



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER M-121**

## **Appeal M-910332**

### **Metro Toronto Licensing Commission**



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# ORDER

## BACKGROUND:

The Metro Toronto Licensing Commission (the Commission) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all personal information relating to the requester in the custody or under the control of the Commission. The requester also requested correction of her personal information. The Commission did not respond to the request within the statutory 30 day time limit, and the requester filed an appeal on the basis of deemed refusal, under section 22(4) of the Act.

During mediation the Commission issued a decision letter in which it provided access to some records and denied access to others pursuant to section 11 of the Act. The Commission did not respond to the correction request. In the course of processing the appeal, the Commission withdrew section 11, and instead raised sections 12 and 38(a) of the Act as new exemptions. The Commission also agreed to release several additional records to the appellant. The appellant agreed not to pursue her correction request.

Further mediation was not possible and notice that an inquiry was being conducted to review the Commission's decision was sent to the Commission and the appellant. Both parties made representations.

The records which remain at issue are as follows (the record numbers and item numbers correspond to the numbers used in Appendix B to the Notice of Inquiry):

1. Item #30 (137 on list of 217) 2 pages of handwritten notes, dated September 11, 1990.
2. Item #31 (174 on list of 217) 2 pages of fact finding notes, dated January 8.
3. Item #32 (175 on list of 217) 2 pages of notes on a meeting, dated August 8, 1990.
4. Item #34 (176 on list of 217):
  - (a) 1 page of a supervisor's notes, dated August 1, 1990.
5. Item #35 (198 on list of 217) notes on a meeting between a supervisor and an employee, dated August 2, 1990.
6. This item is the same as item #4.
7. Item #37 (197 on list of 217) 2 pages of notes on a meeting, dated August 1, 1990.

8. Item #40 (202 on list of 217) 2 pages of a four-page memorandum, dated August 3, 1990.
9. Item #41 (203 on list of 217) 4 pages of notes on a meeting, dated August 7, 1990.
10. Item #42 (204 on list of 217) 7 pages of verbatim notes on meeting, dated August 7, 1990.
11. Item #43 (212 on list of 217):
  - (a) one-page memorandum from a manager to a department head, dated September 24, 1990;
  - (b) one-page memorandum from the Chief Executive Officer of the Commission to an Acting Manager, dated September 20, 1990.
12. Item #44 (75 on list of 217) 2 pages of a six-page memo from a supervisor to a manager, dated May 23, 1990.
13. Item #45 (155 on list of 217):
  - (b) 2 pages consisting of 2 lists titled "ASSAULTS IN THE LAST THREE YEARS", and "ASSAULTS PRIOR TO 1989", undated.
21. Item #64 (140 on list of 217) 3 pages of notes of a department head regarding a meeting, dated August 14, 1990.

The Commission claims that sections 12 and 38(a) apply to all of the records and that section 14 applies to Record 13(b).

## **ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the record contains "personal information" as defined in section 2(1) of the Act.

- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.
- C. Whether the records qualify for exemption under section 12 of the Act.
- D. If the answer to Issue A and C is yes, whether the discretionary exemption provided by section 38(a) of the Act applies.

### **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the record contains "personal information" as defined in section 2(1) of the Act.**

Section 2(1) of the Act reads, in part:

"personal information" means recorded information about an identifiable individual ...

I have examined the records at issue. In my view, all of the records, with the exception of page three of Record 8 and Record 13(b) in its entirety, contain personal information which relates solely to the appellant.

Page three of Record 8 is a list of female Licensing Enforcement Officers of the Commission, along with a notation as to whether the officer was on "vacation" or "in the office", the number of the vehicle assigned to the officer and the hair colour of the officer. With the exception of the appellant's name on line seven, the information on this record relates to individuals other than the appellant.

Record 13(b) is a list of Licensing Enforcement Officers of the Commission who were assaulted in the course of the performance of their duties, along with a brief description of the nature and circumstance of the assault and the date of the incident. The appellant's name is not on this list. I find that the information on the list is personal information which relates solely to the individuals on the list.

**ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.**

Under Issue A, I found that Records 8 and 13(b) contain the personal information of individuals other than the appellant.

Section 14(1) of the Act prohibits the disclosure of personal information to any person other than to the individual to whom the information relates, except in certain circumstances listed under the section.

In my view, the only exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is section 14(1)(f), which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether or not disclosure of personal information would result in an unjustified invasion of personal privacy.

Section 14(3) lists the types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. In my view, none of the presumptions are relevant in the circumstances of this appeal.

Section 14(2) lists factors which may be considered in determining whether or not the disclosure of personal information would constitute an unjustified invasion of personal privacy.

In her representations, the appellant states that her employment was unjustly terminated by the Commission and she needs the records to prepare for grievance hearings filed by her against the Commission. She also indicates that she requires the records for trial as a defendant in a law suit, as well as for contemplated litigation. These claims raise the possible application of section 14(2)(d) of the Act which states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

Having carefully considered the representations of the appellant and the records, in my view, the personal information contained in these records, which relates to other individuals, is not relevant to a fair determination of the appellant's rights. Accordingly, I find that section 14(2)(d) is not a relevant factor in the circumstances of this appeal. Therefore, in the absence of any evidence or argument weighing in favour of finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception under section 14(1)(f) does not apply.

Normally, this conclusion would lead me to the finding that the mandatory exemption under section 14(1) applies to the records; however, in the circumstances of this appeal, I feel that it would be appropriate to consider whether any part or parts of the records could be disclosed without violating section 14(1). This exercise is in accordance with the severance provisions of section 4(2) of the Act, which require the disclosure of as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

I understand from the representations of the Commission that the reason the records were placed in the appellant's personal file is because the Commission considered the information in the records would be needed for use in the grievance proceeding initiated by the appellant. It is clear from reviewing the records and the circumstances of the appeal, that it is the general information in the records, not the names of the individuals, that would be relevant to the appellant's grievance. Therefore, I have considered whether severing the names can remove the remaining information from the ambit of the exemption under section 14.

In the circumstances of this appeal, I find that section 4(2) is applicable. In my view, severing the names of the individuals in both records will render the remaining information not subject to the exemption under section 14. In my view, without the names, the rest of the information is not personal information since it would not be possible to identify from its contents the individuals to whom it relates.

In summary, I find that section 14(1) applies only to the names of the individuals as they appear with the other information in the records, but not to the information which remains after the names have been severed.

**ISSUE C: Whether the records qualify for exemption under section 12 of the Act.**

The Commission claims that section 12 applies to all of the records.

Section 12 states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal

advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide the Commission with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1.
  - a) there is a written or oral communication, **and**
  - b) the communication must be of a confidential nature, **and**
  - c) the communication must be between a client (or his agent) and a legal advisor, **and**
  - d) the communication must be directly related to seeking, formulating or giving legal advice;

**OR**

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49, M-2 and M-19]

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Orders 210, M-2 and M-19]

The Commission claims that the records qualify for exemption under both the second branch and the second part of the first branch of the exemption. Its arguments under each branch are essentially the same; it submits that the records were prepared for Commission counsel in contemplation of litigation.

The question of what constitutes "in contemplation of litigation" was considered by former Commissioner Sidney B. Linden when he was discussing section 19 of the provincial Freedom of Information and Protection of Privacy Act, which is similar to section 12 of the Act. He stated that in order for a record to qualify as being prepared "in contemplation of litigation", "(a) the **dominant** purpose for the preparation of the document must be in contemplation of litigation; **and** (b) there must be a reasonable prospect of such litigation at the time of the preparation of the record - litigation must be more than just a vague or theoretical possibility" (Order 52). I agree with former Commissioner Linden's view and adopt it for the purposes of this appeal.

In order to decide whether these two requirements have been satisfied in the present case, it is necessary to review the circumstances surrounding the preparation of the records being withheld by the Commission.

The Commission submits:

Although the grievances arising out of the incidents discussed in the records had not been initiated at the time of preparation of these records, the nature of the relationship between the appellant and the managers of the institution was such that it was highly probable that a grievance would result from the initiation of any discipline against the appellant.

I have carefully considered the Commission's representations, the contents of the records and the circumstances of this appeal and in my view, the Commission has not provided sufficient evidence to establish that the "dominant" purpose for creating these records was in contemplation of litigation. I am not satisfied that any of the records were created or obtained especially for a lawyer's brief in contemplation of litigation, nor am I satisfied that they were prepared by, or for a lawyer employed or retained by the Commission in contemplation of litigation. Therefore, I find that the exemption provided by section 12 does not apply to any of the records.

Because of the manner in which I have disposed of Issues A-C, I need not consider Issue D.



**ORDER:**

1. I order the Commission to disclose to the appellant Records 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 21, in their entirety, within 15 days of the date of this order.
2. I order the Commission to disclose Records 8 and 13(b) after severing the names of the individuals other than the appellant within 35 days of the date of this order, but not earlier than the thirtieth (30th) day following the date of this order. I have provided a highlighted copy of the record with the copy of this order which is being forwarded to the Commission, indicating the portions of the record which contain the exempt information. The highlighted portions are the parts that should **not** be disclosed.
3. In order to verify compliance with the provisions of this order, I order the Commission to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1 and 2, **only** upon request.

Original signed by: \_\_\_\_\_

Asfaw Seife  
Inquiry Officer

\_\_\_\_\_ April 16, 1993