



Information and Privacy
Commissioner/Ontario

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

ORDER M-120

Appeal M-9200133

Metro Toronto Licensing Commission



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

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 documents related to an allegation of assault made by the requester. The requester was an employee of the Commission and the alleged incident occurred at her place of employment. The Commission identified 22 responsive records and provided access to some and denied access to others pursuant to sections 7 and 14 of the Act. The requester appealed the decision to deny access and also claimed that additional responsive records had not been identified by the Commission.

During the appeal, the appellant elaborated on her claim about additional records. She stated that there should be two records: a record of a November 22, 1991 phone call with an employee of the personnel department at the Municipality of Metropolitan Toronto and a Worker's Compensation Board report of the same date. The Commission located both the report and the notes of the November 22, 1991 phone call and released them to the appellant. The appellant was contacted after these records were released and provided with an opportunity to comment. She did not respond. In the absence of specific concerns of the appellant, I find that the issue of whether additional records exist is resolved.

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.

In its representations, the Commission indicated that it was prepared to release more records to the appellant and that it was raising sections 12 and 38(a) of the Act as an additional exemption claim. The records which remain at issue together with the exemptions claimed are as follows (The numbers correspond to the numbers used in Appendix B to the Notice of Inquiry):

1. A single page consisting of typewritten notes of the Acting Field Manager about a meeting held on January 8, 1992 regarding the alleged assault against the appellant - withheld in its entirety pursuant to section 12 of the Act.
2. Eight pages of handwritten notes of a department head about the meeting held on January 8, 1992 regarding the alleged assault against the appellant - withheld in their entirety pursuant to section 12 of the Act.
3. Eight pages of handwritten notes prepared by a department head for the meeting of January 8, 1992 regarding the alleged assault against the appellant - partially withheld (the first 3 1/2 pages have been disclosed) pursuant to section 12 of the Act.

6. A three-page memorandum from the Director of Administration to the Department Head, dated November 22, 1991, partially disclosed, severances made pursuant to section 7 of the Act.
7. Twelve pages of documents, consisting of various memoranda and letters addressed to the General Manager of the Commission from the person against whom the assault allegation was made (the affected person) or by counsel to the affected person - withheld in their entirety pursuant to sections 12 and 14 of the Act (pages 4 to 8 were exempted under section 14, and pages 1 to 3 and 9 to 12 were exempted under section 12).

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the records contain "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. Whether the records qualify for exemption under section 7 of the Act.
- E. If the answer to Issue A and Issues C and/or D is yes, whether the discretionary exemption provided by section 38(a) applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the records contain "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, with the exception of pages 4-8 of Record 7, they all contain the appellant's personal information in the context of the investigation of the assault allegation.

Pages 4-8 of Record 7 relate solely to the person against whom the allegation was made and contain only that person's personal information.

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 pages 4-8 of Record 7 contain only the personal information of the person against whom the assault allegation was made.

Once it is has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances.

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 must be considered in determining whether or not the disclosure of personal information would constitute an unjustified invasion of personal privacy. The Commission relies on sections 14(2)(f) and (h) which state:

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,

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

The Commission submits:

... the information in question is highly sensitive in that it documents the emotional effect the allegations of assault made by the appellant have had on the third party and her family. ... the information was supplied by the third party in confidence and was intended only to be reviewed by management of the institution.

Having reviewed pages 4-8 of Record 7, I agree that sections 14(2)(f) and (h) are relevant factors.

In her representations, the appellant states that she needs the records to prepare for upcoming grievance hearings, thus raising the possible application of section 14(2)(d) of the Act. This section 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;

I have examined pages 4-8 of Record 7 carefully. In my view, the personal information contained in these pages has no bearing on or significance to the determination of the appellant's right in the context of a grievance proceeding. Therefore, I find that section 14(2)(d) is not a relevant factor.

In the circumstances of this appeal, I have not been provided with sufficient evidence or argument that disclosure of the personal information which relates solely to the affected person would not constitute an unjustified invasion of the personal privacy of the affected person. Therefore, I find that the exception provided by section 14(1)(f) is not present, and that the mandatory exemption provided by section 14(1) of the Act applies to pages 4-8 of Record 7. These pages should not be released to the appellant.

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

The Commission claims that Records 1, 2, 3 and pages 1-3 and 9-12 of Record 7 qualify for exemption under section 12 of the Act. Records 1, 2 and 3 and pages 1-3 of Record 7 are notes related to a meeting about the assault allegation. Pages 9-12 of Record 7 are memoranda about the allegation prepared by the person against whom the allegation of assault was made.

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 Commission 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.

[Order 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.

[Order 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 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.

ISSUE D: Whether the records qualify for exemption under section 7 of the Act.

The Commission submits that the severances to Record 6 qualify for exemption under section 7 of the Act. This section states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

"Advice" pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient in the deliberative process (Order 118). "Recommendations" should be viewed in the same vein (Order P-348).

In addition, in Order 94 former Commissioner Sidney B. Linden, in discussing section 13 of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 7 of the Act, stated:

[I]n my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

The Commission submits:

... disclosure of the severed portions of the record still at issue would reveal advice and recommendations of a consultant retained by the institution.

...

The consultant's advice and recommendations on the proper course of action to follow with respect to the situation arising from the alleged assault are set out in the severed portions of the record.

I have carefully reviewed the severed portions of Record 6 and I agree with the Commission's submission that disclosure of this portion of the record would reveal the advice of a consultant employed by the Commission. Therefore, I find that the severed portions of Record 6 qualify for exemption under section 7 of the Act.

ISSUE E: If the answer to Issue A and Issues C and/or D is yes, whether the discretionary exemption provided by section 38(a) applies.

In Issue D, I found that the severed portions of Record 6 qualify for exemption under section 7 of the Act.

Section 38(a) provides an exception to the general rule that a requester has a right of access to his or her own personal information in the custody or control of an institution. It provides the Commission with the discretion to refuse to disclose to the appellant his own personal information where the record qualifies for exemption under certain sections of the Act, including section 7.

I have reviewed the Commission's reasons for exercising discretion in favour of denying the requester access to the severed portions of Record 6, and I find nothing improper in the circumstances of this appeal.

ORDER:

1. I uphold the Commission's decision to deny access to the severed portions of Record 6 and pages 4 to 8 of Record 7.
2. I order the Commission to disclose Records 1, 2, 3, and pages 1-3 and 9-12 of Record 7 to the appellant within 15 days of the date of this order.
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 2, **only** upon my request.

Original signed by: _____
Asfaw Seife
Inquiry Officer

_____ April 16, 1993