Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER MO-2425-I

Appeal MA08-219

City of St. Catharines

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NATURE OF THE APPEAL:

The City of St. Catharines (the City) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> April 28, 2008 I, thru my [named lawyer] & [named engineer], requested council to review staff's decision (which was based upon previous misconceptions & no proof) and allow me a "reasonable" solution to the parking problem that exists together with encroachments on the City's portion of a shared "right of way" – which has prevented me from selling this property as of Nov. 1st/07. Financially, I am in great distress, and need a decision made regarding correct & factual information. Council denied my request based upon a "report" from staff. I have the right to see the information used against me and in secret. The issues staff is focused on, happened 16 years ago & not by me. I have proof of same. City has erred in their assumptions in their letter in Dec/07. & I believe still do. As the "accused" I need the report.

The City located a report, dated April 24, 2008, that its Financial Management Services Department submitted to St. Catharines City Council for consideration at a closed meeting. The City denied the requester access to this report pursuant to the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*.

The requester (now the appellant) appealed the City's decision to this office, which appointed a mediator to assist the parties in resolving the issues. This appeal was not resolved through mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by sending a Notice of Inquiry to the City, which submitted representations in response. I then sent the same Notice of Inquiry to the appellant, along with a copy of the City's representations. The appellant submitted representations in response.

RECORD:

The record at issue is a five-page report (plus two appendices) that the City's Financial Management Services Department submitted to St. Catharines City Council for consideration at an in-camera meeting.

DISCUSSION:

CLOSED MEETING

General principles

Section 6(1)(b)

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.

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

[Orders M-64, M-102, MO-1248]

Under part 3 of the test

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

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 [Order MO-1344].

Section 6(2)(b) – exception

Section 6(2)(b) of the *Act* sets out an exception to section 6(1)(b). It reads:

> 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;

Analysis and findings

In determining whether the record at issue qualifies for exemption under section 6(1)(b) of the *Act*, I will consider the three-part test set out above.

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

To satisfy the first requirement of the three-part test for the section 6(1)(b) exemption, the City must establish that City Council held a meeting.

As noted above, the record at issue is a five-page report (plus two appendices) that the City's Financial Management Services Department submitted to City Council for consideration at a closed meeting. The purpose of this report was to provide City Council with background information about the encroachment issues relating to the appellant's property and to outline the position of City staff with respect to how these issues should be resolved.

The City states that City Council met on April 28, 2008 to consider various matters and moved into a closed meeting to consider the report. As supporting evidence, the City has provided me with a certified copy of the "General Committee Minutes" that were prepared after this meeting that summarize what took place and what decisions were made. Item No. 228 of these minutes specifically states that City Council moved in camera to consider the above report.

The appellant does not dispute that a meeting took place.

I am satisfied that City Council held a meeting. Consequently, I find that the City has met the first requirement of the three-part test for the section 6(1)(b) exemption.

Part 2 – statute authorizes the holding of the meeting in the absence of the public

To satisfy the second requirement of the three-part test for the section 6(1)(b) exemption, the City must establish that a statute authorized the holding of the City Council meeting in the absence of the public.

The City has provided me with a copy of section 239 of the *Municipal Act* and submits that section 239(2)(c) (proposed or pending acquisition or disposition of land) authorized City Council to hold a closed meeting to consider the report.

Section 239(1) of the *Municipal Act* requires that all meetings be open to the public, subject to the exceptions and other criteria and conditions set out in sections 239(2), (3) and (3.1). These provisions state:

> (1) Except as provided in this section, all meetings shall be open to the public.
>
> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> (a) the security of the property of the municipality or local board;

> (b) personal matters about an identifiable individual, including municipal or local board employees;
>
> (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
>
> (d) labour relations or employee negotiations;
>
> (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 purpose;
>
> (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.
>
> (3) A meeting shall be closed to the public if the subject matter relates to the consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act* if the council, board, commission or other body is the head of an institution for the purposes of that Act.
>
> (3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:
>
> 1. The meeting is held for the purpose of educating or training the members.
>
> 2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

I would note that both sections 239(2) and (3.1) use the word "may" and are therefore discretionary exceptions to the general rule that meetings must be open to the public. They allow a meeting or part of a meeting to be closed to the public if the requirements of those exceptions are met. However, a municipal council, board or committee still has the discretion to hold such meetings in public, even if the requirements of sections 239(2) and (3.1) are met. In deciding whether to close a meeting in such circumstances, a municipal council, board or committee would presumably weigh the principles of transparency and public accountability against the interests designed to be protected by sections 239(2) and (3.1).

In contrast, section 239(3) uses the word "shall" and is therefore a mandatory exception to the general rule that meetings must be open to the public. A municipal council, board or committee must close a meeting to the public if the requirements of section 239(3) are met.

The City submits that the subject matter of the report "clearly concerned the possible disposition of property [section 239(2)(c)] and therefore the [report was] properly considered 'in camera' in accordance with this provision."

The appellant does not specifically address whether the City has established that a statute authorized the holding of the City Council meeting in the absence of the public, other than claiming that she and her lawyer "were not informed the meeting would be private."

As noted above, the entire five-page report (plus the two appendices), which was prepared by the City's Financial Management Services Department, was submitted to City Council for consideration at a closed meeting. The purpose of this report was to provide City Council with background information about the encroachment issues relating to the appellant's property and to outline the position of City staff with respect to how these issues should be resolved.

Section 239(2)(c) of the *Municipal Act* does not provide City Council with the discretionary authority to close a meeting or part of a meeting simply because the subject matter being considered relates to "land." This provision specifically requires that "a proposed or pending acquisition or disposition of land" by the municipality be the subject matter under consideration.

I have carefully reviewed the report itself, which serves as a significant piece of evidence in determining whether section 239(2)(c) authorized City Council to hold the specific closed meeting that took place. There are some limited references in the report to the possible disposition of land by the City, because the appellant had requested that she be permitted to acquire the City land that her property encroaches upon.

However, the subject matter of most of the report does *not* deal with "a proposed or pending acquisition or disposition of land by the municipality," as required by section 239(2)(c). The bulk of the report contains background information and sets out other options (beyond the disposition of land) for addressing the appellant's request that the encroachment issues relating to her property be resolved.

In short, I find that City Council did not have the authority, under section 239(2)(c), to consider the subject matter of most of the report in a closed meeting. As noted above, the subject matter of the bulk of the report does not concern "a proposed or pending acquisition or disposition of land" by the City, as required by section 239(2)(c). Consequently, City Council's consideration of the subject matter of most of the report, which took place in a closed meeting, should actually have taken place in an open meeting.

However, I find that City Council had the statutory authority, under section 239(2)(c), to close part of its meeting to the public to consider the limited portions of the report that address the possible disposition of City-owned land to address the encroachment issues. In my view, the part of the closed meeting in which City Council considered those limited portions of the report was authorized by section 239(2)(c).

The City must meet all three requirements of the section 6(1)(b) test to satisfy this exemption. Given that I have found that the City has not met the second requirement of the test with respect to most of the report, including the appendices, these portions of the record at issue do not qualify for exemption under section 6(1)(b) of the *Act* and must be disclosed to the appellant.

However, the City has met the second part of the section 6(1)(b) test with respect to the limited references in the report that address whether the City should dispose of the encroached-upon land to the appellant. Consequently, I will now consider whether the City has satisfied the third requirement of the test with respect to those portions of the record.

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

To satisfy the third requirement of the three-part test for the section 6(1)(b) exemption, an institution must establish that disclosure of the record would reveal the substance of the deliberations of the closed meeting. In the circumstances of this appeal, the City must establish that disclosure would reveal the substance of the deliberations of the closed meeting held by City Council that considered the limited references in the report that address whether the City should dispose of the encroached-upon land to the appellant.

In Order MO-1344, former Assistant Commissioner Tom Mitchinson stated the following with respect to the meaning of the third requirement of the section 6(1)(b) test:

> To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations on this in camera meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the **subject** of the deliberations and not their **substance** (see also Order M-703). "Deliberations" in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385).
>
> …
>
> It is clear from the wording of the statute and from previous orders that to qualify for exemption under section 6(1)(b) requires more than simply the authority to hold a meeting in the absence of the public. The *Act* specifically requires that the record at issue must reveal the substance of deliberations which took place at the meeting.

The City submits that disclosure of the report would reveal the substance of City Council's deliberations at the closed meeting:

> … The report specifically details the property in question, relevant considerations and the position taken by Staff with respect to the matter, all of which form the substance of what Council was being asked to deliberate upon in terms of the

> potential disposition of the property. Therefore, it is the City's position that the disclosure of the report at issue would reveal the actual substance of the deliberations of City Council in this matter as the report formed the basis of their "in camera" discussions conducted with a view towards making a decision concerning the matter …

The City further cites Orders MO-1487, MO-1909 and MO-2087 to support its position.

In her representations, the appellant does not directly address whether disclosure would reveal the actual substance of the deliberations of the closed meeting held by City Council.

I have carefully considered the City's representations on this issue. In my view, there is sufficient evidence before me to find that City Council deliberated upon the land disposition references in the report at its closed meeting. In particular, Item No. 228 of the "General Committee Minutes," which briefly summarize what took place at the closed meeting, state that one councillor unsuccessfully moved that the City "offer for sale to the abutting property owner, the City's portion of the land containing the five foot right-of-way."

In my view, this evidence demonstrates that City Council deliberated upon the land disposition references in the report at its closed meeting. I find, therefore, that disclosing those limited portions of the report to the appellant would have the effect of revealing the substance of City Council's deliberations on that subject matter.

In short, I find that the City has met the third requirement of the three-part test for the section 6(1)(b) exemption with respect to the limited references in the report that address whether the City should dispose of the encroached-upon land to the appellant.

Section 6(2)(b) – exception

As noted above, section 6(2)(b) of the *Act* sets out an exception to the discretionary exemption in section 6(1)(b). Under this exception, an institution cannot refuse to disclose a record under section 6(1)(b) if the subject matter of the deliberations with respect to the record has been considered in a meeting open to the public. Neither of the parties has adduced any evidence to suggest that the subject matter of City Council's deliberations with respect to the report was considered in an open meeting. Consequently, I find that the section 6(2)(b) exception does not apply.

I will now determine whether the City exercised its discretion properly in applying the section 6(1)(b) exemption to the limited portions of the report that address whether the City should dispose of the encroached-upon land to the appellant.

EXERCISE OF DISCRETION

General principles

The section 6(1)(b) exemption 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.

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- 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

Analysis and findings

The City submits that it exercised its discretion in good faith in applying the section 6(1)(b) exemption "in order to safeguard the confidentiality and integrity of Council's deliberations and communications with City Staff with respect to the property matter that was properly dealt with 'in camera'." The appellant submits that the City did not take relevant factors into account, such as the fact that she has a sympathetic and compelling need for the information.

I have found that limited portions of the report qualify for exemption under section 6(1)(b) of the *Act*. These portions address whether the City should dispose of the encroached-upon land to the appellant and set out the position of staff on this issue. As noted above, the section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. Consequently, although the City has the authority to exercise its discretion in favour of disclosure, it has chosen not to do so.

I do not doubt that the City exercised its discretion in "good faith" in applying the section 6(1)(b) exemption. However, I am not persuaded that it took all relevant factors into account. The City has not provided evidence to suggest that it took any of the relevant factors listed above into account in exercising its discretion, particularly:

- the purposes of the *Act*, including the principle that information should be available to the public
- whether the requester has a sympathetic or compelling need to receive the information
- whether disclosure will increase public confidence in the operation of the institution

In my view, the report reveals that City staff engage in careful and thoughtful decision-making with respect to land disposition issues, which could only have the effect of increasing public confidence in the City's operations, if this information was disclosed. Consequently, I find that

this is a particularly relevant factor that the City should have taken into account in exercising its discretion under section 6(1)(b).

I would note as well that a portion of the report (page 5) suggests that the "terms and conditions" set out in the report were conveyed to the appellant's lawyer. This appears to include the limited portions of the report that address whether the City should dispose of the encroached-upon land to the appellant, which I have found qualify for exemption under section 6(1)(b) of the *Act*.

In my view, the fact that the report suggests that the City's position with respect to the disposition of land has already been communicated to the appellant's lawyer, is a relevant factor that the City has not taken into account in exercising its discretion under section 6(1)(b). If the City has already made its position on land disposition known to the appellant's lawyer, there is a certain level of absurdity in refusing to disclose those portions of the report.

In short, I find that the City has not provided sufficient evidence to show that it took all relevant factors into account in exercising its discretion to apply the section 6(1)(b) exemption to the limited portions of the report that address whether the City should dispose of the encroached-upon land to the appellant. As noted above, this office may not substitute its own discretion for that of the institution. However, I do have the authority to order the City to re-exercise its discretion based on proper considerations, and I will do so.

CONCLUSION

I conclude that most of the report (including the two appendices) does not qualify for exemption under section 6(1)(b) and must therefore be disclosed. I have found the limited portions of the report that address whether the City should dispose of the encroached-upon land to the appellant, qualify for exemption under section 6(1)(b) of the *Act*. However, I have also found that the City did not take all relevant factors into account when it exercised its discretion to withhold those portions of the report from the appellant. Consequently, it must re-exercise its discretion.

In her representations, the appellant identifies several other records to which she is seeking access and appears to suggest that they are at issue in this appeal. These records were not cited in her original request to the City and are therefore not at issue in this appeal. If the appellant wishes to seek access to these records, she must file a new request with the City.

ORDER:

1. I order the City to disclose the record at issue to the appellant, except for those portions that I have found qualify for exemption under section 6(1)(b) of the *Act*.

2. I order the City to disclose the non-exempt portions of the record to the appellant by **June 29, 2009**. I am providing the City with a copy of the record and have highlighted in green the limited portions that must not be disclosed because they qualify for exemption under section 6(1)(b).

3. I order the City to re-exercise its discretion with respect to the limited portions of the record that I have found qualify for exemption under section 6(1)(b). In re-exercising its discretion, the City must take into account the relevant factors that I have identified in this order.

4. If the City decides, after re-exercising its discretion, to disclose the remaining withheld portions of the record to the appellant, I order it to provide the appellant with a written notice that sets out this decision, with a copy to this office, within 30 days of the date of this interim order. In such circumstances, this appeal will be considered resolved and no final order will be issued.

5. If the City decides, after re-exercising its discretion, to continue withholding some or all of the remaining undisclosed portions of the record under section 6(1)(b), I order it to provide the appellant with a written notice that sets out this decision. This written notice must clearly explain what factors the City took into account in re-exercising its discretion and why these factors have led the City to decide to continue withholding the undisclosed portions of the record. The City must provide this written notice to the appellant, with a copy to this office, within 30 days of this interim order.

6. If the appellant wishes to respond to the City's decision, if any, to continue withholding the remaining undisclosed portions of the record, the appellant must provide me with written representations within 21 days of the date of the City's written notice. I will take the City's written notice and the appellant's response into account when issuing my final order.

7. In order to verify compliance with this interim order, I reserve the right to require the City to provide me with a copy of the record that it discloses to the appellant.

Original signed by: May 29, 2009
Colin Bhattacharjee
Adjudicator