



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-523

Appeal M-9400598

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 Municipality of Metropolitan Toronto (the Municipality) received a request from one of its employees for various records relating to his employment. The Municipality located records responsive to the request and provided access in full to a number of them. The Municipality denied access to the remaining documents, relying on the following exemptions contained in the Act:

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

The requester appealed the Municipality's decision to deny access. During the mediation of the appeal, an additional 36 pages of records were disclosed to the appellant, leaving 36 pages of documents remaining at issue. A Notice of Inquiry was provided to the appellant, the Municipality and seven individuals whose rights may be affected by the disclosure of the records (the affected persons). Representations were received from the appellant, the Municipality and three of the affected persons.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Municipality submits that Records 14, 15-16, 17-20 and 21-22 are exempt from disclosure under section 7(1) which states that:

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.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of the exemption in section 13(1) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 7(1) of the Act. He stated that "this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making."

"Concerns" do not qualify as "advice or recommendations" pursuant to section 7(1) of the Act as they do not contain a suggested course of action which will ultimately be accepted or rejected by its recipient during

the deliberative process. Additionally, where opinion or factual material would not reveal a recommended course of action, the material is not covered by this exemption.

I have reviewed the records for which the section 7(1) exemption has been claimed and the representations of the parties. I find that Record 15-16 does not contain "advice or recommendations" within the meaning of the Act. The author is expressing his concerns about a particular statement contained in an investigation report and asks the recipient of the letter to amend the report. Information of this sort does not qualify as "advice or recommendations within the deliberative process of government decision-making or policy-making".

Similarly, the response to the letter, Record 14, describes the amendment made to the investigation report, but does not contain any advice or recommendations as to a course of action to be taken by its recipient.

Record 21-22 is a letter from the Human Rights Manager of the Municipality's Equal Employment Opportunity Division to the Director of the Operations Division of Parks and Recreation Department in which the role of an investigator into a complaint of discrimination is clarified. I find that this record does not contain any advice or recommendations but, rather, seeks to inform the addressee of the role of an investigator, particularly in relation to the matter involving the appellant.

Record 17-20 is a letter from the individual who conducted the investigation described above, addressed to the Municipality's Human Rights Manager. Record 37-44 is a draft version of the investigation report submitted by the investigator. I find that each of these records contain detailed recommendations as to a specific course of action which will ultimately be accepted or rejected by the Municipality in reference to the findings reached in the report. These records, accordingly, qualify for exemption under section 7(1) of the Act.

In summary, I find that Records 14, 15-16 and 21-22 are not exempt from disclosure under section 7(1) of the Act. As no other exemptions have been claimed to apply to these records, they should be disclosed to the appellant. As stated above, Records 17-20 and 37-44 qualify for exemption under section 7(1).

SOLICITOR-CLIENT PRIVILEGE

The Municipality relies on section 12 of the Act to deny access to Records 1-10, 55, 56-61, 71 and 73.

This section consists of two branches, which provide the Municipality 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 the

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

Records 1-10

The Municipality is relying on both parts of Branch 1 to exempt from disclosure Records 1-10. These documents consist of a covering page along with 9 pages of attachments sent by the Acting Director of Operations of the Municipality's Parks Department to counsel with the Municipality's Legal Department. The Municipality submits that these records relate to a complaint made by the appellant to the Ontario Human Rights Commission and were forwarded to counsel in order to assist him in the preparation of the defence to the complaint on behalf of the Municipality.

I find that at the time the records were sent to the solicitor, and at the date that the request was made,

litigation in the form of a complaint before the Ontario Human Rights Commission was underway. I also find that the records were obtained specifically for the lawyer's brief for existing litigation within the meaning of the test set out above. Records 1-10 are, therefore, qualify for exemption under the second part of Branch 1 of the section 12 exemption.

Records 55, 71 and 73

The Municipality has not submitted representations on the application of the solicitor-client privilege exemption to these records, nor do the records themselves indicate that the exemption should apply. Accordingly, I find that they are not exempt from disclosure under this exemption.

Record 56-61

The Municipality has not provided any specific information regarding the author of this record or the reason for its creation. It appears to be a summary of certain complaints made by the appellant about the hiring practices existing in his workplace. Without having any details about the circumstances surrounding the creation of the record, including the date it was written, I am unable to find that it falls within either of the two branches of the section 12 exemption.

As no other exemptions have been claimed, Record 56-61 should be disclosed to the appellant.

INVASION OF PRIVACY

The Municipality submits that Records 55, 71 and 73 are exempt from disclosure under section 14 of the Act.

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.

I have reviewed the three records at issue. I find that each contain the personal information of the affected persons only.

Once it has been determined that a record contains personal information section 14(1) of the Act prohibits the disclosure of this personal information to any person other than the individual to whom it relates, except in certain circumstances. One such circumstance is contained in section 14(1)(f) of the Act. The effect of this exception is that the section 14 exemption does not apply if disclosure of the personal information would not be 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 personal privacy. The Municipality submits that the presumption contained in section 14(3)(d) (employment or educational history) apply to the personal information contained in the records.

I have reviewed the records and the representations of the parties and make the following findings:

- (1) The personal information contained in the records relates to the employment history of the affected persons. Accordingly, the disclosure of this information would constitute a presumed unjustified invasion of privacy under section 14(3)(d) of the Act.
- (2) None of the information falls within the ambit of section 14(4) and the appellant has not raised the possible application of section 16 of the Act.
- (3) Accordingly, the exemption in section 14(1) applies to these three records.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

I have found above that Records 17-20 and 37-44 qualify for exemption under section 7 and that Records 1-10 qualify for exemption under section 12. Each of these records also contain the personal information of the appellant.

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 institutions covered by the Act. However, this right of access is not absolute. Section 38 of the Act provides a number of exceptions to this general right of access, including section 38(a) which reads as follows:

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) of the Act provides the Municipality with the discretion to refuse to disclose an appellant's personal information where sections 7 or 12 otherwise apply to the information. I have reviewed the factors considered by the Municipality in the exercise of its discretion in favour of refusing to disclose the information to the appellant. I find nothing improper in the determination which has been made with respect to the name of the complainant and would not alter it on appeal. Records 1-10, 17-20 and 37-44 are, therefore, exempt from disclosure under section 38(a).

ORDER:

1. I uphold the Municipality's decision to deny access to Records 1-10, 17-20, 37-44, 55, 71 and 73.
2. I order the Municipality to disclose to the appellant Records 14, 15-16, 21-22 and 56-61 within thirty-five (35) days following the date of this order but not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Municipality to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ May 15, 1995