



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

# ORDER M-625

Appeal M\_9500234

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>

## **NATURE OF THE APPEAL:**

The Municipality of Metropolitan Toronto (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the contents of the requester's personnel files, including notes made by two named supervisors. Partial access was granted. The requester appealed the decision to deny access to the remaining records.

The Municipality withheld access to the records on the basis of the following exemptions:

- advice or recommendations - section 7(1)
- solicitor-client privilege - section 12
- discretion to refuse requester's own personal information as it relates to sections 7(1) and 12 - section 38(a)
- invasion of privacy - sections 14 and 38(b)

The requester is a former employee of the Municipality. The records that remain at issue are supervisors' notes, namely pages 49, 51-59, 66, 67, 71-77 and 82 withheld in their entirety and pages 46, 65, 81, 83 and 85 withheld in part. For ease of reference, I will refer to each page as a record and I adopt the numbering system used by the Municipality.

A Notice of Inquiry was provided to the appellant, the Municipality and two individuals referred to in the records (the affected persons). Representations were received from the Municipality and the affected persons.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where 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 reviewed the records at issue. All of the records contain information that relates to the appellant. Accordingly, I find that all the records contain the appellant's personal information. Records 46, 49, 81, 82, 83 and 85 also contain information which relates to other identifiable individuals and therefore, constitutes the personal information of these individuals.

In addition, certain records contain references to other employees which, in my view, appear in the context of their employment or professional duties. It has been held in a number of previous orders that information that relates to individuals in their professional capacity or in the execution of their employment responsibilities does not qualify as "personal information" for the

purposes of the Act. Therefore, this information does not qualify as the personal information of the employees referred to.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government institution. Section 38 provides a number of exceptions to this general right of access.

### **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION**

Section 38(a) gives the Municipality the discretion to deny access to an individual's own personal information in circumstances where any of the exemptions listed in that section would otherwise apply to that information. The exemptions listed in section 38(a) include both of the exemptions claimed with respect to Records 51-59, 65-67 and 71-77, namely advice or recommendations (section 7(1)) and solicitor-client privilege (section 12).

In the discussion that follows, I will consider whether the records qualify under these sections as a preliminary step in determining whether the exemption in section 38(a) applies. I will first consider the application of section 12 of the Act.

### **SOLICITOR-CLIENT PRIVILEGE**

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.

Section 12 consists of two branches, which provide 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).

For a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record either constitutes a written or oral communication of a confidential nature between a client (or the client's agent) and legal advisor which relates directly to seeking, formulating or giving legal advice **OR** that the document was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

For a record to qualify for exemption under Branch 2, the Ministry must establish that the document was prepared by or for counsel employed or retained by an institution and the document must have been prepared (1) for use in giving legal advice, or (2) in contemplation of litigation, or (3) for use in litigation.

The Municipality relies on both Branch 2 and the second part of Branch 1 to withhold access to the records.

The Municipality points out that in most cases, where an employee is terminated, the possibility of litigation exists. Accordingly, the managers involved are required to document the reasoning and the basis for termination for the principal purpose of providing it to counsel for use in the event that litigation does materialize. The Municipality states that the appellant had indicated that he had previously sued other organizations and therefore, at the time the records were created, litigation was more a certainty than just a mere possibility.

The Municipality states that the records are being used in ongoing litigation which includes grievance and arbitration hearings and a matter before the Ontario Human Rights Commission. The Municipality states that Records 73-77 constitute notes created during the Step II hearing and which will be relied upon by counsel during the Arbitration Board hearing.

Records 51-59, 65-67 and 71 and 72 consist of the supervisors' documentation of the day-to-day occurrences and meetings that lead to the decision to terminate the appellant. The Municipality submits that these records were prepared for use by counsel in giving legal advice and in contemplation of litigation. The Municipality submits that the records will be relied upon by counsel in giving legal advice with respect to the grievances and arbitration hearings.

Previous orders of the Commissioner's office have accepted that no distinction should be made between court actions and matters heard before administrative tribunals (Order M-162). I agree with this approach and adopt it for the purposes of this appeal.

I have carefully reviewed the records and the representations of the Municipality. I am satisfied that the records were prepared for counsel for use in giving legal advice and in contemplation of litigation and that there was a reasonable prospect of litigation at the time that the records were prepared. Therefore, the requirements for Branch 2 have been met and the records qualify for exemption under section 12.

On this basis, the records are exempt under section 38(a) of the Act. Because I have found that section 12 applies to the records, I do not need to consider the application of section 7(1) of the Act.

## **INVASION OF PRIVACY**

I will now consider the remaining records, i.e. Records 46, 49, 81, 82, 83 and 85 which the Municipality claims are exempt from disclosure under section 38(b) of the Act. I have already found that all the records in this appeal contain the personal information of the appellant and that Records 46, 49, 81, 82, 83 and 85 also contain the personal information of other identifiable individuals.

Another exception to the general right of access under section 36(1) is section 38(b) of the Act. Under section 38(b), where a record contains the personal information of both the appellant and

other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act as well as all other considerations that are relevant in the circumstances of the case.

The Municipality relies on section 14(2)(h) as a relevant consideration in denying access to the personal information. The affected persons submit that sections 14(2)(f) and (h) are relevant in the circumstances of this case.

Sections 14(2)(f) and (h) 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,

(f) the personal information is highly sensitive;

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence.

The Municipality submits the personal information in the records relates to the affected persons' role in a certain incident and management's response to these actions. The Municipality and the affected persons state that the personal information in the records was supplied in confidence and should not be disclosed. One of the affected persons submits that the information relates to an incident in the employment context and is highly sensitive.

I have carefully reviewed the information in the records together with the representations of the parties. I have not been provided with any evidence to show that the information in the records is highly sensitive. I accept the submissions of the Municipality and the affected persons that the personal information in the records was supplied by the individual to whom the information relates in confidence (section 14(2)(h)).

I have not been provided with submissions on any factors which would weigh in favour of disclosure of the personal information. In the absence of this evidence, I find that section 14(2)(h) is relevant in the circumstances of this case and weighs in favour of protection of the

personal privacy of those individuals referred to in the records. After considering the factors listed in section 14(2) of the Act, as well as all other factors which are relevant in the circumstances of this case, I find that disclosure of the records would constitute an unjustified invasion of personal privacy of the individual to whom the personal information relates under section 14(2)(h), and that section 38(b) of the Act applies.

**ORDER:**

I uphold the decision of the Municipality.

Original signed by: \_\_\_\_\_  
Mumtaz Jiwan  
Inquiry Officer

\_\_\_\_\_ October 20, 1995