



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-431

Appeal M-9400403

Municipality of Metropolitan Toronto



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of all records containing her personal information in the custody or control of the Municipality of Metropolitan Toronto (the Municipality). The appellant is a former employee of the Municipality and the requested records relate primarily to her grievance proceedings before an Arbitration Board (the Board).

The Municipality originally relied on the following exemptions to deny access to the requested records:

- advice or recommendations - section 7(1)
- invasion of privacy - sections 14(1) and 38(b)
- solicitor-client privilege - section 12
- discretion to refuse requester's own information - section 38(a)

A Notice of Inquiry was provided to the appellant and the Municipality. Representations were received from the Municipality only.

In its representations, the Municipality indicates that it is no longer relying on the exemptions contained in sections 7, 14 and 38(b) of the Act.

The records consist primarily of notes of interviews conducted with potential witnesses, notes made by counsel regarding ideas and strategies for the case and notes made at the arbitration hearing (approximately 556 pages). An additional 17 pages contain internal and external correspondence to or from counsel, relating to the appellant's grievance. Pages 93 to 96 of File A (the Municipality's reference) consist of a facsimile cover sheet and correspondence relating to the appellant's current access request.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Section 12 consists of two branches, which provide an institution 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.

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.

In its representations, the Municipality states that it is relying on the second part of Branch 1 (litigation privilege) and on Branch 2 as the basis for claiming this exemption.

Previous orders have held that grievance proceedings (Order M-86) and proceedings before administrative tribunals (Order M-162) qualify as litigation for the purposes of this exemption.

The Municipality submits that the records at issue are all contained in grievance arbitration files which were opened by lawyers employed in its legal department.

The Municipality provides background information on the four-stage grievance procedure under the governing collective agreement, and indicates that lawyers only become involved in the process at the last stage. In practice, lawyers in the legal department open a grievance arbitration file for the exclusive purpose of preparing for and conducting the hearing before the Board.

The Municipality includes affidavits sworn by the two lawyers whose files contained responsive records. The lawyers confirm that the usual file practice was followed in this case and that the files were prepared exclusively for the purposes of conducting the arbitration before the Board.

I have reviewed the records and representations.

I find that with the exception of pages 93 to 96 of File A, the remaining records were prepared by counsel employed by the Municipality for use in litigation and, accordingly, they qualify for exemption under Branch 2 of this section.

I find that pages 93 to 96 of File A do not qualify under either Branch 1 or 2 of the exemption. In my view, they do not carry any litigation privilege in that they are not the subject of, nor do they have any relation to the grievance proceedings. In addition, pages 95 and 96 consist of correspondence from the appellant.

In summary, I have found that with the exception of pages 93 to 96 of File A, the remaining pages qualify for exemption under section 12.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The Municipality concedes, and I agree, that the records which I have found to qualify for exemption under section 12 all contain the personal information of the appellant.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 12, would otherwise apply to that information.

Accordingly, I find that, with the exception of pages 93 to 96 of File A, the remaining records are all exempt under section 38(a).

I have reviewed the information contained in pages 93 to 96 of File A, and I find that it relates solely to the appellant. I am satisfied, therefore, that sections 14 and 38(b) do not apply. As the Municipality has withdrawn its reliance on the exemption in section 7, the information contained in these pages should be disclosed to the appellant.

ORDER:

1. I order the Municipality to disclose pages 93 to 96 of File A in their entirety to the appellant within fifteen (15) days after the date of this order. For greater certainty, I have provided a copy of these pages to the Municipality's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I uphold the Municipality's decision to deny access to the remaining records in their entirety.

3. In order to verify compliance with this order, I reserve the right to require the Municipality to provide me with a copy of the pages of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ December 9, 1994