

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4391

Appeal MA22-00002

Hamilton-Wentworth District School Board

June 07, 2023

Summary: A reporter requested records related to an investigation into the conduct of a certain board trustee from the Hamilton-Wentworth District School Board (the board), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The board withheld an external investigator's report under the discretionary exemption at section 6(1)(b) (closed meeting), and on appeal, the reporter argued that an exception to this exemption applies [at section 6(2)(b) (open meeting)]. He also raised the public interest override at section 23 of the *Act*. In this order, the adjudicator upholds the board's decision, and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56, as amended, sections 6(1)(b), 6(2)(b), and 16; *Education Act*, RSO 1990, c E.2, as amended, sections 218.3(10), (11), (12) and (13).

Orders Considered: Order MO-3947

OVERVIEW:

[1] A reporter for a media outlet requested records related to an investigation into the conduct of a certain board trustee from the Hamilton-Wentworth District School Board (the board), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).¹ This order upholds the board's decision to withhold an external investigator's report (the report), under the discretionary exemption at section 6(1)(b) of the *Act*.

¹ The original request consisted of four parts, but only part one remains at issue. The other parts of the request were addressed and resolved at IPC mediation, and are not discussed in this order.

[2] The relevant part of the request is as follows:

1. The report and any other relevant documents from the Integrity Commissioner to the board of trustees related to the Code of Conduct breaches by trustee [named individual] that led the board of trustees to issue sanctions outlined in resolution [number] at their [specified date] board meeting.

[3] The board withheld the report under section 6(1)(b), and the requester (now the appellant) appealed the board's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC appointed a mediator to explore resolution. During mediation, the appellant advised that he was raising the public interest override at section 16 of the *Act*, and the exception at section 6(2)(b) (open meeting) of the *Act* to the closed meeting exemption. In a supplemental decision, the board later claimed the mandatory exemption at section 14(1) (personal privacy) over the report, in addition to section 6(1)(b).

[5] Since no further mediation was possible, the file moved to the adjudication stage of the appeal, where an adjudicator may conduct an inquiry.

[6] I conducted a written inquiry under the *Act* on the above issues,² seeking and receiving written representations from both parties.³

[7] For the reasons that follow, I uphold the board's decision that the report is exempt under section 6(1)(b) of the *Act*. As a result, it is not necessary to address the board's alternative claim under section 14(1) of the *Act*, and I dismiss the appeal.

RECORD:

[8] The record at issue is a 10-page report of an external investigator.

DISCUSSION:

[9] The appellant submits that the *exception* to the exemption claimed by the board applies, and that the record should be disclosed in the public interest. However, as I will explain below, I find that the record is exempt under section 6(1)(b) and that the exception at section 6(2)(b) does not apply. Since the public interest override at section 16 cannot apply to a record which is exempt under

² In doing so, I also sought representations about the issues of whether the record contains "personal information" as that term is defined in section 2(1) of the *Act*, and whether the board exercised its discretion under section 6(1)(b), and if so, whether the IPC should uphold that exercise.

³ Portions of the board's representations were not shared with the appellant due to confidentiality concerns, under *Practice Direction 7 of the IPC's Code of Procedure* (which deals with the sharing of representations). After reviewing the appellant's representations, I determined that I could close the inquiry.

section 6 at all, I do not consider it.

Section 6(1)(b): record that discloses deliberations of a closed meeting

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

[11] 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.

[12] For this exemption to apply, the board 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.⁴

[13] For section 6(1)(b) to apply, it must be established that disclosure of the record would reveal the actual substance of deliberations that took place at the *in camera* meeting, and not just the subject of the meeting or the deliberations.⁵ "Deliberations" refer to discussions conducted with a view towards making a decision.⁶

[14] The board submits the report at issue in this appeal meets this three-part test, and relies on the reasoning in Order MO-3947, which upheld a section 6(1)(b) claim over a code of conduct report that was discussed at a closed meeting.

[15] In response to the board, the appellant accepts that the report that he seeks was discussed at a closed meeting but submits that the exception to the exemption applies.

[16] Having reviewed the report itself and the parties' positions, I find that the exemption applies to the report.

[17] The board states, and I find, that it held a closed meeting (part one), which it was authorized to hold under section 207(2)(b) of the *Education Act* because there

⁴ Orders M-64, M-102 and MO-1248.

⁵ Orders MO-703, MO-1344, MO-2389 and MO-2499-I.

⁶ Order M-184.

were allegations of a personal nature and involving personal information of a board trustee being discussed (part two).⁷

[18] As the board notes, in Order MO-3947, the adjudicator accepted that the report in its entirety would have been reviewed at the closed meeting, and that significant portions of it were included in those discussions. There was no evidence that the issues pertaining to the trustee had been previously decided. In the circumstances, the adjudicator accepted that the report formed the substance of deliberations with a view to making a decision. He found that disclosure of the report would reveal the substance of the deliberation at the closed meeting, as the report contains the facts and a recommended course of action that was the very substance of the discussion.

[19] I agree with the board, that the reasoning in Order MO-3947 applies in this appeal, and I adopt it here. Based on my review of the board's evidence, and the report itself, it is clear to me that disclosure of the report would reveal the actual substance of the deliberations of the meeting (part three). I accept that the report as a whole was considered at the closed meeting and that significant portions of it were discussed, given the circumstances and conclusion contained in the report.

[20] Accordingly, the report meets all three parts of the test for the exemption at section 6(1)(b) of the *Act*.

[21] As contemplated by section 4(2) of the *Act*, I have considered whether any part of the report can reasonably be severed and disclosed,⁸ but I find that that is not the case. For example, some information in the report (such as on the title page, and page numbering) would not, if disclosed on its own, reveal the substance of the *in-camera* meetings. I find, however, that ordering the disclosure of this information would result in the disclosure of meaningless or disconnected snippets of information. In my view, severing and disclosing such meaningless information would not, in the circumstances, constitute a reasonable severance. Therefore, I will not order that any information in the report to be severed and disclosed.⁹

[22] I will explain why I do not accept that an exception to the exemption at section 6(1)(b) applies, next.

The exception at section 6(2)(b): open meeting

[23] Section 6(2)(b) says:

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

⁷ Section 207(2)(b) of the *Education Act* says, in part:

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 ... the disclosure of ... personal ... information in respect of a member of the board ... [.]

⁸ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

⁹ See *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23.

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[.]

[24] Regarding this exception, the Notice of Inquiry asked the following:

- Has the subject-matter of the deliberations in question been considered in a meeting that was open to the public? Please explain.
- Was a vote taken in a public meeting concerning the subject-matter of the deliberations?

[25] The board states that the following occurred in public:

- notice of in-camera meeting,
- a resolution was carried, in accordance with sections 218.3(10),¹⁰ (11),¹¹ (12)¹² and (13)¹³ of the *Education Act* [these provisions relate to considering code of conduct issues],
- the vote relating to the carrying of two specified resolutions occurred, one of which says that the "conclusions of an Integrity Commissioner [the external investigator who prepared the report at issue]" were confirmed, and
- the two resolutions were passed following from "a review" of the report.

[26] The appellant submits that the board considered the subject-matter of deliberations in the public session, after emerging from the in-camera meeting, and that therefore, the exception at section 6(2)(b) applies. He asserts that contrary to the typical board practice, the video of this (public) meeting is not available on the board's website. He states that he obtained a digital audio recording and the minutes of meeting. The appellant asserts that the "recording and meeting minutes

¹⁰ Section 218.3(10) says:

Despite subsection 207(1) [which says that board meetings shall be public] but subject to subsection (11) [see Note 11, below], the part of a meeting of the board during which a breach or alleged breach of the board's code of conduct is considered may be closed to the public when the breach or alleged breach involves any of the matters described in clauses 207(2)(a) to (e) [which authorizes certain closed meetings].

¹¹ Section 218.3(11) says:

A board shall do the following things by resolution at a meeting of the board, and the vote on the resolution shall be open to the public:

1. Make a determination under subsection (2) that a member has breached the board's code of conduct.
2. Impose a sanction under subsection (3).
3. Confirm or revoke a determination under clause (6) (c).
4. Confirm, vary or revoke a sanction under subsection (8).

¹² Section 218.3(12) says: "A member who is alleged to have breached the board's code of conduct shall not vote on a resolution to do any of the things described in paragraphs 1 to 4 of subsection (11)."

¹³ Section 218.3(13) says: "The passage of a resolution to do any of the things described in paragraphs 1 to 4 of subsection (11) shall be recorded in the minutes of the meeting."

demonstrate that the subject matter of the Board's deliberations and the report were discussed publicly."

[27] He says that the board "outlined the Report's conclusions regarding" the specified trustee's breach of the code of conduct, including a failure to maintain the integrity, dignity, and decorum of office, and to ensure civility and confidentiality. He states that, after discussing the report, the board adopted several sanctions, including a formal letter of censure, request of a formal apology and for cost incurred during the board's investigation, and barring the trustee from sitting on committees until the end of the specified elected term.

[28] He submits that publishing the letter of censure (which includes the report's "conclusions") on the board's website "brought the subject matter of deliberations further into the public realm."

[29] He submits that the board's release of the public cost of the investigation did so as well.

[30] As a result, the appellant argues the subject matter of deliberations was discussed publicly, and that because information related to the subject was released (including the letter of censure and investigation cost), section 6(2) applies.

[31] I do not agree that the exception at section 6(2) applies. In concluding this, I have considered the report itself, the appellant's representations, the board's evidence (including the minutes of meeting), and the sections of the *Education Act* on which the board relied to carry resolutions at the public meeting. Stating "the conclusions" of the report does not amount to revealing the substance of the deliberations about it. Likewise, referring to the conclusions in the censure letter, or disclosing the cost of the investigation do not constitute discussing the subject matter of the deliberations at the closed meeting in public. With respect to the adoption of sanctions, I note that the board was required to do this in public by the *Education Act*.¹⁴ The appellant relies on the contents of a recording that he did not provide with his representations, so I am unable to give weight to the arguments he makes in that regard. Therefore, in my view, the appellant asserts that the exception applies, but did not support his assertion with sufficient evidence.

[32] For these reasons, I find that the exception at section 6(2)(b) does not apply to the report. As a result, my finding that the exemption at section 6(1)(b) applies, stands.

The public interest override at section 16 cannot apply

[33] The appellant argues that the record should be disclosed in the public interest by ensuring public accountability and maintaining public confidence in the board and its trustees. He argues, for example, that given the seriousness of the code of conduct breaches and reprimands adopted, the public requires the information contained in the report to adequately scrutinize the board and trustee conduct and

¹⁴ See Note 11, above.

to determine whether the cost of the investigation was justified.

[34] However, section 16 of the *Act*, the “public interest override,” provides for the disclosure of records that would otherwise be exempt under *only* certain sections of the *Act*.

[35] Section 16 says:

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.

[36] Since section 6 is not one of the sections appearing in the above list of exemptions, section 16 cannot apply where a record is exempt under section 6(1)(b) of the *Act*.

[37] Regardless of the types of considerations referenced by the appellant, if an institution establishes that the three-part test set, out above, has been met, then section 6(1)(b) applies. An institution may, however, consider the types of public interest factors raised by the appellant in the exercise of its discretion to disclose or withhold records that would otherwise be subject to section 6(1)(b), as a discretionary exemption; however that is separate from the issue of whether section 6(1)(b) applies to the record. I address the board’s exercise of discretion, next.

The board’s exercise of discretion

[38] 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. 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. The IPC cannot, however, substitute its own discretion for that of the institution.¹⁵

[39] Here, there is no dispute that the board exercised its discretion.

[40] The board submits, and I accept, that it considered relevant factors in exercising its discretion, such as the wording of the exemption and the interests it seeks to protect, its historical practice with respect to confidential reports reviewed during in camera sessions, whether the requester had a sympathetic or compelling need to receive the report, and the sensitivity of the information in the report to the board and individuals involved.

[41] The appellant notes that the board has released similar reports in the past, and argues that this creates a public expectation of transparency in this appeal, which he submits is further supported by the board’s announcement at a public

¹⁵ Section 43(2).

meeting that the report would be released to the public. He argues that given the board's past release of similar past investigation reports (which include names and problematic comments), it is unclear why the board did not release the report at issue in this appeal. However, the board was free to consider its main historic practice on such reports. As noted, the IPC cannot substitute its own discretion on this, or any factor.

[42] On balance, I accept that the board considered relevant factors, and not irrelevant factors, in exercising its discretion under section 6(1)(b) of the *Act*. Given this finding, and having reviewed the report, I accept that the board did not exercise its discretion to claim this exemption in bad faith or for an improper purpose.

Conclusion

[43] For these reasons, I find that the report meets the three-part test for the exemption at section 6(1)(b), and that an exception to this exemption does not apply. As a result, I dismiss the appeal.

ORDER:

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

Original Signed by: _____

Marian Sami
Adjudicator

June 07, 2023 _____