

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-4485-F

Appeal MA20-00425

The Corporation of the City of Oshawa

January 30, 2024

Summary: The appellant made a request to the City of Oshawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for council minutes, reports and correspondence on a specific topic. The city denied access to them in part, relying on the discretionary exemptions at section 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(d) and (e) (economic and other interests), and 12 (solicitor-client privilege), as well as the mandatory exemption at section 14(1) (personal privacy) of the *Act*.

The appellant appealed the city's decision and in Interim Order MO-4455-I, an adjudicator upheld some aspects of the city's decision, but ordered other information disclosed. She also ordered the city to re-exercise its discretion to apply the section 6(1)(b) exemption. In this final order, the adjudicator finds that the city has now exercised its discretion under section 6(1)(b) and she dismisses the remainder of the appeal.

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

OVERVIEW:

[1] This final order considers whether the Corporation of the City of Oshawa has exercised its discretion under section 6(1)(b) (closed meeting) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] This matter began when a requester asked the city to provide information about council minutes, reports and correspondence on a specific topic, pursuant to the *Act*.

The city granted the requester partial access to the responsive records. It withheld some information pursuant to the discretionary exemptions at sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11 (economic or other interests), 12 (solicitor-client privilege) and the mandatory exemption at section 14(1) (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the city's decision to the Office of the Information and Privacy Commissioner for Ontario (the IPC) and this appeal was opened. Mediation did not resolve the issues and I commenced a written inquiry under the *Act*. I then issued Interim Order MO-4455-I, where I:

- upheld the city's decision to apply section 12 to the information at issue,
- determined that sections 6(1)(b), 7(1), 11(d), and 14(1) applied to some pages and/or portions of pages of the records at issue,
- concluded that section 11(e) did not apply to any of the information at issue,
- ordered the city to withhold the information that section 14(1) applied to,
- upheld its discretion to apply sections 7(1), 11(d) and 12 to withhold certain information,
- ordered it to disclose the remaining information not subject to any of the exemptions, and
- ordered it to re-exercise its discretion in relation to its application of the section 6(1)(b) exemption and provide me with representations in support of that exercise of discretion.

[4] Interim Order MO-4455-I contains a detailed summary of the circumstances of the request and the appeal. In that interim order, I explained my reasons for finding that section 6(1)(b) applied to some of the records at issue in full, and others in part, as described in Appendix I below, and in the interim order. However, the city did not provide any representations about what factors it considered when exercising its discretion to apply section 6(1)(b) of the *Act* to the information listed in Appendix I. Furthermore, it did not provide any indication that it considered the fact that it could choose to disclose the information at issue. As a result, I ordered the city to re-exercise its discretion, taking into account the guidance provided in my interim order.

[5] In accordance with the interim order, the city re-exercised its discretion and provided me with representations to explain its decision. I provided a copy of the city's representations to the appellant, who provided a response. The city then provided a reply, and the appellant made a sur-reply.

[6] In this final order, I find that the city has now demonstrated that it properly

exercised its discretion under section 6(1)(b) of the *Act*. While the city maintains its decision to withhold the information at issue pursuant to section 6(1)(b), it is entitled to do so, because I already found (in Interim Order MO-4455-I) that section 6(1)(b) applies to this information, and I now find (in this final order) that the city properly exercised its discretion under section 6(1)(b). On this basis, I dismiss the remainder of this appeal.

DISCUSSION:

[7] Section 6(1)(b) is a discretionary exemption (the institution “may” refuse to disclose). This means that the city can decide to disclose information even if it qualifies for exemption. As such, an institution must exercise its discretion. On appeal, the IPC may determine whether an institution failed to do so, or if it erred in exercising its discretion. Examples of errors in exercising discretion include: doing so in bad faith or for an improper purpose, taking into account irrelevant considerations, or failing to take into account relevant considerations.¹ In any of these cases, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations. The IPC cannot, however, substitute its own discretion for that of the institution.

The city’s representations

[8] In accordance with the interim order, the city provided representations explaining how it exercised its discretion under section 6(1)(b) in response to the appellant’s original request, and again in response to Interim Order 4455-I. In its representations, the city asserts that it took into account many relevant factors, including the purpose of the *Act* and the following principles and considerations:

- information should be available to the public,
- exemptions from the right of access should be limited and specific,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization, including the relationship of the requester to the city and the records,
- whether disclosure will increase public confidence in the operation of the institution,

¹ Order MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution,
- the age of the information,
- the importance of transparency in decision-making,
- the context behind the creation of the records, being that they are directly related to a meeting held appropriately in closed session in accordance with section 239(2)(c) of the *Municipal Act*, 2001, S.O. 2001, c. 25,
- whether the subject of the records, which was subsequently discussed at the closed meeting of December 9, 2019, remains timely and confidential to the city, and,
- the city's historic practices with respect to records related to meetings held in closed session under the *Municipal Act*, which has been consistently to withhold such records in accordance with section 6(1)(b) of the *Act*.

[9] The city submits that it took into account all of the above factors prior to making its decision, including the wording of the exemption at issue and the interests it seeks to protect. The city also says that it considered the information in the report and why it was being discussed during the closed session portion of the Development Services Committee meeting. The city states that it took into account all of the relevant factors and did not take into account any irrelevant factors prior to exercising its discretion. It denies that it exercised its discretion in bad faith or for an improper purpose.

Appellant's representations

[10] In response, the appellant submits that the city has not provided sufficient evidence to determine whether it properly exercised its discretion pursuant to section 6(1)(b) of the *Act* with regard to pages 3247 to 3248 and 3296.² Specifically, the appellant says that the city has made "blanket statements by quoting all the factors listed in the *Act*, without providing details about which factors it considered and applied to each of the documents it is withholding."

[11] The appellant also says that an Ontario Superior Court Justice ordered the production of a document with the title "Closed Report dated December 6, 2019." As a result, the appellant argues that the meeting minutes from that meeting "are not privileged." The appellant then reiterates that the city has not shown that it has properly exercised its discretion under section 6(1)(b).

² I note that the appellant has specifically referred to pages 3247 to 3248 and 3296. These pages are no longer at issue because I ordered the city to disclose them to the appellant in Interim Order MO-4455-I. The city's revised decision dated November 28, 2023 and addressed to the appellant indicates that full access to these pages was granted.

The city's reply

[12] In reply, the city reiterates that it has properly exercised its discretion in accordance with section 6(1)(b) of the *Act*. It emphasizes that, as detailed in its previous representations, the disclosure of the records at issue would reveal the actual substance of deliberations during the closed meeting. Additionally, the city says that the content within the report at issue, as well as the conditions surrounding the discussion of the report in the closed meeting detailed above, are both factors which were considered in the city's original exercise of discretion.

[13] Regarding the Ontario Superior Court of Justice decision the appellant referred to, the city submits that the ruling was released several years after the city's decision related to the release of the records at issue in this appeal.³ Accordingly, the city says that the court decision was not an original factor for consideration in the city's exercise of discretion. It argues that the ruling is not relevant to this matter because the request for the production of documents heard by the Superior Court Justice does not directly raise the issue of the appellant's request for access to information under the *Act*.

[14] The city asserts that the litigation discovery process is separate and distinct from the access to information process under the *Act* and that any records requested through the litigation discovery process are released directly through the city's Legal Services branch. By contrast, the city says that records requested under the *Act* are subject to review in accordance with the provisions of the *Act*, and released by notice of decision from the City Clerk.

[15] In conclusion, the city submits that it has considered many factors in exercising its discretion, including those which have been previously detailed, as well as the ruling subsequently provided by the appellant. The city maintains that it did not exercise its discretion in bad faith or for an improper purpose.

Appellant sur-reply

[16] In its sur-reply, the appellant continues to deny that the city has demonstrated that it properly exercised its discretion under section 6(1)(b). The appellant says that the city has cited the exception under section 239(2)(c) without providing any evidence that the subject meeting considered "a proposed or pending acquisition or disposition of land" by the city. The appellant submits that the city's "bald assertion" must be rejected.

Findings and analysis

[17] Based on my review of the parties' representations, I find that the city has re-exercised its discretion in a proper manner. In re-exercising its discretion not to disclose the remaining records at issue, I find that the city appropriately considered the contents

³ The decision was released in 2023.

of the records and the specific considerations outlined in Interim Order MO-4455-I, as well as the purposes of the *Act*.

[18] Specifically, I am satisfied that the city turned its mind to the relevant factors that I identified in Interim Order MO-4455-I, and that it considered that it could decide to disclose the remaining records at issue, despite the fact that section 6(1)(b) applies to them.

[19] In making this determination, I considered the appellant's assertion that the city has simply made blanket statements by quoting all the factors listed in the *Act*, without providing details about which factors it considered and applied to each of the documents it is withholding. However, I am satisfied that the city considered both the content of the records at issue, the conditions surrounding the discussions at the closed meeting, and the purpose of the *Act* when exercising its discretion not to disclose the items listed in Appendix I. The city has listed the factors that it considered and I note that each of the factors listed is relevant and applicable to the circumstances. The city is entitled to exercise its discretion to continue to withhold records that are subject to section 6(1)(b) and, in my view, it has provided sufficient information about the reasons it decided to do so.

[20] I also considered the appellant's submissions regarding the Ontario Superior Court decision ordering the production of a closed report. I agree with the city that the litigation discovery process is separate and distinct from access to information processes under the *Act*. The application of section 6(1)(b) of the *Act* was not before the Ontario Superior Court Justice and the decision engaged different legal issues. Nonetheless, the fact that some of the information at issue may have been disclosed through other processes is a factor that should be taken into account by an institution when deciding whether to exercise its discretion to continue to withhold information under the *Act*. I am satisfied that the city did so in this case.

[21] Finally, I note that in its sur-reply representations, the appellant says that the city has cited the exception under section 239(2)(c) without providing any evidence and that its "bald assertion must be rejected." This issue was considered in Interim Order MO-4455-I and addressed by me at paragraph 63 of that decision. It is not necessary for me to consider it again here.

[22] In the circumstances, and for all the reasons given above, I conclude that the city properly re-exercised its discretion pursuant to section 6(1)(b) and I uphold its decision to withhold the remaining information, as set out in Appendix I, pursuant to section 6(1)(b) of the *Act*. As this is the only issue left to be decided in the appeal, the appeal is now dismissed.

ORDER:

I uphold the city's exercise of discretion to withhold pages 3146-3199, 3204-3205, 3206-3207, 3212-3213, 3216, 3236-3241, and 3338-3340 pursuant to section 6(1)(b) of the *Act* and I dismiss the appeal.

Original signed by: _____
Meganne Cameron
Adjudicator

_____ January 30, 2024

APPENDIX I

| Group C Records – Section 6(1)(b) (closed meetings) | | |
|--|--|--|
| 3146-3199 | Closed Report DS-19-230 to Development Services Committee regarding Request for a Lease Agreement between the City of Oshawa and Canadian Flight Academy Ltd. for Land at the Oshawa Executive Airport (including attachments) | Section 6(1)(b) <u>applies in full report and attachments.</u> |
| 3204-3205 | Memorandum of confidential direction of Development Services Committee concerning Closed Report DS-19-230, dated December 11, 2019 | Section 6(1)(b) <u>applies in full.</u> |
| 3206-3207 | Email chain with subject line: "RE: CFA Motion Last Night," dated December 10, 2019 | Section 6(1)(b) <u>applies in full.</u> |
| 3212-3213 | Email chain with subject line: "RE: CFA Report," dated December 5, 2019 | Section 6(1)(b) <u>applies in part</u> to the information highlighted in red only. |
| 3216 | Email chain with subject line "RE: CFA Report," dated December 4, 2019 | Section 6(1)(b) <u>applies in full.</u> |
| 3236-3241 | Handwritten notes and edits related to Closed Report DS-19-230, undated | Section 6(1)(b) <u>applies in full.</u> |
| 3338-3340 | Closed Report DS-10-118 to Development Services Committee regarding Proposed 20 Year Lease Agreement with Canadian Flight Academy Ltd., dated May 26, 2010 | Section 6(1)(b) <u>applies in full.</u> |