



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

# **INTERIM ORDER MO-2572-I**

**Appeal MA09-323**

**The Corporation of the Township of Cavan-Monaghan**



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## **NATURE OF THE APPEAL:**

The appellant submitted a request to the Corporation of the Township of Cavan-Monaghan (the Township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of “all tests and related technical information that pertain to the well on [name of street] and the issue of possible contamination as referred to in Township documents and letters.”

The Township issued a decision letter denying the appellant access to the responsive record. In its decision letter, the Township claimed that the record qualifies for exemption under section 7(1) of the *Act* (advice and recommendations). The Township also claimed that the record was considered at a closed meeting.

The appellant appealed the Township’s decision to this office.

During mediation, the Township issued a supplemental decision letter and raised the possible application of the mandatory exemption at section 10(1) of the *Act* (third party information) to the record. The Township also clarified that it is relying on the discretionary exemption at section 6(1)(b) of the *Act* (closed meeting) to deny access to the record on the basis that it was considered at a meeting of Council or one of its Committees authorized by statute to be held in the absence of the public. Finally, the Township confirms that it continues to rely on the exemption at section 7(1) to deny access to the record.

Also during mediation, the mediator contacted the author of the report and a company (the affected parties) to inquiry as to whether they would consent to the disclosure of the information relevant to their companies. The affected parties advised the mediator that they object to the disclosure of any information contained in the record which relates to them.

Finally, the appellant raised the possible application of the public interest override provision at section 16 of the *Act* to the record.

No issues were resolved in mediation and the appeal was transferred to the adjudication stage of the appeals process. The adjudicator previously assigned to this appeal decided to commence her inquiry by seeking the representations of the Township and the affected parties initially.

The Township and one of the affected parties provided representations. The other affected party did not provide representations but advised this office that it objects to the release of any information which relates to it. The previous adjudicator then sought representations from the appellant and provided her with a complete copy of the affected party’s representations and the non-confidential representations that were submitted by the Township. The appellant also submitted representations. After reviewing them, the previous adjudicator decided to seek representations in reply from the Township and the affected parties, and provided them with a copy of the appellant’s non-confidential representations. The Township submitted representations in reply.

## **RECORDS:**

The record at issue is a bound report, entitled "Report on Phase I Environmental Site Assessment and Subsurface Environmental Investigation...", which was submitted to the Township in December 2008.

## **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.

***Parts 1 and 2 – was an in camera meeting of council, board, commission or other body, or a committee of one of them held and was is authorized by statute?***

The first and second parts of the test for exemption under section 6(1)(b) require the Township to establish that a meeting was held by the Township and that it was properly held *in camera* (Order M-102).

The Township indicates that the record was “requisitioned for the purpose of a proposed property acquisition.” The Township indicates further that an *in camera* meeting of Council was held on December 1, 2008 pursuant to section 239(2)(c) of the *Municipal Act, 2001*. The Township attached a copy of the minutes of the December 1, 2008 Council meeting which confirms that Council resolved to move to a closed session to consider “the acquisition or disposition of property.”

The appellant does not address this aspect of the section 6(1)(b) test.

Section 239(1) of the *Municipal Act, 2001* 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). The relevant provisions at issue 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,
- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;

Based on the submissions provided by the Township and my review of the record at issue, I am satisfied that the first two parts of the section 6(1)(b) test have been met. I accept that the Township held an *in camera* meeting and that this meeting was authorized by section 239(2)(c) of the *Municipal Act, 2001*. The minutes of the *in camera* meeting clearly indicate that Council went into closed session to discuss the potential acquisition of the property in question. Moreover, I am satisfied that the report itself provides the evidentiary basis for determining that section 239(2)(c) authorized Council to hold the specific closed meeting that took place.

***Part 3 – would disclosure of the record 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, the Township must establish that disclosure of the record would reveal the substance of the deliberations of the closed meeting.

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.

I agree with this approach to determining the third part of the section 6(1)(b) test. Accordingly, the Township must establish that disclosure of the record would reveal the substance of the deliberations of the closed meeting held by Council that considered the report regarding an environmental site assessment of the subject property.

The majority of the Township’s representations have been withheld due to confidentiality concerns. In essence, the representations describe the substance of the deliberations of Council at its *in camera* meeting, including the various topics in the report that Council considered. It is apparent from the Township’s representations that significant deliberations on the content of the report were conducted with a view to making a decision.

Accordingly, I find that the third part of the section 6(1)(b) test has been met and the record, in its entirety qualifies for exemption under this section.

***Section 6(2)(b) – exception***

As noted above, section 6(2)(b) of the *Act* sets out a mandatory exception to the discretionary exemption in section 6(1)(b). Under this exception, the Township 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.

The Township indicates that although it notified the public that it was not pursuing the acquisition of the property in question, there was no public discussion or disclosure of the matter at an open meeting of Council or one of its Committees.

The appellant has made significant representations on many of the issues in this appeal, but does not specifically address the exemption in section 6(1)(b). With respect to the exception in section 6(2)(b), although the appellant does not specifically address the exception, she makes reference to a comment made by one of the affected parties in its representations, that it understood that the record at issue had been provided to the other affected party, the owner of the land. The appellant suggests that if the record was provided to the owner of the property, there should be no barrier to it being provided to the public at large.

I am not persuaded that disclosure of the report to the other party in a proposed land transaction brings the exception in section 6(2)(b) into play. The appellant has not suggested that the subject matter of the deliberations *vis-à-vis* the record has been considered in a meeting of Council or one of its Committees open to the public. Consequently, based on the Township's submissions, and in the absence of evidence to the contrary, I find that the section 6(2)(b) exception does not apply.

**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

### **Representations**

The Township submits that in exercising its discretion to withhold the record it took into account the general principle that the public should have access to information that forms the basis of Council's decision making processes. However, in the circumstances, the Township indicates that the preservation of future property acquisition processes weighed against disclosure.

The Township also considered that the appellant did not have a compassionate or compelling reason to receive the information and took the position that disclosure of the report could not reasonably be construed as increasing public confidence in the operation of the Township. In this regard, the Township notes that the appellant is not a resident of the Township and therefore “has no vested interest in this Council’s decision making processes nor the potential property acquisition.” The Township submits that the appellant’s confidence or lack of confidence in the operation of the Township should not be a consideration in the exercise of its discretion.

The Township also submits that the appellant is seeking information relating to a private individual’s property. The Township notes that there is already significant information concerning this particular property in the public realm, “through the Ministry of the Environment and the provincial freedom of information framework.”

The Township considers the record and the process through which it was obtained to be very sensitive to its own interests, as well as those of the property owner. The Township states:

[M]aintaining the confidentiality of the Report is integral to preserving Council’s ability to consider potential property acquisitions in closed session and integral to protecting the interests of the Township and its taxpayers.

The Township also notes that although it routinely considers potential property acquisitions in closed session, once a property has been purchased, documents relating to it become available for public consumption.

The appellant has made significant representations and attached a number of documents to her submissions in support of her argument. She notes that in 2006 studies conducted at the subject property as part of the environmental assessment process for the Fraserville North Monaghan Servicing Study Master Plan were made public. She queries why the report at issue in this appeal would not also be made public. She also appears to allege that the record at issue should have been disclosed in accordance with a condition imposed on the Township by the Ministry of the Environment following this review.

The appellant alludes to some confusion and speculation that has arisen as a result of the Township’s decision not to purchase the subject property.

The appellant acknowledges that she is not a resident of the Township, but states in response to the Township’s position that she can have no interest in Township business that she:

submitted the FOI request for copies of all tests and related technical information that pertain to the well...with regard to the issue of possible contamination on behalf of many citizens who reside in the [Township]. A list of those names can be provided.

...



Unlike municipal boundaries, water knows no boundaries. The water supply on the requestor's property is obtained through a 230 foot deep drilled well. From maps obtained, indications are that it is quite possible that the requester's water supply is connected to the aquifer that supplies the wells in Millbrook...

The appellant goes on to explain why she, as a nearby landowner, has a vested interest in matters concerning the water supply that occur in the Township.

Much of the appellant's submissions raise "public interest" issues; however, the public interest override in section 16 of the *Act* does not apply to records exempted under section 6(1)(b). Nevertheless, in my view, the appellant's arguments are relevant to assist in determining whether the Township properly exercised its discretion not to disclose the record. She submits:

The understanding of the technical reports and tests on the wells and groundwater on the [identified] property is of paramount importance to the citizenry of the township and surrounding area. The announcement of 'possible site contamination' of an approved municipal water supply needs to be addressed. The public needs to understand what the nature of the possible contamination is, and why this contamination was not uncovered in 2006 when studies conducted by [one affected party] indicated the water quality was very good. Furthermore, the public needs to be assured that the 'possible site contamination' will not result in future detrimental effects to the [affected party] located on the premises.

The [identified property] well was a pivotal component to an interconnected water servicing plan approved by the township in 2006. The rejection of that water supply has led to the alternative of diverting the water that supplies the Millbrook wells; Oak Ridges Moraine sourced water that is vital not only to the residents of the township but also to inhabitants of a vast region outside the township borders.

The public has the overriding right to know and understand what the nature of the 'possible site contamination' is. Citizens are fearful that non-disclosure of the technical information on the [identified property] and the subsequent decision to employ the Millbrook wells as an alternative water supply may put their future health, safety and financial security at risk.

The Township was invited to comment on the appellant's representations on this issue. Rather than addressing the concerns raised and the weighing of them against any considerations in favour of exercising its discretion not to disclose the record, the Township skirted the issue and chose to attempt to undermine the appellant and her reasons for seeking the record.

The Township submits that the fact that the appellant claims to be representing a group of residents should be given no weight. Moreover, the Township asserts that the appellant's "stated reason [for seeking the records] is a concern about her private property." The Township states that the appellant is attempting to access a report, prepared at the expense of another party, to obtain information that she can obtain herself by retaining a technician or professional to undertake testing on her own property. The Township states further:

The appellant's suggestion that it has a vested interest in the decisions made by Council of the Township of Cavan Monaghan is not substantiated. The appellant has stated a concern over the protection of her property and its water supply. The decision by council was a decision not to pursue a potential purchase of land. The appellant has made no assertions or submissions concerning the impact of Council's decision to terminate the process on the protection of her property.

The Township also asserts that the reasons given by the appellant for seeking the record "do not address or provide any indication as to how the non-disclosure of the report would affect the 'public confidence' in the operation of the [Township]." Finally, in the only acknowledgement of the appellant's primary basis for requesting the record at issue the Township states:

The bulk of the appellant's submissions on this issue are related to the substantive merits of choosing and utilizing various sources to supply water for municipal purposes. Such a substantive review is not germane to the issue of disclosing confidential documents under [the *Act*]. That information is more appropriate or germane in the context of a formal Environmental Assessment or perhaps as evidence in Environmental Review Tribunal proceeding.

### **Analysis and Findings**

As I indicated above, the section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. Section 239(2) of the *Municipal Act, 2001* is an exception to the general rule that meetings must be open to the public as stated in section 239(1). Similar to the exemption in section 6(1)(b) of the *Act*, section 239(2) of the *Municipal Act, 2001* is discretionary. As a result, Council, or one of its Committees has the discretion to hold meetings in public, even if the requirements of section 239(2)(c) are met. Presumably, Council, or one of its Committees would weigh the principles of transparency and public accountability against the interests to be protected by section 239(2). (See, for example: Orders MO-2425-I and MO-2503)

In determining whether the Township erred in the exercise of its discretion I will examine, *inter alia*, whether it took into account irrelevant considerations and failed to take into account relevant considerations. After reviewing the submissions made by both parties, I find that the Township took into account certain relevant considerations, but that it failed to consider other relevant considerations and appeared to rely heavily on a number of irrelevant considerations in making its decision to exercise discretion in favour of non-disclosure. I have come to this conclusion for the following reasons.

I accept that there are valid reasons to conduct deliberations relating to the acquisition and disposition of land in closed session. Different considerations may apply, however, once the transaction has been completed or abandoned. In my view, a weighing of the principles of transparency and public accountability against the interests to be protected by section 239(2) are relevant to the exercise of discretion under section 6(1)(b) once a request has been made for records relating to that land transaction. As I indicated earlier, relevant considerations may

include those listed above. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be important as well.

The appellant has made it abundantly clear that her concerns and the concerns of the group that she represents relate to the environmental issues raised by the record at issue. The Township has effectively dismissed these concerns as being irrelevant to its exercise of discretion in deciding to withhold the record. In my view, the Township has taken an overly narrow view in considering the circumstances of this request and has failed to take into consideration the concerns of the group the appellant represents, whether or not she or other members of this group are residents of the Township. Failure to take into consideration the concerns of residents within the Township as well as those neighbouring it about the quality of water in the area represents an error in the exercise of discretion.

Moreover, justifying its decision not to disclose the record by focusing on the fact that the appellant had raised environmental concerns about her own property and alleging that this was what was behind her request introduced an irrelevant consideration into this decision-making process.

Similarly, brushing off the appellant's stated concerns by suggesting that she can have her own property tested completely sidesteps the issues that the Township was asked to consider when exercising its discretion to disclose or not disclose the record. In addition, I find that the Township's failure to consider whether the appellant's concern about her own property might have larger implications in the community was also an error in the circumstances of this appeal.

There are times when private interests must give way to the larger public interest. It is apparent from the Township's representations that it gave very short shrift to the public's concerns about water quality issues and attempted to justify its decision not to disclose the record at issue on the basis that the appellant lived outside the Township, even though she had indicated that she was writing on behalf of a group of individuals, including local residents, and that she had her own private concerns relating to this issue.

Although I find that the Township did take into consideration several relevant considerations, its failure to consider others, beyond dismissing them outright, and its reliance on irrelevant considerations undermines its exercise of discretion. Failure to weigh the considerations favouring disclosure with those favouring non-disclosure and to give cogent reasons for doing so is also a failure to exercise its discretion in a proper manner.

In order to be clear, I have set out below my findings regarding the Township's exercise of discretion and have decided to return this matter to the Township for a proper exercise of its discretion based on the findings in this order.

In particular, I am satisfied that the Township took into consideration the following relevant considerations:

- the fact that the report was produced as part of the process for the acquisition of private property, which is typically conducted in confidence at least until such time as the purchase is finalized;
- in the circumstances, the purchase of the property was not finalized and the interests of the owner of the property may well be affected by disclosure of the report;
- there is some additional information that is publicly accessible regarding the property in question with respect to environmental testing.

I find that the following considerations relied upon by the Township in exercising its discretion not to disclose the record are irrelevant to that decision:

- reliance on the fact that the appellant can make an access request under the provincial *Act* to obtain information about the property before such a request has been made and a decision granting access has been given;
- placing significant reliance on the fact that the appellant does not live within the Township's boundaries, particularly given her indicated representation of other individuals, including local residents;
- placing significant reliance on the fact that the appellant has stated concerns about her own property with respect to environmental issues.

I find further that the Township has failed to take into account the following relevant considerations:

- the general concerns regarding water quality raised by the appellant, and the relationship between the record and those concerns generally;
- the concerns of the larger community regarding this issue;
- the impact on public perception of the Township's decision not to pursue the property in question;
- there was no weighing of the competing interests in the Township's decision.

In view of the findings that I have made in this order, I will defer any further discussion of the remaining issues pending resolution of this issue.

**ORDER:**

1. I order the Township to re-exercise its discretion under section 6(1)(b) in accordance with the directions I have set out above.
2. I order the Township to provide me with representations on its exercise of discretion no later than **December 14, 2010**.

3. I will defer my final decision with respect to disclosure of the record at issue pending my review of the Township's exercise of discretion as required by Provision 1.

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Laurel Cropley  
Adjudicator

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November 30, 2010