

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-2966-I

Appeal MA12-577

Municipality of the Township of Tiny

October 22, 2013

**Summary:** The township received a request for an identified report (including appendices), and denied access to the records on the basis of the exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice and recommendations) and 10(1) (third party information). This interim order finds that the records remaining at issue do not qualify for exemption under section 6(1)(b), and that the portions of one record which contain specific, detailed information about six named Parks and Recreation Associations do not qualify for exemption under section 7(1). This order requires the township to disclose to the appellant (representing one of the associations) the specific information relating to it. Decisions regarding access to the remaining portions of the records are reserved.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 7(1).

**Cases Considered:** *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div.Ct.).

### OVERVIEW:

[1] The Municipality of the Township of Tiny (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a particular numbered report, which is a report entitled "Review – Parks and Recreation Associations 'Memorandum of Understanding'."

[2] The township responded to the request by stating that access to the report was denied on the basis of the exemption in section 12 (solicitor-client privilege) of the *Act*.

[3] The appellant, who represents one of the Parks and Recreation Associations identified in the report, appealed the township's decision.

[4] During mediation, the township issued two revised decision letters. In the first revised decision, the township provided an index of the responsive records, identifying that the records included a 15-page report and eight appendices. The township granted partial access to the records, and indicated that it was denying access to records or portions of the records on the basis of the exemptions in section 7(1) (advice and recommendations), 10(1) (third party information) and 12 of the *Act*. The index of records attached to the decision noted the exemptions that applied to the portions of the records to which access was being denied. It also indicated that access was granted to appendices 1, 3, 4, 6 and 7.

[5] After receiving the revised decision, the appellant's representative advised that she was not pursuing access to appendices 2 and 5, which were the only records for which the exemption in section 12 was claimed. Accordingly, these records and the section 12 exemption were no longer at issue.

[6] In addition, the index provided by the township made reference to the information in the report (pages 1-15) and Appendix 8 (page 53) being "discussed in-camera in accordance with Section 239 of the *Municipal Act*," and the township confirmed that it wished to raise the application of section 6(1)(b) (closed meetings) of the *Act* to pages 1-15 and page 53 of the record. The township then sent the appellant a second revised decision, and an amended index of records, confirming that it was claiming the exemption in section 6(1)(b), as well as the exemptions in section 7(1) and 10(1), to these records.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the township, initially, inviting it to provide representations on the issues. The township provided brief representations in response.

[8] After reviewing the township's representations, I decided to issue this interim order in this appeal, which addresses a number of the issues.

[9] In particular, I find that the records do not qualify for exemption under section 6(1)(b) of the *Act*. I also find that certain portions of Record 1 which contain detailed, specific information about six named associations do not qualify for exemption under section 7(1) of the *Act*. As a result, I order the township to disclose to the appellant the information that relates to it. Decisions regarding access to the remaining portions of the records are reserved.

## **RECORDS:**

[10] The records remaining at issue consist of a 15-page report (Record 1 - the Report, contained on pages 1-15) and a 1 page memo (Record 2 - Appendix 8, contained on page 53) as described in the index provided by the township.

## **ISSUES:**

- A. Does the information in the records qualify for exemption under section 6(1)(b) of the *Act*?
- B. Does the discretionary exemption at section 7(1) apply to the portions of Record 1 which contain detailed, specific information about the six named associations?

## **DISCUSSION:**

### **A. Does the information in the records qualify for exemption under section 6(1)(b) of the *Act*?**

[11] The township takes the position that the records are exempt under section 6(1)(b). That section states:

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.

[12] 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.<sup>1</sup>

[13] I will review each part of this three-part test to determine whether the records qualify for exemption under this section.

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<sup>1</sup> Orders M-64, M-102 and MO-1248.

***Part 1 - a council, board, commission or other body, or a committee of one of them, held a meeting***

[14] The township states in its representations that council held a closed meeting on October 29, 2012 to consider the report (including attachments) at issue in this appeal. In the circumstances, I am satisfied that the meeting took place, and that Part 1 of the three-part test under section 6(1)(b) has been met.

***Part 2 - a statute authorizes the holding of the meeting in the absence of the public***

[15] In support of its position that this part of the three-part test is established, the township states that the meeting of October 29, 2012 was closed to the public in accordance with the provisions of section 239(2)(f) of the *Municipal Act, 2001*, which reads:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

advice that is subject to solicitor-client privilege, including communication necessary for that purpose.

[16] The township states that a motion was passed authorizing council to close the meeting to the public, and the township provides a copy of that motion. It also provides a copy of its procedural by-law which outlines the closed meeting requirements, and states that all of the required conditions to allow the in-camera meeting to be held were met.

[17] During the course of this appeal, however, the parties were made aware of a Report of the Ombudsman (the Ombudsman's Report) dated February 1, 2013, which addresses the issue of whether the township properly held the October 29, 2012 meeting closed to the public to discuss the records at issue. The Ombudsman's Report finds that the portion of the meeting during which the records at issue in this appeal were discussed was improperly closed to the public. The relevant portion of that report reads:

At the October 29 meeting Council next discussed a review of a memorandum of understanding with the six parks and recreation associations in the Township. You advised our Office that this was discussed under the solicitor-client privilege exception.

While in camera council reviewed a staff report. The Director of Risk for the municipality's insurance carrier was present to answer questions on risk management.

While in camera council also reviewed a legal opinion, dated January 24, 2008. The opinion appears to have been provided at the October 29, 2012 meeting as background information on the memorandum of understanding.

You advised our Office that this matter was closed to the public under the solicitor-client privilege exception because of the written legal opinion being reviewed by council. We understand that the Township's solicitor was not present for this portion of the discussion.

We discussed that, although the January 24, 2008 legal opinion would be considered privileged, it appears that the majority of the in camera discussion pertained to the staff report, and the current issues with the memorandum of understanding. This portion of the conversation would not be appropriate for in camera discussion under s. 239(2)(f), or any other exception. Accordingly, this portion of the meeting was improperly closed to the public, in violation of the [*Municipal Act, 2001*].

[18] In the Notice of Inquiry I sent to the township, I referred to the Ombudsman's Report, and asked the township to address the following:

The township is asked to specifically address the impact of the February 1, 2013 Ombudsman's Report, in light of the claim by the township that the exemption in section 6(1)(b) applies.

[19] The township does not address this issue in its representations.

[20] In the absence of any representations from the township on this issue, I accept the findings of the Ombudsman and find that Part 2 of the three-part test has not been established, as section 239(2)(f) of the *Municipal Act, 2011* does not authorize the township to hold the meeting to discuss the records at issue (the Report and Appendix 8) in the absence of the public.

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

[21] Under Part 3 of the test set out above, previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision<sup>2</sup>

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<sup>2</sup> Order M-184.

- “substance” generally means more than just the subject of the meeting<sup>3</sup>

[22] The township’s representations identify that, by passing an identified motion, “the actual substance of the closed meeting deliberations was revealed but the motion did not divulge the actual recommendations made by the staff members.” The township provides a copy of the referenced motion which summarizes the township’s position relating to some of the information in the report, and also the decisions made by council.

### *Findings*

[23] Even if the township had been authorized to hold the meeting to discuss the staff report in the absence of the public under section 239(2)(f) (legal advice) of the *Municipal Act, 2011*, it would be open to me to consider whether all portions of the record meet Part 3 of the test for exemption. The Divisional Court has confirmed that, even when a public body is authorized to discuss a matter in-camera, the portions of the record which do not relate to that matter, and would not reveal the substance of the deliberations relating to it, can be severed and disclosed.<sup>4</sup>

[24] Applying this approach to the records remaining at issue in this appeal (the Report and Appendix 8), I am satisfied that disclosure of these records would not reveal the substance of deliberations relating to “advice that is subject to solicitor-client privilege, including communication necessary for that purpose,” and that part three of the test has also not been met.

[25] Accordingly, I am satisfied that the records do not qualify for exemption under section 6(1)(b) of the *Act*.

### **B. Does the discretionary exemption at section 7(1) apply to the portions of Record 1 which contain detailed, specific information about six named associations?**

[26] Certain portions of Record 1 contain detailed, specific information about six named associations (the appellant and five affected parties). This information is contained in the following portions of Record 1:

- the table on the bottom of page 4 and the top of page 5;
- the table on page 6;

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<sup>3</sup> Orders M-703 and MO-1344.

<sup>4</sup> *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div.Ct.). In that decision, the Divisional Court found that the city was authorized to proceed in-camera to discuss the sale of land under section 239(2)(c) of the *Municipal Act, 2001*, but also determined that the portions of the record that did not relate to the sale of land did not qualify for exemption under Part 3 of the test.

- one sentence on page 7;
- the table on page 8 extending to the top of page 10;
- the table on the bottom of page 10 and the top of page 11;
- a sentence and the financial information listed on the middle of page 12;
- the table on the bottom of page 12 and the top of page 13;
- the table towards the bottom of page 13.

[27] The township is claiming the application of the exemption in section 7(1) to the records at issue, including Record 1. Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[28] The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.<sup>5</sup>

[29] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information.<sup>6</sup>

[30] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.<sup>7</sup>

[31] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.<sup>8</sup>

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<sup>5</sup> Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

<sup>6</sup> Order PO-2681.

<sup>7</sup> Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

<sup>8</sup> Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

[32] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation.<sup>9</sup>

[33] As noted above, the township is claiming the application of the exemption in section 7(1) to the records at issue.

[34] With respect to the application of the exemption in section 7(1) to Record 1, the township submits that this record qualifies for exemption under that section because the record "contains advice and recommendations by an employee of the municipality on how to move onward with respect to the subject matter."

[35] On my review of Record 1, I accept that some of this record may contain advice or recommendations for the purpose of section 7(1). Because the appellant has not had the opportunity to address the possible application of the section 7(1) exemption to the records, I will not review the application of this exemption to all of the records at issue. I will, however, review the application of this exemption to the detailed, specific information about the six named associations contained in Record 1.

[36] I find that the portions of Record 1 listed above, which relate to the six named associations, do not contain advice or recommendations, nor would they permit one to accurately infer the advice given. Instead these portions of Record 1 contain factual or background information about the six associations, and I find that they do not qualify for exemption under section 7(1).

### *Summary*

[37] In this Interim Order, I have found that the records do not qualify for exemption under section 6(1)(b), and that the portions of Record 1 relating to specific information about the six named associations do not qualify for exemption under section 7(1).

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<sup>9</sup> Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

[38] The township takes the position that the portions of Record 1 relating to the six named associations qualify for exemption under the mandatory exemption in section 10(1). However, because of the concurrent claim that the discretionary exemptions in sections 6(1)(b) and 7(1) apply to Record 1, the named associations were not provided with the opportunity to provide representations on the possible application of section 10(1) to Record 1, nor would they have been able to provide informed representations on those portions relating to them, as access to Record 1 was denied under these other exemptions.

[39] As noted above, the appellant represents one of the six associations referenced in Record 1. Section 10(1) cannot apply to deny a third party access to the information that relates to it.<sup>10</sup> As a result of the findings in this order, I order the township to disclose to the appellant those portions of Record 1 which relate to it.

[40] Furthermore, in the interest of expediting this appeal, I will be sending a Notice of Inquiry to the other five associations, inviting them to address the possible application of the mandatory exemption in section 10(1) to the information which I have found does not qualify for exemption under section 7(1). Because of my findings in this order, the township is no longer constrained from describing the relevant portions of Record 1 to the affected parties, thus allowing the affected parties to submit informed representations on the possible application of section 10(1) to the actual information in Record 1 relating to them.

[41] I reserve my decision on the application of section 10(1) until the affected parties and, if necessary, the appellant, have had the opportunity to address this issue. I also reserve my decision on the possible application of section 7(1) to the remaining portions of Record 1 and to Record 2.

## **ORDER:**

1. I find that the records do not qualify for exemption under section 6(1)(b) of the *Act*.
2. I find that the portions of Record 1 that refer to detailed, specific information relating to identified third parties (the six associations), as identified above, do not qualify for exemption under section 7(1).
3. I order the township to disclose to the appellant the specific, detailed information relating to it contained in Record 1. For greater certainty, I have attached a copy of Record 1 to the order provided to the township, with the portions that should be disclosed to the appellant highlighted in green. I order the township to disclose the green highlighted portions of this record to the appellant by **November 22, 2013**.

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<sup>10</sup> See section 10(2).

4. I remain seized of the issues in this appeal pending final determination of all outstanding issues.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ October 22, 2013