

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2661

Appeal MA10-108

Hamilton Police Services Board

October 25, 2011

Summary: The appellant made a request for records and documents related to the police's 2010 budget deliberation. The police granted partial access to the responsive records denying access under the discretionary exemptions in section 6(1)(b) and 11(e). The police argued that it had authority to hold *in camera* meetings for budget matters pursuant to section 35(4)(b) of the *Police Services Act* (the *PSA*). The police were found not to have the authority to hold *in camera* meetings as it had not met the requirements under section 35(4)(b) of the *PSA* and thus section 6(1)(b) exemption does not apply. Section 11(e) also does not apply to exempt the records because the negotiations between the police and the police association have been completed. The police are ordered to disclose the records remaining at issue.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 6(1)(b), 11(e); *Police Services Act*, R.S.O. 1990, c. P.15, s. 35(4)(b).

Orders and Investigation Reports Considered: MO-1198.

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Hamilton Police Services Board (the police) for access to the following information:

Any and all records and documents related to Police Services Board 2010 budget deliberation, review and discussion including, but not limited to, all meeting agendas, meeting minutes, reports, recommendations and the entire approved 2010 Police Service budget.

[2] The police located the responsive records and granted partial access to them. Access to the remaining information was withheld pursuant to the discretionary exemptions in sections 11(c) and (e) (economic and other interests) of the *Act*.

[3] In addition, the police indicated that the meetings which are the subject of the request were held *in camera* and that section 35(4)(b) of the *PSA* applies in this case.

[4] The appellant appealed the police's decision to this office. During mediation, the police confirmed that they are relying on section 35(4)(b) of the *PSA* in relation to the application of the section 6(1)(b) (closed meeting) exemption. The police further identified portions of pages 1, 2 and 3 of the records that it viewed as not responsive to the appellant's request. The appellant confirmed that he is not pursuing access to the non responsive information.

[5] Finally, the police confirmed that section 6(1)(b) of the *Act* applied to those portions of the meeting minutes that have not been disclosed to the appellant.

[6] During the inquiry into this appeal, an adjudicator sought and received representations from the appellant and the police. The police did not submit representations regarding the application of section 11(c) and the adjudicator removed this issue from the scope of the appeal. Representations were shared in accordance with Section 7 of the IPC *Code of Procedure and Practice Direction 7*. The appeal was then transferred to me to render a decision.

[7] In this decision, I order the records disclosed to the appellant.

RECORDS:

[8] The records remaining at issue consist of the withheld portions of the following records:

- Minutes of a Police Services Board *in camera* meeting held November 16, 2009 (withheld portion on page 2)
- Minutes of a Police Services Board *in camera* meeting held February 16, 2010 (withheld portion on page 4)
- Police Services Board Report #09-123, dated November 12, 2009 (pages 11 - 12)

- Police Services Board Report #10-103, dated February 8, 2010 (pages 5 – 10)
- Budget analysis (pages 13 – 83)

[9] The police have not specified which portions of the records they have applied sections 6(1)(b) and 11(e) to for the purposes of this appeal.

ISSUES:

- A. Would disclosure of the records reveal information exempt under the discretionary section 6(1)(b) exemption of the *Act*?
- B. Would disclosure of the records reveal information exempt under the discretionary 11(e) exemption of the *Act*?

DISCUSSION:

A. WOULD DISCLOSURE OF THE RECORDS REVEAL INFORMATION EXEMPT UNDER THE DISCRETIONARY SECTION 6(1)(B) EXEMPTION OF THE *ACT*?

[10] During mediation, the police confirmed that they only applied section 6(1)(b) to those portions of pages 1, 2 and 3 that were withheld. On my copy of the records, all the information remaining at issue is marked with a notation that section 6(1)(b) applies. Accordingly, I will consider the application of section 6(1)(b) to all of the records at issue.

[11] Section 6(1)(b) of the *Act* 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

[Orders M-64, M-102, MO-1248]

[13] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision [Order M-184]; and
- “substance” generally means more than just the subject of the meeting [Orders M-703, MO-1344].

[14] 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 [Order MO-1344].

[15] 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* [Order M-102].

[16] 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? [*St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.)]

[17] The police submit that under section 35(4)(b) of the *PSA*, the police services board is permitted to go *in camera* to discuss budget matters. Section 35(4)(b) states:

The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

[18] The police submit that disclosure of the records would reveal the actual substance of the deliberations of the meeting. The police state:

Although access to the 2010 budget for the Hamilton Police Service has been made public there were intricate details that were also discussed at these deliberations in respect to the Collective Bargaining for Police and Civilian Members of the Service.

[19] The appellant submits that the police have not met the requirements of section 35(4)(b) which permits them to hold the meetings relating to budgets *in camera*. The appellant argues that section 35(4)(b) requires that meetings be open unless “when avoiding disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be available to the public.” The appellant submits that the police have not made the argument that holding the meeting *in camera* was in the public interest.

[20] The appellant makes two additional arguments. The first is that the police did not give proper notice, as required under the *PSA*, to have the meeting *in camera*. Secondly, the appellant submits that the exception in section 6(2)(b) of the *Act* applies as the subject matter of the *in camera* meeting was discussed by the City of Hamilton's city council in a meeting open to the public.

[21] While I accept that the police meet the first requirement for the application of section 6(1)(b), I find they have not established that they were authorized to hold the meeting in the absence of the public. The police have not established that those budget matters which are the subject of the *in camera* meetings constitute intimate financial matters whose non-disclosure was in the public interest which outweighed the principle that proceedings should be open to the public, as is required under section 35(4)(b) of the *PSA*.

[22] In Order MO-1198, the former Assistant Commissioner Tom Mitchinson dealt with an appeal of a decision of the Lindsay Police Services Board, where the responsive records were similar to those records at issue in the present appeal. In finding that the Lindsay Police Services Board did not have the authority to hold the budget discussions *in camera*, the Assistant Commissioner found the following:

In my view, the Police have failed to establish the requirements of the second part of the section 6(1)(b) test. Sections 35(4)(b) of the *PSA* and 8.8(a) of the By-law are both discretionary, and both require a Police Services Board to consider factors beyond the mere subject matter of the discussions. I am not persuaded that the discussion of the line-by-line Police budget qualifies as an **intimate** financial matter. However, even if I were, this finding would be insufficient to bring this matter within the scope of section 35(4)(b). To do so, in my view, the Police would have to “have regard to the circumstances” of the particular situation, and conclude that “the desirability of avoiding their disclosure ... in the public

interest outweighs the desirability of adhering to the principle that proceedings be open to the public". [emphasis in original]

[23] I agree with the rationale set out in Order MO-1198 and apply it here. I find that the budget matters which are the subject of the records do not qualify as intimate financial matters as required by section 35(4)(b) of the *PSA*. Further, the police's representations do not explain or provide evidence as to how the budget matters and information in the records might qualify as intimate financial matters. Moreover, the police have also failed to provide me with the reasons why, in the circumstances of discussing these budget matters, it was in the public interest to go *in camera* instead of holding the meeting open to the public. Based on my review of the information in the record itself, I am unable to discern why it was in the public interest to avoid disclosure of the budget information by holding the meeting *in camera*. Accordingly, I find that the police have not established that it was authorized to hold the two meetings in the absence of the public as required by section 35(4)(b) of the *PSA*. I conclude that the exemption in section 6(1)(b) of the *Act* does not apply.

[24] The appellant's representations raised several issues about the police's authority to hold budget meetings *in camera* and how the police's notice of the *in camera* meeting was deficient. I do not have the jurisdiction to comment on the police's position to hold budget meetings *in camera* or the notice requirements under the *PSA*. In the particular circumstances of this appeal, I have found that the police did not have the authority to hold the meetings *in camera*, and thus are not able to claim the section 6(1)(b) exemption for these particular records.

B. WOULD DISCLOSURE OF THE RECORDS REVEAL INFORMATION EXEMPT UNDER THE DISCRETIONARY 11(E) EXEMPTION OF THE *ACT*?

[25] The police submit that section 11(e) applies to exempt the information at issue. This section states:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

[26] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*.

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[27] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11 [Orders MO-1947 and MO-2363].

[28] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

[29] In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution [Order PO-2064].

[30] Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Orders PO-2064 and PO-2536].

[31] The police made submissions on the application of the section 11(e) exemption with respect to "a meeting and the final report." The police did not specify which meeting or which report it is referring to in its representations. However, I will consider the application of section 11(e) to all the records at issue.

[32] The police argue that the records and meetings took place prior to negotiations between itself and the Hamilton Police Association, which is the negotiating body for the police and civilian membership. However, the police also state:

...although the negotiations are complete at the time of these representations we feel that future reports containing this type of content

could jeopardize and prejudice negotiations and would be considered bargaining in bad faith.

[33] Accordingly, the police concede that at the time it was making its representations there were no current or future negotiations that were referable to the information in the records. The police are solely concerned about the disclosure of these records being a precedent for future requests for similar information.

[34] The second requirement of this exemption is that the negotiations between the police and the Hamilton Police Association be ongoing or will be carried on in the future. The police concede that the negotiations have been completed. The police are concerned about harm to negotiations if future budget documents in future negotiations between itself and the Hamilton Police Association are disclosed. Even if I were to find the records at issue exempt under section 11(e) in the present appeal, my finding would not exempt similar records in future appeals. Accordingly, I find that the police have not established the exemption in section 11(e) as the negotiations between itself and the police association are complete.

[35] In summary, I find that both the section 6(1)(b) and 11(e) exemptions do not apply to the records at issue. As the police have not claimed any additional discretionary exemptions and no mandatory exemptions apply, the information in the records should be disclosed to the appellant.

ORDER:

1. I order the police to disclose the records to the appellant by providing him with a copy of the following records by **November 14, 2011**.
 - Meeting minutes for February 16, 2010 (withheld portions on page 2)
 - Meeting minutes for November 16, 2009 (withheld portions on page 4)
 - Report #10-013 (pages 5 – 10)
 - Report #09-123 (pages 11 – 12)
 - Budget Analysis (pages 13 – 83)
2. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the records sent to the appellant.

Original Signed by: _____
Stephanie Haly
Adjudicator

October 25, 2011 _____