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

ORDER M-975

Appeal M_9700075

City of 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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The City of Toronto (the City) received a request for access to "the complete record of all dealings, including all reports of any kind, transcripts, minutes of meetings, memos, letters of correspondence, and any other relevant documents pertaining to communications between the City of Toronto Public Health Department and [a named building and the corporation which owns/manages it] (collectively, "the Centre"), [a named engineering firm], [a named mycologist] and any other corporate or private body with regard to the concerns of toxic mould, any environmental contaminants, air quality and air quality testing, as well as the record of any and all relevant concerns relating to the current environmental crisis at the [named building]."

The City located 254 pages of records that were responsive to the request, granted access in full to 49 pages, partial access to 31 pages and denied access in full to 46 pages. In addition, with respect to the remaining 128 pages, pursuant to section 21 of the Act, the City notified the Centre as a third party whose interests might be affected, and sought its representations regarding disclosure of these records.

After considering the Centre's representations, the City issued another decision letter granting access in full to six pages and denying access in full to the remaining 122 pages. The City relies on the following exemption claims under the Act to deny access to the records at issue:

- advice or recommendations - section 7(1)
- third party information - sections 10(1)(a), (b) and (c)
- economic and other interests - sections 11(c), (d) and (e)
- solicitor client privilege - section 12
- invasion of privacy - sections 14 and 38(b)
- discretion to refuse requester's own personal information - section 38(a)

The appellant appealed this decision and claimed that further responsive records exist. In this regard he believes that a letter dated late November or early December to the City from a named individual from the mycology department of the Ministry of Health should exist. Further, he claims that City Board of Health meeting minutes relating to the Centre exist and should be disclosed. In addition, he believes that the identities of individuals who made notes/wrote reports (in particular, handwritten notes), etc., should be provided along with the records which were disclosed to him. The appellant also claimed that the photocopies of several of the records he received were of such poor quality that he was unable to read them and, therefore, the City should be required to produce legible copies or, in the alternative, provide him with the opportunity to view the original records.

During mediation the City reconsidered its position with respect to some of the records at issue and issued a new decision to the appellant granting access in full to three pages which had been previously denied in full, partial access to 25 pages which had been previously denied in full and additional partial access to one page which had been previously partially denied.

Consequently, the records remaining at issue in this appeal total 196 pages (139 in full and 57 in part) and consist of letters and other correspondence, draft letters and documents, handwritten notes, notes to file, inspection reports, voice mail messages, "E-mail" messages, "Facsimile" correspondence, memoranda and various other related documents.

A Notice of Inquiry was provided to the appellant, the City, the Centre and two individuals whose interests may be affected by the outcome of this appeal (the affected persons). Representations were received from the appellant, the City and the Centre.

In its representations, the City states that it will not be submitting representations on the exemptions claimed under sections 7(1), 10(1)(a), (b), (c), 11(c), (d) and (e) but adds that sections 10(1)(a), (b) and/or (c) should have been originally claimed for pages 128 and 129. Accordingly, sections 7(1) and 11(c), (d) and (e) are no longer at issue in this appeal. As these were the only exemptions claimed by the City to withhold pages 44, 127 and 203 from disclosure, I will order these pages be disclosed to the appellant in their entirety. In addition, section 10 is a mandatory exemption and the Centre has provided me with representations on the application of section 10(1) to the records, including pages 128 and 129. Accordingly, I will consider the application of this exemption for the records to which it has been applied, including pages 128 and 129.

The Centre, however, in its representations states that it no longer objects to the disclosure of pages 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 58, 64, 65, 66, 67, 77, 99, 111, 127, 145, 146, 149, 150, 151, 152, 163, 187, 212 and 216. Consequently, as no other exemptions have been claimed for pages 38, 77, 99, 111, 145, 146, 163, 187, 212 and 216 and the only other exemptions claimed for pages 30, 31, 32, 33, 34, 36, 37, 39, 40 and 127 are sections 7 and 11, which are no longer at issue, I will order disclosure of these records to the appellant in their entirety. I will include pages 27, 28, 29, 58, 64, 65, 66, 67, 149, 150, 151 and 152 in my discussion regarding personal information.

Finally, I note that neither the City nor the Centre have provided me with representations on the application of sections 7, 10 and 11 for page 35 (the only exemptions claimed for this page) and, therefore, I will also order disclosure of this record in its entirety as well.

PRELIMINARY MATTER:

In his letter of appeal and during the mediation stage of this appeal, the appellant raised the concern that many of the photocopies of the records to which he was provided access were of "sufficiently poor quality that they are very difficult to read" and, therefore, "[e]xamination of the original record would be necessary". He also enclosed a copy of the records to which he was granted access in the City's original decision with his letter of appeal.

The Appeals Officer raised this as an issue in the Notice of Inquiry requesting that the parties provide representations. The appellant has not provided me with further representations on this issue. The City submits that it copied the records in the darkest tint possible and that some of the records in their original form were handwritten lightly or illegibly. The City further submits that since these records contain the personal information of other individuals it would not be "reasonably practicable" to give the appellant the opportunity to view the originals.

Having reviewed the City's explanation and the copies of the records which the appellant provided this office, I am satisfied that the City took all reasonable steps to provide the appellant with the best copies possible. Moreover, in my view, it is not possible, in the circumstances of this appeal, to provide the appellant with the opportunity to view the originals. Accordingly, I will not consider this issue further.

DISCUSSION:

THIRD PARTY INFORMATION

As I stated above, I have only received representations from the Centre on the application of sections 10(1)(a), (b) and/or (c) of the Act. The Centre claims that pages 10-21, 48, 59, 61-62, 86-87, 93-96, 112, 119-120, 126, 128-129, 130, 131, 135, 142-143, 147-148, 155-156, 165, 170_185, 210-211, 223-224, 229-232 and 241 qualify for exemption under these sections.

For a record to qualify for exemption under section 10(1)(a), (b) or (c) the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 10(1) will occur.

[Order 36]

Part One

The records, for the most part, relate to complaints of, and subsequent testing for, toxic mould in the named building. The Centre submits that pages 10, 59, 61-62, 112, 126, 130, 147-148 and 170 contain commercial information, page 48 contains financial information, page 165 contains commercial and financial information and the remaining pages contain scientific and commercial information. Having reviewed the records, I am satisfied that all but pages 59, 93, 112, 130, 131, 135, 165, 182, 184, 210, 211 and 229 contain one or more of these types of information. It is my view, however, that the pages indicated in the preceding sentence do not contain any of the types of information contemplated by section 10(1) of the Act.

Therefore, Part 1 of the section 10(1) test has been satisfied for pages 10-21, 48, 61-62, 86-87, 94_96, 119-120, 126, 128-129, 142-143, 147-148, 155-156, 170-181, 183, 185 223-224, 230-232 and 241.

Part Two

The second part of the test has two elements. First, the party resisting disclosure must establish that the information was **supplied** to the City and second, that it was supplied **in confidence**, either implicitly or explicitly.

It is clear from a review of the records that they consist of information and documentation provided to the City by the Centre and, therefore, were "supplied" to the City.

I must now determine if this information was supplied to the City in confidence, either implicitly or explicitly.

The Centre submits that it supplied the information to the City explicitly in confidence and under the expectation that the information be treated as confidential. I note, for example, on page 10, the Centre explicitly states that the records were being provided in confidence. The Centre further submits that the records would not have been provided to the City without this expectation of confidentiality.

In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the application of the second part of section 10(1) of the Act:

> In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

Having carefully considered the Centre's representations, and the records, I find that the Centre held a reasonable expectation that the records or information contained in them were supplied to the City explicitly in confidence and, therefore, part 2 of the section 10 test has been established for pages 10-21, 48, 61-62, 86-87, 94-96, 119-120, 126, 128-129, 142-143, 147-148, 155-156, 170-181, 183, 185, 223-224, 230-232 and 241.

Part Three

With respect to this part of the section 10(1) test, the Centre states that it was not required to provide the information to the City and, that disclosure could reasonably be expected to cause harm to it in its rental of units in the building. The Centre asserts that it may not supply similar information to the City in future.

As I stated above, it has been established in a number of previous orders that the burden of proving the applicability of the exemption lies with the party resisting disclosure, in this case the Centre.

In my view, the Centre has not provided me with information to demonstrate how disclosure would harm it in its rental of units and has provided no submission on how it would be in the public interest that similar information continue to be supplied to the City. As a result, my finding is that the Centre has not established that the harms set out under sections 10(1)(a), (b) and/or (c) are likely to occur if the records are disclosed and, consequently, I find that part three of the test has not been established.

As all three parts of the section 10(1) test must be satisfied, I find that section 10(1) has no application to pages 10-21, 48, 59, 61-62, 86-87, 93-96, 112, 119-120, 126, 128-129, 130, 131, 135, 142-143, 147-148, 155-156, 165, 170-185, 210-211, 223-224, 229-232 and 241.

In addition, as no other exemptions have been claimed for pages 93, 112, 165 and 229, and as pages 18-21, 178-181 and 211 contain only the personal information of the appellant, I will order these pages be disclosed to the appellant in their entirety.

SOLICITOR-CLIENT PRIVILEGE

The City claims that information severed from page 49 qualifies for exemption under section 12 of the Act.

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).

The City submits that both branches apply to the record.

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.

[See Order 210]

The City submits that the information severed from the bottom portion of page 49 which follows the identified date of "Aug. 29/96" is a note of an oral communication between an employee of the City's Public Health Department and the City's counsel. The City further submits that this communication was of a confidential nature and was directly related to the seeking, formulating and giving of legal advice.

Having reviewed this information, I am satisfied that it satisfies Branch 1 of the section 12 exemption and is, therefore, properly exempt from disclosure.

INVASION OF PRIVACY

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 information contained in the records and I find that pages 1-6, 11-17, 25-26, 45-49, 51, 54-55, 63, 75, 81-83, 87-88, 91-92, 95-98, 100-106A, 116, 131-132, 141, 152-153, 156, 158, 159, 164, 166, 171-177, 186, 189, 194_201, 206-207, 213-215, 217-220, 224-226, 231-238, 241-242, 244-246 and 249 contain the personal information of the affected persons and other identifiable individuals only and that pages 10, 27-29, 56, 58-59, 61, 64-67, 74, 86, 90, 94, 113, 147-151, 155, 168, 170, 182, 222-223 and 230 contain the personal information of the appellant and other identifiable individuals. It is also my view, however, that when the personal information of other individuals is severed from pages 10, 23, 27-29, 56, 58-59, 61, 64-67, 75, 81, 86-87, 90-92, 94-98, 100-106A, 113, 116, 147_152, 155-156, 170, 182, 189, 206, 222-224, 230-232 and 235 the remaining information cannot be considered as relating to any identifiable individual and, therefore, does not qualify as personal information. Accordingly, subject to my findings which follow, I will order, at the least, disclosure of these pages in severed form to the appellant.

I also find that pages 22, 23, 24, 57, 60, 62, 68-69, 80, 117-124, 126, 128-130, 135, 142-143, 154, 167, 169, 183-184, 190-191, 210, 228 and 235 contain the personal information of the appellant only, and/or information relating to identifiable individuals acting in their professional or employment capacity, which does not qualify as personal information. As no other exemptions apply to them, I will order the City to disclose these pages in their entirety to the appellant.

I further find that some of the information which has been exempted from pages 56, 75, 81, 166, 182, 189 and 206 also relates to individuals acting in their employment or professional capacities and, therefore, does not qualify as personal information. However, I have found that other information contained in these pages qualifies as personal information and I will, therefore, consider this information in the discussion that follows.

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

Under section 38(b) of the Act, 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.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 14(1) of the Act prohibits an institution from releasing this information.

In both these situations, 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 the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2).

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under 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.

The City submits that all of the personal information contained in the records was supplied by the individuals to whom the information relates in confidence (section 14(2)(h) of the Act). In addition, the City submits that the information contained in pages 1-6, 46, 47 and 75 relates to the medical condition of the identifiable individuals and, therefore, disclosure of this information would constitute an unjustified invasion of personal privacy under section 14(3)(a) of the Act. The City further submits that the information contained in page 82 relates to the employment and educational history of the individual named therein and, therefore, disclosure of this record would constitute an unjustified invasion of personal privacy under section 14(3)(d) of the Act.

The appellant submits that disclosure of the records is desirable for the purpose of subjecting the activities of the institution to public scrutiny (section 14(2)(a) of the Act) and access to the personal information may promote public health and safety (section 14(2)(b) of the Act). These are factors in favour of disclosure of the personal information.

Having carefully reviewed the representations and the records, I have made the following findings:

(1) Pages 1-6, 46, 47, 75 and 197-201 contain information relating to the identifiable individuals' medical conditions. Accordingly, section 14(3)(a) applies to these pages. I also find that sections 14(4) and 16 do not apply in the circumstances of this case.

(2) Page 82 does not contain information relating to the employment and educational history of the identifiable individual and, therefore, section 14(3)(d) of the Act does not apply.

(3) I have been provided with sufficient information to establish that the personal information was supplied to the City by the identifiable individuals implicitly in confidence and, therefore, section 14(2)(h) is a relevant consideration in favour of privacy protection.

(4) Although not claimed by any party, after considering the representations in their totality, I further find that the personal information should be considered highly sensitive and, therefore, section 14(2)(f) is a relevant consideration in the circumstances of this appeal.

(5) While the appellant submits that disclosure of the record is desirable for the purpose of subjecting the activities of the institution to public scrutiny (section 14(2)(a) of the Act) and access to the personal information may promote public health and safety (section 14(2)(b) of the Act), he does not provide any evidence or supporting argument in favour of these assertions. Therefore, I find that sections 14(2)(a) and (b) are not relevant considerations in the circumstances of this appeal.

(6) Page 159 is clearly a notice of a residents meeting that was publicly posted. Therefore, disclosure of the personal information which is found on this page could not result in an unjustified invasion of personal privacy.

Under Point (1) above, I have found that the presumption contained in section 14(3)(a) of the Act applies to the personal information in pages 1-6, 46, 47, 75 and 197-201. Even if I were to accept the appellant's arguments, as I have previously indicated, a factor or combination of factors under section 14(2) cannot rebut a presumption under section 14(3). With respect to the remaining information, having found that the records contain information which qualifies as personal information, and having found that no factors weigh in favour of a finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that, with the exception of page 159, the personal information contained in pages 1-6, 11-17, 25-26, 45-49, 51, 54-55, 63, 75, 81-83, 87-88, 91-92, 95-98, 100-106A, 116, 131_132, 141, 152-153, 156, 164, 166, 171-177, 186, 189, 194-201, 206-207, 213-215, 217-220, 224_226, 231-238, 241-242, 244-246 and 249 is properly exempt from disclosure under the mandatory requirements of section 14 of the Act. Further, I find that the personal information in pages 10, 27-29, 56, 58-59, 61, 64-67, 74, 86, 90, 94, 113, 147-151, 155, 158, 168, 170, 182, 222-223 and 230 is properly exempt from disclosure pursuant to section 38(b) of the Act. I will order disclosure of page 159 in its entirety to the appellant.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the City indicates that such records do not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. The Act does not require the City to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the City must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

During the course of the appeal, the appellant maintained his claim that further responsive records exist; specifically, a letter dated late November or early December to the City from a named individual from the mycology department of the Ministry of Health, City Board of Health meeting minutes relating to the Centre, and records which identify the author(s) of those records which do not contain this information (in particular, handwritten notes). In his representations, the appellant only addresses the issue of whether the first record (the letter) exists. He has provided me with a severed copy of the letter to which he refers. It is dated December 2, 1996 on Ministry of Health letterhead and is addressed to an employee of the City's Public Health Department from the named mycologist of the Ministry of Health. This supports the appellant's claim that this record exists.

The City, in its representations, submits that it made a reasonable effort to locate records responsive to the request and describes the steps taken to search for responsive records. The Co_ordinator of the Office of the Medical Officer of Health co-ordinated the search for responsive records throughout the Public Health Department. The areas searched include Environmental Health Services, the Office of the Associate Medical Officer of Health and the Office of the Medical Officer of Health. In addition, the Manager and Inspector of Environmental Health Services, the former Associate Medical Officer of Health and the Medical Officer of Health were contacted and their individual personal and department files were searched. The City further submits that another search was conducted during the mediation stage of this appeal and no further records were found.

While the appellant has provided me with a severed copy of the one record, this, in itself, is not determinative of whether the steps taken by the City were **reasonable**. Accordingly, having considered all of the evidence before me on this issue, I find that the City's search for records responsive to the appellant's request was reasonable in the circumstances of this appeal.

ORDER:

1. I order the City to disclose pages 18-23, 30-40, 44, 57, 60, 62, 68, 69, 77, 80, 93, 99, 111_112, 117-124, 127, 128-130, 135, 142-143, 145-146, 154, 159, 163, 165, 167, 169, 178-181, 183-185, 187, 190-191, 203, 210-212, 216, and 228-229 in their entirety and pages 10, 27-29, 56, 58-59, 61, 64-67, 75, 81, 86-87, 91-92, 94-98, 100-106A, 113, 116, 132, 147-152, 155-156, 166, 168, 170, 182, 189, 206, 217, 222-224, 230-231 and 235 in accordance with the highlighted copies of these pages which I have attached to the City's copy of this order (the highlighted portions are **not** to be disclosed) to the appellant by **August 28, 1997**, but not before **August 25, 1997**.

2. I uphold the City's decision not to disclose the information contained in pages 1-6, 11-17, 25-26, 45-49, 51, 54-55, 63, 74, 82-83, 88, 90, 131, 141, 153, 158, 164, 171-177, 186, 194-201, 207, 213-215, 218-220, 225-226, 233-234, 236-238, 241-242, 244-246 and 249 and the higlighted portions of those records referred to in Provision 1.

3. In order to verify compliance with the terms of this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: July 24, 1997
Laurel Cropley
Inquiry Officer