



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

ORDER M-945

Appeal M_9600407

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 the General Welfare Assistance file (the GWA file) and the investigation file pertaining to the requester. The Municipality denied access to the records in both files on the basis of sections 12 (solicitor-client privilege) and 38(a) (discretion to refuse requester's own information) of the Act. The requester appealed the decision.

During mediation, the Municipality agreed to disclose some of the records contained in the GWA file to the requester, now the appellant. The Municipality indicated that the remaining records relate to an ongoing civil suit between the Municipality and the appellant. The appellant indicated that he was not seeking access to duplicate records or facsimile cover sheets. In this regard, I note that Record 141 is such a facsimile cover sheet and I will, therefore, not consider it as part of the records at issue.

Accordingly, the records that remain at issue in this appeal are listed and described in Appendix "A" to this order. These records are being withheld on the basis of sections 12 and 38(a) of the Act.

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

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.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

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. Under section 38(a), 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 all the records in its investigation file and the remaining records in the GWA file under section 12. In order to determine whether the exemption provided by section 38(a) applies to these records, I will first consider whether the exemption provided by 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).

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 M-2 and M-19]

The Municipality states that all income maintenance programs, including social assistance, are administered by its Social Services Division whose legislated authority for determining social assistance also includes derivative authority to conduct investigations into fraudulent applications and/or receipt of benefits. The Municipality explains that records compiled during the investigative stage of determining eligibility for welfare assistance are often deemed to have evidentiary value in over-payment or fraud cases and that the Division employees are aware that notes of an investigatory nature can be potentially obtained for the solicitor's brief in contemplation of litigation.

The Municipality states that in the current case, an investigation into the appellant's eligibility for social benefits was commenced about four years after he first applied for and started to receive social assistance.

The Municipality explains that it is currently involved in on-going litigation with the appellant. It submits that the records at issue constitute written and confidential communications between the Municipality and its legal counsel and relate directly to the seeking or giving of legal advice in respect of the civil action.

The Municipality submits that Records 1, 2 and 113 were provided to legal counsel for the purpose of seeking legal advice and providing instructions related to the anticipated proceedings. Records 139 and 140 are letters from legal counsel to its client (the Municipality) and relate to obtaining instructions in respect of the anticipated legal proceedings.

Having reviewed the records, I find that Records 1, 2, 113, 139 and 140 meet all the requirements for solicitor-client privilege and therefore, qualify for exemption under Branch 1. Accordingly, I find that these records qualify for exemption under section 12 of the Act and are therefore exempt section 38(a).

The Municipality states that part 2 of Branch 1 and Branch 2 apply to the remaining records in the appellant's GWA file and the investigation file. The Municipality submits that the records were obtained for and eventually formed part of the lawyer's brief. In this regard, the Municipality relies on Order P-1342. In this order, former Inquiry Officer Holly Big Canoe discussed this aspect of the privilege and its application to such records and commented:

The second part of Branch 1 has been called the "third party communications", the "lawyer's brief" and the "litigation" privilege. Records which do not represent communications between solicitor and client may become privileged as a result of being copied for inclusion in the lawyer's brief for litigation, as long as there was an intention to keep them confidential.

I agree with my former colleague and I find that the reasoning articulated in Order P-1342 applies equally in the circumstances of this appeal. I find, therefore, that all of the remaining records in the GWA file and the investigation file qualify for exemption from disclosure under the second part of Branch 1.

Previous orders of the Commission have confirmed that the litigation aspect of the common law privilege can be lost as a result of the termination of litigation. As I have indicated, the Municipality's submissions indicate that litigation is ongoing and therefore, this aspect of the privilege is preserved. Accordingly, section 38(a) of the Act applies to the records.

Because of my findings above, it is not necessary for me to address the possible application of Branch 2 of the section 12 exemption.

ORDER:

I uphold the Municipality's decision.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ May 29, 1997

APPENDIX "A"

INDEX OF RECORDS

GENERAL WELFARE FILE

RECORD NUMBER	DESCRIPTION
1, 7 - 16, 20	Income Maintenance/Eligibility Record with entries dating from January 11, 1995 to September 24, 1996
25	Internal Memo dated November 1995
40 and 41	Disentitlement Calculation Sheet (undated)
42	Inquiry Form dated January 12, 1995

INVESTIGATION FILE

RECORD NUMBER	DESCRIPTION
1 - 2	Case Summary
10 - 13	Letter from Ministry of Education and Training to Metro Toronto dated April 11, 1995 and Attachment Attachment - Application for Single Students, Ontario Student Assistance Program, Ministry of Education and Training dated January 12, 1995
15	Student Transcript from George Brown College for September 1991 to December 1993
16	Letter of Attendance from George Brown College dated March 21, 1995
17	Letter from Insurance Company to Metro Toronto dated March 24, 1995 and Attachment
20	Income Statement Request Form dated April 25, 1995
28	Inactive Record Request dated March 27, 1995
29	Income Statement Request Form Dated April 20, 1995
62 - 64	Bank Statement for January to March 1995
66	Student Loan Information from George Brown College
69	Fax Cover Sheet dated April 6, 1995 from Metro Toronto to Ministry of Education and Training
72 - 79	Student Loan Information

RECORD NUMBER	DESCRIPTION
80	Note from Appellant dated November 16, 1994 on George Brown College Letterhead re Student Loan
84 - 85	Letter to Bank from Metro Toronto dated March 16, 1995
86	Letter to Metro Toronto from Bank dated March 10, 1995
90	Letter from Metro Toronto to George Brown College dated March 15, 1995
93	Letter from Metro Toronto to George Brown College dated March 15, 1995
96 - 98	Letter from Metro Toronto to Bank dated March 10, 1995 and Attachment Attachment - Consent to Disclose Information signed by Appellant dated January 31, 1995
99	Letter to Metro Toronto from Bank dated March 10, 1995
101 - 102	Information Request (undated)
103 - 104	Fax cover sheet dated March 31, 1995
106 - 107	Letter to Metro Toronto from Bank dated March 16, 1995
108 - 109	Income Statement Request Form dated April 3, 1995
110	Inquiry dated January 12, 1995
111	Letter dated November 10, 1995 from Solicitor for Metro Toronto to Appellant
113	Internal Memo dated November 1, 1995
114	Case Summary dated October 1995
115 - 134	Income Maintenance /Eligibility Record with Entries Dating from May 4, 1995 to March 7, 1995
135 - 136	Letter from Solicitor for Metro Toronto to Appellant's Lawyer dated March 6, 1996
137 - 138	Letter from Solicitor for Metro Toronto to Appellant's Lawyer dated February 26, 1996
139 - 140	Letter from Appellant's Lawyer to Solicitor for Metro Toronto dated January 15, 1996
142	Letter from Solicitor for Metro Toronto to Appellant's Lawyer dated January 19, 1996
143 - 144	Letter from Solicitor for Metro Toronto to Appellant's Lawyer dated December 14, 1995