
PRIVACY COMPLAINT REPORT
PRIVACY COMPLAINT MC-000029-1
City of Greater Sudbury

June 26, 2001

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PRIVACY COMPLAINT NO. MC-000029-1

MEDIATOR: Alex Kulynych

INSTITUTION: City of Greater Sudbury

SUMMARY OF COMPLAINT:

This investigation was initiated as a result of a privacy complaint, filed jointly by three individuals.

The three complainants are currently employed by the City of Greater Sudbury (the City). All three have an ongoing grievance against the City, formerly the Regional Municipality of Sudbury. The grievance relates to the complainants' vacation entitlements. Prior to working for the City, the complainants were employed by the Ministry of Community and Social Services (MCSS). They had filed a separate grievance against MCSS and this grievance is now concluded.

On October 4, 2000, when the MCSS grievance was still active, MCSS presented the information at issue in this complaint at a Grievance Settlement Board hearing. This information was provided to MCSS by the Regional Municipality of Sudbury (now the City). The complainants had commenced employment with the City by that time. The complainants' position is that the City disclosed their personal information to MCSS in contravention of the *Municipal Freedom of Information and Protection of Privacy Act* (the Act).

The information at issue consists of three documents:

- a Grievance Form dated October 1, 1999, showing the employer as the Regional Municipality of Sudbury;

- a memorandum dated September 10, 1999, from one of the complainants to an individual in the Regional Municipality of Sudbury's Human Resources Department; and
- a grievance response dated November 26, 1999, from the Regional Municipality of Sudbury's Director of Human Resources to the Vice President of a C.U.P.E. Local.

DISCUSSION:

PRELIMINARY ISSUE

Jurisdiction to Investigate Privacy Complaints

In providing its response to the complaint, the City raised an issue relating to the jurisdiction of the Commissioner to investigate privacy complaints against institutions covered by the *Act*, more specifically, jurisdiction to appoint a Mediator to investigate the complaint. The City states simply, "[F]urther, there is no appeal provision under the Act authorizing the Information and Privacy Commissioner/Ontario to appoint a mediator to investigate this dispute".

With respect to her jurisdiction to investigate privacy complaints, the Commissioner wrote the following in her Investigation Report concerning Investigation I98-018P (Ministry of Health):

[I]n the 1993 judgment in *John Doe v. Ontario (Information & Privacy Commissioner)*, 13 O.R. (3d) 367, recently cited with approval by the Ontario Court of Appeal in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, [1998] O.J. No. 3485, the Ontario Divisional Court described the Commissioner's general supervisory role under the legislation, including my reporting function to the legislature, in the following terms:

Under the [provincial] *Act* . . . the adjudicative function is performed by the same person who administers the specialized area of regulatory activity. Such adjudicative function... is integral to the supervision of its specialized area of regulatory activity. The commissioner exercises a supervisory function in respect of compliance by government institutions with provisions of the *Act* and has exclusive jurisdiction to review the decision of a head of an institution under the *Act* relating to a request for access (ss. 4 and 50).

.....

The commissioner is also given administrative and adjudicative responsibility for access to government information on the one hand, and the protection of individual privacy on the other. Under the scheme of the *Act*, the commissioner is responsible for five overlapping and integrated activities: reviewing government decisions concerning the dissemination of information;

investigating public complaints with respect to government practices in relation to the use and disclosure of personal information; reviewing government administrative and records management practices; conducting research and giving advice on issues related to access and privacy; and educating the public concerning privacy and access issues.

The operation of this comprehensive statutory scheme has been documented in annual reports provided by the commissioner to the Legislative Assembly pursuant to s. 58.

The Ministry is correct in suggesting that representations from the public in the form of complaints are the most frequent means by which issues of non-compliance with Part III of the *Act* come to my attention. However, section 59(f) is not the basis for my authority to conduct compliance investigations and make my investigation reports. That authority is found at section 58 of the *Act*.

Section 58(1) requires that I make an annual report to the Speaker of the Legislative Assembly to be laid before the Assembly when it is in session. The contents of my annual report are set out at section 58(2) of the *Act*. This requires that I provide a comprehensive review of the effectiveness of the provincial and municipal *Acts* in providing access to information and protection of personal privacy, including my assessment of the extent to which institutions are complying with the legislation and my recommendations with respect to the practices of particular institutions. Apart from imposing this general duty to report, the Legislature has left it to my Office to determine and adopt the administrative processes deemed necessary or advisable to fulfil my statutory obligations in this regard.

In order to make my report to the Legislature, I require information concerning questions of compliance which arise, as well as an adequate understanding of the institution's position on compliance necessary to make this a meaningful exercise. Accordingly, my Office has developed an investigation process by which information concerning complaints of non-compliance with the legislation is provided by institutions and members of the public on a voluntary and responsible basis. Therefore, the effectiveness of my supervisory role and the usefulness of my annual reports in matters of compliance depend largely on the co-operation I receive from institutions when I am conducting compliance investigations.

In many cases, privacy complaints can be resolved informally without my having to undertake an investigation or make a report on the results of an investigation. Other complaints may warrant a more complete examination of the facts and the production of a report reflecting my views on an institution's compliance with the *Acts*. Where I am of the opinion that an institution is not in compliance, my report will usually make recommendations on how the institution should endeavour to comply with its obligations in the future. My recommendations do not bind the

institution to take specific steps, but are designed to assist it in fulfilling its duties under the legislation in order to remain in compliance.

My privacy complaint investigations and reports form the principal basis for making my annual reports to the Legislative Assembly on the effectiveness of the *Acts* in protecting personal privacy. My annual reports summarize the facts and circumstances of selected investigations, including my findings on compliance, my recommendations to institutions, and their responses on the implementation of my recommendations, and provide other information concerning my activities in monitoring the compliance of institutions with the legislation. My annual reports also refer the Legislature and other readers to the text of my investigation reports, which are made available to the public through my Office Web site (www.ipc.on.ca), and various reporting services.

My privacy investigations and reports on questions of compliance have proved to be an effective, efficient and fair method of fulfilling my obligations to report annually to the Legislature. They also contribute greatly to my ability to perform my other "overlapping and integrated activities," in making sound recommendations on proposed revisions to the *Acts* and regulations, and offering informed comment on the privacy protection implications of proposed legislative schemes and government programs, all in furtherance of my duties set out at sections 58(2)(c) and 59(a) of the *Act*. Without the cumulative knowledge and experience with the legislation which my investigation reports represent, the public and the Legislature would be deprived of one of the principal benefits of the legislation, namely, the expert advisory and supervisory role of an independent Commissioner concerning issues of compliance with the legislation. Further, if I were to accept the Ministry's arguments, the Legislature would not have the benefit of the Commissioner's choice of the most effective means of performing my statutory duties, and I would be impeded in my ability to report fully, accurately and fairly under section 58 of the *Act*. In my opinion, this cannot possibly have been the legislative intent.

Accordingly, I have the jurisdiction to proceed to make my report, which you will find below.

As stated above, the Legislature has left it to the Commissioner to determine and adopt the administrative processes deemed necessary or advisable to fulfil her statutory obligations with respect to section 58 of the provincial *Act*. The Commissioner has determined that the involvement of a Mediator in the investigation of privacy complaints forms part of that process and assists her in fulfilling her obligations under section 58 of that *Act*. The Commissioner's responsibilities in this regard have equal application under the municipal *Act*.

Accordingly, I agree that the Commissioner has the jurisdiction to investigate the complaint which initiated this investigation, and to issue a report, and I conclude that the use of a Mediator in this investigation forms part of the process determined appropriate by the Commissioner to fulfil her statutory obligations.

ISSUES ARISING FROM THE INVESTIGATION

The following issues were identified as arising from the investigation:

- (A) Does the *Act* apply to the information at issue?
- (B) If the answer to (A) is yes, is the information in question the complainants' "personal information," as defined in section 2(1) of the *Act*? If yes,
- (C) Did the Ministry disclose the personal information in compliance with section 32 of the *Act*?

RESULTS OF THE INVESTIGATION

Issue A: Does the *Act* apply to the information at issue?

The Municipality's position is that section 52(3) of the *Act* applies in the circumstances of this complaint and that the *Act* does not apply to the information at issue. Sections 52(3) and 52(4) of the *Act* state:

52(3) Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

52(4) This *Act* applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction.

Section 52(3)3

In order to fall within the scope of paragraph 3 of section 52(3), the City must establish that:

1. the record was collected, prepared, maintained or used by the City or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the City has an interest.

[Order P-1242]

Parts One and Two of the Test

Based on my review of the records, I am satisfied that they were collected, prepared, maintained or used by the City. All three records are either addressed to, or written by, a representative of the City. Based on the contents of the records, I am also satisfied that the collection, maintenance, preparation or use of the records was in relation to meetings, consultations, discussions or communications about the complainants' vacation entitlement and their related grievance. Accordingly, the first two components of the test have been met.

Part Three of the Test

Both the complainants and the City confirm that the grievance against the City is ongoing. The City further advises that it is relying on the three records at issue during the grievance process.

I have reviewed the records at issue in this complaint and conclude that they relate to the grievance proceedings undertaken by the complainants. In my view, these records relate to "labour relations or employment related matters" within the meaning of section 52(3)3. I must now determine whether the City has the requisite "interest" in the records.

It has been established in orders issued by this Office that an "interest" for the purposes of section

52(3)3 is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter must have the capacity to affect the City's legal right or obligations (Orders M-1147, P-1242 and MO-1344).

A number of orders have considered the application of section 52(3)3 (and its provincial equivalent in section 65(6)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" being engaged (see, for example, Orders P-1575, P-1586, M-1128, M-1161, PO-1718, PO-1782, PO-1797 and PO-1814). Specifically, this line of orders has held that an institution must establish an interest, in the sense that the matter has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has the requisite interest. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2000] O.J. No. 1974 (Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.).

Unlike the circumstances in the orders mentioned above, the grievance in the present case is ongoing and the parties remain actively involved. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter, which would diminish or remove the City's legal interest, do not apply in this case.

I find that the City has the requisite degree of interest in the records, which relate directly to the current grievance filed by the complainants. In my view, the subject matter of these records has the capacity to affect the City's legal rights or obligations as contemplated by section 52(3)3. The City's legal interest in this matter remains current as the grievance remains ongoing.

As all three requirements of section 52(3)3 have been met, I conclude that all of the records at issue in this complaint fall within the ambit of that section and are, therefore, outside the scope of the *Act*. In addition, I find that none of the exceptions provided by section 52(4) apply in the circumstances of this complaint.

The Complainants submit that because their situation involves two separate institutions (MCSS and the City), section 52(3) cannot apply. They state:

(T)he core basis of our position is that Section 52(3) of MFIPPA is simply not applicable to our situation as it speaks to circumstances involving one institution and:

1. Proceedings or anticipated proceedings.....**labour relations or to the employment of a person by the institution.**
2. Negotiations or.....**employment of a person by the institution between the institution and a person, bargaining agent or party.....**
3. Meetings, consultations, discussions or communications about labour relations or **employment related matters in which the institution has an interest.**

We are not dealing with a situation that involves one "institution" in relations to the above provisions, but one that involves **two "institutions"**, the Regional

Municipality of Sudbury and our former employer, the Ministry of Community and Social Services. Our submission and position would be that Section 52(3) speaks to circumstances occurring under the umbrella of one institution only. Clearly in our case, we have one institution disclosing/exchanging private information to a second institution that is quite frankly irrelevant and unrelated to the other institution.

[B]oth grievances are mutually exclusive and unrelated and we fail to see how our situation meets the provisions described in Section 52(3) which, once again, speaks to circumstances occurring under the umbrella of **one institution**.
(complainants' emphasis)

When dealing with privacy complaints, I must consider the relationship between the complainants and the institution against which the complaint is filed. The present complaint is against the City. The City has custody of or control over the records at issue. The records are being used by the City in an ongoing grievance, expected to be heard before the Ontario Labour Relations Board. The fact that the City provided another institution with a copy of the records is not relevant in the determination of whether section 52(3) of the *Act* applies in this case. Had I concluded that section 52(3) did not apply and the Commissioner had jurisdiction to deal with the records at issue, my findings would have been directed at whether the City disclosed the complainants' personal information to MCSS in contravention of the *Act*.

Because of my finding with respect to Issue (A), it is not necessary to address Issues (B) and (C).

CONCLUSION:

1. The Commissioner does have jurisdiction to investigate privacy complaints against institutions covered by the *Act* and to appoint Mediators to investigate the complaints,
2. Section 52(3)3 of the *Act* applies in the circumstances of this complaint. The records are excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction.

Original signed by: Alex Kulynych, Mediator
June 26, 2001