

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-4507

Appeal MA22-00543

The Corporation of the City of North Bay

March 28, 2024

**Summary:** The City of North Bay (the city) received a two-part request under the *Act* for a specified staff report to council (the report) and correspondence by a former named Chief Administrative Officer. The city granted full access to the correspondence but withheld the report in full under the discretionary exemption at section 6(1)(b) (closed meeting). In this order, the adjudicator finds that the report is exempt under section 6(1)(b).

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

**Orders Considered:** Order M-241.

### OVERVIEW:

[1] For the last twenty years, the appellant and the City of North Bay (the city) executed 15 pre-servicing agreements and subdivision agreements, which resulted in the appellant developing residential subdivisions. However, in August 2022 the city decided not to execute the pre-servicing agreement and sub-division agreement with the appellant pertaining to a specified road.

[2] Subsequently, the appellant made a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information:

Staff report to Council presented at the August 9, 2022 Council meeting pertaining to [specified road] Phase 4 Pre-Servicing Agreement.

Correspondence issued by [named Chief Administrative Officer (CAO)] either late on August 2<sup>nd</sup> or the following day, August 3<sup>rd</sup> relating to my email dated August 2<sup>nd</sup> at 4:58pm.

...

[3] The city located responsive records and granted access to the correspondence written by the named former CAO. The city denied access in full to the staff "Report to Council" (the report) pursuant to section 6(1)(b) (closed meeting) of the *Act*.

[4] The requester (now the appellant) appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[5] As mediation did not resolve the appeal, it was transferred to the adjudication stage of the appeal process, where I decided to conduct an inquiry under the *Act*. I invited and received representations from the city and the appellant.<sup>1</sup>

[6] For the reasons that follow, I find that the report is exempt under section 6(1)(b) of the *Act*.

## **RECORDS:**

[7] The record at issue is the "Report to Council" presented at the August 9, 2022 council meeting (the report).

## **DISCUSSION:**

[8] The sole issue to be determined in this appeal is whether the exemption at section 6(1)(b) applies to the report.

[9] Section 6 protects certain records relating to a municipal institution's legislative function or closed meetings of a council, board, commission or other body.

[10] Section 6(1)(b) reads:

A head may refuse to disclose a record,

---

<sup>1</sup> The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Practice Direction 7* and section 7.07 of the IPC's *Code of Procedure*.

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 section 6(1)(b) to apply, the city must show 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>2</sup>

**Parts 1 and 2 – a council, board, commission or other body, or a committee of one of them, held a meeting that was authorized by statute to be held in the absence of the public**

[12] The first part of the test requires the city to establish that a meeting was held by a council, board, commission or other body, or a committee of one of them.

[13] The second part of the test requires that the city establish a meeting was properly held *in camera* (in the absence of the public)<sup>3</sup> by identifying the relevant statutory authority to support it. In determining whether there was statutory authority to hold a meeting *in camera* under the second part of the test, I must consider whether the purpose of the meeting was to deal with the specific subject matter identified in the statute authorizing the holding of a closed meeting.<sup>4</sup>

[14] The city submits that council held a meeting on August 9, 2022. It also submits that during this meeting, council resolved to move into closed session. In its representations, the city included the *in camera* correspondence for August 9, 2022, which states council adjourned *in camera* to discuss items 9.2 to 9.11 of the agenda and the reasons for doing so. The city explains that item 9.7 pertains to the report at issue.

[15] Under section 239(1) of the *Municipal Act, 2001*,<sup>5</sup> all meetings must be open to the public unless they fall within the prescribed exceptions. Section 239(2) of the *Municipal Act, 2001* sets out the exceptions that authorize the convening of a meeting in the absence of the public.

[16] The city submits that the closed session of council was authorized by the exception at section 239(2)(k) of the *Municipal Act, 2001*, which states:

---

<sup>2</sup> Orders M-64, M-102 and MO-1248.

<sup>3</sup> Order M-102.

<sup>4</sup> *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

<sup>5</sup> S.O. 2001, c. 25 (the *Municipal Act*).

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

(k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or behalf of the municipality or local board.

[17] The city submits that the purpose of the closed session was to discuss items 9.2 to 9.11 on the agenda,<sup>6</sup> which includes item 9.7 - the negotiations carried on by the municipality with respect to the report at issue.

[18] I have reviewed the parties' representations and the report. Based on this review, I find that a meeting was held by city council and that it was authorized to hold that meeting *in camera* under section 239(2)(k) of the *Municipal Act, 2001*, which provides the city with the statutory authority to hold a meeting *in camera* when the subject matter is instructions to be applied to any negotiations carried on by the city. In its meeting on August 9, 2022, the city was seeking instructions from council about its negotiation with respect to the pre-servicing agreement and sub-division agreement between it and the appellant. Therefore, I find that the first and second parts of the section 6(1)(b) test have been met.

### **Part 3 – disclosure of the records would reveal the actual substance of the deliberations of the meeting**

[19] With respect to the third part of the test, the wording of the provision and previous IPC decisions establish 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 report would reveal the actual *substance of deliberations* which took place at the city's closed meeting, not only the *subject* of the deliberations.<sup>7</sup>

[20] The city has the onus of establishing how disclosure of the report would reveal the actual substance of the deliberations at the meeting and not merely the subject of the deliberations.

[21] The city submits that disclosure of the report would reveal the substance of the deliberations that took place during the meeting. Moreover, it submits that disclosure of the report would reveal more than merely the substance of the deliberations but would reveal the deliberations themselves as the report contains the background and analysis which informed the deliberations that took place during the closed meeting. The city submits that this is true for all parts of the report and no part of the report can be disclosed without providing detail as to the deliberations that took place during the

---

<sup>6</sup> The appellant provided me with a copy of the agenda for the August 9, 2022 regular council meeting.

<sup>7</sup> Orders MO-1344, MO-2389 and MO-2499-I.

meeting.

[22] The appellant submits that the report does not reveal the substance of deliberations. It submits that the report was completed prior to the closed meeting and, therefore, the report does not reveal the substance of deliberations as the closed meeting occurred after the completion of the report.

[23] The evidence before me is that during the closed session of the August 9, 2022 meeting, council discussed the report. As mentioned above, the report contains the background and analysis about the phase 4 pre-servicing agreement between the city and the appellant. I am unable to explain further without revealing the contents of the report. The deliberations of this report by council resulted in a decided course of action by the city.

[24] Although the appellant submits that because the report was prepared prior to the closed meeting it could not reveal the substance of deliberations, I disagree. In my view, the report was clearly prepared beforehand so that council could discuss it at the closed meeting with a view to determining how the upcoming negotiations would be carried out.

[25] Having reviewed all of the materials and submissions before me, I accept the city's assertion that disclosure of the report could be expected to reveal the substance of deliberations by council about its course of actions with respect to the phase 4 pre-servicing agreement between the city and the appellant. I find that the report forms both the subject and substance of deliberation and are intrinsically linked to council's deliberations of August 9, 2022. In this regard, I find that the city has provided me with sufficient evidence to conclude that disclosure of the report would permit the drawing of accurate inferences about the substance<sup>8</sup> of council's discussions.

[26] As I find that the city has established that disclosure of the report would reveal the substance of the deliberations of council at the closed session meetings in question, the report qualifies for exemption under section 6(1)(b) of the *Act*.

### **Section 6(2)(b) exception**

[27] In its representations, the appellant raises the possible application of the exception to the section 6(1)(b) exemption at section 6(2)(b). Section 6(1)(b) states,

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

(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.

[28] The appellant submits that the exception at section 6(2)(b) applies because

---

<sup>8</sup> Orders M-184 and M-196.

resolution #2022-286 was approved in the open session of council.

[29] Resolution #2022-286 states that council did not authorize the execution of the pre-servicing agreement with the appellant and authorized staff to continue to negotiate the terms for trunk sanitary cost share for the subject pre-servicing agreement.

[30] The city submits that the exception at section 6(2)(b) does not apply. It submits that only the recommendation from the report was voted on during the open session.

[31] The city relies on Order M-241, where the adjudicator held that because the report was adopted by a vote of council in an open session does not mean that the exception at section 6(2)(b) applies.

[32] The city also relies on Order MO-4082, where the adjudicator found that council's deferring three recommendations from the report (the record at issue in that appeal) in open session and subsequently opting to make them public following approval did not establish that the exception at section 6(2)(b) applies.

[33] In Order M-241, the adjudicator states:

On May 29, 1991, in a public meeting, a recorded vote was taken in which the City Council adopted the Executive Committee Report, as amended, without further discussion. In my view, the Council's adoption of a report, without discussion in a public meeting, cannot be characterized as the consideration of the subject matter of the in camera deliberations as contemplated by section 6(2)(b) of the Act.

[34] In Order MO-4082, the adjudicator relied on the reasoning applied in Order M-241 to find that the adoption, in an open meeting, of recommendations from a report considered in a closed meeting did not meet the exception at section 6(2)(b).

[35] I agree with the reasoning applied by the adjudicators in both of these orders and adopt them for the purpose of this appeal.

[36] As was found in Order M-241, in this case, I find that the city's approval of resolution #2022-286 does not mean that the subject matter of the closed session deliberations had been considered in an open session. I note that section 239(5) of the *Municipal Act* requires that a meeting shall not be closed to the public during the taking of a vote, subject to section 239(6). As such, council is required to vote in open session. On my review of the report, I find that the subject matter of the closed session deliberations was not considered in the open session.

[37] Accordingly, I find that the section 6(2)(b) exception does not apply and therefore that the section 6(1)(b) exemption applies to the report. My finding is subject to my review of the city's exercise of discretion below.

## Exercise of discretion

[38] The exemption in section 6(1)(b) is discretionary and permits an institution to disclose the information subject to the exemption despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[39] The IPC may find 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 or fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>9</sup> However, the IPC may not substitute its own discretion for that of the institution.<sup>10</sup>

[40] The city submits that it properly exercised its discretion. It submits that it took into account the following factors: (i) whether the requester was seeking their own personal information; (ii) whether the requester had a sympathetic or compelling need to receive the information; (iii) 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; (iv) the historic practice of the institution with respect to similar information; and (v) whether the requester is an individual or an organization. The city also submits that it took into account that safeguarding the interests designed to be protected by the exceptions in section 239(2) of the *Municipal Act* must take priority over the principles of transparency and accountability in this case. Finally, it submits that it took into consideration the appellant's interest in receiving the report and the public interest in transparency and access to information, as well as its interest protected by section 6(1)(b).

[41] The appellant submits that the city has not properly exercised its discretion. It submits that it has a compelling need for the report as the former CAO thwarted its efforts to ensure that all elected council members were aware of the issues from its perspective. As such, the appellant requires the report to review the information that city staff provided to council that led to the pre-servicing agreement and sub-division agreement not being approved in August 2022.

[42] The appellant notes that the city's historic practice was to allow it access to the previous reports prior to the council meetings.

[43] The appellant disputes the city's statement that the potential harm from disclosure outweighed any interest that weighs in favour of disclosure of the report. It notes that the city provided no support or explanation to support its statement. The appellant opines that the potential harm is the city's own concern if it becomes aware of what city staff stated in the report.

---

<sup>9</sup> Order MO-1573.

<sup>10</sup> Section 43(2) of the *Act*.

[44] Finally, the appellant submits that the city acted in bad faith and/or for an improper purpose. It explains that the former CAO was determined to have it pay cost share by disregarding the provision in the 2008 agreement. The appellant also explains that the former CAO intervened and successfully blocked council members from meeting with its president prior to the council meeting on August 9, 2022. It points out that with a new mayor, six new councillors and the former CAO no longer employed with the city, the new council approved the pre-servicing and sub-division agreement on January 9, 2023. The appellant notes that the majority of council members agreed to meet with its president prior to the January 9, 2023 council meeting.

[45] I will first address the appellant's allegation that the city acted in bad faith and/or for an improper purpose because its former CAO blocked the appellant's president from meeting with council members prior to the August 9, 2022 meeting. Although the former CAO was a city staff member, this allegation does not relate to how the city exercised its discretion. As such, I find that the appellant has not provided sufficient evidence to support its claims that the city acted in bad faith or for an improper purpose, in this respect.

[46] Based on my review of the parties' representations and the nature and content of the report, I find that the city properly exercised its discretion to withhold the report pursuant to the discretionary exemption at sections 6(1)(b) of the *Act*. I note that the city took into account all the above-noted relevant considerations in exercising its discretion. I am also satisfied that the city did not consider any irrelevant considerations or act in bad faith or for an improper purpose. Accordingly, I uphold the city's exercise of discretion in deciding to withhold the staff report pursuant to the section 6(1)(b) exemption and dismiss the appeal.

**ORDER:**

I uphold the city's decision to withhold the report under section 6(1)(b).

Original signed by: \_\_\_\_\_  
Lan An  
Adjudicator

\_\_\_\_\_ March 28, 2024