

INTERPRETATION BULLETIN

Draft By-Law/Closed Meeting

This interpretation bulletin outlines the factors for determining whether the discretionary exemption relating to draft by-laws and closed meetings apply to a record, as set out in **section 6(1)** of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA).

Section 6(1) of MFIPPA states:

A head may refuse to disclose a record,

- (a) that contains a draft of a by-law or a draft of a private bill; or
- (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.

What is the purpose of this section?

Section 6 protects certain records relating to a municipal institution's legislative function or meetings of a council, board, commission or other body that are statutorily authorized to be closed.

Who has the burden of proof?

When an institution refuses access to a record or part of a record, the burden of proving the record or part of the record falls within one of the specified exemptions in the act lies upon the institution, as per section 42 of MFIPPA.



Information and Privacy
Commissioner of Ontario

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

What does a discretionary exemption mean in relation to section 6(1)?

The exemption under section 6(1) of MFIPPA is discretionary. This means that an institution may still disclose the requested information, even though the exemption applies.¹

When deciding whether to exercise its discretion, an institution must consider whether it will disclose the record even though the exemption may apply to it. On appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner may find that the institution has erred in exercising its discretion if:

- 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.²

Section 6(1)(a): Draft by-law or private bill

Section 6(1)(a) of MFIPPA only applies to records that actually contain a draft of a by-law or private bill. The exemption under section 6(1)(b) is broader in scope in that it refers to records that may “reveal” the substance of deliberations, including records from which accurate inferences can be drawn about the deliberations. By contrast, the wording in section 6(1)(a) is more limited in scope and exempts only records that actually contain a draft of a by-law or private bill.

For example, in one case, the City of Oshawa claimed this exemption for a variety of records including draft by-laws and covering memoranda.³ The adjudicator found that while the draft by-laws were exempt, the covering memoranda were not.

In another decision, an appellant sought access to various records related to a specified sign.⁴ The City of Toronto granted partial access but withheld some records claiming the exemption for section 6(1)(a), among other exemptions. Toronto claimed that the pages for which it claimed the exemption consisted of a draft by-law relating to the appellant’s sign. The adjudicator found that those pages contained a draft by-law and this draft by-law was not subject to the exception in section 6(2)(a) because it was not discussed in a meeting open to the public.

1 Order [MO-2572-I](#).

2 Order [MO-2572-I](#).

3 Order [MO-1374](#).

4 Order [MO-3311](#).

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

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.⁵

Is the meeting authorized to be held in camera?

The institution must show that it held a meeting, and that it was authorized by law to hold the meeting in camera.⁶ For the meeting to be authorized to be held in camera, its purpose must have been to deal with a matter for which a closed meeting is authorized by statute.⁷

For instance, in one case, the City of Toronto refused to provide access to records relating to its sale of street and expressway lights that were considered during in camera meetings.⁸ The city argued that it was authorized to conduct such meetings in camera under section 239(2)(a) of the *Municipal Act* that authorizes closed meetings if the subject matter being considered is “the security of the property of the municipality or local board.” The city took the position that the harm to its financial and economic interests that might come from disclosing the records fell squarely within the intent and meaning of “security of the property.” In the adjudicator’s view, the phrase “security of the property of the municipality” should be interpreted in accordance with its plain meaning, which is the protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety in relation to this property. Accordingly, the adjudicator found that the city was not properly authorized to hold a closed meeting under section 239(2)(a) of the *Municipal Act*.

Substance of deliberations

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 deliberations.⁹ “Deliberations” refers to discussions conducted with a view towards making a decision.¹⁰

Section 6(1)(b) does not protect records merely because they refer to matters discussed at a closed meeting, and it does not protect the

5 Orders [M-64](#), [M-102](#) and [MO-1248](#).

6 Order [M-102](#).

7 [St. Catharines \(City\) v. IPCO, 2011 ONSC 2346](#) (CanLII).

8 Order [MO-2468-F](#).

9 Orders [M-703](#), [MO-1344](#), [MO-2389](#) and [MO-2499-I](#).

10 Order [M-184](#).

names of individuals attending meetings, and the dates, times and locations of meetings.¹¹

The Toronto District School Board received a request from the appellant for copies of various records relating to the lease of a school property by an identified tenant.¹² The adjudicator found that most records claimed exempt under section 6(1)(b) would reveal the substance of deliberations. However, the adjudicator found that one record, a lease agreement, would not. Taken as a whole, the contents of the lease represented the ultimate decisions arising from the deliberations but did not reveal the substance of those deliberations to the degree necessary to bring it within the scope of section 6(1)(b).

Similarly, in another decision¹³, the Deep River Police Services Board denied access to employment contracts of two police employees based on the section 6(1)(b) exemption. The adjudicator found that the exemption did not apply to the final adopted employment agreements because disclosure would not reveal the actual substance of the in camera meetings at which the agreements were discussed.

However, the Office of the Information and Privacy Commissioner of Ontario (IPC) found that a report to the council of the City of North Bay pertaining to a pre-servicing agreement for a specified road was exempt under this section.¹⁴ Here, the evidence showed that the report was discussed during the closed session portion of a meeting of council. The report contained background and analysis about the phase four pre-servicing agreement between the city and the appellant. Therefore, the adjudicator found that disclosure of the report could be expected to reveal the substance of deliberations by council about its course of actions with respect to the phase four pre-servicing agreement.

Section 6(2): Exceptions to the exemption

Section 6(2) of the act sets out exceptions to sections 6(1)(a) and (b). It reads:

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.

¹¹ Order [MO-1344](#).

¹² Order [MO-1590-F](#).

¹³ Order [MO-3181](#).

¹⁴ Order [MO-4507](#).

Section 6(2)(a) and (b): Open meeting consideration of a draft or of the substance of closed meeting deliberations

If an institution relies on the exemption in section 6(1)(a) of MFIPPA, but the IPC finds that a record was disclosed at a meeting open to the public, then the exception under section 6(2)(a) will apply to require disclosure.

Similarly, if an institution relies on the exemption in section 6(1)(b) of MFIPPA, but the IPC finds that the substance of deliberations from a closed meeting was disclosed at a meeting open to the public, then the exception under section 6(2)(b) will apply and the institution will be required to disclose the record.

The meaning of the word “meeting” in the context of section 6(2)(a) has been interpreted in a manner consistent with its definition in the *Municipal Act*.¹⁵ Moreover, taking a plain reading of “open to the public” means that the meeting be open to or shared by all people.

In one decision, for example, the appellant submitted two requests to the City of Toronto.¹⁶ Toronto denied access to all responsive records held by the “City Solicitor” on the grounds that the records consisted of, among other things, draft by-laws. However, Toronto withdrew its reliance on the section 6(1)(a) exemption for the draft by-law. This was because the materials were considered in a council meeting open to the public and section 6(2)(a) applied.

Regarding the application of the section 6(2)(b) exception, an adjudicator found that the exception did not apply to a report that was discussed at a closed session meeting of a township council and then later adopted at an open meeting.¹⁷ In that case, merely adopting the report at a subsequent open meeting did not constitute “consideration.” Further, while the township’s committee shared some information from the report in a later meeting that was open to the public, the adjudicator found that this was not sufficient to establish that the report fell within the section 6(2)(b) exception.

Section 6(2)(c): Record more than twenty years old

A record that is more than 20 years old must be disclosed, even if it would normally be covered by the exemption under s. 6(1) of MFIPPA.

¹⁵ Order [MO-1374](#).

¹⁶ Order [MO-1205](#).

¹⁷ Order [MO-4544](#).