Report to: General Committee Date Report Authored: February 14, 2014

SUBJECT: Closed Meeting Investigator Report – Markham Sports Entertainment and Cultural Sub-Committee meeting of February 11, 2013

PREPARED BY: Kimberley Kitteringham, Ext. 4729
Martha Pettit, Ext. 8220

RECOMMENDATION:

1) That the confidential staff report entitled "Closed Meeting Investigator Report – Markham Sports Entertainment and Cultural Sub-Committee meeting of February 11, 2013" dated February 14, 2014 be received; and

2) That the redacted version of the report (Appendix B) from Amberley Gavel Ltd., be released in its entirety; and further,

3) That Staff be authorized and directed to do all things necessary to give effect to this resolution.

PURPOSE:

To report to Council on the City's Closed Meeting Investigator's final report and recommendations regarding a closed meeting of Markham Sports, Entertainment and Culture Centre Sub-Committee (MSECC) held on February 11, 2013.

BACKGROUND:

The City received a request for an investigation of the closed meeting of the MSECC held on February 11, 2013. This request, dated March 25, 2013, argued that the MSECC closed meeting had nothing to do with the"security of the property" or "solicitor-client privilege". Pursuant to subsection 239(1) of the Municipal Act (the "Act"), the City's duly appointed Closed Meeting Investigator completed its investigation into the request, and provided a final report to Staff on November 25, 2013. Subsequent to receiving the report, the City contacted the Closed Meeting Investigator (Investigator) to discuss: 1) Staff's concerns with the Investigator's interpretation of Section 239(2)(a) of the Act; and 2) the inclusion of personal information about an identifiable individual in the final report. Staff also requested an opportunity to meet with the Investigator to discuss these concerns, however, the Investigator declined the request.

OPTIONS/ DISCUSSION:

This closed meeting investigation relates to the closed meeting of the MSECC on February 11, 2013. The MSECC relied on the following two grounds for going into closed session: 1) Section 239(2)(a) of the Act - security of the property of the municipality as it related to a long-term lease of a City facility; and 2) Section 239(2)(f) of the Act - solicitor/client privilege as the Solicitor was going to be asked to provide legal advice and because some of the information being discussed was the subject of a Non-Disclosure Agreement between the City and a third party. The Investigator has

concluded that the reasons cited by the MSECC as to why the item was dealt with in a closed session were not properly applied. Staff *do not* agree with the findings of the Investigator for the reasons outlined below:

1. INCORRECT INTERPRETATION OF SECURITY OF THE PROPERTY OF THE MUNICIPALITY PROVISION OF ACT

In analyzing the application of the "security of property of the municipality" provision of the Act, the Investigator relied on the Information and Privacy Commissioner of Ontario's (IPC) Order MO-2468-F, dated October 27, 2009 (2009 Order). In the 2009 Order, involving the City of Toronto, the Adjudicator relied on the plain language meaning of "security of the property of the municipality". The Adjudicator found that the plain language meaning of "security of the property of the municipality" relates only to protection of property from physical loss or damage (e.g. vandalism) and the protection of public safety in relation to the property. Based on this 2009 Order, the Investigator found that the "security of the property of the municipality" exception did not apply to MSECC's closed meeting related to a long-term lease of a municipally owned property.

However, Amberley Gavel have failed to take into account two more recent decisions of the IPC that conflict with the result of the 2009 Order. Since 2009, the issue has been dealt with in two subsequent IPC orders (MO-2683-I, December 30, 2011, and MO-2700, March 20, 2012). Both of these more recent Orders applied a more expanded interpretation of the meaning of the words "security of the property" and those cases provide specific direction from the IPC on the City's position in this case

The 2009 Order only considered whether or not the negotiations in a commercial transaction pertained to "security of the property". The Adjudicator in the 2011 Order agreed with the 2009 Order's findings in principle "as a starting point for applying the exemption." The 2011 case involved more than simply protecting the City of Toronto's bargaining power in negotiations. The Adjudicator noted that this 2011 case involved taking measures to secure (meaning to prevent loss or damage to) both "corporeal" and "incorporeal" property owned by the City (including leases). The Adjudicator found that for a municipal Council to rely on the "security of the property" provision of the Act to hold a closed meeting, the municipality must establish that:

- It owns the subject property (corporeal or incorporeal); and
- The subject matter being considered in the meeting is the security (in the sense of taking measures to prevent loss or damage to it) of that property.

In this 2011 Order, the City of Toronto argued it did in fact own the subject property and had the authority to engage in a closed meeting to consider the potential risks and impacts of a lease held by the City arising from the proposed transaction. The City's position was upheld by the IPC, recognizing it did have the authority to refuse access to information from a closed meeting during which a lease was discussed.

The 2011 Order is both more recent and more closely on point to the closed meeting investigation of the MSECC meeting than the 2009 Order relied on by the Investigator. The closed MSECC meeting in question involved a potential long-term lease of a municipally owned property. The MSECC meeting involved discussion about taking measures to prevent loss or damage to this municipally owned property, similar to the discussions that were undertaken in 2011 by the City of Toronto. As such, it is Staff's view that the Investigator did not apply the correct and most recent rationale when assessing if MSECC improperly went into closed session. Its decision with respect to the exemption contained in Section 239(2)(a) of the *Municipal Act* is, therefore, incorrect.

2. IPC IS NOT IN POSITION TO INTERPRET MUNICIPAL ACT

Notwithstanding the above, it is Staff's view that the IPC is not the expert in Municipal Act issues, as found by the Ontario Divisional Court in *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*. The Divisional Court found that the standard of review for decisions issued by the IPC is that of correctness. The Municipal Act is not a statute that the IPC is responsible for administering and as such they do not have the necessary expertise or specialization in which the standard of review could be reasonableness. Therefore the IPC's definition of "security of the property" as it relates to the Municipal Act should not have been given a lot of deference by the Investigator. While the decisions of the IPC are informative, they are not determinative of the issue before a Closed Meeting Investigator.

REQUIRED REDACTION OF REPORT:

While a municipality is required to make the Investigator's reports available to the public, upon review by Staff it was determined that the content of the Investigator's report included confidential information about an identifiable individual (a City staff person). This information is not germane to the Investigator's conclusion and should be redacted in accordance with the principles of the Municipal Freedom of Information and Protection of Privacy Act. Therefore, appended to this report are the original and redacted versions of the Investigator's report. Staff recommend that only the redacted version of the report be made available to the public.

FINANCIAL CONSIDERATIONS AND TEMPLATE: (external link)
None

HUMAN RESOURCES CONSIDERATIONS
None

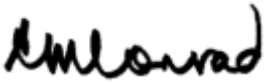
ALIGNMENT WITH STRATEGIC PRIORITIES:
N/A

BUSINESS UNITS CONSULTED AND AFFECTED:
N/A

RECOMMENDED BY:

X 

Kimberley Kitteringham
City Clerk

X 

Catherine Conrad
City Solicitor

ATTACHMENTS:
Appendix B - Amberley Gavel Ltd. Report - redacted
Appendix C - Information and Privacy Commissioner Interim Order MO-2683-I
Appendix D - St. Catharines (City) v. Ontario (Information and Privacy Commissioner)

Appendix B

Amberley Gavel Ltd.

November 25, 2013

Kimberley Kitteringham, City Clerk
Markham Civic Centre
101 Town Centre Boulevard
Markham, Ontario
L3R 9W3

Re: Complaint re MESC Closed Meeting February 11, 2013

Dear Ms. Kitteringham:

Enclosed please find the Report of the Investigator into the request for an investigation into the meeting as noted above.

In accordance with our established procedure, this report was prepared by one of our Review Officers and then subsequently peer reviewed, not only for quality assurance and consistency with the meeting investigation process we are following across Ontario, but also with respect to the findings and interpretations arising from this process in other investigations.

Please ensure that this report is made available to the public in accordance with the Municipal Act, 2001.

Sincerely yours,

For: Amberley Gavel Ltd.

35 Ambleside Drive, London, ON N6G 4M3
Toll free 1-866-535-8079/ 519-434-8079/ www.agavel.com/ info@agavel.com

REPORT TO
THE CORPORATION OF THE CITY OF MARKHAM
REGARDING THE INVESTIGATION OF THE MEETING OF THE MARKHAM SPORTS, ENTERTAINMENT AND CULTURE CENTRE SUB-COMMITTEE OF FEBRUARY 11, 2013

I. COMPLAINT

The Corporation of the City of Markham ("City") received a complaint on March 25, 2013 about a closed meeting of the Markham Sports, Entertainment and Culture Centre Sub-Committee ("MESC") held on February 11, 2013. The essence of the complaint is that the holding of a closed meeting was in contravention of the open meetings provision of the *Municipal Act, 2001*[1], as amended by Bill 130[2] ("*Municipal Act*" or "*Act*").

This request was sent to the offices of Amberley Gavel Ltd. ("Amberley Gavel") for investigation.

II. JURISDICTION

The City appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act*.

LAS has delegated its powers and duties to Amberley Gavel to undertake the investigation and report to City Council.

III. BACKGROUND

Section 239 of the *Municipal Act* provides that all meetings of a municipal council, local board or a committee of either of them shall be open to the public. This requirement is one of the elements of transparent local government.

The section sets forth exceptions to this open meetings rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public. The section confers discretion on a council or local board to decide whether or not a closed meeting is

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[1] S.O. 2001, c. 25.
[2] *Bill 130: An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 ("Bill 130").

required for a particular matter. That is, it is not required to move into closed session if it does not feel the matter warrants a closed session discussion.

Section 239 reads in part as follows:

Meetings open to public

239. (1) Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Exceptions

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

(a) the security of the property of the municipality or local board;

(b) personal matters about an identifiable individual, including municipal or local board employees;

(c) a proposed or pending acquisition or disposition of land by the municipality or local board;

(d) labour relations or employee negotiations;

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

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

(g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2).

IV. INVESTIGATION

Documents provided by the City and reviewed during the course of the investigation included the City's Procedure By-law, the Agendas and Minutes of the open and closed meetings of the MESC, and other relevant documentation. The City Solicitor and City Clerk were consulted during the course of the investigation.

BACKGROUND

(a) The Markham Sports, Entertainment and Culture Centre Sub-Committee

The MESC is a sub-committee of the General Committee of Council. On February 11, 2013 it was comprised of seven Members of Council, including the Mayor and Deputy Mayor.[3] The mandate of the MESC was "to provide recommendations specifically related to the proposed Markham Sports, Entertainment & Cultural Centre to be located

[3] We note that the composition of the MESC was changed after the subject meeting to include all Members of Council.

in Markham Centre and to provide recommendations on any other directly related development."[4]

(b) Agenda for the MESC Meeting of February 11, 2013

The Agenda for the February 11, 2013 meeting contained an item intended to be dealt with in-camera listed as:

> "**3.** In **Camera Matters**
>
> That, in accordance with Section 239 (2) (a) of the *Municipal Act*, the Markham Sports, Entertainment and Cultural Centre Sub-Committee resolve into an in-camera session to discuss the following confidential matters:
>
> - The security of the property of the municipality"

According to the City's Council/Committee Coordinator, a revised agenda was issued to the Members of the Sub-Committee and the public at the open meeting of the MESC on February 11, 2013. The subject item was listed as:

> "**3.** In **Camera Matters**
>
> That, in accordance with Section 239 (2) (a) of the *Municipal Act*, the Markham Sports, Entertainment and Cultural Centre Sub-Committee resolve into an in-camera session to discuss the following confidential matters:
>
> - The security of the property of the municipality
> - Advice that is subject to solicitor-client privilege, including communications necessary for that purpose"

(c) Minutes of the MESC Meeting on February 11, 2013

The Minutes for the MESC Meeting of February 11, 2013 indicate that the meeting commenced at 12:14 p.m. in open session. At 12:15 p.m., the meeting went into closed session to discuss the subject item. It resolved back into open session at 2:42 p.m. The meeting then immediately adjourned.

(d) Agenda for the Closed Meeting MESC Meeting of February 11, 2013

The subject agenda item was identified on the revised "Confidential Agenda" in the same manner as that on the revised open meeting agenda. The item specified that the

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[4] Markham Sports, Entertainment and Cultural Centre Sub-Committee (MESC): Terms of Reference, accessed at http://www2.markham.ca/markham/ccbs/indexfile/Agendas/2012/General/gc120523/MESC%20Terms%20of%20Reference%20attachment.pdf (May 15, 2013)

discussion would include an individual associated with the Markham Sports, Entertainment & Cultural Centre proposal.

(e) Minutes of the Closed Meeting of the MESC Meeting on February 11, 2013

The Minutes for the In-camera (closed) Meeting of the MESC on February 11, 2013 indicate that the MESC received a deputation from individuals associated with the Markham Sports, Entertainment & Cultural Centre proposal. Discussion occurred between members of the MESC and these individuals.[5] City staff answered questions from members of the MESC relating to the issues under discussion. The third party individuals were present throughout the whole meeting.

V. ANALYSIS AND FINDINGS

Three reasons were cited by the City to Amberley Gavel as to why the agenda item was intended to be dealt with in closed session:

(a) The subject matter dealt with security of the property of the municipality, and could be exempt from the open meetings rule by virtue of section 239(2)(a) of the *Municipal Act*, since it involved a potential long-term lease of a City facility; and
(b) The City Solicitor would be called upon to provide legal advice that would be subject to solicitor/client privilege under section 239(2)(f) of the *Municipal Act*; and
(c) There was an agreement between the municipality and a third party not to divulge confidential information belonging to that third party.

Each of those reasons will be canvassed in light of the *Municipal Act*.

(a) Section 239(2)(a) of the *Municipal Act*

The City asserted that the subject matter of the closed meeting dealt with the security of the property of the municipality or local board and, therefore, was exempt by virtue of section 239(2)(a) of the *Municipal Act*. The City contended that it is dealing with the potential long-term lease of a City facility and that it routinely deals with such issues in closed session.

The *Municipal Act* does not define the phrase "security of the property of the municipality". However, the Information and Privacy Commissioner ("IPC") considered the meaning of this phrase in a 2009 decision involving the City of Toronto and stated in

[5] It would be improper, for Amberley Gavel to discuss in this report the detailed substance of the closed meeting discussions, since disclosure would offend the principle of confidentiality that closed meetings protect. In addition, to do so would allow complainants and other third parties to receive information through a closed meeting investigation that they would otherwise not be privy to; that is not the function of a closed meeting investigation. That is not to say that the complainant in this instance was attempting to do that, but rather that the possibility could be contemplated in other instances.

part that:

> "The City takes the position that a closed meeting that deals with the financial matters pertaining to the sale of street and expressway lights is a meeting authorized by section 239(2)(a), as this subject matter can be characterized as "the security of the property of the City". The City also argues that disclosure of the records would harm its financial and economic interest and that such a harm "falls squarely within the intent and meaning of 'security of the property' as contemplated in section 239(2)(a)."
>
> After considering the arguments put forward by the City and the appellant, I conclude that the plain meaning of the phrase "security of the property of the municipality", when used in the context in which it is employed in section 239(2) of the *Municipal Act, 2001*, is very different from the meanings the City wishes to give this phrase. I agree with the appellant that to give the phrase the meanings that the City urges is to distort its meaning. In my view, "security of the property of the municipality" should be interpreted in accordance with its plain meaning, which is the protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety in relation to this property..."[6]

Since the legislative aims of the *Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA")* are similar but not identical to the open meetings provision of the *Municipal Act*, in that the public has a right to open and transparent government, Amberley Gavel is guided in this instance by the meaning advanced by the IPC relating to the "security of the property of the municipality or local board".

For the purposes of this investigation, the MESC must be found to have discussed in closed session considerations related to protection of property from loss or damage in order to comply with section 239(2)(a) of the *Municipal Act*. A review of the Minutes of Confidential Meeting of the MESC indicates that the matters discussed did not relate to the protection of the municipality's property from loss or damage. Hence, section 239(2)(a) of the *Municipal Act* does not apply to the meeting in question.

In terms of the potential harm to the municipality's financial and economic interests, the IPC concluded:

> "In coming to this conclusion, I recognize that this interpretation fails to prevent a harm which one might expect the Legislature to have addressed; premature disclosure of a municipality's bargaining strategy when attempting to buy or sell assets other than land [i.e. sale of street and expressway lights]. The result of this "plain meaning" interpretation is that section 239(2) protects the confidentiality of negotiations for the purchase or sale of municipally-owned land (**under section 239(2)(c)**), but not of other municipally-owned assets [emphasis added]."[7]

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[6] Information and Privacy Commission Order MO-2468-F; re: City of Toronto (October 27, 2009).
[7] *Ibid.*

(b) Section 239(2)(c) of the *Municipal Act*

The City contends that one of the reasons that the MESC met in closed session was that it was dealing with a potential long-term lease of municipal property. Amberley Gavel accepts that negotiations about the terms and conditions of long-term leases of municipal property might fall within the exemption of the *Municipal Act* respecting "a proposed or pending acquisition or disposition of land" (section 239(2)(c)). Although the MESC did not invoke this exemption to deal with the subject matter under consideration, for completeness of our report, this exemption will be canvassed.

The purpose of section 239(2)(c) is to allow a council or local board to give instructions to staff, a lawyer, or its agent (collectively, "agent") in closed session respecting the acquisition or disposal of land within certain parameters. It makes sense that a council or local board would not have open public discussions about its negotiating strategy, most specifically the price it is willing to pay for lands that it wants to acquire title to or receive for lands that it wants to dispose of (including through a long-term leasing arrangement).[8] Open disclosure of the price that a municipality is willing to pay for acquisition of land, or willing to accept for disposal of land, could detrimentally affect the market value of the property. Potential purchasers or sellers of land ought not to know what value a council is willing to accept or pay. The exemption under the *Municipal Act* protects the municipality's economic interests by not compromising the municipality's bargaining position. Hence, the discussion can be held in closed session.

It would appear from the reading of the Minutes of the In-Camera Meeting of the MESC on February 11, 2013 that the MESC was not confidentially discussing its negotiating strategy, although it was discussing certain concerns respecting a potential deal as between the parties. Most importantly, however, it was having the discussion in the presence of the very party with which it was purporting to negotiate.

We do not believe that it is a proper interpretation of section 239(2)(c) that a council can negotiate behind closed doors with the very corporate entities (or their personal representatives) with which they wish to enter into a long-term lease. There is no provision in the *Municipal Act* that allows a council to negotiate behind closed doors with third parties. As a result, the exemption to the *Municipal Act* in section 239(2)(c) can not apply to the closed meeting of the MESC on February 11, 2013.

(c) Section 239(2)(f) of the *Municipal Act*

The City also indicated that the subject meeting was closed to the public under Section 239(2)(f) of the Municipal in that the MESC would be receiving advice that is subject to solicitor-client privilege.

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[8] However, the council or local board can only execute the actual acquisition or disposal of land by a by-law enacted in open session.

The Supreme Court of Canada recently considered the nature of the solicitor-client privilege in *Blank v. Canada (Minister of Justice)*[9]:

"The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice."

A municipal council, committee, or local board must be able to confide in its solicitor on all legal matters and to have "full, free, and frank discussions". This is necessary to ensure that the communication between the solicitor and the council, committee, or board, as the client of the solicitor, is not going to be revealed in a public forum to third parties. That is the purpose of solicitor-client privilege and is the reason why a council, committee, or local board is permitted to go into closed session to deal with a matter involving solicitor-client privilege.

Most importantly, the rationale for solicitor-client privilege is to ensure that the strategic legal advice of the solicitor is not divulged to the very party with which the council, committee, or local board is dealing.

Three criteria are necessary to establish the existence of solicitor-client privilege: (1) a communication between solicitor and client, (2) which entails seeking or giving of legal advice, and (3) which is intended to be confidential.[10]

The client in this case is the municipality and discussions with its internal solicitor can be solicitor-client communications. The City Solicitor was asked to provide certain advice during the subject MESC meeting, albeit apparently in the form of information rather than legal guidance. For the purposes of that information, solicitor-client privilege can be established.

However, it cannot be said that the information was "intended to be confidential" when the party against whom solicitor-client privilege can be asserted is in the meeting at which the information is divulged. In these circumstances, solicitor-client privilege has been waived.

Solicitor-client privilege can be waived, either advertently or inadvertently. Where legal advice of any kind is sought from a legal adviser in his or her capacity as such, the communications made in confidence by or to the client are permanently protected from disclosure by either the client or the legal adviser, except if the protection against disclosure is waived by the client. As a result, when a municipal council, committee, or

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[9] [2006] 2 S.C.R. 319, 2006 SCC 39 ("Blank").
[10] *Solosky v. The Queen*, [1980] 1 SCR 821 at 837.

board seeks or receives legal advice on a matter, whether orally or in writing, that advice is protected by solicitor-client privilege unless the municipal council, committee, or board permits disclosure of the advice or of any communication dealing with the advice. Absent a waiver of solicitor-client privilege, the *Municipal Act* exemption in section 239(2)(f) allows a council, committee, or board to seek or receive legal advice in a closed meeting.

Even if solicitor-client privilege could be asserted over the information divulged by the City Solicitor at the subject meeting, the privilege was waived by the MESC (as client) when it invited the third parties into the meeting room. It is our opinion that the benefit of the *Municipal Act* exemption dealing with solicitor-client privilege was waived by the MESC when it allowed third parties (i.e. parties other than the client, the client's staff or agents and the solicitor) to be in attendance at or the entire meeting in which the information that could be subject to solicitor-client privilege was divulged. As a result, the exemption to the *Municipal Act* in section 239(2)(f) does not apply to the closed meeting of the MESC on February 11, 2013.

(d) A Confidentiality Agreement

The City indicated that there is an agreement between the municipality and a third party not to divulge confidential information belonging to that third party. As a result, it was contended that all discussions between the MESC and the third party have to be done in closed session.

We were not provided with a copy of the confidentiality agreement, nor were we given specific details about its content or the extent of the cloak of confidentiality.

No documents were handed out at the subject meeting, either by staff or the third party, which contained confidential information, as far as we could determine. Further, it appears from a reading of the Minutes of the In-Camera Meeting of the MESC that much of the information discussed in the meeting did not involve third-party proprietary commercial information. Indeed much of the information was already in the public domain.[11]

While we appreciate that a municipality is concerned about divulging third-party confidential information, there is no exemption in the *Municipal Act* that allows a council, committee, or local board to go into closed session solely to receive or discuss third-party commercial information. [12]

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[11] See for example:
http://www2.markham.ca/markham/ccbs/indexfile/Agendas/2012/General/gc120420/April%2020%20Project%2044%20FINAL.pdf

[12] We note that there is a subsection of the *MFIPPA* which could apply to disclosure of information held by a municipality where such "disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization. This involves significant injury to competitive position, or significant interference with contractual or other negotiations. (cont'd)

The only time it would be permitted to do so is if the subject matter under consideration can be discussed in closed session by virtue of a listed exemption in the *Municipal Act* (e.g. litigation or pending litigation).

Moreover, the Minutes of the In-Camera Meeting of the MESC of February 11, 2013 indicate that the third party was in attendance as a follow up to correspondence submitted to City Council on January 29, 2013. That correspondence was on a public agenda of City Council and was received in open session. Much of the discussion in the closed session of the MESC of February 11, 2013 dealt with substantially the very same information that was contained in the public correspondence or already available in the public domain. Since it was the third party itself who provided the information in a public forum in the first place, there would be no reason for the municipality to feel that it had to later discuss that same information behind closed doors.

The City cannot rely upon a broad confidentiality agreement with a third party to assert a statutory privilege to consider all discussions and information with respect to the subject matter at issue in a closed session.

(e) Closed Meetings are Discretionary

[redacted]

The *Municipal Act* itself does not require a council, committee, or local board to go into closed session to consider a matter. The default position required by the *Municipal Act* is for all meetings to be conducted in open session. Section 239(1) stipulates that "Except as provided in this section, all meetings shall be open to the public." The use of the word "shall" means that open meetings are mandatory unless an exemption to this rule applies.

The *Municipal Act* then provides for discretionary statutory authority to consider a matter in closed session if the subject matter properly and lawfully falls under a listed exemption to the open meetings rule. The Act says that a "meeting or part of a meeting may be closed to the public if the subject matter being considered" is one in which an exemption can apply. The use of the word "may" confers discretion on the council, committee, or

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It requires some measure of the injury. The particular circumstances must be evaluated in each case. The institution or third party must present evidence that is detailed and convincing and must describe a set of facts and circumstances that would lead to a reasonable expectation that harm would occur it the information were released. Generalized assertions of fact without sufficient evidence do not meet the test." *Freedom of Information (FOI) and Privacy Manual*, Ontario Ministry of Government Services, available at http://www.mgs.gov.on.ca/en/infoaccessandprivacy/Practitioners/STDU_101437.html?openNav=foi_and_privacy_manual. However, there is no such provision in the *Municipal Act* dealing with the exemption to the open meetings rule.

local board to discuss the matter in closed session. However, discussion in closed session is not mandatory. Assuming that it is not breaching other laws (e.g. privacy laws), the council, committee, or local board can choose to discuss something in open session even if an exemption to the open meetings rule might otherwise apply.

(f) Closing All or Part of a Meeting

A review of the Minutes of the In-camera Meeting of the MESC on February 11, 2013 shows that the amount of advice sought from or given by the City Solicitor to the MESC was quite limited in content, particularly in light of the discussion that appears to have occurred over a period of almost two and a half hours.

Section 239(2) of the *Municipal Act* provides that "all or part of a meeting" may be closed to the public if the subject matter under discussion relates to one of the listed exemptions to the open meetings rule. That does not mean that the whole meeting must be closed to the public. Only that portion of the meeting that is subject to the exemption can be closed. Best practice is for a council, committee, or local board to discuss as much as it can in an open meeting and go in-camera only on those portions of the subject matter that properly meet the exemptions criteria.

This best-practice approach will foster the aims of the *Municipal Act* requiring openness and transparency in municipal decision-making, including discussions that lead up to such decisions.

VI. CONCLUSION

Amberley Gavel has concluded that the MESC breached the open meetings requirement of the *Municipal Act* in closing its meeting to the public on February 11, 2013 during discussion of the proposed Markham Entertainment, Sports and Cultural Centre.

VII. RECOMMENDATIONS

As a result of the investigation, we offer several recommendations:

(a) THAT City Council, its committees, and local boards be reminded that the exemptions from the open meetings rule of the *Municipal Act* are discretionary in nature. To the extent possible, all discussions should be held in open session unless the subject matter being discussed clearly and unequivocally falls within one of the listed exemptions in the *Municipal Act.*

(b) THAT, even when a listed exemption applies to the subject matter under consideration, in-camera discussions be limited to those issues that need to be dealt with in closed session. To the extent that some issues may be dealt with in open session, City Council, its committees, and local boards should do so in order to encourage openness, transparency, and accountability.

(c) THAT members of City Council, its committees, and local boards; and senior staff, in attendance at a closed session be mindful of the specific authority or authorities in the authorizing resolution(s) for the exclusion of the public and be prepared to draw it to the attention of the body when the discussion strays from the authority cited or if the authority ceases to exist during the discussion.

VII. PUBLIC REPORT

We received full co-operation from all parties that we contacted and we thank them.

This report is forwarded to the Council of the City of Markham. The *Municipal Act* provides that this report be made public. It is suggested that the report be included on the agenda of the next regular meeting of Council or at a special meeting called for the purpose of receiving this report prior to the next regular meeting.

AMBERLEY GAVEL LTD.

November 2013

Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-2683-I

Appeal MA09-225

City of Toronto

December 30, 2011

Summary: The appellant sought access to records relating to an identified project. The city granted access to many of the responsive records, and denied access to excerpts of the meeting minutes of ten meetings, and one identified report, on the basis of section 6(1)(b). The application of the exemption in section 6(1)(b) to these pages of records is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 6(1)(b); *City of Toronto Act, 2006*, S.O. 2006, s. 190(2)(a).

Orders and Investigation Reports Considered: MO-2468-F

Cases Considered: *St. Catharines (City) v. IPCO*, *2011* ONSC 346

NATURE OF THE APPEAL:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* [*MFIPPA* or the *Act*] for the following records relating to an identified project (the project):

> [A]ll communication[s], letters, electronic dispatch[es], minutes of meetings and agreements during [an identified time period].

[2] The appellant also provided a list of the specific types of records it was seeking.

[3] This request involves records held by the city as well as records of the City of Toronto Economic Development Corporation (TEDCO). In a 2008 decision of the Ontario Court of Appeal,[1] the court determined that TEDCO was deemed to be part of the city for the purpose of the *Act* on the basis of section 2(3) of the *Act*.

[4] In response to the request the city identified 499 pages of responsive records, and denied access to all of the records on the basis of a number of identified exemptions under the *Act*. The city also provided the appellant with a detailed index of the responsive records. The appellant appealed the city's decision.

[5] During the mediation stage of the appeal, the city located an additional 177 pages of records. It also issued a revised decision in which it indicated that, because certain negotiations were now complete, access was being granted to over 600 pages of records. It also stated that approximately 55 identified pages were not responsive to the request, and denied access to the remaining 21 pages of records (pages 454-462, 469-473 and 670-676) on the basis of the exemption in section 6(1)(b) (closed meeting) of the *Act*. The decision letter also indicated the fees payable for the records.

[6] The appellant subsequently paid the fee and obtained access to the records. The appellant also confirmed that the only issue remaining was the application of section 6(1)(b) to the identified 21 pages of records.

[7] A Notice of Inquiry was sent to the city, and the city provided representations in response. The non-confidential portions of these representations were then provided to the appellant, who also provided representations. In its representations, the appellant raised, for the first time, the issue of whether the city's search for responsive records was reasonable. The appellant also requested that this search issue be addressed in this appeal.

[8] The appellant's representations were shared with the city, and the city was invited to submit representations in reply, and also to address the search issue. In response, the city provided reply representations on the issues. In addition, the city conducted further searches and located 31 additional pages of records. It then issued a supplementary decision letter in which it granted access to a number of the newly-located records, and denied access to three of them (consisting of 10 pages) on the basis of the exemption in section 6(1)(b) of the *Act*.

[9] The appellant confirmed that it also wished to appeal the city's decision to deny access to these additional 10 pages of records, and they were added to the scope of this appeal. A Supplementary Notice of Inquiry was sent to the city, and the city provided representations in response. These representations, to a large extent, paralleled the earlier representations of the city.

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[1] City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario (2008), 292 D.L.R. (4th) 706 (Ont.C.A).

[10] On my review of the records at issue in this appeal, including the "additional records," I note that one of these records (a seven-page "confidential report") is identical to one of the records already at issue in this appeal (pages 670-676). I will only review the application of the section 6(1)(b) exemption to the earlier copy of this record.

[11] With respect to the other two "additional" records, I note that these two records are similar to the record comprising pages 670-676. However, because of the discussion below and because the appellant has not had the opportunity to review the specific representations of the city on these three pages of records, I will not address them in this order, and will provide the appellant with the opportunity to provide representations on these three pages, if it wishes to do so.

RECORDS:

[12] There are 11 records remaining at issue, totalling 21 pages or portions of pages. These records are:

- ten excerpts from the minutes of ten separate meetings of TEDCO's Board of Directors (portions of pages 454 to 462 and 469 to 473); and
- a 7-page report (pages 670 to 676).

DISCUSSION:

CLOSED MEETING

[13] The city relies on the exemption in section 6(1)(b) to deny access to the records at issue.

[14] 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.

[15] Previous orders have held that, for this exemption to apply, the city 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]

[16] I will review each part of this three-part test to determine whether the records qualify for exemption under this section.

Part 1- a council, board, commission or other body, or a committee of one of them, held a meeting

[17] The city submits that the records, including those at issue and those disclosed to the appellant, contain notations which confirm that in-camera meetings were held and the dates on which they were held.

[18] With respect to the 10 excerpts from the minutes of the meetings of TEDCO's Board of Directors (pages 454 to 462 and 469 to 473), the city states:

> The Confidential Minutes consist of excerpts from meeting minutes of TEDCO's Board of Directors describing the content of in camera discussions. The City submits that a review of the meeting minutes of TEDCO's Board of Directors - including both the Confidential Minutes and the documents previously disclosed to the Requester - confirm the dates of the in camera meetings of TEDCO's Board of Directors to which the Confidential Minutes relate. Previous orders of the IPC have, routinely and repeatedly, acknowledged that minutes of a meeting are sufficient evidence to satisfy the requirement to establish that a meeting was held and that the meeting was held in the absence of the public.

[19] The city itemizes the specific dates on which each of the in-camera meetings was held. It then states:

> The City submits that the minutes for these meetings contain notations indicating that the portions of the meetings that considered the abovementioned items were held in the absence of the public. As a result, the City has satisfied the requirement that there be a meeting held in the absence of the public with respect to the Confidential Minutes.

[20] With respect to the 7-page report (pages 670-676) the city states that this record is a confidential attachment to an April 3, 2009 report, which was considered at an in-camera meeting of City Council. Although the bulk of the April 3 report was made

public, the city confirms that the confidential report has been consistently treated in a confidential manner. The city submits that the minutes of the April 6, 2009 meeting of City Council indicate that it went into closed session to consider and deliberate on the issues contained in the confidential report.

[21] The appellant acknowledges that an in-camera meeting was held on April 6, 2009 and that records disclosed to it confirm this. However, the appellant notes that it has not received the minutes of the TEDCO meetings that would confirm that those were in-camera meetings, and questions the city's position.

Findings on part 1 of the section 6(1)(b) test

[22] The City asserts that in-camera meetings were held by both City Council and TEDCO's Board of Directors on the dates noted in its submissions. The appellant appears to acknowledge that the City Council meeting was held in-camera, but takes the position that other meetings (the TEDCO Board of Director's meetings) were not closed to the public and argues that it has not been provided with sufficient evidence to establish that those meetings were held in closed session.

[23] In determining this issue, in addition to the representations, I have also viewed the TEDCO meeting minutes at issue as they form an important part of the evidence before me. I find that a number of these records themselves provide corroborative evidence that a number of these meetings were, in fact, held in-camera (specifically, pages 457-462, 469-470 and 472-473). The other records at issue (pages 454, 455, 456 and 471) contain only the portions of the minutes directly responsive to the request, with the remaining portions of these records severed. Although these portions of these records do not themselves provide corroborative evidence that these four meetings were held in-camera, based on the nature of the subject matter discussed and on the representations of the city and the circumstances of this appeal, I am satisfied that I have been provided with sufficient evidence to establish that these meetings were also held in-camera.

[24] Therefore, based on the evidence before me, I am satisfied that the in-camera meetings did take place, and that Part 1 of the three-part test under section 6(1)(b) has been met.

Part 2 - a statute authorizes the holding of the meetings in the absence of the public

[25] The city provides extensive representations in support of its position that a statute authorizes the holding of the in-camera meetings. The basis of its position is that it, and TEDCO, were authorized to hold meetings in the absence of the public based on section 190(2)(a) of the *City of Toronto Act, 2006* (COTA, 2006), which provides:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> > the security of the property of the City or local board;

[26] The city confirms that the meetings at issue were held in-camera because of the operation of section 190(2)(a) of COTA, 2006.[2]

[27] Under the second part of the section 6(1)(b) test, I must determine whether the city was authorized to hold in-camera meetings to discuss the matters, and whether the matters at issue involve the "security of the property." In examining this issue, I have reference to Order MO-2468-F, in which Adjudicator Laurel Cropley reviewed in detail the phrase "security of the property" found in section 239(2)(a) of the *Municipal Act*, and I discuss this issue later in this order. I am also guided by the decision of the Divisional Court in *St. Catharines (City) v. IPCO*, 2011 ONSC 346. In that decision, the court reviewed Adjudicator Colin Battacharjee's findings in Order MO-2425 that the City of St. Catharines was only authorized to conduct part of a particular meeting in-camera. The court, in disagreeing with those findings, discussed the approach to take in determining whether an institution was authorized to hold a meeting in-camera. The court noted:

> The error in the Adjudicator's analysis is underscored by a consideration of the practical implications of the decision made. The decision determined that only parts of the meeting could be closed. How is such a meeting to be conducted? Whenever a participant interrupts the consideration of the disposition of land to refer to any other option being considered or to review any part of the history or background, the meeting would have to adjourn to go into a public session and then close again when the discussion returned to consider the sale of property. It is not realistic to expect the members of a municipal council to parse their meetings in this way. At a minimum, it would distract from free, open and uninterrupted discussion. It could lead to meetings that dissolve into recurring, if not

[2] This appeal involves the property interests of both the city and TEDCO. For ease of reference, I will refer to the city as representing both interests.

> continuous, debate about when to close the meeting and when to invite the interested public to return.

The city's representations

[28] The city has made substantial representations on this issue. However, given my findings that the city has met the second part of the section 6(1)(b) test, I will only refer to those submissions specific to my decision.

[29] The city begins by identifying the authority under which the TEDCO Board of Directors held its in-camera meetings. It states:

> As TEDCO is a corporation incorporated under the [*Ontario Business Corporations Act* (the OBCA)], the meetings of TEDCO's Board of Directors are regulated by the provisions of the OBCA, which contains provisions that expressly regulate the holding of meetings of the Board of Directors of OBCA corporations. The OBCA requires corporations to enact corporate by-laws and requires meetings to be held in accordance with the corporate by-laws enacted by the corporation. As such, TEDCO's authority to hold closed meetings is provided by the OBCA. However, TEDCO has enacted corporate by-laws under the provisions of the OBCA which require TEDCO to close meetings of its Board of Directors in a manner which is consistent with the City's policies and procedures with respect to meetings of the City Council and its committees.
>
> For all time periods at issue in this appeal, TEDCO's corporate by-laws contained provisions authorizing the closing of meetings on grounds equivalent to those provided for authorizing closed meetings of City Council under the *City of Toronto Act, 2006* (COTA, 2006). Therefore, while TEDCO's ability to conduct closed meetings is ultimately authorized by the OBCA, TEDCO willingly adopted corporate by-laws which authorize TEDCO's Board of Directors to hold meetings in the absence of the public, on similar grounds as provided in subsection 190(2) of COTA, 2006 authorizing in camera meetings of City Council.

[30] The city also states that, in addition, city council was authorized to hold a meeting in the absence of the public on the basis of section 190(2) of COTA, 2006. The city identifies that this section of COTA, 2006 (which mirrors section 239(2) of the *Municipal Act, 2001*) provides as follows:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> (a) the security of the property of the City or local board;

> (b) personal matters about an identifiable individual, including a city employee or a local board employee;
>
> (c) a proposed or pending acquisition or disposition of land by the City or local board;
>
> (d) labour relations or employee negotiations;
>
> (e) litigation or potential litigation, including matters before administrative tribunals, affecting the City or local board;
>
> (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose; or
>
> (g) a matter in respect of which the city council, board, committee or other body may hold a closed meeting under another Act.

[31] In addition, the City confirms that it takes the position that the in-camera meetings at issue dealt with "security of the property" in section 190(2)(a) of COTA, 2006. It also states that the portions of the relevant TEDCO meetings held in the absence of the public were also permissible under the corporation's by-laws as the subject matter under consideration at these portions of the meetings dealt with the "security of the property." It then states:

> ... Each of the in camera meetings ... involved discussions of the particular risks involved in the development of [the identified project] in [the land], and the methods to be taken to secure the City's property from potential adverse impacts arising from the various decisions required in the development of [the project]. ...
>
> The in camera meetings included a substantive deliberation concerning the potential harms and risks to the City's property in relation to specific proposed transactions. Such deliberations constitute a consideration of the "security of the property" of the City or its local boards, for purposes of subsection 190(2)(a) of COTA, 2006. As a result, the City submits that the meetings were authorized by statute to be held in the absence of the public and that part 2 of the test has been satisfied with respect to the Confidential Minutes and the Confidential Report.

[32] The city takes the position that the phrase "security of the property" can include the prevention of financial harm to the city's financial and economic interests. The city states:

> The phrase "security of the property of the City or local board" should be understood to include preventing any of the things owned by the City or a local board from being exposed to adverse impacts.

[33] The city examines the meaning to be given to the term "property," stating:

> The term "property" in the phrase "security of the property" includes a wide breadth of items that do not have a physical or material existence, such as stock options, trade secrets, or business goodwill, as well as property which has a physical existence. The City notes that the New Shorter Oxford English Dictionary includes the following definitions for the term property – "that which one owns; a thing or things belonging to a person or persons..." and "the condition or fact of owning or being owned; the (exclusive) right to the possession, use, or disposal of a thing, ownership..." Black's Law Dictionary includes the following definitions for the term property – "the right to possess, use and enjoy a determinate thing" and "any external thing over which the rights of possession, use and enjoyment are exercised."
>
> The term "property" extends beyond items which have a material existence and includes all items which can be considered to be "owned," even where the item does not have a physical presence. The City notes that Black's Law Dictionary includes both corporeal and incorporeal property in its larger definition of property. Black's Law Dictionary defines the term corporeal property as including:
>
> > A. "The right of ownership in material things" and,
> > B. "Property that can be perceived, as opposed to incorporeal property; tangible property"
>
> Whereas Black's Law Dictionary defines the term incorporeal property as including:
>
> > A. "An in rem proprietary right that is not classified as corporeal property [...] Incorporeal property is traditionally broken down into two classes: (1) *jura in re aliena* (encumbrances), whether over material or immaterial things, examples being leases, mortgages; and servitudes; and (2) *jura in re propria* (full ownership over immaterial things), examples being patents, copyrights, and trademarks;" and,

B. "A legal right in property having no physical existence."

> It is the City's position that the meaning of the term "property" in the phrase "security of the property" should be understood as referring to all forms of property held by the City, including the City's intangible or incorporeal property. The City submits that the everyday meaning of the phrase "security of the property" includes not only protecting or preventing physical damage to the City's tangible property, but also includes protecting or preventing other forms of adverse impacts to the City's assets.
>
> The City submits that preventing harm to the financial or economic value of the City's tangible and intangible property would commonly be understood to be contemplated within the scope of the phrase "security of the property." As a result, the authority granted under COTA, 2006 provides for the City to hold an in camera meeting to discuss the adverse impacts to any form of property owned by the City. For example, the authority to hold a closed meeting to consider "security of the property" would include the authority to engage in a meeting to consider the potential risks and impacts on a "lease" held by the City or a local board arising from a proposed transaction.
>
> In the present appeal, the meetings to which the Confidential Report and the Confidential Minutes related were held in-camera since the subject matter of these meetings included a consideration of the potential harms to the City's tangible and intangible assets related to the proposed transactions. ...

The appellant's representations

[34] The appellant accepts the city's position that meetings may be closed to the public on the basis of section 190(2)(a) of COTA, 2006 if the matter being considered is the "security of the property;" however, the appellant argues that this phrase, within the context of freedom of information legislation, should be interpreted narrowly so that exemptions are "limited and specific." The appellant states:

> The IPC favoured this approach in its decision in MO-2468-F dated October 27, 2009, where it held that "security of the property" should be interpreted in accordance with its plain meaning ie: the protection of property from physical loss or damage and the protection of public safety in relation to the property. Although previous IPC decisions have discussed the phrase, MO-2468-F is the most recent and comprehensive discussion on the subject.

> [The city] does not allege that the information at issue deals with protection of property from physical loss or protection of public safety, and [the appellant] submits that [the city and/or TEDCO] therefore did not have the authority to hold these meetings in the absence of the public.
>
> In its submissions, the [city] attempts to expand the definition of "property" to include "intangible property", "incorporeal property", and anything that can be "owned, even where the item does not have a physical presence." The [appellant] submits that this expansive and limitless interpretation of *MFIPPA*'s exemptions is not consistent with the principles of freedom of information and should not be accepted.
>
> [The city] summarizes its position by stating that the information, if disclosed, could reasonably be expected to injure the City's economic and financial interests because it "dealt with the issues relating to the City's interest in relation to agreements." The City of Toronto has, however, already disclosed the agreements themselves. The agreements have already been finalized precluding the possibility that the City could be financially "injured" as alleged.

The city's reply representations

[35] In its reply representations the city reiterates its position that it disagrees with the findings in Order MO-2468-F. Much of the city's submissions argue against those findings. Because of my findings in this case, which distinguish the circumstances of the current appeal with those in Order MO-2468-F, it is not necessary to replicate those arguments here. I note, however, that the city takes issue with the appellant's assertion that the city's interpretation of this exemption is "expansive and limitless."

[36] The city submits that it has never advanced that any exemption under the *Act* should be interpreted in an "expansive and limitless" fashion. It submits that it has merely advanced that section 190(2)(a) of COTA, 2006 is to be interpreted as harmonious with the overall scheme of COTA, 2006 and the intention of the legislature in enacting COTA, 2006.

Analysis and Findings on Part 2 of the Section 6(1)(b) test

[37] As noted above, both the city and the appellant refer extensively to Order MO-2468-F, as this order examines in considerable detail the interpretation of the phrase "security of the property" in the context of negotiations regarding the purchase and sale of assets other than land. In the context of the negotiations surrounding the sale of street and expressway lights, the adjudicator in that order found that "security of the property of the municipality" concerns the "protection of property from physical loss or

damage (such as vandalism or theft) and the protection of public safety in relation to this property." In examining this issue, the adjudicator noted that other Ontario statutes "use the word 'security' in relation to individuals in the sense of keeping them safe from harm, and in relation to property in the sense of taking measures to prevent loss or damage to it."

[38] In reviewing Order MO-2468-F in the context of the current appeal, it must be noted that the adjudicator in Order MO-2468-F was only considering whether the negotiations in a commercial transaction pertain to "security of the property" as she clearly stated (on page 57):

> In my view, the elaborations of the meaning of "secure", "security" and "security of property" in the above provisions strongly suggest that these terms, when used in an Ontario statute, in the absence of any indication to the contrary, are intended to encompass the kinds of actions and purposes set out in the above provisions, and *not actions and purposes of a very different nature proposed by the City, i.e., protecting the City's bargaining power when it negotiates the sale of its property*. [emphasis added]

[39] Broadly speaking, the adjudicator's findings in Order MO-2468-F do not recognize "security of the property" as including the "protection of the financial and economic interests and assets of a municipality" [page 59] made in the context of the specific factual circumstances, that is, the city's financial interests *vis a vis* its negotiation strategy, the type of records at issue in that appeal and the arguments that had been made. I agree with the findings in Order MO-2468-F in principle as a starting point for applying the exemption in section 6(1)(b) to other types of records and fact situations.

[40] However, I also agree with the city that "property" includes both "corporeal" and "incorporeal" property. These are clearly defined concepts and recognized at law as "property interests." In that respect, the use of the word "property" in section 190(2)(a) of COTA, 2006 can refer to both corporeal and incorporeal property owned by the city. Accordingly, if the subject matter being considered in a meeting is the "security" (in the sense of taking measures to prevent loss or damage to it) of the property of the city or local board, COTA, 2006 authorizes holding the meeting in-camera.

[41] As a result, applying the analysis in Order MO-2468-F, previous decisions, and the discussion above, I find that, in order to establish that the requirements of COTA, 2006 apply, the city must establish that:

- it owns identified property (corporeal or incorporeal); and
- the subject matter being considered in the meeting is the security (in the sense of taking measures to prevent loss or damage to it) of that property.

The records at issue

The 7-page report (Pages 670-676)

[42] The city states that the in-camera meeting at which this report was discussed involved discussions of "the particular risks involved in the development of [the project]" and "the methods to be taken to secure the City's property from potential adverse impacts arising from the various decisions required." The city also provides confidential representations in which it specifically identifies the risks and impacts to the city's property discussed at the meeting.

[43] On my review of the 7-page report, I am satisfied that it pertains to a class of incorporeal property (in the sense of a *jura in re aliena* class of property, referred to above). In that regard, it specifically refers to property owned by the city.

[44] I am also satisfied, based on my review of the contents of the report, that among other things, it addresses the taking of measures to prevent loss or damage to the property. Although the report relates to a commercial transaction, it also specifically pertains to the preservation of the property, in the sense of identifying specific risks to it and taking measures to prevent loss or damage to it. I note that this protection issue identified in the record is distinguishable from a mere financial interest in negotiating strategies.

[45] Finally, I am satisfied that the subject matter of the in-camera meetings at which this report was discussed included a discussion of the security of the property identified above. Although not all of the information contained in the report could be said to be on this topic, the Divisional Court has made it clear that once it is determined that the statute authorizes going into closed meeting to discuss a particular topic, the second part of the test would be met for all aspects of that closed meeting.

[46] Accordingly, I find that the second part of the section 6(1)(b) test has been met for the identified 7-page report.

The ten separate excerpts from the minutes of ten in-camera meetings of TEDCO's Board of Directors (portions of pages 454 to 462 and 469 to 473)

[47] Regarding the excerpts from the minutes of ten in-camera meetings of TEDCO's Board of Directors, the city states:

> In particular, each of the above mentioned in camera meetings addressed the particulars of developing [the project]. Each of the in camera meetings of TEDCO's Board of Directors ... involved discussions of the particular risks involved in the development of [the project], and the methods to be taken to secure the City's property from potential adverse

> impacts arising from the various decisions required in the development of [the project].

[48] The city also provides confidential representations in which it provides an example of the specific risks to the city's property discussed at one of the identified meetings.

[49] On my review of the excerpts of the in-camera meeting minutes at issue, I am satisfied that they pertain to a class of incorporeal property owned by the city. Furthermore, although I have not been provided with supporting evidence as detailed as that which relates to the confidential report addressed earlier, I am also satisfied, based largely on the city's representations set out above in combination with my finding that the confidential report contains information relating to risk, that the in-camera meetings of TEDCO's Board of Directors involved discussions of particular risks to the property, and the methods to be taken to secure the property from potential adverse impacts.

[50] Accordingly, I am satisfied that the subject matter of the identified in-camera meetings of TEDCO's Board of Directors included discussions of the security of the property identified above. Again, the Divisional Court has made it clear that once it is determined that the statute authorizes going into closed meeting, the second part of the test would be met for all aspects of that closed meeting.

[51] Accordingly, I find that the second part of the section 6(1)(b) test has been met for the excerpts from the minutes of the ten in-camera meetings of TEDCO's Board of Directors.

Summary

[52] In summary, I am satisfied, based on my review of the contents of the records and the city's representations, that the in-camera meetings concerned the "protection" or "security" of the city's property, and that this protection issue is distinguishable from a mere financial interest in negotiating strategies. Although the overall factual context related to a commercial transaction, the discussions at issue pertained to the protection from harm of a recognized property interest of the city. In my view, this interpretation is consistent with the interpretation of "security" in Order MO-2468-F.

[53] As identified above, the city made substantial representations on the application of section 190(2)(a) of COTA, 2006. This included arguments in support of its position that section 190(2)(a) could apply to circumstances where disclosure could reasonably be expected to injure the City's economic and financial interests because it "dealt with the issues relating to the City's interest in relation to agreements." I found above that the records at issue pertain to a class of incorporeal property and, in making that finding, it was not necessary for me to consider the city's arguments that would extend

this definition of property to other types of situations. However, I agree with the adjudicator's decision in MO-2468-F that found that the wording of the statute would not apply to "protecting the City's bargaining power when it negotiates the sale of its property." In that regard, I do not agree with the city's argument that the application of this exemption could extend to the city's "informational assets" (the positions, plans and strategies that the city would apply to its negotiations),[3] nor do I agree with the city's position that this section applies in all circumstances where disclosure could impact the value of the property. Section 190(2)(a) of COTA, 2006 is not contingent on a possible "harm" to the city or board; rather, this section allows the city or board to proceed in-camera in the event that a particular subject matter is being discussed. Whether or not disclosure will cause financial or other "harm" is not the definitive issue.

Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting

[54] 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].

[55] Under part 3 of the test

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344 and MO-2337]

- "deliberations" refer to discussions conducted with a view towards making a decision [Orders M-184, MO-2337, MO-2368, and MO-2389]

[56] The city submits that the records at issue contain "specific detailed content which would disclose the actual content of, or permit the drawing of accurate inferences of, the substance of the deliberations" at the in-camera meetings. The city submits further that a finding that the third part of the section 6(1)(b) test has been met for the types of records at issue is consistent with many previous orders of this office (Orders MO-2335, MO-2087, MO-2483, MO-2444 and MO-2386).

[57] The appellant takes the position that, under this part of the test, "deliberations" refer to discussions conducted with a view towards making a decision. It refers to previous orders of this office which have also established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question.

[3] Which, in some instances, may be exempt under section 11(e) of the *Act*.

[58] The appellant then submits that disclosure of the 7-page report would not reveal the "substance of deliberations" as the document was created prior to the April 6, 2009 in-camera meeting. It states that "[t]he Confidential Attachment cannot possibly contain information on deliberations that had not yet been conducted at the time the report was created." The appellant also states that the meeting minutes from that in-camera meeting, which were disclosed to the appellant, indicate that the 7-page report included only one set of recommendations that were adopted in full. It then states:

> As such it is not possible that any "deliberations" regarding various options would be revealed by the production of this document as there was only one set of recommendations contained within the document. The recommended lease amendments were adopted and the amended lease was subsequently produced in response to this access request.

[59] With respect to the excerpts of the minutes of the in-camera meetings of TEDCO, the appellant submits that minutes of meetings usually simply summarise decisions that were made at the meeting. It notes that the city has produced meeting minutes in full from City Council, even minutes that refer to in-camera discussions by City Council, and submits that the TEDCO meeting minutes should be produced in full.

[60] In reply, the city disputes the appellant's position that a document prepared prior to an in-camera meeting cannot qualify for exemption under section 6(1)(b), and states that this interpretation would result in municipalities being unable to provide any documents to municipal council for use at an in-camera discussion. It also identifies that previous orders have drawn a distinction between documents which describe the "subject" of the discussion, and ones that describe the "subject matter" of the discussion. The city then states that the April 6, 2009 meeting was held to discuss the particulars of the 7-page report, and refers to previous orders where a report was found exempt under section 6(1)(b). In addition, the city refers to its previous submissions where it states that the 7-page report contains information concerning the project which, if disclosed, would reveal the substance of the issues deliberated by council. It also states that whether or not council adopted the recommendations in the report does not mean that the contents of the report would not reveal the content of the in-camera council deliberations.

[61] With respect to the excerpts of the in-camera meeting minutes of TEDCO's board of directors, the city states that the content of these minutes do reveal the in-camera deliberations of the Board of Directors. The city then provides confidential representations in which it reviews each of the meeting minutes in some detail, and identifies information which reveals the specific discussions at those meetings.

[62] Based on my review of the 7-page report, the minutes of the April 6, 2006 meeting, and the city's representations, I am satisfied that the disclosure of the 7-page report would reveal the substance of the issues deliberated by council. I am satisfied

that, in adopting the recommendations in the report, council would have also considered the specifics identified in the 7-page report.

[63] In addition, based on my review of the in-camera meeting minutes of TEDCO's board of directors, as well as the confidential representations of the city, I am satisfied that disclosure of the excerpts of the minutes would reveal the substance of the deliberations at these closed meetings.

[64] Accordingly, I find that the third requirement for the three-part test for section 6(1)(b) has been met for the records at issue in this appeal.

Exercise of discretion

[65] 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.

[66] 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
- it fails to take into account relevant considerations.

[67] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[68] The city states:

> There is a need to balance the interests intended to be protected in subsection 6(1)(b), and the public interest in disclosure of information concerning the operation of their municipal institutions. The City has disclosed considerable amounts of information relating to [the project], including public reports and other documents that are readily available on the City's website, which would permit the public to make informed decisions about the City's operations with respect to [the project]. However, the City has chosen to deny access to the specific and limited information contained in the [records at issue] in this appeal to prevent

> exposing the City, and – as a result – the public, to the risk of loss or harm to the City's public assets.

[69] The city also outlines the specific factors it took into consideration in exercising its discretion not to disclose the records at issue, including the purposes and principles of the *Act*, the wording of section 6(1)(b) and the harms that the city believes would result from disclosure of information it considers to be "highly sensitive" and may have a negative effect on competitive relationships.

[70] In response to the city's submissions on this issue, the appellant points out that it is a private company with an interest in the project. It indicates that it is seeking information about the extent that its competitors are being directly or indirectly funded by taxpayers, and also believes that its business interests may be harmed by the city's activities. The appellant does not believe that the city's assets will be harmed by disclosure of the information at issue.

[71] The primary focus of the appellant's submissions is that as a competitor of the company with which the city is involved, it believes that the city should be "open and honest about public monies given to private companies, particularly where only one of several companies is being given public funds." The appellant also believes that disclosure of the records would increase public confidence in the operations of the city and "the manner in which it oversees and leases out [the lands]." The appellant points out that funding issues have been of considerable concern within a particular industry and refers to its own litigation history with the city relating to the manner in which it has treated its access requests.

Findings

[72] Having considered the submissions made by both parties, I am not persuaded that the city erred in its exercise of discretion. I am satisfied that it has taken into account relevant considerations, including the competitive relationships involved, the amount of information that is already publicly available and the small amount of information remaining, as well as the harms it believes would result from disclosure and its limited reliance on the exemption in section 6(1)(b) to prevent those anticipated harms. Accordingly, I find that the city has properly exercised its discretion to withhold the information at issue.

ORDER:

1) I uphold the city's decision to deny access to the 21 pages of records at issue on the basis of the exemption in section 6(1)(b) of the *Act*.

2) I remain seized of this appeal in order to deal with the three pages of newly-located records.

Original signed by: December 30, 2011

Frank DeVries
Adjudicator

CITATION: St. Catharines (City) v. IPCO, 2011 ONSC 2346
DIVISIONAL COURT FILE NO.: 351/09
DATE: 20110316

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

FERRIER, SWINTON & LEDERER JJ.

BETWEEN:	
THE CORPORATION OF THE CITY OF ST. CATHARINES Applicant	*Daron L. Earthy,* for the Applicant
– and –	
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO AND LINDA FAYE LANDRY Respondents	*William S.D. Challis*, for the Respondent, Information and Privacy Commissioner of Ontario
	HEARD at TORONTO: January 6, 2011

LEDERER J.:

[1] This application for judicial review is made in respect of a decision of the Information and Privacy Commissioner of Ontario. The decision allows for the release of a substantial portion of a report that had been withheld by the City of St. Catharines on the basis that it concerned a property matter dealt with by the General Committee of the Municipal Council in an *in camera* meeting.

BACKGROUND

[2] Linda Landry is the owner of land in the City of St. Catharines. She lives in a home located on the property.

[3] Neighbouring property, to the north and to the east, belongs to the City. Linda Landry parks her car on land that is owned by the City. A wood deck and sunroom that are part of the house extend on to City land. These encroachments have become an impediment to efforts she has made to sell her home.

[4] Linda Landry retained a lawyer and, with his assistance, approached the City in an effort to resolve the problem.

[5] Among the solutions that they proposed was the acquisition of property owned by the City.

[6] On April 28, 2008, at a meeting of councillors of the City of St. Catharines, sitting as the General Committee of Council, the lawyer, as part of a presentation, said:

> The problem which we are bringing to you this evening is the use of land for parking of one vehicle and on which a deck encroaches. We are seeking permission to acquire the land in question or to obtain a licence to permit the continued use of the land for the parking of one vehicle and for permission to continue the encroachment.

[7] In the same submissions he noted:

> Our request to the Council is that council authorize the continued use of the City land, as shown on the survey and permit the continued encroachment of the deck also as shown. We believe that the history of the deck and the improvements makes [*sic*] a strong case for adverse possession. However, Ms. Landry's desire is to resolve matters so that she may sell her home.
>
> As an alternative, Ms. Landry is prepared to enter into negotiations with the City to acquire the five-foot wide strip of land shown in Red. The acquisition of these lands will solve the issues of the use of the lands for parking and of encroachment by the deck.

[8] Later the same evening, the members of the General Committee of Council voted to adjourn to go "*in camera*" for the purpose of discussing certain items, including the request of Linda Landry. The Minutes of the General Committee, in recording the resolution, referred to this matter in the following way:

> Report from the Financial Management Services Department, Re: Property Matter-Potential Property Disposition (In Camera Pursuant to By-law No. 2007-311, as amended, Section G 6.3 (C) A Proposed or Pending Acquisition or Disposition of Land by the Municipality), Realty File 97-43; Legal Matter.

[9] The same Minutes record the consideration the Committee gave to this situation while *in camera*, as follows:

> That the recommendation contained in the report from the Financial Management Services Department, dated April 24, 2008, respecting a property matter - potential property disposition, be approved.
>
> CARRIED

and

> That the City of St. Catharines offer for sale to the abutting owner, the City's portion of the land containing the five-foot right-of way.
>
> LOST

[10] Subsequent to the meeting, Linda Landry asked that she be given a copy of the report referred to in the Minutes.

[11] The City refused the request. In a letter, dated May 16, 2008, the Deputy City Clerk explained why:

> Please be advised that Section 239(2) of the Municipal Act authorizes City Council meetings to be held closed to the public if the subject matter being considered deals with a proposed or pending acquisition or disposition of land by the municipality or a local board. As well Section 6(1)(b) of the Municipal Freedom of Information and Protection of Privacy Act provides that a head may refuse to disclose a record that reveals the substance of a meeting of City Council, a board, a commission, or other body or a committee of one of them, if a statute authorizes holding that meeting in the absence of the public. As a result, since the subject of your request was a property matter dealt with by City Council in an 'In Camera' meeting I am unable to release the report at this time.

[12] The letter went on to explain that, if she wished, Linda Landry could appeal this decision to the Information and Privacy Commissioner, which she did.

[13] In the decision made by the Commissioner, the City was ordered to:

- with the exception of only a few sentences, disclose the report;
- with respect to the few sentences which were excepted from disclosure, to exercise its discretion again and determine, taking into account factors identified in the Commissioner's decision, whether those items should be released; and,
- in the event that the City decided that any part of the report should remain undisclosed, to provide reasons for that determination.

[14] It is this decision which is the subject of the application for judicial review.

THE APPLICABLE LEGISLATION

[15] The applicable provision in this case is s. 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (hereinafter referred to as "*MFIPPA*"). It says:

> **6. (1)** A head may refuse to disclose a record,
>
> . . .
>
> (b) 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.*
>
> [Emphasis added]

[16] The application of s. 6(1)(b) requires determination of three questions derived from its wording. For the exemption to apply, the municipality 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.

[17] The City of St. Catharines relied on s. 239(2)(c) of the *Municipal Act, 2001,* S.O. 2001, c. 25 as the statutory provision authorizing the holding of a meeting in the absence of the public. It says:

> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> . . .
>
> (c) a proposed or pending acquisition or disposition of land by the municipality or local board.

THE ISSUES FOR THE COURT

[18] There are three issues that the Court is required to resolve:

(a) What is the applicable standard of review?

(b) Did the Commissioner unreasonably conclude that the exemption found in s. 6(1)(b) of the *MFIPPA* only applied to a limited portion of the report?

(c) In reviewing the City's exercise of its discretion to refuse to disclose the report, was the jurisdiction of the Commissioner exceeded?

(a) What is the Applicable Standard of Review?

[19] The principal question is what standard of review applies to a decision made by the Commissioner regarding the interpretation and application of s. 6(1)(b) of the *MFIPPA.*

[20] In the now-seminal case of *Dunsmuir v. New Brunswick*, the Supreme Court of Canada affirmed the principle of deference to the decisions of administrative tribunals. It replaced what had been three available standards of review (correctness, patent unreasonableness and reasonableness *simpliciter*) with two (correctness and reasonableness). The case stated that, if the appropriate standard has been identified in a satisfactory manner, the question need not be re-visited in each succeeding decision (see: *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190 at paras. 57 and 64; and, see: *Nolan v. Kerry (Canada) Inc.,* [2009] 2 S.C.R. 678 at para. 24).

[21] In the case of *Ontario (Minister of Health and Long Term Care) v. Ontario (Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.), the Court of Appeal dealt with the standard of review applicable to a decision of the Commissioner interpreting a statutory provision allowing a Minister to refuse to confirm or deny the existence of a record if disclosure would constitute unjustified invasion of personal privacy. In doing so, it adopted the following quotation as demonstrative of the Commissioner's role and expertise:

> Unlike the tribunal under the *CHRA,* [*Canadian Human Rights Act*] the commissioner is at the apex of a complex and novel administrative scheme, involving the regulation of the dissemination of the information in the hands of hundreds of heads of government agencies, whose decision-making under the Act reaches a final administrative focus in such appeals.
>
> . . .

> Accordingly, the commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the commissioner's mandate is beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson C.J.C., as he then was, in *New Brunswick Liquor Corp. v. Canadian Union of Public Employees, Local 963, supra,* the commission is a specialized agency which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the Commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the Commissioner is all the more required if the twin purposes of the legislation are to be met.
>
> (*John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at pp. 781-783 as quoted in *Minister of Health and Long Term Care v. Ontario (Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.) at para. 29)

[22] The Court reviewed the situation in the context of each of the four factors of the "pragmatic and functional test", which was the law at the time. It found that reasonableness was the appropriate standard.

[23] The Supreme Court of Canada has recently affirmed that it is the reasonableness standard that generally applies to decisions of the Commissioner made in respect of the interpretation and application of freedom of information legislation. It said:

> Decisions of the Assistant Commissioner regarding the interpretation and application of FIPPA [*Freedom of Information and Protection of Privacy Act*] are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Commissioner)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] S.C.J. No. 23 at para. 70)

[24] The cases referred to consider the *Freedom of Information and Protection of Privacy Act*, rather than the legislation with which we are concerned here, being the *MFIPPA.* These two pieces of legislation are similar. The former considers access to information in the hands of the provincial government and the latter with the same issue in regard to municipalities. For the purposes of this analysis, there is no reason to distinguish between them.

[25] Insofar as the Commissioner's interpretation and application of s. 6(1)(b) of the *MFIPPA* is concerned, the applicable standard of review is reasonableness. However, this is not the end of a consideration of the appropriate standard of review.

[26] In this case, it is necessary to also account for s. 239(2)(c) of the *Municipal Act.* Counsel for the Commissioner submitted that the standard of review applicable to the Commissioner's interpretation and application of this section should be reasonableness. He submitted that s. 6(1)(b) of the *MFIPPA* and s. 239(2)(c) of the *Municipal Act* spring from the same set of background reports and are so "intimately connected" that, in dealing with them, the Commissioner is, in effect, responding to only one question.

[27] I disagree.

[28] The *Municipal Act* is not a statute that the Commissioner is responsible for administering. It has a broader reach. Questions respecting whether a council or committee properly exercised its discretion to hold a meeting in the absence of the public can arise in circumstances not associated with whether the record should be made public.

[29] In *London (City) v. R.S.J. Holdings Inc.*, [2007] 2 S.C.R. 588, the owner of land made the applications necessary for him to develop his property. In response, the City passed an interim control by-law putting in place a one-year freeze on development. The deliberations that led to the adoption of the by-law took place in two meetings of the council held in the absence of the public. The owner moved to quash the by-law for illegality (see: s. 273 of the *Municipal Act*). The substance of the application was that the City had contravened its general obligation to hold meetings in public. The Supreme Court of Canada confirmed the decision of the Court of Appeal to grant the relief sought.

[30] Counsel for the Commissioner pointed out that there have been many occasions when decisions of the Commissioner have considered the joint application of s. 239(2)(c) of the *Municipal Act* and s. 6(1)(b) of the *MFIPPA.* This may be so, but it does not imply that the expertise of the Commissioner extends to the *Municipal Act* such that the applicable standard of review is reasonableness.

[31] In *Geranium Corporation v. (Ontario) Information and Privacy Commissioner,* 2007 CanLII 3291 (Div. Ct.), a developer sought access to a letter written to the municipality by an opponent to its project. The municipal council had approved the project, but the individual had appealed to the Ontario Municipal Board. The decision of the Commissioner determined that the letter should not be disclosed. It was information personal to its author (see:

subsection 14(1) of the *MFIPPA*). The case required the Commissioner to consider sections of the *Planning Act* dealing with the obligation of the municipality to forward its record to the Board (see: *Planning Act*, R.S.O. 1990, c. P.13, subsections 17(29) and 17(42)). The developer sought judicial review. As has been found here, the parties there agreed that the standard of review in respect of the interpretation of the *MFIPPA* was reasonableness. However, in respect of the *Planning Act,* the Court found that the Commissioner was required to be correct.

[32] The *Planning Act* and the *Municipal Act* are statutes that may, at times, be considered by the office of the Privacy Commissioner. They are not that office's enabling statutes. Insofar as the Commissioner's interpretation and application of s. 239(2)(c) of the *Municipal Act* is concerned, the applicable standard of review is correctness, as these are matters beyond the specialized expertise of the Commissioner.

(b) Did the Commissioner unreasonably conclude that the Exemption found in s. 6*(1)(b) of the MFIPPA* only Applied to Limited Portions of the Report?

[33] The Commissioner delegated to an Adjudicator the conduct of the inquiry and the preparation of the decision and order that responded to the appeal of Linda Landry. The Adjudicator considered the three questions identified in s. 6(1)(b) of the *MFIPPA.*

The First Question

[34] The answer to the first question was clear and not disputed by either of the parties to this application. The Adjudicator found there was a meeting.

The Second Question

[35] The Adjudicator concluded that, for the most part, s. 239(2)(c) of the *Municipal Act* did not apply to the meeting. This is the part of the decision which attracts correctness as the standard of review. The Adjudicator found that "City Council did not have the authority, under section 239(2)(c), to consider the subject matter of most of the report in a closed meeting." In arriving at this conclusion, the Adjudicator observed:

> …the subject matter of most of the report does *not* deal with 'a proposed or pending acquisition or disposition of land by the municipality,' as required by section 239(2)(c). The bulk of the report contains background information and sets out other options (beyond the disposition of land) for addressing the appellant's request that the encroachment issues relating to her property be resolved.

[36] The Adjudicator relied only on the content of the report and not what was considered in the meeting to determine if all or part of the meeting was one that could be closed to the public. Given the content of the report, he concluded that only part of the meeting could be closed.

[37] I find the decision of the Adjudicator in this regard was not correct. The task before him was to determine whether there was statutory authority to hold the meeting ***in camera.*** In determining whether s. 239(2)(c) of the *Municipal Act* provided that authority, he was required to determine whether the purpose of the meeting was to deal with a disposition of land. The report gives some indication of whether the meeting was to deal with a disposition of land, but there were other indications as well.

[38] The difficulty is the Adjudicator used only the content of a report prepared in advance of the meeting. The report does not necessarily reflect what was discussed in the meeting. This is underscored by the statements the lawyer made, before the decision to go *in camera* was taken, to the effect that his client wished to acquire land, obtain a licence or continue the encroachment. This suggested a meeting to examine the disposition of property in the context of other available options.

[39] The Adjudicator's determination was also made despite the Minutes of the General Committee. The Minute recording the decision to take the request of Linda Landry *in camera* does mention the report. This did nothing more than identify the item to be discussed. The Minute goes on to refer to the report as: "A Proposed or Pending Acquisition or Disposition of Land by the Municipality". This did not limit the meeting to what was in the report. This is made plain by the two Minutes which deal with the decisions made in the meeting. The first refers to the recommendation contained in the report, described as "respecting a property matter – potential property disposition", being approved. It does not outline the breadth of the discussion or what other material may have been referred to. The second does not refer to the report at all. It records a proposal that property be offered for sale. The proposal was rejected.

[40] These references to what took place in the meeting are consistent with the requirements of s. 239(2)(c) of the *Municipal Act.* They suggest that the meeting considered "a proposed… disposition of land".

[41] The decision of the Adjudicator acknowledged that the City exercised its discretion in good faith. The Adjudicator had no reason to doubt the *bona fides* of the vote to consider the matter of the disposition of land in private. In the circumstances, subsection 239(2)(c) of the *Municipal Act* provided a statutory authorization for the meeting to be closed to the public.

[42] The error in the Adjudicator's analysis is underscored by a consideration of the practical implications of the decision made. The decision determined that only parts of the meeting could be closed. How is such a meeting to be conducted? Whenever a participant interrupts the consideration of the disposition of land to refer to any other option being considered or to review any part of the history or background, the meeting would have to adjourn to go into a public session and then close again when the discussion returned to consider the sale of property. It is not realistic to expect the members of a municipal council to parse their meetings in this way. At a minimum, it would detract from free, open and uninterrupted discussion. It could lead to meetings that dissolve into recurring, if not

continuous, debate about when to close the meeting and when to invite the interested public to return.

The Third Question

[43] The answer to the third question, as considered by the Adjudicator, relied on the approach he took in dealing with the second question. He did not consider the entire report. He examined only if "those limited references in the report that address whether the City should dispose of the encroached-upon land to the appellant" should be disclosed. These are the same references on which he relied to determine which parts of the meeting could be closed. He found that release of those references would reveal the actual substance of the deliberations of the meeting. They are the only references he considered.

[44] If the Adjudicator had found that subsection 239(2)(c) of the *Municipal Act* provided a statutory authorization for the meeting to be closed to the public, he would have been required to consider whether any part of the report could have revealed the actual substance of the deliberations that took place in the meeting. Instead, he went forward based on an incorrect premise. There are large parts of the report he did not consider. In respect of the third question, the proper question was never asked.

[45] I find that the analysis undertaken by the Adjudicator was flawed. Nevertheless, when the report is considered as a whole, his conclusion that it should be released, with the exception of certain sentences dealing with the disposition of land, was within a range of reasonable, acceptable outcomes.

[46] There is very little in the report that reveals the actual substance of the deliberations of the meeting. In particular, I have turned my mind to the references in the report to an encroachment agreement, and I am satisfied that they do not reveal the substance of discussions concerning the disposition of land.

[47] Therefore, despite the flawed analysis of the Adjudicator, the decision concerning the application of s. 6(1)(b) to the report was a reasonable one.

[48] Finally, it should be noted that s. 6(2)(b) of the *MFIPPA* sets out an exception to the discretionary exemption in s. 6(1)(b). Under this exception, a municipality cannot refuse to disclose a record under s. 6(1)(b) if the subject-matter of the deliberations which apply to the record has been considered in a meeting that was open to the public. The participation of the lawyer in the meeting and correspondence delivered to him suggest the possibility that this exception could apply. The decision of the Adjudicator indicated that neither of the parties produced any evidence in support of this proposition. Consequently, it was determined that the exception raised by s. 6(2)(b) of the *MFIPPA* did not apply. In this court, the matter was raised but not pressed by either side.

(c) In reviewing the City's exercise of its discretion to refuse to disclose the report, was the jurisdiction of the Commissioner exceeded?

[49] Counsel for the City submitted that the Adjudicator exceeded his jurisdiction when, having found that the City acted in good faith in refusing access to the report, he ordered the City to "re-exercise its discretion" in respect of those parts of the report the decision did not order disclosed. Counsel went on to propose that the excess of jurisdiction was continued by the requirement that if the City, in its re-exercise of its discretion, determined not to release those parts of the report, it provide written reasons for its decision. These reasons would be subject to further review by the Adjudicator.

[50] The authority of the Commissioner to return matters to an institution for further consideration is referred to in the *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* [2010] S.C.J. No. 23 at para. 69 where the Court cited with approval comments made by the Commissioner:

> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
> > In my view the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed

[51] The Court, at paragraph 71, described the scope of the Commissioner's reviewing authority, as follows:

> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for any improper purpose; the decision took into account irrelevant consideration; or, the decision failed to take into account relevant considerations.

[52] Thus, the Adjudicator had jurisdiction to return the issue of the exercise of discretion to the City for further consideration. The decision was a reasonable one, as the City's representations on the exercise of its discretion did not show that it considered relevant factors in refusing to disclose the exempt portions of the record, nor did it show that it considered the public and private interests in disclosure and non-disclosure. While the City argued that the Adjudicator has substituted its decision for that of the City, that is not the case.

CONCLUSION

[53] For the reasons reviewed herein, the application is dismissed. Counsel advised the court of their agreement that, regardless of the decision, there should be no costs.

Lederer J.

Ferrier J.

Swinton J.

Released: 20110316

CITATION: St. Catharines (City) v. IPCO, 2011 ONSC 346
DIVISIONAL COURT FILE NO.: 351/09
DATE: 20110316

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

FERRIER, SWINTON & LEDERER JJ.

BETWEEN:

THE CORPORATION OF THE CITY OF ST. CATHARINES

Applicant

– and –

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO AND LINDA FAYE LANDRY

Respondents

REASONS FOR JUDGMENT

LEDERER J.

Released: 20110316