

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2679

Appeal MA11-146

Town of Carleton Place

December 20, 2011

Summary: The town received a request for a remedial action plan prepared by an environmental consultant concerning a particular property and surrounding area. The town denied access on the basis of the discretionary exemption in section 6(1)(b) of the *Act*. In this order, the town is required to disclose the record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, 6(1)(b); *Municipal Act*, S.O. 2001, c. 25, section 239(2)(c).

OVERVIEW:

[1] The Town of Carleton Place (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the following information:

Remedial Action Plan related to subsurface pollutant problem at [address] and surrounding area in Carleton Place.

[2] The town located the responsive record and denied access to it pursuant to section 6(1)(b) of the *Act*.

[3] The requester, now the appellant, appealed the town's decision.

[4] Mediation was not successful and the appeal was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the town and the appellant, which were shared in accordance with *Practice Direction 7* of the *IPC Code of Procedure*.

RECORD:

[5] The record at issue consists of a draft Remedial Action Plan.

DISCUSSION:

Does the discretionary exemption at section 6(1)(b) apply to the record?

[6] 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.

[7] 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]

[8] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision [Order M-184]; and
- “substance” generally means more than just the subject of the meeting [Orders M-703, MO-1344].

[9] 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].

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

[11] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting? [*St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.)]

[12] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations (Orders MO-1344, MO-2389 and MO-2499-I).

[13] The town was asked to provide the following information as part of its representations.

1. Did a council, board, commission or other body, or a committee of one of them, hold a meeting? If so, was the meeting held in the absence of the public? Please explain.
2. What is the statute and specific section that authorizes the holding of the meeting in the absence of the public? Was there a resolution closing the meeting to the public? Please explain, and provide a copy of the section and/or resolution.
3. Has a procedural by-law been passed under section 238(b) of the *Municipal Act* or any applicable analogous provision? Does the by-law include requirements for closed meetings? Please describe any such requirements and provide a copy of the by-law. Do these requirements pertain to the type of closed meeting that occurred in this case?
4. Were all required conditions for holding a closed meeting met? Were all required notices for holding a closed meeting provided to those entitled to notice? Please explain, and provide any relevant documentation.

5. Was a vote taken at the closed meeting? Was the vote authorized to be held at a closed meeting? If so, on what authority was the vote taken?

6. How would disclosure of the record reveal the actual substance of the deliberations at the meeting, and not merely the subject of the deliberations? Please explain, and provide evidence in support of your position.

7. Would the disclosure of any part of the record reveal the actual substance of the deliberations that took place at the closed meeting? If so, could any part of the record be disclosed? [*St. Catharines (City) v. IPCO*]

[14] The town submits that the record was reviewed by members of Council at the Policy Review Committee meeting of January 11, 2011 in a closed session. The town states that this closed session meeting was approved by resolution and conducted in accordance with Section 239(2)(c) of the *Municipal Act*, S.O. 2011. The town provided a copy of the minutes from this meeting which indicated that:

... in accordance with Section 239 of the *Municipal Act*, S.O. 2011, that the meeting be closed to the public with the following agenda:

Agenda

20-07-10-3 a proposed or pending acquisition or disposition of land by the municipality or local board...

[15] The town states that at the meeting, Council directed staff to meet and obtain comments on the record from the Ministry of the Environment (MOE). Based on the comments from MOE and further test results, the record was re-drafted. This re-drafted Remedial Action Plan includes new conclusions and recommendations. Accordingly, the town opposes disclosure of the record, which is the draft Remedial Action Plan, as the information in it would be misleading. The town states that the final Remedial Action Plan will be available to the public when it has been finalized.

[16] The appellant states that the record was discussed at a closed meeting. He is not disputing that the meeting was closed or that the *Municipal Act* allows the deliberations to be withheld from the public. He states that the record itself does not qualify as a "deliberation."

[17] The appellant also states that the town's suggestion that any document ever discussed at a closed meeting is to be withheld from the public, runs counter to the word and spirit of legislation. He further states that the legislation does not differentiate

between draft, final, rejected or approved documents, but deals with all documents produced by a municipality.

[18] In their reply and surreply submissions, the parties repeat and rely on their earlier representations.

Analysis/Findings

[19] Based upon my review of the parties' representations and the record, I agree with the parties that the record was discussed at a closed meeting of Council. Section 239(2)(c) of the *Municipal Act* allows a proposed or pending acquisition or disposition of land by the municipality to be considered in a closed meeting. However, the subject matter of the record is not about a proposed or pending acquisition or disposition of property. According to the town's website, the property that is the subject matter of the record was purchased in March 2008. The record is dated January, 2011 and is a remedial action plan prepared by a consultant for the town. According to the town, the final remedial action plan had not yet been made public as of September 21, 2011. Referring to the record on its website¹ on February 10, 2011, the town states that:

Town staff and its environmental consultant have just completed a "remedial action plan" in accordance with MOE policy. The scope of this document was to review and evaluate site conditions, the potential practical remedial technologies to address the pollution problem, and for staff to recommend the most appropriate solution to Town Council. With Council's approval in hand staff will soon meet with the MOE to discuss the recommended remedial option and to seek their approval... [emphasis added].

[20] I have reviewed the record and find that it concerns an action plan prepared by an environmental consultant setting forth its suggestions as to how to remediate an area of the town that has been polluted by a contaminant. In my view, the record does not concern a proposed or pending acquisition or disposition of land by the town, but rather a 2011 plan to remediate a property acquired in 2008 and its surrounding area.

[21] The town has also attached to the copy of the record provided to this office three pages of minutes of a meeting held at the consultant's office with the town and the MOE on February 24, 2011. I find that these minutes are not responsive to the appellant's request, which seeks the:

Remedial Action Plan related to subsurface pollutant problem at [address] and surrounding area in [the town].

¹ <http://www.carletonplace.ca/whatsnewc4.php?command=viewArticle&ID=26¤tFeed=1>

[22] The town was only authorized under section 239(2)(c) to hold a meeting in the absence of the public if the subject matter being considered is a proposed or pending acquisition or disposition of land by the town. Accordingly, as the town was not authorized under section 239(2)(c) of the *Municipal Act* to hold a meeting in the absence of the public to deliberate on the subject matter of the record, the record is not exempt under section 6(1)(b) and I will order it disclosed.

ORDER:

1. I order the town to disclose the record to the appellant **January 10, 2012**.
2. In order to verify compliance with order provision 1, I reserve the right to require the town to provide me with a copy of the record provided to the appellant.

Original signed by: _____
Diane Smith
Adjudicator

_____ December 20, 2011