



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

ORDER M-687

Appeal M_9500571

Regional Municipality of Peel Police Services Board



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NATURE OF THE APPEAL:

The Regional Municipality of Peel Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the submissions made by the Police with respect to an earlier appeal (Appeal Number M-9500295) filed with the Commissioner's office. The requester was also the appellant in Appeal Number M-9500295.

The Police denied access to the records pursuant to section 41(13) of the Act. The requester appealed the decision, claiming that the Police may not rely on this section to deny access to a record.

A Notice of Inquiry was provided to the appellant and the Police and representations were received from both parties.

DISCUSSION:

ACCESS TO REPRESENTATIONS MADE TO THE COMMISSIONER

The Police have denied access to the records on the basis of section 41(13) of the Act, which reads as follows:

The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

The records requested consist of representations made by the Police in relation to an earlier appeal filed by the appellant. That appeal was resolved by Order M-561 in which Inquiry Officer Donald Hale determined that the fee charged of \$3.68 was "too small to justify requiring payment" under section 8 of Regulation 517 made under the Act, and ordered the Police to waive payment of the fee.

The appellant submits that the Police cannot deny access to the records under section 41(13) of the Act. The appellant refers to section 4(1) of the Act which provides:

Every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the record or part falls within one of the exemptions under sections 6 to 15.

It is therefore the appellant's position that section 41(13) is not an exemption and cannot be relied upon to deny access to a record. Clearly, section 41(13) is not a exemption listed in the access provision of the Act.

However, in my view, there is nothing in the Act which precludes the Police from relying on section 41(13) where the records requested constitute representations made before the Commissioner during the inquiry process. On the contrary, since it is only the Commissioner or his delegate who decides whether an appellant will have access to the representations made by an institution in the course of an inquiry, it is my view that the Police have appropriately relied on section 41(13) to withhold access to the record, pending appeal to this office.

The appellant also claims that he was “procedurally disadvantaged” because he did not have access to the representations of the Police. The appellant states that he was therefore, not able to address the arguments raised by Police and not contained in the Notice of Inquiry.

The issues of access to representations and procedural fairness have been addressed previously by the Commissioner’s office. In Order 164, former Commissioner Sidney B. Linden pointed out that section 52(13) of the provincial Freedom of Information and Protection of Privacy Act, the equivalent of section 41(13) in the present case, does not confer a right on a party to an appeal to obtain access to the other party’s representations. He stated that while this section does not prohibit the Commissioner from ordering such access in the proper case, he emphasized that it would be “an extremely unusual case” where such an order would be issued.

In the same order, the former Commissioner also acknowledged that while procedural fairness requires some degree of mutual disclosure of the arguments and evidence of the parties, the procedures established by this office allow the parties a considerable degree of such disclosure. In Orders P-207 and P-345, Commissioner Tom Wright agreed with the reasoning set out above and concluded that the appellant in that case did not have a right of access to the representations made in another appeal.

In Order P-666, former Commissioner Irwin Glasberg also addressed the question of access to representations made on another appeal resolved by order and found that the records should not be disclosed to the appellant.

I agree with the reasoning in these earlier orders and rely on it for the purposes of this appeal.

With respect to the appellant’s submission that he was prejudiced because he was not provided access to the records, I find that the procedures established by this office allow for adequate disclosure to the parties to ensure procedural fairness. In my view, the appellant has not provided any evidence of prejudice nor has he shown how this case could be construed as “an extremely unusual case”. On the contrary, the previous appeal was resolved by order and the fee charged was waived in favour of the appellant. In the circumstances, it would be inappropriate and would not contribute to procedural fairness to order disclosure of the representations after the initial appeal has been resolved.

In my view, the appellant does not have a right of access to the records pursuant to section 41(13). I find that the circumstances of this appeal do not constitute the “extremely unusual case” intended to be the exception.

I find that, in the circumstances of this appeal, the Police have appropriately relied on section 41(13) of the Act which precludes access to the records.

ORDER:

I uphold the decision of the Police.

Original signed by: _____

Mumtaz Jiwan
Inquiry Officer

_____ January 12, 1996