

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3989

Appeal MA18-15

Town of Pelham

December 15, 2020

Summary: The Town of Pelham (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specific report prepared by an external consultant. The town issued a decision denying access to the report. The requester appealed that decision. In this order, the adjudicator upholds the town's decision to deny access to the report under section 6(1)(b) (closed meeting) of the *Act* and finds that it appropriately exercised its discretion to do so.

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

Orders and Investigation Reports Considered: Interim Order MO-2966-I.

Other Reports Considered: Ombudsman Ontario, *Investigation into complaints about a meeting and an informal gathering held by council for the Town of Pelham on September 5, 2017*, (Toronto: Ontario Ombudsman Ontario, April 2018).

OVERVIEW:

[1] Following the termination of a former employee, the Town of Pelham (the town) discovered a number of accounting irregularities amid its financial records. Through its lawyers, the town retained an external consultant to prepare an expert report to examine the state of the town's finances in the face of the accounting irregularities, as well as the conduct and performance of the former employee. The report was presented to Pelham Town Council (Council) during an in camera session of a special

meeting.

[2] The town received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from local media for the report prepared by the external consultant. Specifically, the requester sought access to the following information:

1. The audit of Pelham's financial records carried out by [the external consultant] and presented to Pelham Town Council at its Special Meeting on September 5, 2017.
2. The resolution passed by Pelham Town Council at its Special Meeting on September 5, 2017 that authorized the acquisition of a bank loan of an approximate value of \$8 million dollars.
3. The actual bank account balances as of September 2, 2018 of all Town bank accounts and investment accounts.

[3] The town issued an access decision with respect to items 1 and 2 of the request. The town denied access in its entirety to the record identified as responsive to item 1, citing the application of the discretionary exemptions at sections 6(1)(b) (closed meetings), 12 (solicitor-client privilege) and the mandatory exemption at section 10(1) (third party information) of the *Act*. With respect to item 2, the town advised that no responsive records exist. The town also advised that it would be issuing a decision with respect to item 3 of the request shortly.

[4] The requester (now the appellant) appealed the town's decision with respect to item 1 of his request.

[5] During mediation, the appellant confirmed that he had received the town's decision with respect to item 3 of the request and had been granted full access to the responsive records. He advised that he continues to seek access to the record responsive to item 1 of his request, the report prepared by the external consultant and presented to Council at its special meeting on September 5, 2017. He takes the position that the exemptions claimed do not apply. The appellant also takes the position that there is a compelling public interest in the disclosure of the report under section 16 of the *Act*.

[6] As a mediated resolution was not reached, the appeal was transferred to the adjudication stage of the appeal process for an inquiry.

[7] During my inquiry, I sought and received representations from the parties on the issues. Representations were shared in accordance with this office's *Code of Procedure and Practice Direction 7*.

[8] In this order, I find that the exemption at section 6(1)(b) applies to the report

and the town's exercise of discretion to deny access to the record was appropriate. I uphold the town's decision not to disclose the report and dismiss the appeal.

RECORD:

[9] The record at issue is a report entitled "Forensic Review of Town Finances, (August 2008 to May 2017)" prepared by an external consultant and presented to Council at its September 5, 2017 meeting. In this order I will refer to it as "the report."

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) apply to the record?
- B. Did the town exercise its discretion not to disclose the record under section 6(1)(b)

DISCUSSION:

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

[10] The town submits that the report is exempt from disclosure under section 6(1)(b) of the *Act*. Section 6(1)(b) 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.

[11] 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

[12] Section 6(1)(b) is not intended to protect records merely because they refer to

¹ Orders M-64, M-102 and MO-1248.

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.²

[13] Section 6(2) of the *Act* sets out exceptions to the exemption at section 6(1)(b).³ None of them apply in the circumstances of this appeal.

Part 1: the town's Council held a meeting

[14] The first part of the test for exemption under section 6(1)(b) requires the town to establish that it held a Council meeting.

[15] The town submits that Council held a special meeting on September 5, 2017 at 4:00 p.m. in the Council Chamber, 20 Pelham Town Square, Fonthill (Pelham). It submits that the public agenda was published to the municipal website on Friday, September 1, 2017.

[16] The appellant does not dispute that Council held a special meeting.

[17] As the meeting agenda for September 5, 2017 is published on the town's website and the appellant does not dispute that the town held a meeting on that date, I am satisfied that the town held a special meeting of Council. I find that the first part of the three-part test under section 6(1)(b) has been met.

² Order MO-1344.

³ Section 6(2) states:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material;
- (b) a statistical survey;
- (c) a report by a valuator;
- (d) an environmental impact statement or similar records;
- (e) a report or study on the performance or efficiency of an institution;
- (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
- (g) a report containing the results of field research undertaken before the formulation of a policy proposal;
- (h) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program;
- (i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;
- (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
- (k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

Part 2: the Municipal Act, 2001 authorizes the holding of the meeting in the absence of the public

[18] The second part of the test requires the town to establish that the meeting was properly held in the absence of the public or in camera.⁴ In determining whether there was statutory authority to hold a meeting in camera under part two of the test, the town must establish that the purpose of the meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.⁵

[19] Under section 239(1) of the *Municipal Act, 2001*, all meetings of Council must be open to the public unless they fall within the prescribe exceptions. Section 239(2) of the *Municipal Act, 2001* provides authorization for the convening of a meeting in the absence of the public. The town submits that sections 239(2)(d) and 239(2)(f) apply in the context of this appeal. Those sections read:

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

(d) labour relations or employee negotiations;

...

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose [.]

[20] With its representations, the town provided a copy of its procedural by-law which outlines the closed meeting requirements. It submits that all of the required conditions to allow the in camera meeting to be held were met. Specifically, it submits that as required by the by-law, notice was given as the meeting agenda package was published to the municipal website on the Friday preceding the meeting; the requisite resolution to authorize Council to close the meeting to the public was stated by the Mayor;⁶ and, no vote was taken during the meeting.

[21] To support its position that the purpose of the in camera special meeting of Council was to deal with matters described in section 239(2) of the *Municipal Act, 2001*, the town enclosed with its representations, an Ombudsman Report, dated April 2018, entitled "Investigation into complaints about a meeting and an informal gathering held by Council for the Town of Pelham on September 5, 2017." The first part of that report addresses whether the town was authorized, under the *Municipal Act, 2001*, to hold the

⁴ Order M-102.

⁵ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

⁶ The town reproduced the portion of the minutes of the meeting that record that resolution in its representations.

special meeting of Council on September 5, 2017, in camera. In his report, the Ombudsman concluded:

Council for the Town of Pelham did not contravene the *Municipal Act, 2001* on September 5, 2017, when it discussed a consultant's report, received legal advice, and received a presentation from staff in camera.

[22] With respect to whether the subject matter of the report related to the exceptions set out in sections 239(2)(d) and (f) of the *Municipal Act, 2001*, the town points to portions of the Ombudsman Report that found that the in camera meeting was authorized under both of those sections.

[23] The town submits that the in camera discussion during the special meeting of Council on September 5, 2017, fits within the exception for matters related to labour relations and employee negotiations in section 239(2)(d) of the *Municipal Act, 2001* and the Ombudsman Report confirms this. The Ombudsman Report found that the report that was presented and discussed during the Council meeting related to "the conduct and performance of an individual in the context of employment with the town." The Ombudsman Report states:

In the closed meeting on September 5, 2017, Council for the town discussed an individual's conduct and performance with respect to employment. The discussion fit within the exception for labour relations and employee negotiations in section 238(2)(d) of the [*Municipal Act, 2001*].

[24] With respect to whether the subject matter of the discussion fit within the exception at section 239(2)(f) of the *Municipal Act, 2001* that relates to advice that is subject to solicitor-client privilege, including communications necessary for that purpose, the town submits that the Ombudsman Report confirms that the report considered at the Council meeting was pivotal to the resulting legal advice. The Ombudsman Report states:

The consultant retained by the town's lawyers acted as a translator, interpreting the financial information provided by the town and explaining it to the lawyers to allow them to formulate legal advice. The discussion in camera about the consultant's report fit within the exception for solicitor-client privilege.

[25] The appellant's representations do not specifically address whether the in camera meeting was held in accordance with the requirements of the *Municipal Act, 2001*, including whether the subject matter of the meeting related to matters falling within the exceptions in section 239(2)(d) or (f) authorizing meetings to be held in the absence of the public.

[26] On my review of the evidence before me, including the Ombudsman Report, the

town's representations and the content of the report itself, I accept that during the special meeting held on September 5, 2017, Council passed a resolution to move into closed session to discuss the report that is the record at issue in this appeal and that it followed the procedural requirements of its by-law and the *Municipal Act, 2001*. I am also satisfied that the town was authorized by sections 239(2)(d) and (f) of the *Municipal Act, 2001* to hold the meeting in the absence of the public to consider the subject matter of the report. It is clear from its content that any discussion about the report would have included deliberations about labour relations and employee negotiations related to the former employee and advice that is subject to solicitor-client privilege about the town's finances as well as about potential litigation involving the former employee. Additionally, following a thorough investigation of the special meeting of September 5, 2017, the Ombudsman concluded that the meeting was properly authorized to have been held in the absence of the public under both sections 239(d) and (f) of the *Municipal Act, 2001*.

[27] I acknowledge that the town's representations rely heavily on the Ombudsman Report that specifically investigated whether the special meeting was authorized to be held in camera under the *Municipal Act, 2001* and that, in turn, my finding that it was authorized under the *Municipal Act, 2001* is based, in part, on the Ombudsman's findings.

[28] In Interim Order MO-2966-I, Adjudicator Frank DeVries considered the application of section 6(1)(b) of the *Act* to records that the Township of Tiny claimed had been discussed in camera in accordance with section 239 of the *Municipal Act, 2001*. Adjudicator DeVries considered a Report of the Ombudsman that found that the portion of the meeting during which the records at issue in the appeal were discussed was improperly closed to the public. In the absence of representations challenging or rebutting the Ombudsman's findings, Adjudicator DeVries relied on the Ombudsman Report and accepted its findings to conclude that the township was not authorized to hold the meeting in camera.

[29] I agree with Adjudicator DeVries' reasoning and find that, in the circumstances of this appeal where I have no evidence before me challenging or rebutting the Ombudsman's finding, it is a valid consideration in my determination that the town was authorized under the *Municipal Act, 2001* to discuss the report at issue in a meeting held in the absence of the public.

[30] Accordingly, for the reasons set out above, I am satisfied that the town was authorized to hold the special meeting of its Council on September 5, 2017 in the absence of the public to discuss the report at issue and I find that the second part of the test under section 6(1)(b) has been met.

Part 3: Disclosure of the report would reveal the actual substance of the deliberations of the meeting

[31] With respect to the third requirement of the test 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 town's in camera meeting, not merely the subject of the deliberations.⁷

[32] Previous orders have found that:

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

[33] It is not sufficient that the record itself was the subject of deliberations at the meeting in question,⁸ where the record does not reveal the actual substance of the deliberations or discussions that took place leading up to the decisions that were made.

[34] The town submits that the report was consistently referenced throughout the Council deliberations on the matter for which the meeting was convened. It submits that:

Legal counsel and a representative from [the external consultant] walked Council through the report in its entirety to ensure the validity of the information and to provide clarity and context relating to the resulting legal advice informing the negotiations with [the former employee].

[35] The town points to the Ombudsman Report which it submits confirms that during the closed meeting, the external consultant presented the report to Council and discussions were had about its content. The Ombudsman Report confirms that the report formed the basis for discussions about matters including the consideration of information necessary to support legal advice provided to the town as well actions to be taken arising from the conduct and performance of an individual in the context of employment.

[36] Based on the evidence before me, I accept that the report, in its entirety, was reviewed during the closed meeting and significant portions of it were discussed and considered by those in attendance with a view to making decisions with respect to the matters set out in it. The report itself forms the basis of, and reveals, recommended courses of action that I accept were at the core of discussions that took place during the meeting. I am satisfied that its disclosure would reveal the very substance of the in

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

⁸ Order M-98 and M-208.

camera deliberations of Council with respect to courses of action considered and ultimately taken by the town.

[37] Accordingly, I find that that the third part of the test has also been met.

[38] Neither of the parties have argued that any of the section 6(2) exceptions to the exemption apply and in my view, none of them are relevant here. As all three parts of the three-part test in section 6(1)(b) have been met, I find, subject to my review of the town's exercise of discretion below, the report is exempt from disclosure.

B. Did the town properly exercise its discretion not to disclose the record under section 6(1)(b)?

[39] The exemption at section 6(1)(b) 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.

[40] In addition, this office 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.

[41] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office may not, however, substitute its own discretion for that of the institution.¹⁰

[42] The town takes the position that it exercised its discretion to deny access to the report in good faith. It submits that it gave "careful and due consideration" to the circumstances when it decided not to disclose the report under the claimed discretionary exemptions, including section 6(1)(b). It submits that, due to the sensitive nature of its contents, the report was presented to Council during a closed session and that the reasons for doing so are the same reasons why the town chose to exercise its discretion not to disclose it: in order to protect information that relates to matters of labour relations and employee negotiations and information subject to solicitor-client privilege.

⁹ Order MO-1573.

¹⁰ Section 43(2).

[43] The appellant does not directly address whether the town appropriately exercised its discretion in denying access to the report under section 6(1)(b); however, he does submit that there is a compelling public interest in disclosure, as its non-disclosure engenders public mistrust and anger. He suggests that the town framed the report in a particular manner in a deliberate attempt to ensure that it was exempt under the *Act*.

[44] In reply, the town disputes the allegations made by the appellant and reiterates that its decision to withhold the report was made in good faith. The town refers to a public report prepared by the external consultant and presented during a public presentation on November 29, 2017 that it submits provides a financial overview and contains components of the same information as in the report at issue in this appeal. The town states that the public report differs from the report at issue in this appeal because all reference to privileged information and the external consultant's findings and recommendations with respect to the conduct of identifiable individuals were omitted.

[45] I have considered the arguments of the appellant. However, I find that there is insufficient evidence before me to establish that the town exercised its discretion under section 6(1)(b) in bad faith, or for an improper purpose, or took into account irrelevant considerations.

[46] Additionally, I have considered the external consultant's public report referenced by the town, which is available on the town's website. From my review of the public report, it contains much of the same foundational information about the town's finances as is contained in the report that was put before Council in the special meeting on September 5, 2017. As the town notes, this public report has been drafted in a manner that does not reveal the specific matters and recommendations related to labour relations and employee negotiations and solicitor-client privileged advice that I have found formed the substance of deliberations during the closed meeting.

[47] Based on all of the circumstances, including the specific information contained in the report and the information that is already available to the appellant in the public report, I find that the town properly exercised its discretion to apply section 6(1)(b) to the report and that it did not take into account irrelevant considerations or fail to take into account relevant considerations in doing so.

[48] As a result, I uphold the town's decision not to disclose the report due to the application of section 6(1)(b).

[49] Given my finding that the exemption at section 6(1)(b) applies and the town's exercise of discretion not to disclose the report under that exemption was appropriate, it is not necessary for me to consider whether any of the other exemptions the town has claimed for the report apply.

[50] The appellant has argued that section 16 of the *Act* applies because there is a

compelling public interest in the disclosure of the report that overrides the purposes of the exemptions claimed by the town. As section 16 does not apply to records that are found to be exempt under section 6(1)(b), it is not necessary for me to consider whether there is a compelling public interest in the disclosure of the report.

ORDER:

I uphold the town's decision and dismiss the appeal.

Original Signed by: _____
Catherine Corban
Adjudicator

December 15, 2020 _____