



Information and Privacy  
Commissioner/Ontario

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

# **ORDER M-251**

## **Appeal M-9300115**

### **Toronto Transit Commission**



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# ORDER

## BACKGROUND:

The Toronto Transit Commission (the TTC) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to "any documentation that pertains to decisions related to my employment, performance, promotion or transfer". In particular, the requester sought access to all correspondence relating to the decision making process respecting a particular employment opportunity.

The TTC identified five records that were responsive to the request and granted access to four of these documents in their entirety. The TTC denied access to part of the fifth document, however, which contained comments provided by a named individual. This decision was based on the exemptions contained in sections 13, 14 and 38 of the Act. The requester appealed the TTC's decision.

Mediation was not successful and notice that an inquiry was being conducted to review the TTC's decision was sent to the appellant, the TTC and an individual whose interests might be affected by the outcome of this appeal (the affected person). Representations were received from the TTC only.

## ISSUES:

The issues to be addressed in this appeal are:

- A. Whether the record contains "personal information" as defined by section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies to the personal information contained in the record.

## SUBMISSIONS/CONCLUSIONS:

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

Under section 2(1) of the Act, personal information is defined to mean recorded information about an individual including information relating to employment history, correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature and the individual's name if it appears with other personal information relating to the individual.

Based on my review of the record, I find that it contains the personal information of both the appellant and the affected person.

**ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies to the personal information contained in the record.**

I have found under Issue A that the record at issue contains the personal information of both the appellant and another individual. Section 36(1) of the Act gives individuals a general right of access to personal information about themselves which is in the custody or under the control of institutions covered by the Act. However, this right is not absolute. Section 38 provides a number of exceptions to this general right of access, including section 38(b), which reads as follows:

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 TTC must look at the information and weigh the requester's right of access to his own personal information against the other individual's right to the protection of his or her privacy. If the TTC determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the TTC the discretion to deny access to the personal information of the requester.

Where the personal information relates to the requester, the onus should not be on the requester to prove that the 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 or 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 the disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in such an unjustified invasion of privacy.

In its representations, the TTC submits that the presumption contained in section 14(3)(d) of the Act applies to the personal information contained in the last paragraph of the record. This provision reads as follows:

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

relates to **employment** or educational history; [emphasis added]

I have carefully reviewed the record at issue and the submissions advanced by the TTC. In my view, the

information contained in this document cannot reasonably be said to relate to the employment history of the affected person. On this basis, I find that section 14(3)(d) does not apply to the information in question. I also find that none of the other presumptions contained in section 14(3) are relevant in the circumstances of this appeal.

I must now consider the application of section 14(2) of the Act to the personal information found in the record. This provision reads, in part, 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,

- (f) the personal information is highly sensitive;
- ...
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;
- ...
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

In interpreting section 14(2), all the relevant circumstances of the case must be considered not only the factors enumerated in the section.

In its representations, the TTC relies on sections 14(2)(f) and (h) of the Act to substantiate its position that the disclosure of the personal information would constitute an unjustified invasion of the personal privacy of the affected person.

The TTC states, at the outset, that the personal information found in the record is "highly sensitive" pursuant to section 14(2)(f) of the Act. In order for personal information to be characterized in this fashion, the parties relying on this proposition must establish that the disclosure of the information would cause excessive personal distress to the affected person (Order M-173).

I have carefully reviewed the personal information at issue and I am satisfied that it may be characterized as highly sensitive for the purposes of the Act. Consequently, I find that section 14(2)(f) is a relevant consideration in determining whether or not to release the personal information.

The TTC also submits that section 14(2)(h) of the Act applies to the personal information contained in the record (the personal information has been supplied by the individual to whom the information relates in

confidence). This argument was also advanced by the affected person in the submissions made to the TTC prior to the initiation of this appeal. The appellant contends, on the other hand, that had the affected person genuinely been concerned about maintaining confidentiality, that party would not have supplied the relevant information to the TTC.

Based on the circumstances in which the personal information was solicited by, and provided to, the institution, I am satisfied that the affected person had a reasonable expectation that the information at issue would be held in confidence. In my opinion, this expectation is a relevant circumstance which would weigh in favour of protecting the privacy interests of the affected person.

In his letter of appeal, the appellant submits that the contents of the record could adversely affect his future employment. The appellant goes on to state that he is justified in requesting a copy of the information:

in order to accurately evaluate the seriousness of the allegations on my reputation and so that I may appropriately respond to allegations which have been made.

In this fashion, the appellant has implicitly raised the application of section 14(2)(i) of the Act (the disclosure may unfairly damage the reputation of any person referred to in the record). Previous orders issued by the Commissioner's office have held that 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.

While the appellant has asserted in general terms that the information found in the record may adversely affect his career prospects, the evidence available to me is insufficient to establish that such disclosure may unfairly damage his reputation for the purposes of section 14(2)(i) of the Act. On this basis, I find that this provision is not a relevant consideration in determining whether the information should be released to the appellant.

To summarize, therefore, two of the considerations raised by the TTC and/or the affected person (the finding that the information is highly sensitive and the expectation of confidentiality) weigh in favour of not disclosing the personal information at issue in this appeal. I also find that there do not exist any relevant considerations under section 14(2) which favour the release of the personal information to the appellant. My conclusion, therefore, is that the disclosure of this personal information would constitute an unjustified invasion of the personal privacy of the affected person.

Section 38(b) of the Act is a discretionary exemption. On this basis, I have reviewed the TTC's exercise of discretion in refusing to disclose the personal information to the appellant. I find nothing improper in the determination which has been made.

**ORDER:**

[IPC Order M-251/January 21,1994]

I uphold the decision of the TTC.

Original signed by:  
Irwin Glasberg  
Assistant Commissioner

January 21, 1994