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

ORDER M-257

Appeal M-9200270

Metropolitan Licensing Commission

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ORDER

BACKGROUND:

The Metropolitan Licensing Commission (the Commission) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all records pertaining to a work-related incident involving the requester, which purportedly occurred on May 20, 1992. The requester was an employee of the Commission. The Commission identified a number of responsive records, provided access to some and denied access to others. The requester appealed the decision to the Commissioner's office.

During the mediation stage of the appeal, the Commission disclosed to the appellant several additional records and further indicated that it was relying upon section 14(1) of the Act to deny access to the remaining five records. Further mediation was not successful, and notice that an inquiry was being conducted to review the Commission's decision was sent to the Commission and the appellant. Both parties submitted representations. In its representations, the Commission indicated that it would release one of the remaining documents, being a handwritten memorandum dated May 21, 1992. The Commission also indicated that it would also be relying on sections 12 and 38(a) of the Act with respect to the remaining records.

While the representations were being considered, Commissioner Tom Wright issued Order M-170, adopting the Ontario Court (General Division) (Divisional Court) June 30, 1993 decision in the case of John Doe et al. v. Information and Privacy Commissioner et al. This decision interpreted several provisions of the Act in a way which differed from the interpretation developed in orders of the Commissioner. Since similar statutory provisions were also at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the parties. The appellant and the Commission were provided with the opportunity to change or to supplement the representations previously submitted. Further representations were received from the Commission.

The records at issue in this appeal are described as follows:

1. A one page witness statement dated May 21, 1992.

2. A one page memorandum dated May 21, 1992.

3. Five pages of handwritten notes taken at an interview of one of the affected persons.

4. A further two pages of notes taken at an interview of another of the affected persons.

ISSUES:

The issues in this appeal are:

A. Whether the discretionary exemptions described in sections 12 and 38(a) of the Act apply to the records at issue.

B. Whether the records contain "personal information" as defined in section 2(1) of the Act.

C. If the answer to Issue B is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption contained in section 38(b) of the Act applies.

D. If the answer to Issue B is yes, and the personal information relates to the appellant only, whether the mandatory exemption in section 14(1) of the Act applies.

ISSUE A: Whether the discretionary exemptions described in sections 12 and 38(a) of the Act apply to the records at issue.

In its representations, the Commission claims that section 12 of the Act applies to each of the four records at issue.

Section 12 of the Act states that:

> 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 provides an institution 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 institution 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.

[Orders 49, 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

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 and M-19]

The Commission claims that the records qualify for exemption under both the second branch and the second part of the first branch of the exemption. Its arguments under each branch are essentially the same as it submits that the records were prepared for Commission counsel in contemplation of litigation.

The question of what constitutes "in contemplation of litigation" was considered in Order 52, by former Commissioner Sidney B. Linden in the context of section 19 of the provincial Freedom of Information and Protection of Privacy Act, which is similar to section 12 of the Act.

In Order 52, he applied the following two requirements 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 (emphasis added).

I agree with former Commissioner Linden's approach and adopt it for the purposes of this appeal.

In order to decide whether these two requirements have been satisfied in the present case, it is necessary to review the circumstances surrounding the preparation of the records which are now being withheld by the Commission.

The Commission submits:

> ... although a grievance in relation to this matter had not been initiated by the appellant at the time these records were prepared, given the previous labour relations experience with the appellant, litigation was more than a theoretical possibility. The initiation of a grievance in respect to the incident forming the subject matter of the records was likely and highly probable at the time the records were prepared.

I have carefully considered the Commission's representations, the contents of the records and the circumstances of this appeal and, in my view, the "dominant" purpose for creating these records was to provide documentary support for contemplated disciplinary action against the appellant, rather than in contemplation of litigation.

I am not satisfied that any of the records were created or obtained especially for a lawyer's brief in contemplation of litigation, nor am I satisfied that they were prepared by or for a lawyer employed or retained by the Commission in contemplation of litigation.

ISSUE B: Whether the records contain "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act reads, in part, as follows:

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

> (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,
>
> …
>
> (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.

I have examined the records at issue and find that they contain information which qualifies as "personal information" within the meaning of the Act. In my view, they contain the personal information of the appellant and other identifiable individuals. As I have found that the records contain the personal information of the appellant and other individuals, it is not necessary for me to consider Issue D.

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

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 their 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 access to the personal information of the requester.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified

invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it is demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's 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 the personal privacy of an individual other than the requester. Section 14(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy.

The only way in which a section 14(3) presumption may be overcome is if the information at issue falls within section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption (Order M-170).

I have considered section 14(4) and I find that it is not relevant to this appeal. Section 16 of the Act has not been raised by any of the parties and I find that it is not applicable.

The Commission, in its representations, submits that section 14(3)(d) of the Act applies to the records as " ... all the personal information in these records relates to employment history".

Section 14(3)(d) of the Act provides:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > relates to employment or educational history.

However, not all information relating to employment qualifies as "employment history". Rather, the information in question must have a connection to the individual's position, job responsibilities, career history, performance appraisal or other human resource related characteristics which are normally associated with a person's employment history (Order P-256).

The records at issue relate to a single incident which occurred during the appellant's employment with the Commission. The records contain information provided by other employees of the Commission who witnessed the incident. The creation of these records was not in the ordinary course of employment of these witnesses and does not conform to the type of information which would normally be considered to be the witnesses' "employment history". For this reason, I find that section 14(3)(d) does not apply to the records.

I have also determined that none of the other provisions of section 14(3) are relevant to this appeal.

Section 14(2) of the Act provides a non-exhaustive list of criteria which are to be considered, along with all other relevant circumstances, in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

The appellant's representations state that the information is required in order to prepare a defence to a legal action and to prepare for grievance arbitration proceedings, as contemplated by section 14(2)(d) of the Act. The Commission has referred to the considerations outlined in sections 14(2)(f) and (h) of the Act. These provisions of section 14(2) of the Act read 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,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

I will address each of the section 14(2) considerations separately.

Section 14(2) (d)

In Order P-312, former Assistant Commissioner Tom Mitchinson established the following requirements which must be met for section 21(2)(d) of the Freedom of Information and Protection of Privacy Act (which is similar to section 14(2)(d) of the Act) to apply to personal information contained in a record:

> (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 in question 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.

I adopt this test for the purposes of this appeal.

The appellant's representations indicate that her legal rights are at issue as legal proceedings have been commenced or are contemplated, satisfying the first two parts of the test. The appellant also submits

that the information is necessary to prepare for a legal action and certain pending grievance proceedings.

The Commission's representations state that the appellant has been through the first two stages of the grievance process and that the arbitration hearing would likely occur "in the near future". The Commission submits that in the course of the grievance proceeding, the appellant has already received "substantial disclosure" of the information contained in the records at issue in this appeal.

The records previously disclosed to the appellant during the mediation stage of the appeal contain the names of the witnesses, summarized versions of their statements and reveal the Commission's basis for imposing disciplinary action on the appellant.

However, the appellant has failed to meet parts three and four of the criteria required to establish the relevance of section 14(2)(d). I am not satisfied that the information contained in the records is significant to the determination of her rights and is not required to prepare for the proceeding or in order to ensure an impartial hearing. Accordingly, I find that section 14(2)(d) has no application in this appeal.

Section 14(2)(h)

In its representations, the Commission indicated that there was a "limited expectation of confidentiality" on the part of the witnesses, since they expected that disclosure of the information would occur, but only in the context of formal discipline of the appellant and potential grievance proceedings resulting from that discipline.

In my view, the fact that the witnesses were aware at the time they supplied the information, that it would be disclosed to the appellant is of importance. The Commission has indicated that, in fact, there has already been "substantial disclosure" to the appellant through the grievance process. As such, I am not satisfied that there was an expectation of confidentiality and I find that section 14(2)(h) does not apply in the circumstances of this appeal.

Section 14(2)(f)

The Commission submits that the information is "highly sensitive" for the following reasons:

> The personal information contains observations made by the individuals to whom the information relates and indicates that the individual identified therein have [sic] provided information that may have been to the appellant's detriment. Given these factors, it is submitted that the information is of a sensitive nature and should not be disclosed.

In my view, in order to find that the information is "highly sensitive", there must be evidence that the person to whom the information relates would experience "excessive personal distress" if the information were to be disclosed.

As noted above in my discussion of section 14(2)(f), the witnesses were aware at the time the information was supplied that it would be disclosed to the appellant. They were also aware that the information could be used to the appellant's detriment in a discipline proceeding. Records already disclosed to the appellant contain the identities of the witnesses and the substance of their statements. Discipline proceedings regarding the incident have already been completed.

On this basis, I am not persuaded that the personal information in the records is "highly sensitive" and I find that section 14(1)(f) of the Act is not relevant in the circumstances of this appeal.

In applying the balancing principle introduced by section 38(b), I have found that none of the considerations described in section 14(2) of the Act which were raised by either of the parties are relevant. Having also considered the records themselves, I find that none of the other considerations listed in section 14(2) or any unlisted factors are relevant in the circumstances of this appeal.

The party relying upon the section 38(b) exemption must establish that the disclosure of the information **would** be an unjustified invasion of the personal privacy of the other individuals. I am not satisfied, in all the circumstances of this appeal, that disclosure of the records would be an unjustified invasion of personal privacy and, accordingly, I find that the exemption provided by section 38(b) of the Act does not apply.

ORDER:

1. I order the Commission to disclose the records to the appellant within thirty-five (35) days of the date of the date of this order but not earlier than the thirtieth (30th) day following the date of this order.

2. In order to verify compliance with the provisions of this order, I order the Commission to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: February 2, 1994
Donald Hale
Inquiry Officer