



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-157

Appeal M-9300063

Metropolitan Licensing Commission



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ORDER

BACKGROUND:

The Metropolitan Licensing Commission (the Commission) received a request pursuant to the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all information held by the Commission which pertains to the requester. The Commission located records responsive to the request and granted access in full to a portion of them, granted partial access to others, and denied access in total to the remainder. The Commission claimed the application of sections 8(1)(a), 8(2)(a), 12 and 14(1) of the Act to deny access in whole or in part. The requester appealed.

Mediation was not possible and notice that an inquiry was being conducted to review the decision of the Commission was sent to the Commission and the appellant. Representations were received from both parties.

In its representations, the Commission agreed to disclose to the appellant in full all the records to which partial access had originally been granted, as well as several other records which had not been disclosed. The Commission also withdrew its claim for exemption to certain records under section 8(1)(a) and applied the provisions of sections 38(a) and (b) to other individual records.

The records which remain at issue in this appeal, and the corresponding exemption claims associated with each are described in Appendix A to this order. Record 25 is an attachment to that portion of Record 30 that is still at issue in this appeal. Accordingly, I will only consider Record 30 in this order; my decision will apply to both records.

ISSUES:

The issues arising in this appeal are:

- A. Whether Records 1, 5, 17, 18, 30, 44, 46, 49, 50, 51, and 53 contain "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the personal information relates solely to individuals other than the appellant, whether the mandatory exemption provided by section 14 of the Act applies.
- C. If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.
- D. Whether the discretionary exemptions provided by sections 12 and 38(a) of the Act apply to Records 50 and 51.
- E. Whether the discretionary exemptions provided by sections 8(2)(a) and 38(a) of the Act applies to

Records 1, 5, 17, 18, 30, 44, 46, 49, and 53.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether Records 1, 5, 17, 18, 30, 44, 46, 49, 50, 51, and 53 contain "personal information" as defined in section 2(1) of the Act.

I have reviewed all the records at issue. In my view they all contain personal information about the appellant and/or other individuals.

Records 1, 5, 17, 18, 30, 44, 46, 49, and 53 all contain personal information about the appellant and other identifiable individuals.

Records 50 and 51 contain solely the personal information of the appellant.

Because I have determined that none of the records contain personal information that relates only to individuals other than the appellant, it is not necessary for me to consider Issue B.

ISSUE C: **If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.**

I have found under Issue A that Records 1, 5, 17, 18, 30, 44, 46, 49, and 53 contain the personal information of the appellant and other identifiable individuals.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute; section 38 provides a number of exceptions to this general right of access to personal information by the person to whom it relates. Specifically, section 38(b) of the Act states:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. The Commission must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her personal privacy. If the Commission determines that release of the information would

constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the Commission the discretion to deny the requester access to the personal information (Order 37).

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 14(2) lists a number of factors to be considered in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

In its representations, the Commission relies on the presumption provided by section 14(3)(b) of the Act. This section reads as follows:

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;

The Commission submits that the personal information at issue was compiled as part of an investigation it undertook into possible violations of Metropolitan Toronto By-law 20-85, which the Commission is responsible for enforcing. In particular, the Commission was investigating the possible violation of subsection 2(49) of the By-law - carrying on a taxicab brokerage without a licence.

I agree with the Commission's characterization of the personal information contained in the records. In my view, the presumption found in section 14(3)(b) of the Act applies to all of the records which contain both the personal information of the appellant and that of other individuals.

Once it is determined that the requirements for a presumed invasion of personal privacy under section 14(3) have been established, I must consider whether any other provisions of the Act come into play to rebut this presumption. A combination of listed and/or unlisted factors weighing in favour of disclosure might be so compelling as to outweigh a presumption under section 14(3); however, such a case would be highly unusual (Order 20).

Although the appellant does not specifically refer to section 14(2)(d), his representations indicate that it may have relevance in this appeal as he wishes to pursue a civil action against the Commission and its employees. Section 14(2)(d) states as follows:

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 personal information is relevant to a fair determination of the rights affecting the person who made the request;

In Order P-312, former Assistant Commissioner Tom Mitchinson, in discussing the provincial equivalent of section 14(2)(d), established the following test:

In my view, in order for section 21(2)(d) [section 14(2)(d) of the municipal Act] to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

In the circumstances of this appeal, I feel that section 14(2)(d) is a relevant consideration in determining whether the presumption of an unjustified invasion of personal privacy pursuant to section 14(3)(b) can be rebutted. However, in my view, the application of section 14(2)(d) alone is not sufficient to rebut the presumption contained in section 14(3)(b). Accordingly, I find that the presumption in section 14(3)(b) applies, and the disclosure of the information at issue in Records 1, 5, 17, 18, 30, 44, 46, 49, and 53 would constitute an unjustified invasion of personal privacy.

ISSUE D: Whether the discretionary exemptions provided by sections 12 and 38(a) of the Act apply to Records 50 and 51.

In its representations, the Commission claims that Records 50 and 51 are exempt under section 12 of the Act.

Section 12 provides:

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 a head 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Commission must provide evidence that the record satisfies either of the following tests:

1.
 - a) there is a written or oral communication; **and**
 - b) the communication must be of a confidential nature; **and**
 - c) the communication must be between a client (or his agent) and a legal advisor; **and**
 - d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49. See also Orders M-2 and M-19]

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. 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**

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2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The Commission claims the application of both branches of the section 12 test to Records 50 and 51. It indicates, however, that it is only relying on the first part of the Branch 1 test.

I am not satisfied that the first part of the Branch 1 test applies to Record 50. While I agree that there was a written communication of a confidential nature between a solicitor and his client, I find that the communication was not directly related to the seeking, formulating or giving of legal advice. The communication merely asks for a factual response regarding the status of a pending court application.

In my view, the Commission has also failed to show that Branch 2 of the section 12 exemption applies to Record 50. The information contained in this record does not satisfy the second criterion of this branch; specifically, it was not prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

Record 51 is a one page memorandum dated September 30, 1992, addressed to the Commission's General Manager from a solicitor employed by the Municipality of Metropolitan Toronto's Legal Department. This record describes the results of a Divisional Court proceeding which took place on September 29, 1992. It goes on to advise the General Manager on how to proceed with this matter.

I find that only the first sentence of the second paragraph of the record qualifies for exemption under Branch 1 of the section 12 test. It is only this portion of the record that contains legal advice, advice related to the appellant's application for Judicial Review and the Commission's appropriate course of action. It is also my view that only this portion of the record satisfies the Branch 2 test of the section 12 exemption.

Because under Issue A, I have found that Record 51 contains the personal information of the appellant, I must determine if the Commission has properly exercised its discretion under section 38(a) of the Act to withhold the portion of the record which I have found meets the test for exemption under section 12 of the Act. Section 38(a) 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]

Section 38(a) provides the Commission with the discretion to refuse to disclose to the appellant his personal

information where, among others, section 12 applies to the record. In any case in which the Commission has exercised its discretion under section 38(a), I look very carefully at the manner in which the Commission has exercised its discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal.

In reviewing the Commission's exercise of discretion in favour of refusing to disclose the records at issue in this appeal, I have found nothing to indicate that the exercise of discretion was improper and would not alter it on appeal.

Because of the manner in which I have dealt with Issues A, C, and D, it is not necessary for me to consider Issue E.

ORDER:

1. I uphold the Commission's decision to deny access to Records 1, 5, 17, 18, 30, 44, 46, 49, and 53.
2. I order the Commission to disclose to the appellant Records 50 and those portions of Record 51 which are **not** highlighted on the highlighted copy of the record which I have provided to the Commission's Freedom of Information and Privacy Co-ordinator with the copy of this order. These should be disclosed within fifteen (15) days of the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Commission to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____ June 30, 1993
Anita Fineberg
Inquiry Officer

APPENDIX A

- Record 1 - Memorandum dated September 14, 1989. Sections 8(2)(a), 14(1), 38(a) and (b).
- Record 5 - Letter dated August 16, 1989. Sections 8(2)(a), 14(1), 38(a) and (b).
- Record 17 - Undated, unsigned letter re: identified Plate #. Sections 8(2)(a), 14(1), 38(a) and (b).
- Record 18 - Minutes of interview dated March 1, 1990. Sections 8(2)(a), 14(1), 38(a) and (b).
- Record 30 - Memorandum February 26, 1990 (typed and handwritten versions). Sections 8(2)(a), 14(1), 38(a) and (b).
- Record 44 - Statement dated November 6, 1990. Sections 8(2)(a), 14(1), 38(a) and (b).
- Record 46 - Statement dated October 10, 1990. Sections 8(2)(a), 14(1), 38(a) and (b).
- Record 49 - Memorandum dated May 14, 1991. Sections 8(2)(a), 14(1), 38(a) and (b).
- Record 50 - Memorandum dated September 17, 1992. Sections 12 and 38(a).
- Record 51 - Memorandum dated September 30, 1992. Sections 12 and 38(a).
- Record 53 - Memorandum dated March 8, 1991. Sections 8(2)(a), 14(1), 38(a) and (b).