

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-4058-I

Appeal MA19-00388

Municipality of Leamington

May 28, 2021

**Summary:** The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all communications, including emails, about him exchanged between municipal staff and councillors during a specified period of time. The municipality located responsive records and issued a decision granting partial access to those records. The municipality withheld some information on the basis that it is exempt under section 6(1)(b) (closed meeting). In this interim order, the adjudicator finds that the record contains the appellant's personal information and that the information at issue is not exempt under section 38(a) (personal privacy), in conjunction with section 6(1)(b), because it would not reveal the substance of deliberations of a closed meeting. She orders the municipality to disclose the information at issue to the appellant, except for the names of third parties.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of "personal information"), 6(1)(b), and 38(a); *Municipal Act, 2001*, S.O. 2001, c. 25, sections 239(1) and 239(2)(e).

### OVERVIEW:

[1] This appeal is about a request for access to the withheld portion of an email exchanged between two councillors of the Municipality of Leamington (the municipality).

[2] An individual made a request for access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to all communications about him exchanged between municipal council members and staff during a defined period of time. Specifically, the request was for:

Copies of any and all emails and/or letters of communication sent or received from April 01, 2018 to February 20, 2019 by the Municipality of Leamington staff members; CEO; Mayor; Deputy Mayor and Councillors in regards to any communication involving my name [requester's name] and/or any abbreviation and/or any derivative of my name regarding any matter or topic and/or conversation. There is no need for any emails that were sent on a monthly basis pertaining to town building permits issues and/or unit summaries.

[3] The municipality located responsive records and issued a decision granting partial access to the records, which it itemized and numbered in an accompanying index. The municipality denied access to certain records, claiming they were exempt from disclosure pursuant to section 6(1)(b) (closed meeting), section 8(1)(b) (law enforcement investigation), and section 12 (solicitor-client privilege) of the *Act*. The municipality also withheld some information on the basis that it was not responsive to the request.

[4] The requester, now the appellant, appealed the municipality's decision to the Information and Privacy Commissioner of Ontario (the IPC). In his appeal, the appellant sought access to all responsive records, that is, to the records that the municipality withheld in full, and to the withheld portions of those records to which the municipality granted partial access. The appellant also challenged the reasonableness of the municipality's search for responsive records.

[5] The parties participated in mediation to explore the possibility of resolution. During mediation, the municipality disclosed further records. Based on this further disclosure, the section 8(1)(b) and section 12 exemptions, as well as the reasonableness of the municipality's search, were removed as issues in this appeal.

[6] Included in the further disclosure were portions of an email from the then-deputy mayor to another councillor, identified as Record 23-A in the municipality's index of records, which made reference to the appellant. The municipality withheld the first part of the email on the basis that it did not make any reference to the appellant and was therefore not responsive to his request. The appellant does not take issue with that assessment. However, the municipality also withheld eight sentences of the email that it acknowledged contain the appellant's personal information. The municipality says that it withheld this information on the basis that it refers to discussions that took place in a closed meeting of council and that disclosure would reveal the substance of those deliberations. The municipality took the position that these eight sentences are therefore exempt under section 6(1)(b) of the *Act*.

[7] When mediation could not resolve the issue of access to the withheld portions of the email, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry. I conducted an inquiry and as part of it, I received representations from the parties that were shared between them.

[8] After reviewing the parties' representations and the record itself, I invited further representations from them in a Supplementary Notice of Inquiry, regarding the possible application of the discretionary personal privacy exemption in section 38(b) of the *Act*, because of reference in the record to individuals other than the appellant.

[9] In this order, I find that the record contains the appellant's personal information. I also find that the information at issue is not exempt under section 38(a), read in conjunction with section 6(1)(b), because disclosure would not reveal the substance of deliberations of a closed meeting of council. I order the municipality to disclose a severed version of the information at issue.

### **RECORD:**

[10] The record is an email from the then-deputy mayor to a municipal councillor, identified as Record 23-A in the municipality's index of records. The information at issue is contained in eight sentences that make up four complete lines and one partial line of the email to which the municipality has denied access.

### **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1), and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the section (6)(1)(b) closed meetings exemption apply to the record?

### **DISCUSSION:**

#### **Background provided in the parties' representations**

[11] The withheld portions of the record at issue in this appeal relate to an email the appellant wrote to the mayor and council that was critical of an annual charity event hosted by the municipality. There is no dispute between the parties that the appellant's email was disclosed to the event's organizers, or that it was later posted on social media and discussed in a local news media story.

[12] The appellant made a complaint to the IPC alleging that the municipality had breached his privacy when it disclosed the entire text of his email, together with his contact information, identifying him as the author. That complaint was the subject of a

privacy investigation and was resolved by a privacy complaint report.<sup>1</sup> The parties' representations in this appeal refer to the email and its disclosure, and to the appellant's privacy complaint to the IPC.

**Issue A: Does the record contain "personal information" as defined in section 2(1), and, if so, to whom does it relate?**

[13] In order to determine which sections of the *Act* apply, I must decide whether the record contains "personal information" and, if so, whose. Section 2(1) of the *Act* defines personal information to mean "recorded information about an identifiable individual," and contains a non-exhaustive list of examples of personal information. This list includes:

(g) the views or opinions of another individual about the individual, and,

(h) the individual's name if it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual.

[14] Information that does not fall under paragraphs (a) to (h) of the definition of personal information in section 2(1) may still qualify as personal information.<sup>2</sup> To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>3</sup>

***Representations***

[15] There is no dispute between the parties that the record contains the appellant's personal information.

[16] The municipality submits that the record contains the appellant's personal information as described in paragraph (g) of section 2(1), because it contains the views or opinions of another individual about him.

[17] The appellant submits that the record contains his personal information because the email contains a discussion about him by elected officials.

[18] Because the record contains a name and partial names other than the appellant's, I invited the parties to submit further representations regarding whether

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<sup>1</sup> Privacy Complaint Report MC18-23, issued April 8, 2021.

<sup>2</sup> Order 11.

<sup>3</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

this is the personal information of identifiable individuals other than the appellant, and whether any of this information appears in a professional, rather than personal, capacity.

[19] The municipality declined to submit further representations on personal information, maintaining its initial position that the record contains the appellant's personal information (but that this information is exempt under section 6(1)(b), discussed below). The appellant maintains that the record contains his personal information because it contains the then-deputy mayor's views or opinions of him.

### **Analysis and findings**

[20] Based on my review of the record, I find that it contains the appellant's personal information because it contains the author's views and opinions about the appellant. I find that this qualifies as the appellant's personal information pursuant to paragraph (g) of section 2(1) of the *Act*.

[21] The information at issue also contains a full name and partial names of individuals other than the appellant. Paragraph (h) of section 2(1) defines personal information to include an individual's name where it appears with other personal information about the individual, or would reveal other personal information about the individual if disclosed. In other words, a name alone, where it does not appear with, or would not reveal, other personal information about an individual, is not personal information. However, because I did not receive representations regarding the partial names and one full name that appear in the information at issue, I have insufficient basis to conclude whether this is personal information belonging to other, identifiable, individuals, pursuant to paragraph (h) of section 2(1), or whether its disclosure would constitute an unjustified invasion of another individual's privacy pursuant to the discretionary personal privacy exemption in section 38(b) of the *Act*.

[22] Below, I find that the information at issue is not exempt under section 38(a), read with section 6(1)(b) (closed meeting). I will therefore order that the information at issue be disclosed, but with the name and partial names of third parties severed. The appellant is to advise me upon review of the information whether he seeks the name or partial names.

### **Issue B: Does the discretionary exemption at section 38(a) in conjunction with the section 6(1)(b) closed meetings exemption apply to the record?**

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

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

[25] The municipality takes the position that section 6 applies and that the record is exempt from disclosure under section 6(1)(b) because disclosure would reveal the actual substance of the deliberations of a closed meeting of council.

[26] Section 6(1)(b) states that:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of 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.

[27] 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.<sup>4</sup>

[28] Each part of this three-part test must be met for the record to qualify for exemption under this section.

[29] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.<sup>5</sup>

[30] The first and second parts of the test for exemption under section 6(1)(b) require the municipality to establish that a meeting was held by the municipality and that it was properly held *in camera*.<sup>6</sup>

[31] In determining whether there was statutory authority to 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.<sup>7</sup>

[32] With respect to the third requirement, the wording of the provision and previous

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<sup>4</sup> Orders M-64, M-102 and MO-1248.

<sup>5</sup> Order MO-1344.

<sup>6</sup> Order M-102.

<sup>7</sup> *St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.).

IPC decisions make 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) 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.<sup>8</sup>

## ***Representations***

### *The municipality's representations*

[33] The municipality submits that it is authorized by section 239 of the *Municipal Act, 2001*, and by its own procedural by-law to hold meetings in the absence of the public in certain enumerated circumstances. Further, one of the listed circumstances is the discussion of litigation or potential litigation, including matters before administrative tribunals.<sup>9</sup>

[34] The municipality says that, on May 14, 2018, council held a meeting in the absence of the public to consider a report in connection with the appellant's privacy complaint to the IPC. The municipality submits that its director of legal services prepared a confidential report regarding the municipality's response to the IPC in respect of the appellant's privacy complaint and that the closed session meeting was held, in part, to discuss this report.<sup>10</sup> The municipality included with its representations a copy of the minutes of the closed session meeting, as well as minutes of the council meeting where the clerk provided a report on the closed session meeting.

[35] The municipality submits that the subject of the deliberations was not considered in open session and there was no vote taken at a public meeting concerning the subject of the closed session. The municipality also provided a copy of its procedural by-law, which sets out the requirement for closed meetings. It says that all procedural requirements and conditions for holding a closed meeting were met, and that notice of the meeting was published on the municipality's website.

[36] The municipality says that, at the closed session meeting, its director of legal and legislative services presented the report regarding the appellant's privacy complaint to the IPC. The municipality says that this report included a summary of the complaint, the law relating to the grounds for the complaint, a summary of the municipality's possible arguments in response, and an opinion about, and the potential financial impacts that may result in the event of, "further litigation." The purpose of the report was to receive direction to respond to the complaint.

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<sup>8</sup> Orders MO-1344, MO-2389 and MO-2499-I.

<sup>9</sup> *Municipal Act, 2001*, section 239(2)(e).

<sup>10</sup> According to the municipality's representations, other matters were also discussed at the closed meeting that are not relevant to this appeal.

[37] The municipality argues that comments in the record at issue are directly related to the contents of the report and therefore to the deliberations that took place. The municipality says that disclosure of the information at issue would reveal the substance of those deliberations and that any part of the record that could be disclosed has already been severed and disclosed to the appellant.

*The appellant's representations*

[38] The appellant submits that all of the information at issue should be disclosed because it was written about him by elected officials.

[39] He says that, under section 239 of the *Municipal Act, 2001*, no council meeting or official council business can be conducted by way of an unannounced or unrecorded meeting outside of the municipality. He says that the "Councillors going back and forth via email on the internet about myself" is, in effect, an attempt to carry out such a meeting outside of the municipality and, therefore, is contrary to section 239 of the *Municipal Act, 2001*.

[40] The appellant makes considerable reference in his representations to his privacy complaint, which is not before me in this appeal. He submits that his email to the mayor and councillors regarding the annual event was private and that the municipality breached his privacy when it shared his email with the event's organizers, without safeguarding his name, full contact or other identifying information. The appellant says that this "leak" resulted in publication of his email on social media and discussion on local news media, followed by death (and other) threats, intimidation and harassment, property damage, and led to his privacy complaint to the IPC against the municipality. He submits that any reference in the record at issue to his email or the municipality's actions relating to his email should be disclosed to him in its entirety.

[41] The appellant also argues that exemptions initially claimed by the municipality over records since disclosed and that are not at issue (such as section 12 (solicitor-client privilege)) do not apply to the record, notwithstanding that those exemptions were removed as issues in this appeal during mediation. Although I have read the appellant's complete representations, I have only summarized those portions of his representations that are relevant to the issues in dispute.

***Analysis and findings***

*Parts 1 and 2 of the three-part test in section 6(1)(b): authorized meeting held*

[42] I am satisfied on the evidence before me that the first two parts of the three-part test in section 6(1)(b) have been met. I find that council held a meeting on May 14, 2018, in the absence of the public, to consider a report in connection with the appellant's privacy complaint to the IPC. I find that the meeting was authorized by section 239(2)(e) of the *Municipal Act, 2001*, which states that:



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

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

[43] I also find that the meeting was held in accordance with the municipality's procedural by-law,<sup>11</sup> which allows council to move into closed session to consider matters provided for in section 239(2) of the *Municipal Act, 2001*, following a motion to do so during the open council meeting.

[44] According to the minutes of the May 14, 2018 council meeting and a resolution passed at the meeting, one of the purposes of moving into a closed session was to discuss a confidential report regarding the municipality's response to the IPC regarding the appellant's privacy complaint.

[45] I therefore find that council held a closed meeting on May 14, 2018 and that the *Municipal Act, 2001* authorized the holding of this meeting in the absence of the public. I therefore find that parts 1 and 2 of the test for exemption under 6(1)(b) have been met.

*Part 3 of the three-part test in section 6(1)(b) is not met: Disclosure of the record would not reveal the actual substance of the deliberations of the meeting*

[46] For the following reasons, I find that part 3 of the test has not been met.

[47] As I have noted above, in order to qualify for exemption under section 6(1)(b), the wording of this section and previous IPC decisions make it clear that there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the closed meeting, not merely the subject of the deliberations.<sup>12</sup>

[48] I am not persuaded that disclosure of the information at issue would reveal the actual substance of the deliberations of the closed meeting. Previous IPC orders have found that "deliberations" refer to discussions with a view toward making a decision, and that "substance" generally means more than just the subject of the meeting.<sup>13</sup>

[49] According to the municipality's representations and the meeting minutes, the purpose of the closed meeting was to discuss, *in camera*, legal counsel's report

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<sup>11</sup> By-law 289-13 – Leamington Procedural By-law, at section 11.

<sup>12</sup> Orders MO-1344, MO-2389 and MO-2499-I.

<sup>13</sup> See, for example, Order MO-3989.

regarding the appellant's privacy complaint. The municipality's representations say that the report included a summary of the complaint, relevant law, and discussion of possible responding arguments the municipality could make, as well as potential financial impacts in the event that there was litigation (apart from a matter before an administrative tribunal), and an opinion about the potential for further litigation. The municipality did not provide a copy of the report with its representations.

[50] I have reviewed the record and I note that it pre-dates the closed meeting. The record is dated May 13, 2018, while the meeting took place the following day, May 14, 2018. The information at issue makes no mention of the report or its content, and does not identify it as an item to be discussed in a closed meeting. While I do not have the report before me, the municipality has set out the topics it covers. The municipality has also provided me with a copy of the minutes of the closed meeting in question. Based on my review of the information at issue, I am not satisfied that disclosure of the information would reveal the substance of the deliberations of the closed meeting as described in the municipality's representations or meeting minutes. While the municipality argues that comments in the record at issue directly relate to the contents of the report discussed during the closed session meeting, and to the deliberations that took place therein, I am not satisfied that it has provided the necessary evidence to establish that disclosure would enable anyone to use the information at issue to infer the actual substance of the deliberations that took place at the meeting.

[51] Based on the evidence before me, I accept that, during the closed session, council reviewed a report from the municipality's director of legal services regarding the appellant's privacy complaint relating to the disclosure of his email about the charity event. However, the municipality has provided an insufficient basis on which to conclude that disclosure of the information at issue would reveal the actual substance of those deliberations. The information at issue does not make reference to the report, to the law as it relates to the grounds for the complaint, to any argument that the municipality might present in response to the complaint, to an opinion about or the financial impacts of possible litigation, or to the appellant's privacy complaint itself.

[52] For these reasons, I find that the third part of the test for exemption under section 6(1)(b) has not been met. However, because the information at issue contains information that may be the personal information of other identifiable individuals who have yet to be notified, I will order the municipality to disclose a severed version of the information at issue, severing the name and partial names of these individuals. Once the appellant has had an opportunity to review the information disclosed by the municipality in accordance with this interim order, he may contact me in writing to indicate whether he wishes to continue to pursue access to this severed information and continue this inquiry.

**ORDER:**

1. I do not uphold the municipality's decision regarding section 6(1)(b) of the *Act*, and order the municipality to disclose the highlighted information in Record 23-A, which is provided with the municipality's copy of this order, by **July 5, 2021** but not before **June 28, 2021**.
2. Within 14 days of his receipt of the severed information from the municipality pursuant to order provision 1, the appellant shall notify me in writing if he continues to seek access to the severed information that has been redacted from the information at issue.
3. In order to verify compliance with this order, I reserve the right to require the municipality to provide me with a copy of its correspondence to the appellant in accordance with order provision 1.

Original signed by: \_\_\_\_\_

Jessica Kowalski  
Adjudicator

\_\_\_\_\_ May 28, 2021