



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

ORDER M-866

Appeal M_9600231

Municipality of Metropolitan Toronto



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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 all information contained in the requester's departmental personnel file, corporate personnel file and Workers' Compensation Board (WCB) file. The Municipality granted partial access to the responsive records. In a supplementary letter, the Municipality released twelve more pages to the requester. Subsequently, the Municipality issued another supplementary decision letter, granting partial access to other records that the Municipality had located in response to the request.

The Municipality relied on the exemptions in sections 7, 12, 14(1) and sections 38(a) and (b) of the Act to deny access to the records in whole or in part. In addition, the Municipality denied access to labour relations notes, in their entirety, pursuant to section 52(3) of the Act. The requester, represented by an agent, appealed the denial of access.

During mediation, the Municipality released portions of pages 152 and 152A, previously withheld in full. The appellant reduced the scope of his appeal to the withheld portions of pages 72, 117, 152 and 152A.

This office provided a Notice of Inquiry to the appellant and the Municipality. Representations were received from the Municipality only.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records and I find that they contain the personal information of the appellant and other identifiable individuals.

INVASION OF PRIVACY

Section 36(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 38 sets out exceptions to this general right of access.

Where a record contains the personal information of both the appellant and other individuals, section 38(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 14(2), (3) and (4) provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Disclosing the types of personal information listed in section 14(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the Municipality can disclose the personal information only if it also falls under section 14(4) or if section 16 applies to it. If none of the presumptions in section 14(3) apply, the Municipality must consider the factors listed in section 14(2), as well as all other relevant circumstances.

The Municipality submits that the information severed from pages 72 and 117 relates to the employment history of an individual other than the appellant and disclosure of this personal information is presumed to be an unjustified invasion of personal privacy under section 14(3)(d) of the Act. I have reviewed pages 72 and 117 and I agree with the Municipality. I am satisfied that the presumption in section 14(3)(d) applies to the withheld information. I find that sections 14(4) and 16 are not applicable in the circumstances of this appeal and the personal information is properly exempt under section 38(b) of the Act.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 38(a) of the Act, the Municipality has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 38(a) states:

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)

The Municipality has exercised its discretion to refuse access to the withheld parts of pages 152 and 152A under both sections 7 and 12. In order to determine whether the exemption provided by section 38(a) applies to the undisclosed information in the records, I will first consider whether the exemption in section 12 applies.

SOLICITOR-CLIENT PRIVILEGE

Section 12 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 the Municipality for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Municipality relies on Branch 1 of the exemption.

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

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]

The Municipality submits that the withheld portions of pages 152 and 152A contain a discussion of the legal implications for the Municipality in a hypothetical situation. The record indicates that advice was sought from the Municipality's legal department and the legal opinion given in response is quoted in the record.

Previous orders of the Commissioner have found that a record containing a direct quote of the legal advice given, constitutes written communication of a confidential nature between the client and a legal advisor (Orders 150, P-417 and P-477). The Commissioner has also previously found that legal advice includes a legal opinion (Order 210). I agree with the reasoning and findings in these orders and adopt them for the purpose of this appeal.

Having reviewed the record, I find that it meets all the criteria set out above and qualifies for exemption under Branch 1 of the section 12 exemption. Accordingly, the withheld portions of pages 152 and 152A are exempt under section 38(a) of the Act.

Because I have found that section 12 applies, I need not consider the application of section 7.

ORDER:

I uphold the decision of the Municipality.

Mumtaz Jiwan
Inquiry Officer

November 28, 1996