

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3861-I

Appeal MA17-599

Waterloo Region District School Board

November 15, 2019

Summary: At issue in this appeal is a request for access to a specified code of conduct report. This order finds that the report qualifies for exemption under section 6(1)(b) (closed meeting) of the *Municipal Freedom of Information and Protection of Privacy Act* but orders the board to exercise its discretion under section 6(1)(b) regarding the granting of access to the report.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 2(2.1), 2(2.2), 6(1)(b) and 6(2); *Education Act*, RSO 1990, c E.2, section 207(2)(b).

Order Considered: Order MO-2473.

OVERVIEW:

[1] The Waterloo Region District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified code of conduct report as well as a summary of the board's costs related to the investigation of the subject trustee, including legal billings.

[2] The board identified responsive records and relying on sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) denied access to them, in full.

[3] The requester (now the appellant) appealed the board's decision.

[4] In the course of mediation, the board issued a supplementary decision letter disclosing additional information to the appellant. At the close of mediation, only access to the specified code of conduct report (the report) remained at issue in the appeal.

[5] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] Representations were exchanged between the board and the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[7] In this interim order, I uphold the board's application of the exemption at section 6(1)(b) of the *Act*, but order it to exercise its discretion regarding the granting of access to the report.

RECORDS:

[8] At issue in this appeal is a report.

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) apply to the report?
- B. Did the board exercise its discretion under section 6(1)(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 6(1)(b) apply to the report?

[9] 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.

[10] 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.¹

[11] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;² and
- “substance” generally means more than just the subject of the meeting.³

[12] 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.⁴

[13] 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*.⁵

[14] 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?⁶

[15] 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.⁷

Section 6(2): exceptions to the exemption

[16] Section 6(2) of the *Act* sets out exceptions to sections 6(1)(a) and/or (b). It reads:

¹ Orders M-64, M-102 and MO-1248.

² Order M-184.

³ Orders M-703 and MO-1344.

⁴ Order MO-1344.

⁵ Order M-102.

⁶ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

⁷ Orders MO-1344, MO-2389 and MO-2499-I.

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.

The board's representations

[17] The board submits that the report contains personal information in respect of a member of the board. The board submits that the decision to hire the investigator who prepared the report, and the presentation of the report, took place at closed meetings.

[18] It also states that the trustees were authorized to hold these meetings in the absence of the public pursuant to section 207(2)(b) of the *Education Act*⁸, which states:

A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,

(b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;

[19] The Board submits that the meetings were properly constituted as meetings closed to the public under section 207(2)(b) of the *Education Act* due to the subject matter under consideration.

[20] The board argues that even if information relates to an individual in a professional capacity, it may still qualify as personal information if it reveals something of a personal nature about the individual.

The appellant's representations

[21] The appellant disagrees. He submits that to qualify as personal information, the information must reveal something of a personal nature about the individual. The

⁸ RSO 1990, c E.2.

appellant asserts that information pertaining to someone acting in a business, professional or official capacity is not personal information. The appellant submits that the board chose to examine the conduct of an elected official under a policy it established to hold elected officials to a professional standard. The appellant asserts that the content of the report does not qualify as personal information because it is about the conduct of individuals in their professional capacity and is not about them personally.

[22] The appellant submits:

In this case, the school board is investigating the professional conduct of a trustee, acting in an official capacity. The board is weighing that trustee's conduct against obligations outlined in a trustee code of conduct that's meant to govern professional behaviour.

Put another way, the board has established professional guidelines it expects trustees to follow in their official duties, and is measuring the conduct of a trustee against these guidelines. In its open conclusion in this case, the board determined, without explanation or clarity, that the trustee's professional conduct fell short of official guidelines, breaching policy.

[23] He adds:

Here's the statement from the minutes of June 25, 2012 board meeting: "As a matter of public record and accountability, under the Board's existing Board Policy G200 - Trustee Code of Conduct, I am required to report that at the In Camera meeting of June 4, 2012, a motion to approve a resolution with respect to a breach of Board Policy G200, including a Motion to Disassociate in regard to [named trustee], was approved."

[24] The appellant submits that withholding this report by calling it "personal information" stretches the meaning of personal information beyond its usefulness and intent and contradicts general practice. He submits that it also prevents any member of the public from understanding how the professional conduct of an elected trustee fell short of legislated expectations, thereby defeating the public interest.

Analysis and finding

[25] I find that the *in camera* meeting regarding the report did take place, satisfying the first requirement under section 6(1)(b).

[26] Turning to the second requirement, the *Education Act* refers to the term "personal information" in various sections and in section 266.1 refers specifically to the *MFIPPA* definition of "personal information"⁹. However, for the purposes of this appeal it does not provide an associated definition of "personal information" that is applicable to section 207(2)(b).

[27] In Order MO-2499-I, Adjudicator John Higgins dealt with the issue in the following way:

Turning to the second requirement ... Prior orders of this office have found that the term "personal matters" as used in the *Municipal Act* (also frequently referenced in connection with section 6(1)(b) of the *Act*) is analogous to the term "personal information" used in the *Act* (Orders MO-2473 and MO-2368). In Order MO-2473, Adjudicator Colin Bhattacharjee stated the following in regard to section 239(2)(b) of the *Municipal Act*:

In my view, the purpose of section 239(2)(b) is to provide a municipal council, board or committee with the discretion to close a meeting or part of a meeting to the public to protect the privacy of an identifiable individual, but only if "personal matters" relating to that individual is the subject matter actually being considered.

I agree with Adjudicator Bhattacharjee's reasoning and apply it here. I am satisfied from the representations taken as a whole, and the records that were provided to this office at the intake stage of this appeal, that the Board's in camera meetings were properly constituted under section 207(2)(b) because they involved intimate, personal or financial information in respect of a member of the Board.

In arriving at this finding, I have relied, in part, on the confidential portions of the representations of the Board which I cannot set out in this order. I have also taken into account previous orders of this office dealing with records about the termination of a person's employment or office (see Orders MO-1269, M-978, M-736, M-273, M-184 and M-47).

[28] Whether by reference to the provision in the *Education Act* that refers back to the *MFIPPA* definition of "personal information" or by the application of Adjudicator Higgins' reasoning, the result is the same. The term "personal information" in section 2(1) of *MFIPPA* means "recorded information about an identifiable individual." Section 2(1) also lists examples of "personal information", but the listed examples are not

⁹ Section 266.1 reads: In sections 266.2 to 266.5, "personal information" means personal information within the meaning of section 38 of the *Freedom of Information and Protection of Privacy Act* and section 28 of the *Municipal Freedom of Information and Protection of Privacy Act*.

exhaustive. Therefore, information that does not fall under the listed examples may still qualify as personal information.¹⁰

[29] In addition to the definition of personal information at section 2(1) of the *Act*, sections 2(2.1) and 2(2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[30] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.¹¹

[31] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.¹²

[32] This office has held that if the focus of a record is whether professional, official or business conduct was appropriate, the information takes on a more personal quality.¹³ Accordingly, although the record at issue pertains to the identifiable individual in her conduct as trustee, I find that it contains her personal information because it relates to allegations of misconduct on her part in the course of performing her role as trustee.¹⁴

[33] I find, therefore, that the report contains personal information of the subject trustee.

[34] The only issue remaining is whether the disclosure of the report would reveal the substance of the deliberations at a closed meeting.

¹⁰ Order 11.

¹¹ Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.

¹² Orders P-1409, R-980015, PO-2225 and MO-2344.

¹³ Order PO-2524.

¹⁴ Orders MO-2499-I and PO-2524.

[35] Based on my review of the report and the representations of the parties, I accept that the report, in its entirety, would have been reviewed, and significant portions of it included in the discussions of the board members at the closed meeting. In this case, there is no evidence before me that issues pertaining to the trustee had been previously decided, and I accept that the report did form the substance of deliberations with a view to making a decision.

[36] Having regard to the evidence that is before me, I find that the disclosure of the report would reveal the substance of the deliberations at the *in camera* meeting as they reveal a recommended course of action that was the very substance of the discussions that took place. Therefore, the third requirement for the application of section 6(1)(b) has been met.

[37] I have reviewed the exceptions to the exemption set out in section 6(2) and find that none is established in the circumstances of this appeal. In my view, the statement in the minutes regarding the reporting of the board's conclusion at the in-camera meeting does not amount to "consideration" of the subject matter of the board's deliberations for the purposes of section 6(2)(b).¹⁵ I find, therefore, that section 6(2)(b) does not apply.

[38] As all three requirements for the application of section 6(1)(b) have been met and the exception does not apply, I find that the report is exempt pursuant to section 6(1)(b).

[39] Given my findings regarding the application of section 6(1)(b), it is not necessary for me to consider whether the other exemption claimed for the report applies. However, I must go on to review the board's exercise of discretion.

Issue B: Did the board exercise its discretion under section 6(1)(b)? If so, should this office uphold the exercise of discretion?

[40] 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.

[41] 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

¹⁵ See in this regard Orders M-241, MO-2087, MO-2177 and MO-3462.

- it fails to take into account relevant considerations.

[42] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ This office may not, however, substitute its own discretion for that of the institution.¹⁷

Relevant considerations

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁸

- 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

¹⁶ Order MO-1573.

¹⁷ Section 43(2).

¹⁸ Orders P-344 and MO-1573.

- the historic practice of the institution with respect to similar information.

[44] The board submits that no discretion was exercised as the report was withheld in its entirety.

Analysis and finding

[45] The board did not provide representations on their exercise of discretion under section 6(1)(b). In the absence of its representations on this issue, although I have found that section 6(1)(b) applies to the report, I will order the board to exercise its discretion under section 6(1)(b) with respect to the withheld information. In exercising its discretion under section 6(1)(b), the board is to take into account the appellant's representations, the relevant considerations listed above and any other relevant considerations.

ORDER:

1. I order the board to exercise its discretion under section 6(1)(b) of the *Act* and to provide both the appellant and me with an outline of the factors it considered in exercising its discretion by **December 20, 2019**.
2. I remain seized of this matter in order to deal with any issues stemming from the exercise of discretion by the board.

Original signed by _____
Steven Faughnan
Adjudicator

November 15, 2019