

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4082

Appeal MA19-00209

City of Hamilton

July 8, 2021

Summary: The City of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified report relating to the city's commercial relationship with a third party company. The city issued a decision denying access to the responsive record under sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Act*. The requester, now the appellant, appealed the city's decision to the IPC. In this order, the adjudicator finds that the section 6(1)(b) applies, upholds the city's access decision, and dismisses the appeal.

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 6(1)(b); *Municipal Act, 2001*, S.O. 2001, c.25, sections 239(1) and 239(2)(f).

Orders and Investigation Reports Considered: Order M-241.

OVERVIEW:

[1] This order addresses the issue of access to a specified report, prepared by two staff lawyers and the city's Manager of Procurement, relating to the City of Hamilton's (the city) commercial relationship with a third party company relating to the renovation of an arena. The city received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the specified report. The city located the report and issued a decision denying access under sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Act*.

[2] The requester, now the appellant, appealed the city's decision to the Information

and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[3] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence an inquiry by inviting representations from the city, initially. I received representations from the city, which contained information that I withheld as confidential.¹ I shared the non-confidential representations of the city with the appellant, and invited representations from the appellant. The appellant submitted representations, which I shared with the city. I then invited and received the city's reply representations.

[4] In this order, I uphold the city's decision to withhold the report under section 6(1)(b) of the *Act*, and dismiss the appeal.

RECORD:

[5] The record at issue in this appeal is a 9-page report (the report), which was withheld in full by the city.

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) (closed meeting) apply to the report?
- B. Did the city exercise its discretion under section 6(1)(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 6(1)(b) (closed meeting) apply to the report?

[6] The city denied access to the report under section 6(1)(b), which reads:

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.

¹ These portions were withheld in accordance with the confidentiality criteria in IPC Practice Direction 7 and section 7 of the IPC's *Code of Procedure*.

[7] For this exemption to apply, 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 meeting²

[8] 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.³

[9] Section 6(2) of the *Act* sets out exceptions to the exemption at section 6(1). The appellant argues that the exception in section 6(2)(b) applies. Section 6(2)(b) states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

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[.]

Part 1: the city's committee held a meeting

[10] The first part of the test for exemption under section 6(1)(b) requires the city to establish that a meeting was held.

[11] The city submits that its Audit, Finance and Administration Committee (AFAC) held a meeting on December 17, 2018 (the meeting) to discuss the report. The appellant does not dispute this.

[12] In its representations, the city referenced the AFAC meeting minutes of December 17, 2018 and January 17, 2019, which were provided and publicly available on the city's website.

[13] The AFAC meeting minutes of December 17, 2018 support the city's position that the AFAC held a meeting on that date, and the appellant does not dispute this. I am satisfied that a committee of the city held a meeting. Therefore, I find that the first part of the three-part test under section 6(1)(b) has been met.

² Orders M-64, M-102 and MO-1248.

³ Order MO-1344.

Part 2: the Municipal Act, 2001 authorizes the holding of the meeting in the absence of the public

[14] The second part of the test requires the city to establish that the meeting was properly held *in camera* (in the absence of the public)⁴ by identifying the relevant statutory authority to support it. In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, I must consider whether the purpose of the meeting was to deal with the specific subject matter identified in the statute authorizing the holding of a closed meeting.⁵

[15] Under section 239(1) of the *Municipal Act, 2001*, all meetings must be open to the public unless they fall within the prescribed exceptions. Section 239(2) of the *Municipal Act, 2001* sets out the exceptions that authorize the convening of a meeting in the absence of the public.

[16] The city submits that the meeting was properly held in the absence of the public under section 239(2)(f) of the *Municipal Act, 2001*, which states:

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

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose[.]

[17] The appellant's representations acknowledge that the meeting was held *in camera*. His representations do not address whether the *in camera* meeting was properly held. However, the appellant argues that the report is not subject to solicitor-client privilege, because a "non-lawyer staff member" wrote it.

[18] The city submits that the report was written by two city staff lawyers in conjunction with the city's Manager of Procurement for the express purpose of providing information and legal advice to the city with respect to the city's commercial relationship with a third party company.

[19] From my review of the report, its content supports that it was prepared as a confidential document and that it includes the language of section 239(2)(f) of the *Municipal Act, 2001* as the basis for its discussion in closed session. Furthermore, I am satisfied that the report contains legal advice.

[20] The December 17, 2018 AFAC meeting minutes state that the AFAC moved into closed session under section 239(2)(f) of the *Municipal Act, 2001* to discuss the report and that staff were provided with direction regarding the relationship between the city

⁴ Order M-102.

⁵ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

and the third party company in closed session.

[21] Based on my review of the report and the representations of the parties, I am satisfied that the second part of the three-part section 6(1)(b) test has been met, because the *in camera* meeting was held to consider legal advice contained in the report. Therefore, I find that the city's AFAC properly held an *in camera* meeting authorized by section 239(2)(f) of the *Municipal Act, 2001*.

Part 3: Disclosure of the report would reveal the actual substance of the deliberations of the meeting

[22] With respect to the third requirement set out above, the wording of the provision and previous IPC decisions establish 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 report would reveal the actual substance of deliberations which took place at the city's AFAC's *in camera* meeting, not merely the subject of the deliberations.⁶

[23] The appellant lists four orders⁷ at the end of his representations on section 6(1)(b) as "relevant orders", but he does not specify how they are relevant to my determination. I have reviewed the orders he cites and while the orders deal with the section 6(1)(b) exemption, the facts in those orders are not similar to those before me. Therefore, I find that the orders are not helpful to my determination in this appeal.

[24] The appellant's representations do not specifically address whether disclosure of the report would reveal the actual substance of the deliberations of the meeting, because he asserts that the substance of the deliberations has already been revealed in open session. The appellant's representations focus on the application of the section 6(2)(b) exception, which I will address below.

[25] As noted above, some of the city's representations were withheld as confidential. Generally, the city argues that disclosure of the report would reveal the actual substance of the deliberations of the meeting. Its confidential representations describe the contents of the report, which the city says contain the substance of the deliberations.

[26] The report contains legal advice from the two city staff lawyers and recommendations from them and the city's Manager of Procurement about the city's relationship with a third party company. I am unable to comment further on the report without revealing its contents. Based on my review of the report and the representations of the city, I find that disclosure of the report would reveal the substance of what was discussed at the closed meeting of the city's AFAC on December

⁶ Orders MO-1344, MO-2389 and MO-2499-I.

⁷ Orders MO-1926-I, MO-2572-I, MO-3176-I, and MO-2374.

17, 2018.

[27] Since all three parts of the section 6(1)(b) test have been met, I find that the report at issue is exempt from disclosure under section 6(1)(b) of the *Act*. As noted previously, the appellant focused on the application of the section 6(2)(b) exception in his representations, so I must now determine whether it applies in this case.

[28] I note that the appellant also raised the application of section 7(2)(a)⁸ of the *Act* in his representations. However, as noted by the city in its reply, the city did not rely on the discretionary section 7(1) (advice or recommendations) exemption and, therefore, I will not address the appellant's arguments about the exception to it found in section 7(2)(a). Section 7(2)(a) is not an exception to the section 6(1)(b) exemption.

Section 6(2)(b) exception

[29] Based on the evidence before me, I find that the section 6(2)(b) exception does not apply. I also find that the other exceptions in section 6(2)⁹ do not apply.

[30] The appellant argues that the section 6(2)(b) exception applies, because the subject matter of the deliberations about the report has been considered in a public meeting. The appellant submits that the city's council discussed the report and the *in camera* meeting in open session on December 19, 2018, and deferred three recommendations to the January 17, 2019 AFAC meeting to provide an opportunity for a public delegation on the report. The appellant further submits that on January 17, 2019, in open session, the city's AFAC received a public delegation and a seven-page letter from the third party company regarding the issues detailed in the report and discussed in the December 17, 2018 *in camera* meeting.

[31] The appellant submits that the public delegation, subsequent public questioning of the delegation by committee members, public comments during the open public meeting by committee members, and the letter received in public session and made public during the open committee meeting all revealed the substance of deliberations of the *in camera* meeting. The appellant argues that since the substance of deliberations of the report and the *in camera* meeting—including the theme, subject matter, advice, direction, details and reasons for the decision—were revealed in open public session, the section 6(1)(b) exemption cannot apply.

⁸ Section 7(2)(a) states: despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains factual material.

⁹ Section 6(2) of the *Act* states: despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if, (a) in the case of a record under clause (1)(a), the draft has been considered in a meeting open to the public; (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; or (c) the record is more than twenty years old.

[32] The city submits that the AFAC meeting minutes of December 17, 2018 and January 17, 2019, both state that the contents of the report remain confidential. The city further submits that the AFAC meeting minutes of January 17, 2019 state that "The Closed Session Minutes of the December 17, 2018 Audit, Finance and Administration [Committee] meeting, remain confidential".

[33] The city submits that the January 17, 2019 meeting minutes note that the third party company addressed the city's AFAC in open session, and that the speaking notes of the third party company were included in the city's official record. The city submits, however, that following the third party company's address, the city's AFAC moved into closed session, and that this is noted in section 7(f) of the January 17, 2019 meeting minutes. The city acknowledges that three recommendations from the report were to be released publicly following council's approval, which was noted in section 16(c) of the December 17, 2018 meeting minutes, and subsequently, these recommendations were released.

[34] The city argues, however, that the contents of the report and the substance of the deliberations of the *in camera* meeting are confidential and have remained confidential. The city argues, therefore, that the exception in section 6(2)(b) does not apply, and the report is exempt under section 6(1)(b).

[35] In Order M-241, Adjudicator Donald Hale held that a report was exempt from disclosure under section 6(1)(b), because its disclosure would reveal the substance of deliberations at a closed meeting. Adjudicator Hale went on to consider whether the subject matter of the deliberations at the closed meeting had been considered in an open meeting for the purposes of section 6(2)(b), because the report had been adopted by a vote of council in a public meeting. In finding that it had not, Adjudicator Hale stated:

On May 29, 1991, in a public meeting, a recorded vote was taken in which the City Council adopted the Executive Committee Report, as amended, without further discussion. In my view, the Council's **adoption** of a report, without discussion in a public meeting, cannot be characterized as the **consideration** of the subject matter of the *in camera* deliberations as contemplated by section 6(2)(b) of the *Act*. (emphasis in original)

[36] I agree with Adjudicator Hale's analysis and adopt it in this appeal. While the city's council deferred three recommendations from the report on December 19, 2018 in open session, and subsequently opted to make them public following approval, this does not establish that consideration of the subject matter of the *in camera* deliberations occurred in an open meeting for the purposes of section 6(2)(b). The deferral of recommendations do not constitute consideration. Furthermore, the adoption of recommendations from the report in an open meeting also does not constitute consideration. Therefore, I am not persuaded by the appellant's argument that the deferral and adoption of the recommendations from the report in an open meeting is consideration of the subject matter of the deliberations as contemplated by the exception in section 6(2)(b) of the *Act*.

[37] I am also not persuaded by the appellant's argument that the subject matter of the deliberations has been considered in a meeting open to the public, simply because the city's AFAC received the third party company's public delegation and seven-page letter in open session. I accept that the third party company's public delegation and letter were received by the city's AFAC in open session. However, I also accept the city's explanation that after receipt of the third party company's public delegation and letter, the city's AFAC moved into closed session. The January 17, 2019 meeting minutes note this. These minutes also note that staff were provided with direction on this matter in closed session. Therefore, while I accept that the subject matter of the deliberations may have been revealed by the third party company's public delegation and letter received in open session, I find that this does not amount to the *consideration* of the subject matter of the deliberations as contemplated by section 6(2)(b) of the *Act*.

[38] For the reasons outlined above, I find that the section 6(2)(b) exception does not apply. Accordingly, I find that the section 6(1)(b) exemption applies to the report, subject to my finding on the city's exercise of discretion below.

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

[39] The section 6(1)(b) 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.

[40] 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.

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

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

¹⁰ Order MO-1573.

¹¹ Section 43(2).

relevant:¹²

- 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
- 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.

Representations of the parties

[43] The city submits that it has properly exercised its discretion under section 6(1)(b). The city submits that it only applied exemptions that relate directly to the fact that legal counsel prepared the report, and that it was presented and discussed *in camera* during a meeting of the city's AFAC.

[44] The city further submits that it considered that the report does not contain the appellant's personal information, that the contents of the report are sensitive to the city, and that recommendations with respect to the city's commercial relationship with the third party company were made public in the January 17, 2019 AFAC meeting

¹² Orders P-344 and MO-1573.

minutes. The city also submits that it has acted in good faith in its application of section 6(1)(b) and has not acted for an improper purpose.

[45] The appellant submits that the *Act* and all of the city's policies encourage the proactive release of information where possible. The appellant notes that the city could have exercised its discretion to release this report publicly after it was discussed, debated and approved in public meetings, and after the details of the previously confidential report were shared in public with the third party company.

[46] The appellant argues that the city failed to satisfy its obligations and evidentiary burden under the *Act*, and therefore, the IPC should reject the city's decision and order release of the report. The appellant submits that the city's "effort to keep secret this public information is part of an ongoing practice of cover-up and lack of transparency within the municipal bureaucracy." The appellant submits that city "staff have established a clear pattern of secrecy in an effort to hide facts from its residents, and city councilors themselves, for as long as practicable." The appellant's representations go on to note specific allegations against the city, which I have reviewed but will not reiterate here.

[47] The appellant submits that the city recognizes the "high level of great public interest" in the city's handling of the "bungled" arena addition and renovation, which is the subject of the report, and is trying to apply irrelevant exemptions in order to avoid releasing more embarrassing information. The appellant submits that the "great level" of public interest is enough to override any potential exemptions.

Analysis and findings

[48] Based on the representations of the parties, I find that the city did not err in its exercise of discretion to withhold the report under section 6(1)(b) of the *Act*.

[49] The appellant argues that I should reject the city's access decision and order the release of the report. However, I note that in considering the city's exercise of discretion, I may not substitute my own discretion for that of the city.

[50] The appellant also argues that the public interest in this information alone is enough to override any potential exemptions. The public interest override in section 16¹³ cannot apply to override the section 6(1)(b) exemption, but any public interest in disclosure is a relevant factor for the city to have considered in deciding whether or not to disclose the report. With respect to the public interest in the report, the city submits that recommendations with respect to the city's commercial relationship with the third party company were made public. While the city's consideration of the public interest

¹³ Section 16 of the *Act* states that "An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

may not have resulted in disclosure of as much information as the appellant would like, this does not provide a sufficient basis for me to interfere with the city's exercise of discretion in withholding the report under section 6(1)(b).¹⁴

[51] The appellant alleges that the city withheld the report for an improper purpose and in bad faith, but did not provide sufficient evidence to demonstrate that this is the case. Simply applying a discretionary exemption and withholding the report is insufficient on its own to establish that the city exercised its discretion in bad faith or that it withheld the report for an improper purpose.

[52] Based on the evidence before me, I am satisfied that the city did not withhold the report for an improper purpose or in bad faith. I am also satisfied that the city took into account relevant factors, and did not take into account irrelevant factors in the exercise of its discretion.

[53] Accordingly, I uphold the city's exercise of discretion to withhold the report under section 6(1)(b) of the *Act*.

ORDER:

I uphold the city's decision, and dismiss the appeal.

Original signed by: _____
Anna Truong
Adjudicator

_____ July 8, 2021

¹⁴ Section 54(2) of the *Act*.