

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4319

Appeal MA20-00309

The City of Richmond Hill

January 24, 2023

Summary: The City of Richmond Hill (the city) received an access request under the *Act* for videos and minutes taken at two specified closed sessions of city council in which the topic was the Yonge Bernard Key Development Area Revision Plan. The city withheld the records in full under the discretionary exemptions at 6(1)(b) (closed meeting), 11 (economic and other interests) and 12 (solicitor-client privilege). At mediation, the appellant raised the issue of the possible application of the public interest override at section 16, which was added to the scope of the appeal. In this order, the adjudicator finds that the records are exempt under section 6(1)(b).

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

Orders Considered: Orders MO-3378, MO-4082 and MO-4178.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the City of Richmond Hill (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for videos and minutes taken at two specified closed sessions of city council in which the topic was the Yonge Bernard Key Development Area Revision Plan.

[2] The city located two responsive records totalling 13 pages, and issued a decision

to the requester, denying access to them, claiming the application of the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*.

[3] The requester (now the appellant) appealed the city's decision to the Office of the Information and Privacy Commissioner (the IPC).

[4] At the outset of the mediation of the appeal, the appellant advised the mediator that he believed additional records should exist in response to his request. In particular, he noted that videos had not been identified as responsive records. The appellant also advised that he is pursuing access to the minutes in their entirety and raised the issue of the possible application of the exception in section 6(2)(b) as relevant to this appeal.

[5] The mediator facilitated a teleconference with the parties to discuss the issues under appeal and to explore a possible resolution. The city's FOI coordinator, the appellant, and an individual providing the appellant with legal support attended the teleconference. To address the first issue regarding additional records, the coordinator advised the appellant that the city does not record closed meeting sessions, and accordingly, videos of those meetings do not exist. The appellant accepted the city's explanation; therefore, access to video records is no longer an issue in this appeal.

[6] Also, during the teleconference, the appellant indicated that he wished to pursue the records in their entirety, and the city advised that it would be maintaining its position to withhold the records under section 6(1)(b). In addition, the city noted that it would be issuing a revised decision, claiming additional discretionary exemptions within the permitted time outlined in the Notice of Mediation.

[7] The city then issued a revised decision advising that the records were being withheld in full under section 6(1)(b), and sections 11 (economic and other interests), 12 (solicitor-client privilege) and 15 (information published or available to the public) of the *Act*.

[8] In a follow up discussion with the mediator, the appellant confirmed that he did not wish to pursue access to pages 4-8 of the first closed session meeting minutes. As a result, those pages were removed from the scope of the appeal and consequently section 15 is no longer an issue in dispute. The appellant advised that he is pursuing access to the remaining records as a matter of public interest, thereby raising the public interest override at section 16 of the *Act* which was added as an issue in this appeal.

[9] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*.

[10] The adjudicator initially assigned to this appeal invited the city and the appellant to provide representations on the issues in this appeal. She received representations from both parties. This appeal was subsequently transferred to me to continue the adjudication. I have reviewed the parties' representations and have decided that I do

not require further submissions before making my decision.

[11] For the reasons that follow, I find that the records at issue are exempt under section 6(1)(b) of the *Act*.

RECORDS:

[12] The records at issue consist of the closed session meeting minutes for the first closed meeting (pages 1-3) (Record 1), and the closed session meeting minutes for the second closed meeting (pages 1-5) (Record 2).

ISSUES:

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

DISCUSSION:

Background

[13] By way of background, the city advises that the Yonge Street and Bernard Avenue Key Development Secondary Plan was the subject of a matter before the Ontario Land Tribunal (the OLT).¹ Both the city and the appellant were parties in the case. The OLT is an independent administrative tribunal that adjudicates or mediates matters related to land use planning, environmental and nature features and heritage protections, land valuation, land compensation and related matters as authorized by statute and regulation. The case was an appeal of the city's approval of the secondary plan for the Yonge Street and Bernard Avenue Key Development Area. The OLT issued a final decision in July 2022. Recently leave to appeal the OLT's decision was heard before the Ontario Divisional Court. The parties are currently awaiting the Division Court's decision.

Issue A: Does the discretionary exemption at section 6(1)(b) relating to closed meetings apply to the records?

[14] The city claims the application of the exemption at section 6(1)(b) to the records at issue.

¹ The OLT was formerly known as the Local Planning Appeal Tribunal.

[15] Section 6 protects certain records relating to a municipal institution's legislative function or closed meetings of a council, board, commission or other body.

[16] Section 6(1)(b) 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.

[17] For this exemption to apply, the institution must show 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

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

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

[19] The city submits that the records are minutes of two closed sessions of council, which took place on consecutive days (May 13 and 14, 2020). In its representations, the city included the minutes of both open sessions of council, which document resolutions to move into closed sessions in each case. The minutes from the first open session of council state:

That Council resolve into a closed session meeting for the purpose of receiving advice with respect to a pending litigation matter before an administrative tribunal, and for the purpose of receiving legal advice that is subject to solicitor-client privilege, including communications necessary for that purpose in respect to staff report SRPRS.20.058 (Section 239(2)(e) and 239(2)(f) of the *Municipal Act, 2001*.

[20] The minutes from the second open session of council state:

That Council move into closed session:

² Orders M-64, M-102 and MO-1248.

a) To consider a time sensitive matter regarding litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or a local board; and the receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose regarding the Yonge/Bernard Key Development Area (KDA) appeal to the Local Planning Appeal Tribunal (LPAT) pursuant to Section 239(2)(e) and (f) of the *Municipal Act, 2001*.

[21] Based on the evidence provided by the city, I accept that meetings were held by council. Therefore, I find that the first part 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

[22] The second part of the test requires the city to establish that the meetings were properly held *in camera* (in the absence of the public)³ 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.⁴

[23] 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.

[24] The city submits that the closed sessions of council were authorized by sections 239(2)(e) and 239(2)(f) of the *Municipal Act, 2001*, which state:

(2) 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;

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose⁵

[25] I have reviewed the parties' representations and the records. Based on this

³ Order M-102.

⁴ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

⁵ The city provided the IPC with copies of documentation relating to the Ontario Land Tribunal case, including a pre-hearing decision, motion decisions, a case management conference decision, a hearing decision with respect to part of the appeal, and a summary of the case details.

review, I find that the city was authorized to hold these meetings *in camera* under section 239 of the *Municipal Act, 2001*. Specifically, sections 239(2)(e) and 239(2)(f) of the *Municipal Act, 2001* provide the city with the statutory authority to hold the meetings on May 13, 2020 and May 14, 2020 *in camera*. Therefore, the second part of the section 6(1)(b) test has been met.

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

[26] With respect to the third part of the test, 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 records would reveal the actual *substance of deliberations* which took place at the city's closed meetings, not only the *subject* of the deliberations.⁶

[27] The city has the onus of establishing how disclosure of the records would reveal the actual substance of the deliberations at the meeting and not merely the subject of the deliberations.

[28] The evidence before me is that council received legal advice from external counsel about the OLT hearing dealing with the Yonge Street and Bernard Avenue Key Development Secondary Plan at the closed session meetings on May 13, 2020 and May 14, 2020. The legal advice resulted in questions and discussions from council members to city staff and external counsel. These discussions also resulted in a decided course of action. I am unable to reveal more without revealing the actual records. I, therefore, accept the city's submissions that the records form both the subject and substance of deliberation and are intrinsically linked to council's deliberations of May 13, 2020 and May 14, 2020.

[29] Having reviewed all of the materials and submissions before me, I accept the city's assertion that disclosure of the records could be expected to reveal the substance of deliberation by council about its course of actions with respect to the OLT hearing at the closed session meetings. In this regard, I find that the city has provided me with sufficient evidence to conclude that disclosure of the records would permit the drawing of accurate inferences about the substance⁷ of council's discussions.

[30] As I find that the city has established that disclosure of the records would reveal the substance of the deliberations of council at the closed session meetings in question, the records qualify for exemption under section 6(1)(b) of the *Act*.

[31] However, in his representations, the appellant raised the application of the section 6(2)(b) exceptions. Therefore, I will now consider whether it applies in this

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

⁷ Orders M-184 and M-196.

case.

Section 6(2)(b) exception

[32] Section 6(2) of the *Act* sets out exceptions to section 6(1)(b). In this case, the appellant claims that section 6(2)(b) applies to the records. This section states,

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

(b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public.

[33] The appellant submits that the subject matter of the deliberations had been considered in a meeting to the public. He submits that the public meeting included lengthy submissions, lengthy debates and multiple motions and amendments.

[34] The appellant also submits that it was inappropriate for council to go into closed session on May 13, 2020 because they discussed the same issues that had just been discussed in public. He asserts that the public has a right to know the full discussion once it was started in public as it ensures that councilors are not making deals in secret or hiding their political opinions inappropriately.

[35] As well, the appellant submits that it was inappropriate for council to meet in a closed session on May 14, 2020 to reverse its decision without any public discussion or public vote. He explains that on May 13, 2020 councilors voted publicly and rejected a motion then on May 14, 2020 the same councilors voted to reverse themselves and accepted substantially the same motion. The appellant submits that the public knows the result but it does not know how each individual councilor voted or who might have changed their vote. He finally submits that this is the type of situation when section 6(2)(b) requires disclosure of the minutes of the closed meetings.

[36] The city submits that the subject matter of the deliberations in question being considered for Record 1, namely the recommendations relating to this matter was adopted by council in open session. It explains that this was only the vote on a motion that was not permitted to be voted on in closed session. The city submits that all discussions/debates on the matter occurred in the closed session.

[37] With respect to Record 2, the city submits that the subject matter of the deliberations had not been considered in a meeting that was open to the public.

[38] Upon reviewing the minutes for the open sessions for the two meetings in question and the records, I find that the subject matter of deliberation for the records were not considered in a meeting open to the public.

[39] With respect to Record 1, I note the minutes for the open session indicates that

nine delegates expressed their opinion and position about the Yonge and Bernard Key Development Secondary Plan. I also note that a vote on a motion was taken on the proposed modifications to the Secondary Plan and amendments to the Implementing Zoning By-law, which failed. Without revealing the substance of the record itself, the subject matters of deliberations for Record 1 were not about the proposed modifications to the Secondary Plan and amendments to the Implementing Zoning By-law per se. The subject matters of deliberations related to other issues dealing with the Yonge and Bernard Key Development Secondary Plan. As such, I find that the mandatory section 6(2)(b) exception does not apply.

[40] With respect to Record 2, the appellant did not provide evidence to substantiate his position that the subject matter of the deliberations in this record have been considered in a meeting open to the public. As such, I am unable to find that the mandatory section 6(2)(b) exception applies.

[41] In sum, I find that the section 6(2)(b) exception does not apply to the records. Accordingly, I find that the section 6(1)(b) exemption applies to the records, subject to my finding on the city's exercise of discretion below.

[42] I will not consider the possible application of the section 11 and 12 exemptions having found that the records at issue are exempt under section 6(1)(b). As well, I will not be considering the possible application of the public interest override at section 16 as it does not apply to records found exempt under section 6(1)(b).

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

[43] The section 6(1)(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[44] In addition, the IPC 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, or it fails to take into account relevant considerations.

[45] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁸ The IPC cannot, however, substitute its own discretion for that of the institution.⁹

[46] Some examples of relevant considerations are listed below. However, not all of

⁸ Order MO-1573.

⁹ Section 43(2).

these will necessarily be relevant, and additional considerations may be relevant:¹⁰

- 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, and the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their 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, and
- the historic practice of the institution with respect to similar information.

[47] The city submits that it properly exercised its discretion under section 6(1)(b). It submits that it carefully weighed the interest that the exemption seeks to protect against the purpose of the *Act*.

[48] The city submits that it considered the following factors in exercising its discretion:

- Each of the records, and parts of those records, in view of the language contained in the discretionary exemption applied. The city has concluded that the purpose of the exemption, and the interests it seeks to protect, applies to these records.
- Does the requester have a compelling need to receive the information in the records? The city concluded that there was no compelling need to disclose the records to the requester.

[49] The city also submits that it did not exercise its discretion in bad faith or for an

¹⁰ Orders P-344 and MO-1573.

improper purpose.

[50] The city finally submits that it took into account all relevant factors and did not take into account any irrelevant factors.

[51] The appellant's representations did not address the town's exercise of discretion.

[52] Based on my review of the parties' representations and the nature and content of the records, I find that the city properly exercised its discretion to withhold the records under section 6(1)(b) of the *Act*. I note that the city took into account the above noted considerations, such as the purposes and principles of the *Act*, the wording of the exemption and the interests it seeks to protect, and the lack of any compelling need to receive the records. I am satisfied that it did not act in bad faith or for an improper purpose. Accordingly, I uphold the city's exercise of discretion in deciding to withhold the records pursuant to the section 6(1)(b) exemption.

ORDER:

I uphold the city's decision to withhold the information under section 6(1)(b) and dismiss the appeal.

Original signed by: _____
Lan An
Adjudicator

_____ January 24, 2023