



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

ORDER M-747

Appeal M_9500694

Municipality of Metropolitan Toronto



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NATURE OF THE APPEAL:

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 the requester's personnel and supervisory files. The Municipality granted access to the requester's personnel file in its entirety and denied access to the supervisory file, claiming the application of the following exemptions contained in the Act:

- sections 14(1) and 38(b) - invasion of privacy
- section 38(d) - danger to mental or physical health of the requester

The requester, now the appellant, appealed the Municipality's decision to deny access to the supervisory file. During the mediation of the appeal, 42 complete pages and portions of two pages of the supervisory file were disclosed to the appellant. Eighteen days after the expiration of the 35 day time limit set out in the Confirmation of Appeal, the Municipality raised the possible application of the following discretionary exemptions:

- advice or recommendations - section 7(1)
- solicitor-client privilege - section 12
- discretion to refuse requester's own information - section 38(a)

A Notice of Inquiry was provided to the Municipality, the appellant and to another individual whose rights may be affected by the disclosure of the records (the affected person). Representations were received from the Municipality and the affected person.

The records remaining at issue consist of 42 pages in their entirety and portions of two pages which were not disclosed from the appellant's supervisory file. These are comprised of notes taken by the supervisor, calendar entries and correspondence.

PRELIMINARY ISSUE:

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

On November 16, 1995, following the receipt by the Commissioner's office of the appeal, a Confirmation of Appeal was forwarded to the Municipality's Freedom of Information and Protection of Privacy Co-ordinator. This document advised the Municipality that should it wish to claim any additional discretionary exemptions in addition to those set out in its decision letter, it must do so by December 21, 1995. By letter dated January 8, 1996, the Municipality advised the Appeals Officer that it intended to rely on the discretionary exemptions provided by sections 7(1), 12 and 38(a) of the Act, in addition to those claimed in its decision letter.

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the

authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in its original decision letter.

In Order P-658, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption(s) is claimed late in the appeals process, a decision-maker has the authority to decline to consider the discretionary exemption(s). I agree with Inquiry Officer Fineberg's reasoning and adopt it for the purposes of this appeal.

The Municipality submits that the additional discretionary exemptions claimed apply to the records and that it considered that possible harm to the appellant could result from their disclosure. For these reasons, it indicates that I should consider the application of these exemptions, regardless of the fact that they were not raised until late in the appeals process.

I find that the Municipality has not provided me with an adequate explanation for the delay in raising the additional discretionary exemptions. The issue of harm to the appellant will be addressed in my discussion of section 38(d) below. In my view, a departure from the 35-day time frame is not justified in the circumstances of this appeal and I will not consider the application of sections 7(1) and 12 in this order.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records at issue and make the following findings:

1. All of the records at issue contain the personal information of the appellant.
2. Pages 38, 43, 44, 45, 46, 47, 55, 66, 67 and 77 of the records contain the personal information of the appellant as well as that of other identifiable individuals.
3. The records contain information which relates to other identifiable individuals which I find does not qualify as their personal information within the meaning of the Act. Rather, this information relates to these individuals acting in their employment or professional capacities.

INVASION OF PRIVACY

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(b), where a record contains the personal information of both the appellant and other individuals, as is the case with Pages 38, 43, 44, 45, 46, 47, 55, 56, 66, 67 and 77 in this appeal, and the Municipality determines that the disclosure of the information would constitute an unjustified invasion of another's personal privacy, the Municipality has the discretion to deny the appellant access to that information. In this situation, the appellant is not required to prove

that the disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the appellant has a right of access to her own personal information, the only situation under section 38(b) in which 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 constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the Municipality must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations which are relevant in the circumstances of the case.

The Municipality submits that the factors listed in sections 14(2)(e) (the individual to whom the information relates will be exposed unfairly to harm), 14(2)(f) (the information is highly sensitive), 14(2)(g) (the information is unlikely to be accurate or reliable) and 14(2)(h) (the personal information was supplied in confidence) are relevant considerations in balancing the appellant's right of access against the protection of the privacy of other individuals. The appellant has not submitted any representations.

I have reviewed Pages 38, 43, 44, 45, 46, 47, 55, 56, 66, 67 and 77 and make the following findings:

1. None of the presumptions provided by section 14(3) have any application to the records at issue in this appeal. The information does not fall within section 14(4) and the appellant has not raised the application of section 16.
2. The personal information in the records may be regarded as highly sensitive within the meaning of section 14(2)(e). In addition, I find that it was supplied to the Municipality implicitly in confidence (section 14(2)(f)). These are considerations weighing in favour of privacy protection.
3. I find that, balancing the appellant's right of access against the right to privacy of other individuals, the disclosure of the personal information contained in Pages 38, 43, 44, 45, 46, 47, 55, 56, 66, 67 and 77 would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. It is, therefore, exempt from disclosure under section 38(b).

DANGER TO MENTAL OR PHYSICAL HEALTH OF THE REQUESTER

Another exception to the general right of access provided by section 36 is contained in section 38(d) of the Act. This section states:

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

that is medical information if the disclosure could reasonably be expected to prejudice the mental or physical health of the individual.

The Municipality submits that the disclosure of the information contained in the remaining records could reasonably be expected to seriously exacerbate the appellant's mental health. The affected person, a psychiatrist who has treated the appellant, concurs with the Municipality's opinion.

Section 38(d) clearly states that the information at issue must qualify as "medical information" for the exemption to apply. I have reviewed the remaining pages of the record and find that only the undisclosed portion of Page 16 and Pages 27, 28, 50, 52, 54, 74 and 75 contain information which qualifies as "medical information" within the meaning of section 38(d). The information contained in these pages consists of the observations or advice of medical professionals and pertains directly to the appellant's mental state. Based on the representations made by the Municipality and the affected person, I am satisfied that prejudice to the appellant's mental health could reasonably be expected to result from the disclosure of the information contained in these records. Accordingly, I find that they are exempt under section 38(d).

The remaining records are not subject to either sections 38(b) or 38(a) and should be disclosed to the appellant.

ORDER:

1. I uphold the Municipality's decision to deny access to the undisclosed portion of Page 16 and Pages 27, 28, 38, 43, 44, 45, 46, 47, 50, 52, 54, 55, 56, 66, 67, 74, 75 and 77 in their entirety.
2. I order the Municipality to disclose to the appellant the remaining records by providing her with a copy by **May 15, 1996** but not before **May 10, 1996**.
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 records disclosed to the appellant pursuant to Provision 2.

Original signed by: _____ April 2, 1996

Donald Hale
Inquiry Officer