



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

ORDER MO-1227

Appeals MA-980260-1 and MA-980282-1

City of Toronto



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NATURE OF THESE APPEALS:

The City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy (the Act) for a copy of the following records:

1. all news clipping albums collected by the office of the former North York Mayor Mel Lastman;
2. a list of all items, gifts, personal items etc. that were donated by the former mayor's office and Marilyn Lastman to the City of North York/City of Toronto;
3. all memos and documents relating to the appraisal of the donated items; and
4. all memos and documents relating to any tax benefits derived by the Lastmans from these donations.

The City denied access to any records responsive to Parts 1 and 2 of the request on the basis that they fell within the scope of section 52(2) and therefore outside the jurisdiction of the Act. The requester appealed this decision (Appeal MA-980260-1).

With respect to Parts 3 and 4 of the request, the City identified appraisals submitted by two appraisal companies, and provided these companies with notification of the request, in accordance with section 21 of the Act. Both companies (the affected parties) objected to disclosure of their respective reports. The City then issued its decision to the requester, claiming that the appraisal reports satisfied the requirements of the following mandatory exemptions contained in the Act:

- section 10(1)(a) - third party information
- section 14(1) - unjustified invasion of privacy

The requester also appealed this decision (Appeal MA-980282-1). In addition, he maintained that further records responsive to Part 3 of his request should exist, such as "staff reports or memos relating to the donations, and/or payments by the City to the appraisers for their services".

According to the City, the records at issue in Appeal MA-980260-1 consist of 175 cubic feet of documents dating from 1969 to 1996, including 52 scrap books of newspaper clippings, correspondence, reports, photographs, maps, framed political cartoons, and briefing notes for press conferences and a cable television show. All of these records were provided to the City by Mr. and Mrs. Lastman (the Lastmans) under the terms of a donation agreement entered into by the City and the Lastmans.

The records at issue in Appeal MA-980282-1 consist of a one-page letter from the federal Canadian Cultural Property Export Review Board (the federal Review Board) to the Lastmans, with a one-page appraisal attached; and five appraisal reports, four of which were prepared by the two affected parties, and one which was identified during mediation of this appeal.

A Notice of Inquiry was sent to the appellant, the City, the Lastmans, the two affected parties that were notified by the City at the request stage, and a third company which provided the appraisal report which was identified during mediation. Representations were received from the appellant, the City, Mr. Lastman, and two of the affected parties.

At my request, the City provided a representative sample of records responsive to Appeal MA-980260-1, consisting of approximately 100 pages of cartoons, photographs, letters and other correspondence, campaign material, annotated radio talk show transcripts and annotated reports.

DISCUSSION:

Appeal MA-980260-1

JURISDICTION

The sole issue to be determined in this appeal is whether the 175 cubic feet of records donated to the City by the Lastmans fall within the scope of section 52(2) of the Act. If they do, then all records responsive to Parts 1 and 2 of the request are not accessible under the Act. Section 52(2) reads as follows:

This Act does not apply to records placed in the archives of an institution by or on behalf of a person or organization other than the institution.

The appellant's position is that the records are "public property", having been paid for by the City. He provided a series of payment vouchers obtained from the City for various items purchased between 1993-1998 to substantiate his claim. The appellant submits that the records were collected and compiled by City staff, and do not fall within the scope of section 52(2) because they belong to the City.

The City's representations outline the circumstances that led to the inclusion of the various records in the City Archives:

In mid 1996, the Director of Records and Freedom of Information (the Director), and the City Clerk for the then City of North York approached Mr. Lastman in person and requested he consider donating his personal papers to the Archives of the City of North York. Subsequent meetings were held with Mr. Lastman and Mrs. Lastman (the Lastman family) to discuss a private donation of personal papers and memorabilia relating to approximately 25 years of public service, enterprise and charitable work.

The Lastman family agreed to donate any personal papers and memorabilia which the archivist in her professional opinion believed would be of historical relevance in illustrating the history and development of the City of North York. ...

A private donation agreement was entered into between the parties which made provision for the return of any items which would not form part of the Archives' permanent holdings. Provision was made for the collection to remain closed to public access until ten years following Mr. Lastman's retirement from political life. ...

A review was conducted of the collection to ensure that it did not include any corporate records. I [The City's Director of Corporate Access and Privacy] am advised by the Director of Records and Freedom of Information for the former City of North York that a small number of records were identified as corporate records and removed by her. The remaining textual records which included personal papers, scrapbooks and cartoons donated by the Lastman family were not maintained with corporate records or scheduled as corporate records. ...

The practice in the former City of North York related to the personal papers of politicians is consistent with practices in the seven former cities which make up the amalgamated City of Toronto. The personal papers of politicians which include their constituency work, annotated textual records and election campaign material are not maintained or scheduled as corporate records. ...

The City further states that the National Archival Appraisal Board rendered its professional opinion that the Lastman donations are of archival significance because they illustrate the style, personality and opinions of Mr. Lastman. The City also points out that the federal Review Board deemed the donated documents to be of national significance due, at least in part, to the personal notations made by Mr. Lastman on various transcripts and reports, and the value these records have in outlining the mayor's personal perspective and insight into public events, issues and debates during his long term as mayor of North York.

I am in agreement with the City's position on this issue. The City was aware of the importance of distinguishing corporate records from personal records, and in fact removed some corporate records during the course of discussions with the Lastmans. There would appear to be an established practice within the City of soliciting and obtaining personal papers of politicians, as evidenced by samples of comparable donation agreements with other former elected officials provided by the City with its representations. In my view, the Lastmans' donation is no different, and I accept the view put forward by the City that the ability to acquire private donations of personal papers of elected officials is important to the future of public archives. The inclusion of section 52(2) in the Act recognizes that an institution's archives will, in some instances, house documents other than official corporate records. In my view, personal papers donated by politicians, such as the records at issue in this appeal, are one such category of records.

Having reviewed the sample records, the Lastmans' donation agreement, the City's representations and the circumstances under which the records were donated by the Lastmans, I find that the records responsive to Parts 1 and 2 of the appellant's request were placed in the City's archives by or on behalf of a person other than the institution (ie. the Lastmans). Therefore, they fit within the scope of section 52(2) and fall outside the jurisdiction of the Act.

Appeal MA-980282-1

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name if it appears with other personal information relating to the individual (paragraph (h)).

The records at issue in Appeal MA-980282-1 consist of five appraisal reports outlining the fair market value of a private collection of records belonging to the Lastmans; and a one-page letter from the federal Review Board to the Lastmans, and attachment, which set out the tax benefit to be realized by the Lastmans in return for making the private donation.

I have determined that the records covered by the donation agreement between the Lastmans and the City are not corporate records, and fall within the scope of section 52(2) because they are personal in nature. The appraisal reports at issue in this appeal deal with these same records, and include itemized valuations of each donated item. The letter from the federal Review Board to the Lastmans, and the attached appraisal, reflect that Board's determination of the tax implications of the donation. Taken together, the letter and attachment authorize the City to issue a tax receipt to the Lastmans, which can be used as tax credits for a gift to charity on their personal income tax returns.

The records at issue in this appeal contain information relating to the estimated value of the Lastmans' personal property and the impact of this valuation on their personal income taxes. In my view, this is clearly recorded information about Mr. and Mrs. Lastman, and falls within the scope of the definition of "personal information" referred to above. The records do not contain the personal information of the appellant or any other identifiable individuals.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits disclosure of this information to any person other than the individual to whom the information relates, except in certain circumstances. The only exception with potential application in the circumstances of this appeal is section 14(1)(f) which permits disclosure only if it would not constitute an unjustified invasion of personal 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. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The Ontario Court of Justice (General Division) Divisional Court determined in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, that the only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption.

The City relies on the section 14(3)(f) presumption in support of its position that disclosure would constitute a presumed unjustified invasion of privacy. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

describes an individual's finances, income, assets, liabilities, net worth,
bank balances, financial history or activities, or creditworthiness;

The City submits that the items listed in the appraisal reports, together with the fair market value attributed to each of them, constitutes a description of the Lastmans' assets. The City also points out that the letter from the federal Review Board, and attachment, set out the tax benefit to be derived from the donation, which also describes the Lastmans' finances and assets.

I agree with the City's position, and find that the presumption in section 14(3)(f) applies to the personal information contained in the records. None of this personal information falls under section 14(4), and the appellant has not raised the possible application of section 16 of the Act.

The appellant's representations focus on his view that the records are public property, not personal information of the Lastmans. He does not specifically address the issue of whether disclosure of these records, if they do contain personal information, would constitute an unjustified invasion of privacy. In the absence of representations from the appellant, or any other evidence weighing in favour of a finding that disclosure of the personal information would **not** constitute an unjustified invasion of the Lastmans' personal privacy, I find that it would.

Accordingly, I find that all records at issue in Appeal MA-980282-1 qualify for exemption under section 14(1) of the Act.

Because of this finding it is not necessary for me to consider the possible application of section 10(1)(a) of the Act.

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and an institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The Act does not require the institution to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the institution (the City, in this case) must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Part 3 of the appellant's request is worded as follows:

all memos and documents relating to the appraisal of the donated items

In his letter of appeal, the appellant states that further records responsive to Part 3 of his request should exist. He specifically identifies records such as "any staff reports or memos relating to the donations and/or payments by the City to the appraisers for their services."

In my view, any staff reports or other documents relating to the donations, and any records reflecting payments by the City to the affected parties for their appraisal services, if they exist, would fall within the scope of the part of the appellant's request.

The City's representations on the search issue include affidavits sworn by the Director of Records and Archivist of the former City of North York (the former Director) and the City's current Director of Corporate Records Systems and City Archivist (the Archivist). Both of these individuals were directly involved in issues regarding the Lastmans' donation and the search for records responsive to the appellant's request.

The former Director states:

I was advised of the [appellant's] access request by [the Archivist] and was requested to assist in ensuring that all records responsive to the request had been identified and produced for review. Discussions were held with the Manager of Archival Services and with the Director of Corporate Access & Privacy on the locations searched and the records identified as responsive. The records identified and produced for review are consistent with my knowledge as to the location and existence of responsive records.

I was advised by the Director of Corporate Access & Privacy that the appellant had asserted that there should be correspondence from the former City of North York to the Lastman family which outlines the request to make a private donation and the amount of a tax benefit which the Lastman family could expect to be derived from the donation.

The request to the Lastman family was made in person and not in writing and no promises or assessments related to the amount of tax benefit were made by me at any time or in my presence at any time. Discussions about the proposed collection were held in person with the Lastman family and not in writing due to the close physical proximity of the parties and the personal nature of the discussions. The Lastman family did not receive a benefit of any kind from the City of North York for the private donation.

The Archivist states in his affidavit:

As the Director responsible for the City of Toronto Archives, I was requested to locate and provide records responsive to the request and, particularly, copies of any appraisal reports or similar documents. The Director of Corporate Access and Privacy (the Director) also requested provision of any records relating to any tax benefit derived by the Lastman family.

I advised the Director that the majority of the records requested consisted of a private donation of personal papers by the Lastman family and were located on site at the North York Civic Centre in the inactive records storage facility.

A search for appraisal records and records relating to tax benefits derived by the Lastman family was conducted under my direction at the North York Civic Centre by the Manager of Archival Services (the Manager) who was located on site. ... Copies of the appraisal reports and records relating to tax benefits were identified and produced for review.

The search included contacting [the former Director] for information on any other areas of potential search for responsive records. No additional areas of search were identified and I was advised that no other responsive records beyond those which had been produced for review existed.

During the course of mediation, I was advised by the Director of Corporate Access & Privacy that the appellant was of the opinion that there should be additional records relating to the appraised value of the collection and the tax benefits to be derived by the Lastman family. I was advised the appellant believed there should be correspondence from former North York City officials to the Lastman family requesting a donation to the Archives and setting out the amount of the tax benefit which would be derived from the donation.

I advised the Director of Corporate Access & Privacy that all identified records relating to appraised value and tax benefits had been produced for review. As it is the Canadian Cultural Property Export Review Board which determines the tax benefit, if any, to be derived, an Archivist is not in a position to assess or promise a tax benefit on behalf of the federal government. The number of appraisal reports located and the two records setting out the tax benefit are consistent with the records an archivist would expect to find in the present case.

Based on the evidence provided by the City, I am satisfied that the City has made reasonable efforts to locate any “staff reports or memos relating to the donations”, and I dismiss this part of the appeal.

As far as records relating to “payments by the institution to the appraisers for their services” is concerned, the City states in its representations:

At no time was there any discussion of a request for access to records of any payments by the City to the appraisers.

It is clear from the appellant’s letter of appeal that he felt payment records for the appraisal reports fell within the scope of his request and had not yet been identified by the City. However, the Report of Mediator makes no specific reference to these particular records, and it is unclear whether the contents of the letter of appeal were discussed during mediation. In my view, whether discussions of this nature took place is not relevant in the particular circumstances of this appeal. It is clear from the wording of the appellant’s original request that he is interested in receiving access to “all memos and documents relating to the appraisal of the donated items” which, in my view, would reasonably include records dealing with payments for appraisal services. In the absence of any evidence or representations establishing that records relating to payments made by the City to the affected parties for appraisal services were not or are no longer at issue, I find that they are responsive to the request.

Consequently, I find that the search by the City for records relating to Part 3 of the appellant’s request, particularly any records reflecting payments made by the City to the affected parties, was not reasonable. Therefore, I will include a provision in this order requiring the City to conduct further searches to ensure that all responsive records have been identified.

ORDER:

1. I uphold the City’s decision to deny access to the records at issue in these appeals.

2. I order the City to conduct further searches for additional records responsive to Part 3 of the appellant's request. These searches should include, at a minimum, records of any payments by the City to the three affected parties for appraisal services.
3. I order the City to communicate the results of this search to the appellant by sending him a letter summarizing the search results on or before **August 31, 1999**.
4. If additional responsive records are located, I order the City to issue an access decision concerning those records in accordance with sections 19, 21 and 22 of the Act, treating the date of this order as the date of the request.
5. I order the City to provide me with copies of the correspondence referred to in Provisions 3 and 4, as applicable, by forwarding a copy to me when it sends this correspondence to the appellant.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

_____ August 17, 1999