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

ORDER MO-2028

Appeal MA-040373-3

Toronto Community Housing Corporation

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NATURE OF THE APPEAL:

The Toronto Community Housing Corporation (the TCHC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from one of its tenants for access to her "complete tenancy file", including "all police reports, all complaints made against our family and all complaint letters we made against other tenants". Following the processing of two "deemed refusal" appeals by the Commissioner's office, the TCHC issued a decision letter to the requester in which it stated that:

> Partial access has been granted to the requester's tenant file which is contained in 2 separate consignments, named "Batch A" and "Batch B". Batch A contains 623 pages and refers to the records relevant to the previous FOI request. Batch B has 173 pages and includes the records filed since the finalization of the previous FOI request.
>
> Severances pursuant to sections 7 [advice or recommendations], 12 [solicitor-client privilege] and 14 and 38 [invasion of privacy] of the *Act* have been applied in part or fully to the specified pages of Batch A and B.

The TCHC further advised that a fee of $133.80 was requested for photocopying 518 pages from Batch A and 151 pages from Batch B.

Later, the TCHC issued a revised decision, advising that new severances pursuant to section 7, 12 and 14 of the *Act* had been applied to certain records and portions of records in Batch A. The TCHC further advised that additional records from both Batches A and B were being released in their entirety. Upon payment of the required fees, the requester was provided with copies of these records.

It must be noted that the records which comprise Batch A were the subject of an earlier appeal, and access issues were adjudicated upon in Order MO-1584-F, dated November 4, 2002.

The requester, now the appellant, appealed the TCHC's decision to deny access to the undisclosed records, and parts of records.

During mediation, the TCHC agreed to disclose one additional record from Batch B [Record 11] and withdrew its reliance on section 7(1) with respect to Record 108, claiming instead that this record is not responsive to the request. Also during mediation, the Mediator appointed by the Commissioner's office contacted four individuals whose interests may be affected by the disclosure of the information contained in the records. Three of these individuals refused to consent to the disclosure of their personal information to the appellant and the other individual did not respond.

As further mediation was not possible, the matter was moved to the adjudication stage of the process. On several occasions I sought the representations of the TCHC, but failed to receive a response of any kind. I then sought and received the representations of the appellant.

RECORDS:

The records comprising Batch A comprise some 623 pages of correspondence, memoranda and other documents. The records which form Batch B consist of 173 pages of correspondence, memoranda, reports and draft documents.

PRELIMINARY ISSUES:

Need I re-adjudicate the access issues decided in Order MO-1584-F?

In Order MO-1584-F, Adjudicator Sherry Liang made a determination respecting the applicability of the exemptions in sections 7(1), 12 and 38(b) to a number of records which are now at issue in this appeal. Specifically, these are the records that comprise Batch A of the records at issue. In the Notice of Inquiry that I provided to the appellant, I asked her to provide me with representations on whether any useful purpose would be served in re-visiting the issues addressed in Order MO-1584-F in the current appeal. In response, the appellant indicates that she has now "seen some of the severed material" and has not "acted in any manner consistent with a reprisal".

The issue before Adjudicator Liang was not whether the records ought to be withheld from the appellant on the basis that she would cause harm to the individuals whose personal information was contained in the Batch A records. Rather, the adjudication concerned whether the information was exempt from disclosure on the basis that it fit within one or more of the exemptions in the *Act*.

Addressing the question of issue estoppel in Order MO-1907, Adjudicator Liang quoted with approval from a decision of former Inquiry Officer Anita Fineberg in Order P-1392 in which she stated:

> In addition, the Commissioner's office may dismiss an appeal pursuant to section 52(1) without conducting an inquiry. One of the circumstances in which this may be done is if the appeal involves the same parties, issues and records which had previously been considered.

Adjudicator Liang went on to conclude her analysis as follows:

> I agree with the above analysis and adopt it for the purposes of this appeal. This appeal and Appeal No. MA-010272-2 involve the same institution (the Board) and the same appellant. Orders MO-1574-F and 1595-R, issued in the context of Appeal No. MA-010272-2, decided the issue of the appellant's entitlement to have access to a number of records, approximately 80 of which are also before me. Whether as a matter of issue estoppel, or the application of section 41(1) (the equivalent to section 52(1) of the provincial *Act)*, I find that the policy of judicial finality would be undermined if I were to review the issue of access to these 80

> records once again. These records are therefore excluded from the scope of this appeal.

Similarly, in the present appeal, issues surrounding the application of the exemptions in the *Act* to all of the records that comprise Batch A were addressed in Order MO-1584-F. I find that the appellant has not provided me with a reasonable basis for concluding that any useful purpose would be served by making another determination as to whether the records that comprise Batch A remain exempt from disclosure. I am not satisfied, based on the appellant's submissions in this regard, that any significant reason exists for re-adjudicating this question. Accordingly, I find that the Batch A records are excluded from the scope of this inquiry.

Are Records 108 and 109 responsive to the request?

During the mediation stage of the appeal, the TCHC indicated that, in its view, Records 108 and 109 were not responsive to the appellant's request. The appellant takes the position that because these records appear in her file, they must be responsive to her request.

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose of spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

I have reviewed the contents of Records 108 and 109 and find that they do not contain information that is responsive to the appellant's request. These documents address a property maintenance item that has no relation to the appellant or her dealings with the TCHC. I can only conclude that they were included in her file in error. As a result, I find that Records 108 and 109 are not responsive to the request and I will not be addressing them further in this decision.

Alternative access to the records

With her representations, the appellant provided me with copies of a number of documents that have been disclosed to her as part of the disclosure process during the course of her litigation with the TCHC and its predecessors. The appellant included copies of the following records:

- Record 19 (which is the same as Records 51 and 107), a letter from a representative of City Home to an identified individual, written in response to Records 20 to 23;
- Records 20 to 23 (which is the same as Records 31 to 34 and 124 to 125), dated March 6, 1997 from an identified individual to City Home;
- Records 15 to 17 (which is the same as Records 48 to 50 and 150 to 152), dated October 26, 2004 from an identified individual to the TCHC;
- Record 149, a memorandum from the same identified individual from the TCHC's Property Managers dated January 29, 2005

These records comprise the majority of the remaining records at issue and the appellant states that they came into her possession through the disclosure process in the course of her litigation with the TCHC before the Ontario Rental Housing Tribunal.

Previous orders have identified that an absurd result would occur in situations where the requester originally supplied the information, or the requester is otherwise aware of it, because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]

- the requester was present when the information was provided to the institution [Orders M-444, P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378]. In my view, no useful purpose would be served by making a determination as to whether the exemptions claimed apply to these records. The appellant has complete copies of them and the information which the records contain is, accordingly, clearly within her knowledge. In my view, it would be an absurd result for me to make a finding that she is not entitled to access to them under the *Act* when she clearly already

has them in her possession. Accordingly, I will order the TCHC to provide the appellant with copies of the records described above.

DISCUSSION:

The records remaining at issue consist of Records 27, 69, 70, 71 and 77 (all of which are complaints relating to other tenants in the appellant's building), the undisclosed portions of Record 61 (a memorandum), Record 117 (a draft letter to the appellant's counsel from the TCHC's counsel) and the undisclosed portions of Record 139 (a letter to the appellant with additional handwritten notes).

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

> (h) the individual's name if 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of "about" the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The meaning of "identifiable"

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

I have reviewed the contents of the remaining records and make the following findings:

- Records 27, 69, 70, 71 and 77 contain only the personal information of other tenants in the building occupied by the appellant. None of the records contain any information that relates to her.
- Record 61 does not contain the personal information of any identifiable individuals; the telephone numbers included in the record are not the personal information of the individuals to whom they relate as the numbers represent their business, as opposed to their personal or home, telephone numbers;
- Records 117 and 139 contain only the personal information of the appellant.

INVASION OF PRIVACY

The TCHC has applied the mandatory exemption in section 14(1) to the personal information in Records 27, 69, 70, 71 and 77. Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. However, if the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section

14. In the circumstances, it appears that the only exception that could apply is paragraph (f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). The TCHC has not claimed the application of any of the presumptions in sections 14(3) to the personal information in Records 27, 69, 70, 71 and 77 and I find that none of them apply.

The appellant takes the position that the considerations that weigh in favour of access listed under sections 14(2)(a), (b) and (d) apply. These sections state:

> 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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
> >
> > (b) access to the personal information may promote public health and safety;
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

The appellant has not, however, provided me with any additional evidence or argument to substantiate her contention that these considerations have any relevance to the weighing of her right of access against the privacy rights of the individuals whose personal information is contained in Records 27, 69, 70, 71 and 77.

In the absence of any factors weighing in favour of disclosure under section 14(2), I find that the disclosure of the personal information contained in these records would result in an unjustified invasion of personal property and Records 27, 69, 70, 71 and 77 are exempt from disclosure under section 14(1).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/ADVICE OR RECOMMENDATIONS

The TCHC denied access to portions of Records 61 and 139 on the basis that they are exempt from disclosure under section 7(1). Because of my finding that Record 139 contains the personal information of the appellant, I must determine whether the undisclosed information in that document qualifies for exemption under section 38(a), taken in conjunction with section 7(1).

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal applied for S.C.C. 31226; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224]

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions

- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal applied for S.C.C. 31226]

I have reviewed the contents of both Records 61 and 139 and find that the undisclosed portions of these records do not contain information that qualifies as "advice or recommendations" for the purposes of section 7(1). In each case, the undisclosed portions simply direct the recipient of the handwritten notation to review the document (in the case of Record 139) or comment on the contents of certain attachments (in the case of Record 61). In my view, in neither case does the information conveyed in the messages meet the requirements of section 7(1) and the undisclosed information cannot properly be described as "advice or recommendations" for the purposes of that exemption.

Accordingly, I will order that both Records 61 and 139 be disclosed to the appellant, in their entirety.

SOLICITOR-CLIENT PRIVILEGE

The TCHC argues that Record 117, a draft of a letter from the TCHC's Senior Legal Counsel to a legal representative of the appellant, is exempt from disclosure under the litigation privilege aspect of section 12. Because I have found that this record contains the personal information of the appellant, I must determine whether it qualifies for exemption under section 38(a), taken in conjunction with section 12.

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. The TCHC must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

I have reviewed Record 117, a draft letter prepared by the TCHC's Senior Legal Counsel responding to a letter received from a legal representative of the appellant. I find that the record was prepared for the dominant purpose of litigation, namely the proceeding involving the appellant before the Ontario Rental Housing Tribunal. I further find that Record 117 was prepared as part of counsel's efforts to conduct or aid in the conduct of litigation that was then, and remains still, on-going.

Accordingly, I find that Record 117 qualifies for exemption under the litigation privilege aspect of Branch 1 of section 12. Because Record 117 contains the personal information of the appellant, I find that it is exempt from disclosure under section 38(a).

ORDER:

1. I order the TCHC to provide the appellant with Record 19 (which is the same as Records 51 and 107), Records 20 to 23 (which is the same as Records 31 to 34 and 124 to 125), Records 15 to 17 (which is the same as Records 48 to 50 and 150 to 152), Record 149 and Records 61 and 139 by providing him with copies by **April 12, 2006,** but not before **April 5, 2006**.

2. I uphold the decision of the TCHC to deny access to Records 27, 69, 70, 71, 77 and 117.

3. In order to verify compliance with the requirements of Order Provision 1, I reserve the right to require the TCHC to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: March 8, 2006
Donald Hale
Adjudicator