para 44; *Vaughan (City) v. Ontario (Information and Privacy Commission),* 2011 ONSC 7082 (CanLII), 109 O.R. (3d) 149 (Div. Ct.), at para. 49

Conclusion on Part 2 of the section 6(1)(b) test

[40] I now turn to the record at issue, the audit report. Having reviewed the report, I find that section 207(2)(a) does not apply to the *in camera* meeting of the Committee of the Whole Board that was held on December 11, 2013, when the report was discussed. While I cannot describe the specific subject matter of the audit report without revealing the confidential portions of the board's representations, I find that it does not include the taking of measures to prevent loss or damage to either corporeal (tangible) or incorporeal (intangible) property, within the meaning of "security of the property of the board" for the purposes of section 207(2)(a). While an audit report may be expected to address financial aspects of the program being audited, for section 207(2)(a) to apply there must be a protection issue distinct from a mere financial interest in the matters addressed in the report. I find that there is no such protection interest in the circumstances of this appeal.

[41] I conclude, therefore, that Part 2 of the three-part test under section 6(1)(b) has not been satisfied. It follows that the exemption under section 6(1)(b) has not been established, and since the board has not claimed any other exemption, I will order it to disclose the audit report to the appellant.

ORDER:

1. I do not uphold the board's decision that the audit report is exempt under section 6(1)(b) of the *Act*.

2. I order the board to disclose the audit report to the appellant by providing her with a copy of it, by no later than September 11, 2015.

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

Original Signed By: August 11, 2015
Gillian Shaw
Adjudicator