

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4544

Appeal MA21-00637

Township of Russell

July 11, 2024

Summary: The township received a request under the *Act*, in part, for a report that was discussed at a closed session of the township council. The township relied on section 6(1)(b) of the *Act* to deny access to the report on the basis that it revealed the substance of deliberations of the closed session. In this order, the adjudicator upholds the township's decision.

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); *Municipal Act, 2001*, S.O. 2001, c. 25, section 239(2).

Orders Considered: MO-2544-F.

OVERVIEW:

[1] This order considers the application of the discretionary closed meeting exemption in section 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to a report.

[2] The township held a regular council meeting, which was open to the public, on a specified date. Part of the meeting was held in the absence of the public pursuant to the township's authority to do so in the *Municipal Act, 2001*.¹ When the council reconvened after the specified closed session, it confirmed that it had received a report during the

¹ S.O. 2001, c. 25.

closed session and approved the recommendation in it. At a later time, a township's committee shared some information from the report during a meeting open to the public as part of its report to council and the council later voted on the committee's report.

[3] The appellant submitted an access request for records related to the specified closed session. In its decision, the township provided the appellant with a link to a record responsive to one part of the appellant's request because the record was publicly available. The township denied access to a record responsive to the other part of the request because it reveals the substance of deliberations of the closed session. The record to which the township denied access is the report received by the council at the specified closed session.

[4] As the appellant wished to receive access to the report, he appealed the township's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] The IPC attempted to mediate the appeal. Since the mediation did not resolve the issue in this appeal, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the Act. An IPC adjudicator sought and received the parties' representations in accordance with the confidentiality criteria in the IPC's Practice Direction 7 and section 7.07 of the IPC's Code of Procedure. The appeal was then transferred to me to continue the inquiry. I reviewed the report and parties' representations and sought further representations.

[6] For the reasons that follow, I find that the report is exempt under section 6(1)(b) of the Act. I also uphold the township's exercise of discretion.

RECORDS:

[7] The only record at issue is the report discussed at the specified closed session.

DISCUSSION:

[8] The sole issue to be determined in this appeal is whether the discretionary closed meeting exemption at section 6(1)(b) applies to the report.

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

[10] Section 6(1)(b) reads:

6 (1) A head may refuse to disclose a record,

(b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[11] For this exemption to apply, the township must meet a three-part test:

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

Parts 1 and 2 of the test: a council, board, commission or other body, or a committee of one of them, held a meeting that was authorized by statute to be held in the absence of the public

[12] The first part of the test requires the township to establish that the specified closed session occurred. The second part of the test requires the township to identify a statute that authorized it to hold the specified closed session.³ In determining whether the township was authorized by a statute to hold the specified closed session in the absence of the public, I will consider whether the purpose of the specified closed session was to deal with a matter identified in the statute that authorizes the holding of a closed meeting.⁴

Parties' representations

[13] The township submits that during the specified regular council meeting, the council held a session that was closed to the public. The township says that, pursuant to section 239(2)(h) of the Municipal Act, 2001, it had authority to hold the session in the absence of the public because the council considered at that session information that was explicitly supplied in confidence to the township by an upper level of government.

[14] The township further submits that it complied with all the requirements of its Procedural By-law No. 2021-127 which governs the calling, place and proceedings of meetings. In accordance with section 4.12 of the Procedural By-law No. 2021-127, in advance of the specified regular council meeting, the council posted an agenda of the meeting that stated that part of the meeting would be closed to the public in accordance with section 239(2) of the Municipal Act, 2001 because, among other matters, the council would discuss information explicitly supplied in confidence to the township.

² Orders M-64, M-102 and MO-1248.

³ Order M-102.

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

[15] The appellant did not make representations with respect to this issue.

Analysis and finding

[16] I find that the specified closed session occurred, and the township was authorized by section 239(2)(h) of the Municipal Act, 2001 to hold the session in the absence of the public.

[17] The appellant did not dispute that parts 1 and 2 of the test were met. Having reviewed the report, I am satisfied that it contains information supplied in confidence to the township by an upper level of government and therefore the council was authorized to hold the specified closed session pursuant to section 239(2)(h) of the Municipal Act, 2001 to consider the report.

Part 3 of the test: disclosure of the record would reveal the actual substance of the deliberations of the meeting

[18] The third part of the test requires that the township establish that the disclosure of the record would reveal the actual substance of deliberations that took place at the specified closed session, 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

[19] Section 6(1)(b) does not protect records merely because they refer to matters discussed at a closed meeting or because the township had authority to hold a closed meeting.⁷ The township has the onus of establishing that the disclosure of the report would reveal the actual substance of the deliberations at the specified closed session and not merely the subject of deliberations.

Parties’ representations

[20] The township submits that the disclosure of the report, in whole or in part, would reveal the substance of deliberations at the closed session. The township did not elaborate further on its position.

[21] The appellant did not make representations with respect to this issue.

Analysis and finding

[22] I find that the disclosure of the report would reveal the substance of the council’s deliberations because the report contains the information that the council considered with the view of reaching its decision. The report contains information that is typically included in a report: background, analysis and recommendation or conclusion. Based on my review of the content of the report and the township’s representations, I conclude that the

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

⁶ Order M-184.

⁷ Order MO-1344.

information in the report informed the council's decision to approve the recommendation in the report.

[23] As the township has met the three-part test, I find that the township has established that the report qualifies for exemption under section 6(1)(b) of the Act.

Section 6(2)(b) exception

[24] The appellant focuses his representations on the application of section 6(2)(b) of the Act.

[25] Section 6(2) of the Act sets out exceptions to sections 6(1)(a) and (b). It reads, in part:

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

Parties' representations

[26] The township submits that the report has never been shared publicly. The township says that the minutes of the specified regular council meeting confirm that after the council returned from the specified closed session, it only approved a motion to receive the report and approve its recommendation. The township concedes that some information set out in the report was shared with the public during a later council meeting that was open to the public. However, the township objects to any part of the report being disclosed on the basis that the disclosure of any part of the report would reveal the substance of deliberations of the closed session.

[27] The appellant relies on the same minutes of the specified regular council meeting as the township to argue that because the council voted to receive the report and approve the recommendation set out in it during an open session, the council discussed the report at a meeting open to the public.

Analysis and finding

[28] I find that the exception in section 6(2)(b) does not apply to the report.

[29] First, the adoption at an open session of the specified regular council meeting of the report and recommendation in it does not constitute "consideration" for the purpose of section 6(2)(b) exception. Prior IPC orders have held that section 6(2)(b) does not apply where a record or a recommendation discussed at a closed meeting was solely adopted at an open meeting because adoption of a report or a recommendation does not

constitute "consideration."⁸ I agree with these prior orders and find them relevant to the present appeal.

[30] Further, section 239(5) of the Municipal Act, 2001 requires that a meeting be open to the public during the taking of a vote and therefore the council was required to vote in an open session.

[31] Second, while a township's committee shared some information from the report in its own report at a later meeting open to the public, I find that this is not sufficient to establish that the report falls within section 6(2)(b) exception. The report of the township's committee revealed in general terms only limited information. The information revealed did not include the subject matter of deliberations at the specified closed meeting. Given that exception at section 6(2)(b) applies only if a subject matter of deliberations was considered at a meeting open to the public, the exception does not apply in this case. In MO-2544-F, Adjudicator Higgins held that the fact that the institution in that appeal exercised its discretion to share some information from the records discussed at a closed session did not support a finding that exception at section 6(2)(b) applied.⁹

[32] In light of my finding that a discretionary exemption at section 6(1)(b) applies, I will next assess the township's exercise of discretion.

Exercise of discretion

[33] The exemption at section 6(1)(b) of the Act is discretionary, which means that the institution can decide to disclose the record even if it qualifies for exemption. On appeal, I must determine whether the township failed to exercise its discretion.

[34] I may find that the township 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. In either case, I may send the matter back to the township for an exercise of discretion based on proper considerations.¹⁰ However, I cannot substitute my own discretion for that of the township.¹¹

Parties' representations

[35] The township submits that it exercised its discretion to withhold the report under section 6(1)(b) of the Act properly. The township says that it properly applied the exemption. Reading the entirety of the township's representations, I understand that it determined that the interests protected by the exemption outweighed the interests

⁸ Order M-241, MO-4507.

⁹ MO-2544-F.

¹⁰ Order MO-1573.

¹¹ Section 43(2).

advanced by disclosure.

[36] The appellant submits that the township did not exercise its discretion properly because it failed to consider that the report ought to be disclosed under section 6(2)(b) of the Act. These arguments have been addressed above.

Analysis and finding

[37] I am satisfied that the township took relevant considerations into account when it decided to not disclose the report to the appellant. The township considered the interests protected by the section 6(1)(b) exemption and weighed those against disclosure of the record. Considering the township's overall representations, I am satisfied that it determined that in order to address the interests protected by section 6(1)(b), only certain information from the report could be disclosed to the public. That information was disclosed by a township's committee at a later meeting open to the public, and the township decided that no further information could be made available.

[38] I am also satisfied that the township did not consider irrelevant matters or exercise its discretion in bad faith or for improper purpose.

ORDER:

I uphold the township's decision to withhold the report under section 6(1)(b) of the *Act* and dismiss the appeal.

Original Signed by: _____
Anna Kalinichenko
Adjudicator

_____ July 11, 2024