



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

ORDER M-86

Appeal M-9200179

The Municipality of Metropolitan Toronto



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Municipality of Metropolitan Toronto (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for "all information relating specifically to myself such as personnel/personal files, log notes, etc. which are being held by the Metropolitan Corporation". The Municipality responded to the request by providing access to all of the records requested with the exception of six specified records. Access to these six records was denied on the basis of section 12 of the Act.

The requester appealed the Municipality's decision to deny access to the six records.

In the course of mediation, one of the six records originally denied to the requester was provided to the requester. Access to the other five records was not provided. Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Municipality was sent to the appellant, the Municipality, and the authors of the records (the affected persons). Written representations were received from the appellant, the Municipality, and one of the affected persons.

In its representations, the Municipality indicated that its discretion to deny access to the records was exercised under section 38 of the Act.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by sections 12 and 38(a) of the Act applies.
- C. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.

Section 2(1) of the Act defines "personal information", in part, as follows:

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

...

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

...

- (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;

I have examined the records in issue in this appeal and, in my view, they contain personal information that relates both to the appellant and other identifiable individuals.

Section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of institutions covered under the Act. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access, including section 38(a) of the Act, which reads as follows:

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

if section 6, 7, 8, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information; (emphasis added)

I will now consider whether the exemption provided by section 38(a) applies to any of the records, by virtue of the application of section 12.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by sections 12 and 38(a) of the Act applies.

Under Issue A, I found that the records contain the personal information of the appellant. The Municipality claims that these records qualify for exemption under section 12 of the Act. Section 12 of the Act reads as follows:

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.

This section consists of two branches, which provide the Municipality with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which 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 (Branch 2).

The Municipality claims that the records qualify for exemption under the second branch of the section 12 exemption.

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Orders 210, M-2, M-19]

The records consist of five memoranda prepared by employees of the Municipality with respect to an incident which occurred at the Municipality on November 13, 1991. This incident later became the subject of a grievance proceeding, filed by the appellant against the Municipality on December 9, 1991. Four of the records are dated prior to December 9, 1991, and the fifth record is dated December 11, 1991.

The Municipality submits that the four records dated prior to December 9, 1991, were prepared for counsel employed by the Municipality in contemplation of litigation, and the fifth record was prepared for counsel at a point in time when the appellant's grievance had already been initiated, and it was prepared for use in litigation.

The question of what constitutes "in contemplation of litigation" was considered by former Commissioner Sidney Linden when he was discussing section 19 of the provincial Freedom of Information and Protection of Privacy Act, which is similar to section 12 of the Act. He stated that in order for a record to qualify as being prepared "in contemplation of litigation", "(a) the **dominant** purpose for the preparation of the document must be in contemplation of litigation; **and** (b) there must be a reasonable prospect of such litigation at the time of the preparation of the

record - litigation must be more than just a vague or theoretical possibility" (Order 52). I agree with former Commissioner Linden's view and adopt it for the purposes of this appeal.

In order to decide whether these two requirements have been satisfied in the present appeal, it is necessary to review the circumstances surrounding the preparation of the records being withheld.

The Municipality submits that the records were prepared for counsel, and the dominant purpose for their preparation was in contemplation of or for use in litigation.

The Municipality indicates that "litigation in the form of the initiation of a grievance that would proceed to arbitration was a strong likelihood given the circumstances of the case", and the four records which pre-date the filing of the grievance were prepared by the affected persons at the request of the Deputy Metropolitan Solicitor and Corporation Counsel, "in order to ensure accurate documentary evidence that could be utilized in the course of the conduct of the grievance of the appellant ...".

In his sworn affidavit accompanying the Municipality's representations, the Deputy Metropolitan Solicitor and Corporation Counsel, states as follows:

... I requested all the individuals who had direct knowledge of the incident referred to in the records to record their recollections of the event and provide office administrators with a memorandum setting out those recollections. The dominant purpose for preparation of the records was contemplation of probable litigation. The records were intended for use by counsel ultimately handling the anticipated arbitration as a record of events prepared immediately following the incident.

The affidavit also identifies a number of reasons why the Municipality believed that litigation would result from the incident which led to the preparation of the records, and also identifies that litigation, in the form of a grievance proceeding to arbitration, did result therefrom.

As to the fifth record, the Municipality states that it was prepared by counsel employed by the Municipality "who was recording details of his conversation with the appellant with a view to providing them to counsel assigned to handle the grievance ... as he or she sees fit for the purpose of either resolving the litigation or as evidence at the arbitration hearing." The author of this record has provided a sworn affidavit which indicates that he prepared the record "to aid whichever lawyer assumed carriage of the case on behalf of the institution and also as an aide memoir should I be called upon to testify."

The appellant, in her representations, submits that records created prior to December 9, 1991 (the date of the filing of the grievance) should not be subject to the solicitor-client privilege, "because there was no ongoing litigation prior to that time." She also states that "since my grievance will not proceed to arbitration, ... I feel there is no longer litigation pending, and in my opinion, the [Municipality] can no longer cite section 12 ...". In my view, the fact that the

records were prepared prior to the commencement of litigation, or that the litigation for which they were prepared did not materialize or has since been discontinued, is not determinative of the issue of whether the records qualify for exemption under section 12. As I indicated above, it is the purpose for which the records were originally prepared and whether they were prepared for or by counsel employed or retained by the Municipality, that will be dispositive of the issues under section 12.

After reviewing the records and considering the representations of the parties, I am satisfied that the Municipality has provided sufficient evidence to support the view that all of the records at issue in this appeal were prepared for counsel employed or retained by the Municipality, in contemplation of or for use in litigation.

Therefore, I find that the requirements of the second branch of the section 12 exemption have been satisfied, and the records qualify for exemption under this section.

Section 38(a) is a discretionary exemption, giving the Municipality the discretion to refuse to disclose personal information to the appellant if section 12 of the Act would apply to exempt the record. I have reviewed the Municipality's representations regarding its decision to exercise discretion in favour of denying access, and find nothing improper in the circumstances of this appeal.

Because I have found that section 38(a) of the Act applies to all of the records at issue in this appeal, it is not necessary for me to consider Issue C.

ORDER:

I uphold the Municipality's decision.

Original signed by: _____

February 17, 1993

Asfaw Seife
Inquiry Officer