



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-212**

## **Appeal M-9200394**

### **Municipality of Metropolitan Toronto**



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 Municipality of Metropolitan Toronto (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to any documents relating to the complaints of workplace harassment that were made by a named individual (the primary affected person) against the requester. The Municipality provided the requester with access to many records, but denied access to all or parts of certain records pursuant to sections 7, 8, 11, 14 and 38(a) and (b) of the Act. The requester appealed the decision of the Municipality.

Mediation of this appeal was partially successful. The Municipality provided the appellant with all or parts of certain records to which it had previously denied access. The appellant was informed that many of the records and parts of records still in issue contained material unrelated to the subject of the request, and the parties agreed that these records or parts thereof no longer formed part of the records remaining in issue. The appellant also agreed that he did not wish to obtain access to the names and addresses of affected persons, and that he had no objection to such information being severed from the records. The scope of the appeal was limited accordingly.

Agreement could not be reached with respect to the remaining records however, and the matter proceeded to inquiry. The Notice of Inquiry was sent to the appellant, the Municipality, the primary affected person, and 14 persons whose interests might be affected by disclosure of the information at issue (the secondary affected persons). Representations were received from the appellant, the Municipality, and the primary affected person. In its representations, the Municipality indicated that it was no longer relying on the exemptions provided by sections 8 and 11 of the Act.

## THE RECORD:

The record consists of memoranda prepared by supervisors and officials of the Municipality, supervisors' notes, correspondence and ambulance call reports. All were created or are associated with the Municipality's investigation of complaints of harassment made against the appellant. The pages remaining at issue may be characterized as follows:

Memoranda: 84, 122-25, 127-33, 143-44, 155-59, 163, 165, 175-76, 188-95

Supervisors' Notes: 91, 153-54, 182-85, 187

Correspondence: 83, 162

Ambulance call reports: 172-74

## **ISSUES:**

The issues remaining in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the personal information relates to the appellant and other identifiable individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.
- C. Whether the discretionary exemptions provided by sections 7 and 38(a) of the Act apply.

## **SUBMISSIONS/CONCLUSIONS:**

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

The term "personal information" is defined in section 2(1) of the Act as follows:

... recorded information about an identifiable individual, including,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (g) the views or opinions of another individual about the individual,

I have reviewed the pages at issue and am satisfied that they contain information about the appellant and other identifiable individuals, therefore satisfying the definition of "personal information" as set out in section 2(1) of the Act.

**ISSUE B: If the answer to Issue A is yes, and the personal information relates to the appellant and other identifiable individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.**

Under Issue A, I found that the records contain the personal information of the appellant and other identifiable individuals.

Section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exemptions to this general right of access. One such exemption is found in section 38(b), which reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. The Municipality must look at the information and weigh the requester's right of access to his/her own personal information against the rights of other individuals to the protection of their personal privacy. If the Municipality determines that release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the Municipality the discretion to deny the requester access to his/her own personal information.

In my view, where personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The Municipality submits that the presumptions under sections 14(3)(a), (d) and (g) of the Act apply to all or portions of some of the records at issue.

These sections read as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

[IPC Order M-212/November 9,1993]

- (d) relates to employment or educational history;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

I have reviewed all of the pages for which the Municipality has claimed the application of these sections and find that none of them apply in the circumstances of this appeal.

In my opinion, the information contained in these pages does not relate to the medical history of any identifiable individuals. While these pages do contain information concerning employment-related incidents involving the appellant and other individuals, it is my view that this information cannot accurately be characterized as constituting the employment history of any of these individuals. In addition, although the Municipality claimed the application of section 14(3)(g) of the Act, it did not make any submissions to support the application of this exemption. Therefore, I find that sections 14(3)(a), (d) and (g) of the Act do not apply in the circumstances of this appeal.

I also find that none of the records at issue contain personal information which falls under the ambit of section 14(4) of the Act.

The Municipality submits that the considerations under 14(2)(f), (g), (h) and (i) which favour non-disclosure, are relevant in the circumstances of this appeal. The appellant's representations may be characterized as raising the applicability of the considerations set out in section 14(2)(d) of the Act which favour disclosure.

Sections 14(2)(d), (f), (g), (h) and (i) read as follows:

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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

### **Section 14(2)(d)**

In order for section 14(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as apposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right in question is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

The appellant has submitted that, as a result of the findings of the harassment investigation, he has been "formally disciplined". He also indicates that he is "grieving this discipline through various avenues" and requires access to the requested information for this grievance. In these circumstances, I consider that section 14(2)(d) may be a relevant consideration given the grievance procedure in the circumstances of this appeal.

### **Section 14(2)(f)**

The Municipality submits that, as the personal information at issue concerns allegations and counter-allegations of misconduct made both by and against the appellant, such information is of a sensitive nature and its disclosure will serve only to exacerbate existing workplace tensions.

In Order M-82, Inquiry Officer Holly Big Canoe considered the issue of sensitivity in the context of workplace harassment complaints, and stated the following:

In my opinion, information that pertains to normal, everyday working relationships and workplace conduct is not highly sensitive. However, when an allegation of harassment is made and investigated, it is reasonable for the parties involved to restrict discussion of workplace relationships and conduct and to find such information distressing in nature ...

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Nevertheless, in my view, it is not possible for such an investigation to proceed if the complaint is not made known to the respondents and the direct response to the allegations made in the complaint is not made known to the complainant. Accordingly, I find that section 14(2)(f) is a relevant consideration in the circumstances of this appeal, but only in respect of the information provided by individuals other than the appellant, and not in respect of the information provided by the affected persons in direct response to the appellant's complaint.

In applying the position of Inquiry Officer Big Canoe, with which I agree, to the circumstances of this appeal, I have concluded that section 14(2)(f) is not a relevant consideration with respect to those pages or portions of pages containing information provided by the parties to the complaint, namely the complainant (the primary affected person) and the respondent (the appellant), and information provided by officials investigating the appeal. It is a relevant consideration, however, with respect to information provided by other individuals during the course of the investigation.

#### **Section 14(2)(g)**

The Municipality also submits that, with respect to the application of section 14(2)(g):

The information at issue is partially based on rumour and innuendo and can not always be substantiated. Although this type of information may require compilation as part of a[n] investigation of allegations of harassment and misconduct in the workplace, its accuracy is highly suspect.

However, the Municipality has provided me with no evidence to indicate what information, if any, is unlikely to be accurate or reliable. Accordingly, I find that section 14(2)(g) is not a relevant consideration in the circumstances of this appeal.

#### **Section 14(2)(h)**

The Municipality submits that information supplied by individuals to initiate and further the investigation was arguably intended to remain in confidence. It also argues that generally, there was an "expectation of confidence" with respect to reports of supervisory staff as well. I agree only in part with this position.

In Order M-82, Inquiry Officer Big Canoe discussed the issue of confidentiality in the context of workplace harassment, and made the following comments regarding section 14(2)(h):

In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, complainants must be given enough

information to enable them to ensure that their allegations were adequately investigated. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace. Accordingly, in my view, section 14(2)(h) is a relevant consideration, but only in respect of the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint.

I agree with Inquiry Officer Big Canoe. I am therefore of the opinion that section 14(2)(h) is a relevant consideration in the circumstances of this appeal, but only with regard to the personal information of persons other than the appellant and not to that information which directly address the substance of the complaint.

### **Section 14(2)(i)**

The Municipality also submits that disclosure might damage the reputations and affect the workplace status of identified individuals by disclosing:

1. the fact that these individuals have supplied information as part of the investigation of the alleged harassment, and the nature of that information
2. the evaluation of the credibility and veracity of those individuals by the authors of the various records.

The applicability of section 14(2)(i) is not dependent on whether the damage or harm envisioned by this clause is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved. The Municipality has not, however, explained the nature of the damage that would arise or the unfairness that would occur if the information is disclosed. I therefore find that section 14(2)(i) is not a relevant factor in the circumstances of this appeal.

In summary, I have found that section 14(2)(d) may be relevant and sections 14(2)(f) and (h) are relevant considerations with respect to certain of the information contained in the pages at issue in this appeal. Sections 14(2)(f) and (h) are relevant only with regard to information provided by individuals other than the appellant where it does not directly concern the allegations made by the primary affected party. These two sections weigh in favour of privacy.

With regard to the information provided by the primary affected party and by others directly concerning the allegations made by the primary affected party, I have found that section 14(2)(d) is a relevant factor. This factor weighs in favour of disclosure.

In Order 37, former Commissioner Sidney B. Linden dealt with an employment-related complaint, and stated that "fairness demands that the person complained against be given as much disclosure of the substance of the allegations as is possible. The degree of disclosure...should be more extensive if the



complaint is likely to result in discipline." In this case, disciplinary action has already been taken against the appellant.

I have considered all of the circumstances arising in this appeal. Accordingly, I find that disclosure of certain information contained in the records would constitute an unjustified invasion of the personal privacy of the primary and secondary affected persons; hence section 38(b) of the Act applies. In reviewing the Municipality's exercise of discretion in favour of refusing to disclose the records or parts of records for which I have found section 38(b) to apply, I have found nothing to indicate that the exercise of discretion was improper and would not alter it on appeal.

Based on the considerations noted above, the Municipality should disclose to the appellant those portions of the pages of the record that are highlighted on the copies of the record I have provided to the Municipality with a copy of this order.

**ISSUE C: Whether the discretionary exemptions provided by sections 7 and 38(a) of the Act apply.**

The Municipality submits that section 7(1) of the Act applies to the following pages of the record:

Page 130 - the conclusion;

Page 133 - the recommendation;

Page 184 - last paragraph;

Page 192 - second paragraph from the bottom;

Page 193 - the third paragraph and the last paragraph;

Page 195 - the second paragraph.

As I have not found these portions to be exempt from disclosure under Issue B, I shall consider them here.

Section 7(1) of the Act reads:

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).

I have carefully reviewed the above pages. In my view, the information contained in the last paragraph on page 184 and the third paragraph of page 193 are more appropriately characterized as comments or expressions of opinion rather than advice or recommendations. In neither instance is there a suggested course of action evident from the information contained in the record.

I do agree that disclosure of the remaining portions of the pages listed above would reveal the advice and recommendations of an officer or employee of the Municipality.

Section 7(2) of the Act lists certain exceptions to the section 7(1) exemptions. I have carefully reviewed the records and the section 7(2) exceptions, and I am of the view that none of them apply to the portions of the records exempted under section 7(1).

Because the portions of pages 130, 133, 192, 193 and 195 that I have found to qualify for exemption pursuant to section 7(1) of the Act contain the personal information of the appellant, I must now consider the application of section 38(a) which states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

[emphasis added]

Section 38(a) provides the Municipality with the discretion to refuse to disclose to the appellant his own personal information in instances in which one of the enumerated exemptions would apply. The Municipality has provided representations regarding its exercise of discretion to deny access to the records. Having reviewed these representations, I find nothing to indicate that the exercise of discretion was improper and I would not alter it on appeal.

## **ORDER:**

1. I uphold the decision of the Municipality to deny access to all or portions of pages 84, 122-25, 130, 154, 157, 162, 172-176, 185 and 187-89.

2. I order the Municipality to disclose the portions of pages 83, 91, 127-129, 131-133, 143-144, 153, 155-156, 158-159, 163, 165, 182-84 and 190-95 which **are** highlighted in the copy of the records which is being forwarded to the Municipality with this order.
3. I order the Municipality to disclose the pages referred to in Provision 2 within 35 days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
4. In order to verify compliance with the provisions of this order, I order the Municipality to provide me with a copy of the pages which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by:  
Anita Fineberg  
Inquiry Officer

November 9, 1993