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

ORDER M-773

Appeal M_9500748

Metropolitan Licencing Commission

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Metropolitan Licencing Commission (the MLC) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to charges laid under a new by-law provision dealing with so-called "lap dancing". The requester wanted:

- a list of persons charged, when the charge was laid, and the details of each charge contained in the summons information documents;
- court dates and courtroom locations for each charge already laid; and
- ongoing access to information concerning future similar charges.

The requester asked to be provided with all responsive records free of charge.

The MLC identified 19 responsive records. Each record consists of one or more of the following documents, all of which relate to the same incident: Summons Information sheets prepared by the MLC's Enforcement Officers; formal Summons documents issued by the Ontario Court of Justice (Provincial Division); and Reports of Convictions issued by the same court.

The MLC denied access to all records based on one or more of the following exemptions contained in the Act:

- law enforcement - section 8(1)(a)
- invasion of privacy - section 14(1)

The MLC also raised section 15 (information published or available to the public) as the basis for denying access to the court dates and courtroom locations. The MLC advised the requester that by-law charges are heard in open court "... regularly on Monday and Tuesday mornings and all day Wednesday in "K" court at 90 Queen Street West, Toronto", and claimed that he could obtain the requested information from the daily dockets posted outside this courtroom.

As far as the continuing access aspect of the request was concerned, the MLC stated that the Act does not provide for ongoing or future access, and that access to records created after the date of the request letter would have to be the subject of a new request.

The MLC advised the requester that it intended to charge fees in accordance with the appropriate regulations.

The requester (now the appellant) appealed the decision to deny access, and also the MLC's refusal to treat the request as one for continuing access. The appellant also identified a possible public interest in disclosure of the records, thereby raising the potential application of the so-called "public interest override" contained in section 16 of the Act. The appellant did not include the issue of fees within the scope of his appeal.

Mediation was not successful, and this office sent a Notice of Inquiry to the appellant and the MLC. Representations were received from both parties.

DISCUSSION:

INFORMATION PUBLISHED OR AVAILABLE

Section 15(a) of the Act states:

> A head may refuse to disclose a record if,
>
> > the record or the information contained in the record has been published or is currently available to the public;

In its original response to the appellant, the MLC identified the dockets posted outside the courtroom where the charge is heard as a publicly available source of information concerning court dates and courtroom locations. In its representations, the MLC states that all matters which relate to the records have proceeded to court, and have either been dealt with or have been set down for hearings. In the MLC's view, the information contained in the records is available through the court system, and therefore the provisions of section 15(a) apply.

The appellant submits that because a wide range of different by-law charges are covered by the courts identified by the MLC, it would be almost impossible to identify the charges he is seeking. He goes on to state that:

> "It would also require an inordinate amount of time, money and effort to sift through the information. It would constitute a daily fishing expedition, at the end of which there is not guarantee of finding the cases sought."

In Order 170, Inquiry Officer John McCamus discussed the purpose of the discretion conferred by section 22(a) of the Freedom of Information and Protection of Privacy Act (the provincial Act, which is identical in wording to section 15(a)). On Page 108 of that order, Mr. McCamus stated:

> In general terms, the Ministry appears to be correct in suggesting that the purpose of the discretion conferred by section 22(a) relates to questions of convenience. Obviously, there is no other public interest to be served by withholding disclosure of information which is readily available elsewhere. Accordingly, the discretion to disclose is conferred for the evident purpose of enabling a head to avoid disclosure where that process merely involves expending the resources of the Ministry on the photocopying of material which is otherwise readily available and, from the Ministry's point of view, more conveniently available to the requester in another form. It would, on the other hand, be an abuse of the discretion conferred by section 22(a) if the head were to refuse disclosure of information otherwise publicly available where the refusal does not rest on a balance of convenience of this kind and/or where the refusal to disclose will have the effect of refusing to disclose the nature of the information contained in the

> Ministry's records which is thought by the Ministry to be responsive to the request.

I applied this reasoning in Order P-327, where I made the following statement regarding section 22(a):

> In my view, in order for records to qualify for exemption under section 22(a), they must either be published or available to members of the public generally, through a regularized system of access, such as, for example, a public library or a government publications centre.
> ...
>
> In my view, the section 22(a) exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access.

This line of reasoning has been subsequently followed in a number of orders issued by this office.

In the circumstances of this appeal, I find that the specific information sought by the appellant is not readily available through the "regularized system of access" identified by the MLC. As the appellant points out, a number of different by-law matters are heard by the courts identified by the MLC, and, in my view, it is not reasonable to apply section 15(a) where it is clear that the balance of convenience does not favour this method of alternative access.

LAW ENFORCEMENT

The MLC initially claimed that all of the records qualify for exemption under section 8(1)(a) of the Act. In its representations, the MLC withdrew this exemption claim for Records 3, 4, 8, 11, 12, 14 and 15 on the basis that they are no longer the subject of ongoing prosecutions. Section 8(1)(a) reads as follows:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > interfere with a law enforcement matter;

The purpose of this exemption is to provide the MLC with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to interfere with an ongoing law enforcement matter. The MLC bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing and, second, that disclosure of the records could reasonably be expected to interfere with the matter.

In Order M-657, involving the same parties, I found that the by-law enforcement process under Metropolitan Toronto By-law 20-85 qualifies as a "law enforcement proceeding" within the meaning of section 8(1)(b). Applying the same reasoning outlined in my previous order, I find

that the activity leading to the creation of the records at issue in this appeal qualifies as a "law enforcement matter" for the purposes of section 8(1)(a).

The MLC submits that disclosure of those records which are the subject of prosecutions which have not yet been tried could reasonably be expected to interfere with the ability of the MLC to conduct the prosecutions.

The appellant argues that MLC's law enforcement role ends when charges are laid under the by-law, and that disclosure of these records would not interfere with the prosecution of the charges which are conducted in open court. He also points out that basic information surrounding the laying of charges is routinely disclosed by various police forces in the Metropolitan area.

Having reviewed the various types of documents included within each record, I feel that a valid distinction can be drawn between those records that include a Record of Conviction, and those that do not.

In my view, the existence of a Record of Conviction in Records 2, 5, 6, 7, 13, 16, 17, 18 and 19 is strong evidence that the prosecutions are no longer ongoing, and I find that they do not qualify for exemption under section 8(1)(a).

The remaining records, namely Records 1, 9 and 10 do not contain a Record of Conviction or any other evidence that the matter has been disposed of, and in my view, disclosure of those parts which include details of the evidence which will be relied on at trial could reasonably be expected to interfere with the upcoming prosecutions. However, subject to my discussion of the section 14(1) exemption claim which follows, I find that the remaining parts of these records which include the name and address of the defendant, the offence, etc., could not reasonably be expected to interfere, and do not qualify for exemption under section 8(1)(a).

In responding to the appellant's request, the MLC claimed only section 8(1)(a), but raised section 8(1)(b) as an additional discretionary exemption claim for the first time in its representations.

Although I would not normally consider an exemption claim raised so late in an appeal, for the sake of clarity, I want to state that even if I were to apply this new exemption claim, my finding would be the same as that outlined above with respect to the application of section 8(1)(a), in the circumstances of this appeal.

INVASION OF PRIVACY

The MLC claims that the names and other identifying information of women working in adult entertainment parlours and charged under By-law 20-85 constitutes their personal information, and any such records qualify for exemption under section 14(1) of the Act. The MLC's representations state that this type of information appears in all of the records, with the exception of Records 2 and 5. Having reviewed Records 2 and 5, I find that they also include references to women working in these establishments, and because section 14(1) is a mandatory exemption, I will consider the possible application of this exemption claim to all records.

The appellant states: "My position is that names, ages, time, place of infraction and synopsis of event are not personal, but basic information."

Section 2(1) of the Act defines personal information, in part, as "recorded information about an identifiable individual". Having reviewed the records, I accept the submissions of the MLC, and find that the names, addresses, licence numbers and other identifying information relating to the women contained in the records qualifies as their "personal information" for the purposes of section 2(1). None of the records contain the appellant's personal information.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits disclosure of this information unless one of the exceptions listed in the section applies. The only exemption which might apply in the circumstances of this appeal is section 14(1)(f) which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

In situations where an appellant is seeking access to another individual's personal information, the assumption is that the information will not be disclosed, unless the appellant can establish that disclosure **would not** constitute an unjustified invasion of privacy.

In its decision letter, the MLC identifies sections 14(3)(b) and 14(2)(e) as relevant considerations. These two sections read as follows:

14(3)(b) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

14(2)(e) 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,

> the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

The appellant's submissions with respect to section 14(1) deal primarily with issues of public interest, which are relevant to my consideration of section 16 and will be discussed in detail below.

The appellant contends that publication or dissemination of personal information would not constitute an unjustified invasion of privacy, but the only specific reference he makes to any of the considerations outlined in sections 14(2) or (3) of the Act is the following: "And in the issue of [section 14]3(b) which is also claimed, I submit that the very opposite of [MLC's] position applies, that 'disclosure is necessary to prosecute the violation.' "

In my view, the appellant has failed to establish that disclosure of the personal information contained in the records **would not** constitute an unjustified invasion of the privacy of the women working in the various adult entertainment parlours, and I find that the records containing this information qualify for exemption under section 14(1) of the Act and should not be disclosed.

PUBLIC INTEREST

The appellant, who is a member of the media, makes a number of submissions on the issue of public interest, including references to court judgements where privacy rights were considered in the context of the freedom of the press contained in section 2(b) of the Canadian Charter of Rights and Freedoms. In the appellant's view, the Act was not intended to provide blanket protection to those charged with criminal or by-law offences, and that denying him access to the personal information contained in the records restricts him from providing a fair and accurate account of court proceedings. The appellant states:

> I suggest there is a compelling public interest in the disclosure of the record. One, that this issue is of high public interest, namely Adult Entertainment Parlours and two that the greater public interest is in unfettered and unrestrained access to the courts and all documents as may reasonably be produced.

The appellant points out that lap dancing and the conduct of performers and patrons at adult entertainment parlours has received extensive media coverage since 1994, and the fact that By-law 80-25 was amended to specifically address the issue is evidence of significant public interest.

On a broader level, the appellant submits that:

> [T]here is a compelling public interest in a full and open court system and a law enforcement process that is subject to scrutiny, both in the forum of the court and by public agents such as the media.
>
> If a charge is laid the public has a right to know who was charged, when, why and when the accused will have their day in court. They are further entitled to know if the charge was dismissed for any reason and to ascertain whether the conduct of the law enforcement agency in bringing the matter to court was proper.
>
> The media is the public. As such we are acting to ensure the public's right to scrutiny of process.
>
> The Privacy Act's protection of individuals ends when there is a public allegation of wrongdoing.

The MLC submits that a sufficient amount of disclosure is provided through the court system in order to satisfy public interest concerns. In the MLC's view, section 14(3)(b) recognizes public interest considerations by providing that the presumption only applies "... except to the extent that disclosure is necessary to prosecute the violation".

The appellant is asking me to recognize a public interest in two areas: adult entertainment parlours; and a full and open court system.

As far as adult entertainment parlours are concerned, it is true that lap dancing received a considerable amount of media attention in 1994 and 1995, and it is also true that the Municipality of Metropolitan Toronto amended By-law 80-25 specifically to address this issue. However, neither of these facts leads me to conclude that there is a public interest in lap dancing or adult entertainment parlours themselves. In my view, the recognized public interest present in this context is one of public health and safety, and the elimination of situations which constitute an exploitation of women.

The information contained in the records at issue in this appeal say nothing about public health and safety or the exploitation of women, and any connection between the records and these issues is too remote to attract the application of section 16. Further, one of the exemptions which I have found to apply is a mandatory one which reflects one of the primary tenets of the Act. The arguments presented by the appellant are not, in my view, sufficiently compelling to outweigh the purpose of this exemption.

As for the interest in a full and open court system, I believe this interest is valid and important, but there is no evidence before me which indicates that this interest has not been recognized and served by those responsible for courts administration in this province. Certainly, the balance of convenience in this case does not favour the appellant, but, in my view, this does not mean that the interest of openness and access to the court system has not been addressed.

In the circumstances of this appeal, in my view, the appellant has been provided with the degree of disclosure adequate to address any public interest concerns. I find that there is not a sufficient compelling public interest in disclosure of the parts of the records I have found to be exempt under sections 14(1) and 8(1)(a) which would clearly outweigh the purpose of the personal privacy and law enforcement exemptions, and section 16 of the Act does not apply.

I think it would be helpful if I were to make a few brief comments in response to the appellant's apparent suggestion that he has a greater right of access to the information contained in the records because of his status as a member of the media. In my view, this status does not, in itself, represent a public interest under section 16 of the Act, and the appellant has no greater right under the Act to require disclosure of this information than any other member of the public could assert. I find support for this view in Canadian Newspaper Co. v. Isaac (1988), 63 OR (2d) 698 at 704-705 (Div. Ct.), in which the court discussed the right of the press to access to information about the justice system and freedom of the press under section 2(b) of the Canadian Charter of Rights and Freedoms:

> The right of the press under Charter s. 2(b) is no greater than the right of the public to know what goes on in the courts and in public hearings such as inquests. ...
>
> The right to publish what has already been compelled and disclosed is different from the right to compel a disclosure that has not been made to the trier of fact. The Charter does not give the press or the public the right to insist that the coroner

> compel into evidence any fact. The press has a right to report the inquest, not to control its conduct.

Further, in the context of an application for judicial review of IPC Order P-534 (Ontario (Attorney General) v. Fineberg (1994), 19 OR (3d) 197 (Div. Ct.)), a newspaper reporter argued that the freedom of the press provided by section 2(b) of the Charter entails a constitutional right of access to all information in the possession of government, subject to whatever limitations might be justified under section 1 of the Charter. In rejecting this submission, the Divisional Court said (at pp. 203-204):

> The Canadian legal authority to which we were referred essentially centres on freedom of the press in the context of our courts. Thus, cases such as Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, 45 C.R.R. 1, are distinguishable. They deal with the traditional emphasis which has been placed, in our justice system, upon an open court process. The tradition of open courts runs deep in Canadian society, as does the notion that the media are surrogates for the public. It is against this history that the Supreme Court of Canada has concluded that arguments in favour of the right of press to report on the details of judicial proceedings are strong and that restrictions on that right clearly infringe s. 2(b). However, even this right has been confined to access to the court in contrast to information not revealed and tested in open court proceedings.

CONTINUING ACCESS

Section 24(3) of the provincial Freedom of Information and Protection of Privacy Act permits a requester to ask that a request have effect for a specified period of up to two years. No comparable provision exists in the municipal Act, and a requester is therefore required to submit a new request to cover any records created after the date of the original request.

However, it should be noted that records may be released by institutions without formal requests under the Act. This type of routine disclosure has been encouraged by this office as a way of improving customer satisfaction while at the same time reducing costs. I would encourage MLC to consider whether the appellant's ongoing interest in receiving records similar to those considered in this appeal might be handled outside the formal request processes contained in the Act.

ORDER:

1. I uphold the MLC's decision not to disclose Records 8 to 19, which I have found to qualify for exemption under sections 8(1)(a) and/or 14(1) of the Act.

2. I order the MLC to disclose Record 6 in its entirety, and the parts of Records 1, 2, 3, 4, 5 and 7 which are **not** highlighted on the copy of these records referred to in Provision 1 of this order to the appellant by **June 6, 1996**.

3. In order to verify compliance with this order, I reserve the right to require the MLC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2 of this order.

Original signed by: May 17, 1996
Tom Mitchinson
Assistant Commissioner