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

ORDER MO-1806

Appeal MA-020365-3

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Toronto Community Housing Corporation (TCHC), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester, now the appellant, sought access to all records concerning the appraisal, hiring, performance and termination of himself by a security services contractor to the TCHC (the contractor), his acting in the capacity of "Chief Coordinator, Community Housing Security Association" and his application for the position of "Security Officer" with the TCHC.

The TCHC is the successor to the Metropolitan Toronto Housing Authority (MTHA). In this decision, references to the TCHC are intended to include the MTHA, which is the name of the institution used throughout the records. As background, it appears that the TCHC took over certain security services previously provided by a security services contractor. Employees of the contractor were invited to apply for positions with the TCHC directly. The request relates, in part, to the appellant's termination of employment with the contractor, and application for employment with the TCHC.

In its decision, the TCHC provided access to a number of records, and denied access to others, citing sections 7, 11, 12, 14. It also took the position that section 52(3) excludes some of the records from the scope of the *Act*. The appellant appealed this decision.

During the course of mediation through this office, certain issues were narrowed or clarified. The TCHC agreed to reconsider its decision, and issued two new decision letters, releasing additional records to the appellant. It also withdrew its reliance on section 11 for records 314-316, but claimed that 52(3) excluded these records from the scope of the *Act*. It corrected a typographical error relating to records 44-49, from 52(4) to 52(3).

The appellant raised a question relating to two "sticky" notes he saw on page 322 of the records when he reviewed them at the TCHC offices; these two sticky notes were not on the photocopy of page 322 that the TCHC released to him. He also raised the issue of "compelling public interest" for all the records withheld under an exemption. The mediator raised the application of section 38 (a) for a number of the records.

I sent a Notice of Inquiry to the TCHC, inviting it to submit representations. As the TCHC objected to sharing portions of these representations with the appellant, I ruled on its objection, deciding to withhold some portions but rejecting its position with respect to others.

I then sent the Notice of Inquiry to the appellant along with the non-confidential portions of the TCHC's representations, and invited him to submit representations in response. Prior to this, in correspondence to this office, the appellant had listed a number of additional "Outstanding Issues in Dispute" which, in his submission, ought to be included in this Notice of Inquiry. I invited the appellant to elaborate on these issues in his representations, if he wished.

The appellant requested and received an extension of time to submit his representations. On the new deadline for receipt of his representations, he submitted a lengthy document which he described as a "rough, incomplete draft", and requested a second lengthy extension of time to

complete his representations. This further extension was granted. On the new deadline, the appellant submitted another document dated April 30, 2004, more than sixty pages in length, which he also described as a rough, incomplete draft. The appellant then requested a third lengthy extension to complete his representations. I denied this last request, indicating that he had been given sufficient time to provide his representations, and that I would be proceeding with the adjudication in this matter. I informed the appellant that I would consider his representations of April 30, along with the other material he submitted earlier. I indicated that although he was not precluded from submitting additional information to me, it would be in my discretion whether or not to accept it. Following my letter to this effect, the appellant sent me further correspondence objecting to my decision. I have reviewed this correspondence, and find no reason to vary or change this decision.

It should be noted that as a result of further disclosure of records by the TCHC, sections 11 and 14 are no longer issues in this appeal.

DISCUSSION:

At the outset, I note that the appellant has made voluminous representations in this appeal. I have found it unnecessary to refer to all of them in my decision. Some of the representations, for instance, bear on issues that were ultimately unnecessary to decide. Others were not germane to my findings, or are consistent with my own conclusions and did not require separate consideration.

As the TCHC has claimed that a large number of records are excluded from the *Act* under section 52(3), I will deal with this issue at the outset.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*. In this appeal, the TCHC relies only on section 52(3)3, in relation to Records 44 to 49, 94 to 95, 169 to 178, 183, 294 to 305, 306 to 312, 314, 315, 316, 331 to 333, 334 to 335, and 345 to 346.

The appellant disagrees that these records are excluded from the *Act*. Among other things, he relies on section 52(4) which provides:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Section 52(3)3: matters in which the institution has an interest

For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used

I have reviewed the records at issue and the representations of the parties. I find that most of these records were prepared by the TCHC. I accept that the others were sent to it and either maintained or used by it. Accordingly, all of the records meet the first part of the test under section 52(3)3.

Part 2: meetings, consultations, discussions or communications

Upon my review, I am also satisfied that these records were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications.

Part 3: labour relations or employment-related matters in which the institution has an interest

The final part of the test under section 52(3)3 requires that the meetings, consultations, discussions or communications be about labour relations or employment-related matters in which the TCHC has an interest. The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

The term "labour relations" in section 52(3) means "the collective relationship between an employer and its employees" [Orders P-1223, PO-1721, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*].

Records 44 to 49 are the minutes of a meeting between representatives of the Ontario Public Service Employees Union (OPSEU), which represents employees of the TCHC, and the TCHC. The minutes arise out of a collective bargaining relationship and are therefore records prepared in relation to discussions about labour relations matters in which the TCHC has an interest. I thus conclude that Records 44 to 49 are excluded from the *Act*.

The appellant submits that the *Act* applies to Records 44 to 49 as they constitute an "agreement" within the meaning of section 52(4). He relies on the fact that certain parts of the minutes record agreements reached on some of the issues raised at the meeting between the TCHC and OPSEU. I find that this section requires that the record itself be an "agreement": see Order P-1302. In this case, I am not convinced that the minutes are an "agreement". These pages set out the proceedings of a meeting at which workplace issues were canvassed. On some issues, agreement was reached and on others, no agreement was reached. The purpose of these minutes is to record discussions on issues regardless of their outcome. Given this, I am not convinced that the minutes constitute, in themselves, an "agreement." I am satisfied that section 52(4) does not apply to Records 44 to 49.

Records 94 to 95 consist of a seniority list. The employees listed on it were not employed by the TCHC at the time this record was created, but were employed by a security services contractor.

Given the background of events to this appeal, involving the hiring of security guards by the TCHC from amongst the employees of this contractor, I am satisfied that this record was collected, maintained or used by the TCHC in relation to employment-related matters in which it has an interest.

Records 169 to 178 and 183 appear to be notes of job interviews, concerning positions with the TCHC, and are therefore records prepared in relation to consultations, discussions or communications about employment-related matters in which the TCHC has an interest.

Records 294 to 305 consist of an application under section 96 of the *Labour Relations Act* (the LRA) and its attachments, naming the TCHC as the responding party and OPSEU as the applicant. As OPSEU represents employees of the TCHC for collective bargaining purposes, I find that this is a record prepared in relation to meetings, discussions or communications about labour relations in which the TCHC has an interest. The appellant submits that Records 294 to 305 constitute an "organizational or operational review" and are therefore not excluded from the *Act* under section 52(3)3. He refers to the Notice of Inquiry and its discussion of Orders M-941 and P-1369. I find that these orders are distinguishable. An organizational or operational review, as discussed in those orders, is significantly different in scope, purpose and content from a complaint to a statutory tribunal alleging unfair labour practices.

Records 306 to 312 consist of an excerpt from a consultant's report, a memo from OPSEU to its members, a job advertisement, and a memo from the TCHC to OPSEU. It appears that the consultant's report was attached to the memo from the TCHC to OPSEU (Record 312). The appellant also submits that Records 306 to 312 are in the nature of an organizational review, and are therefore not about labour relations or employment-related matters. Although it is arguable that the consultant's report was not originally prepared for the purpose of labour relations matters, I am satisfied that the excerpt found here formed part of communications between the TCHC and OPSEU about labour relations in which the TCHC has an interest and is therefore a record used in relation to communications about labour relations matters. I also find that the other records in this group were collected, maintained or used in relation to discussions between the TCHC and OPSEU about labour relations matters.

Record 314 is a memo from a contractor to the TCHC, to its employees. As with Records 94 to 95, given the background events to this appeal, and the hiring of security guards by the TCHC from amongst the employees of this contractor, I am satisfied that the TCHC's collection, maintenance or use of this record was in relation to discussions or communications about employment-related matters in which it has an interest.

Record 315 is a memo from the TCHC to all security staff, a category of personnel which appears to cover both TCHC employees and employees of a contractor. I find that this record was used in relation to communications between the TCHC and its employees and potential employees about employment-related matters in which it has an interest.

Record 316 is correspondence between a contractor and the TCHC. Based on the content of this letter, I am satisfied that it was used by the TCHC in relation to consultations, discussions or

communications about employment-related matters in which it has an interest, specifically, its hiring of security staff.

Records 331 to 332 are records providing a comparison of labour costs. I accept that they were prepared by the TCHC for the purpose of discussions or communications about employment-related matters in which it has an interest, specifically, the costs of staffing its security services.

Record 333 appears to be an excerpt from a contract between the TCHC and a contractor. Again, given the background events to these records, involving the hiring of security guards by the TCHC from amongst the employees of the contractor, I am satisfied that this document was collected, maintained or used by the TCHC in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters.

Records 334 to 335 and 345 to 346 are a letter to a Member of Provincial Parliament (MPP), providing information about certain employment-related matters which were the subject of an inquiry by this MPP. I am satisfied that this document was prepared by the TCHC for the purpose of communications about employment-related matters in which it has an interest, specifically, the comparative labour costs of its in-house and contract security services.

In conclusion, all three parts of the test under section 52(3)3 have been met in relation to all of the records to which the TCHC applied this section. Further, I find that section 52(4) has no application to the records. They are therefore excluded from the scope of the *Act*.

In arriving at my above conclusions, I have considered all the representations of the appellant, including his submission that the TCHC's position on the exclusion of these records from the *Act* is "inconsistent, unreasonable and arbitrary" given its decision to provide access to other, arguably similar, records. The appellant's submission here can be interpreted as an argument that section 52(3) cannot apply to these records, or at the very least, that I should be circumspect about the application of section 52(3) given the TCHC's decision to disclose other similar records. With this in mind, I have carefully considered each record at issue. As I have discussed above, I have found that they meet all three parts of the test under section 52(3).

I now turn to consider whether any of the remaining records are exempt from disclosure under the *Act*.

ADVICE TO GOVERNMENT

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

An exception to section 7(1) is found in section 7(2)(a), which provides for the disclosure of "factual material."

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

In this appeal, the TCHC takes the position that Records 4 to 6, 28, 35, 137 to 138, 140, 145 to 147, 154 to 155, 156 to 158, 179, 182, 195, 272 and 289 are exempt under section 7(1).

Records 4 to 6 are a list of various documents, in chart form. The chart provides the date (where known), the sender and recipient and a brief description. The TCHC submits that the chart contains summaries of the contents of the various documents which constitute advice or recommendations to the employee users of the file. As such, it is said, the list goes beyond a mere listing of the various documents.

I am not satisfied that Records 4 to 6 contain advice or recommendations within the meaning of section 7(1). Even if the documents listed are briefly described, they neither contain nor reveal the advice or recommendations of any officer or employee of the TCHC.

Records 28 and 35 are identical, and consist of an email communication. I am also not convinced that this record contains or reveals advice or recommendations. Rather, it is a direction from one employee to another to prepare a response on a matter.

Records 137 to 138, which overlap in their content, are email communications. Record 137 also contains a handwritten notation. The email messages themselves do not contain or reveal advice or recommendations, in that they consist of requests for assistance or advice. However, the handwritten notation does contain advice and I therefore find that this portion of Record 137 is exempt under section 7(1).

Records 140, 182, 195, 272 and 289 are identical. The TCHC submits that it is a handwritten note to file from one staff member to another staff member. The appellant disputes this, and submits that it is in fact his own handwritten note. It is not necessary to resolve this factual difference because I find, in any event, that the note neither contains nor reveals any advice or recommendations and is not exempt under section 7(1).

Records 145 to 147 are said by the TCHC to consist of draft correspondence. The TCHC submits that implicit in them is the advice of TCHC employees with respect to the contents of the correspondence.

The appellant refers to the Notice of Inquiry which notes that "draft documents" have been found in prior orders not to qualify as advice or recommendations under section 7(1). In Order P-434, one of the orders referred to there, the Assistant Commissioner rejected the position of the Ministry of the Attorney General that a draft memorandum was "by its very nature", a recommendation. I agree with the finding in Order P-434. However, it is also the case that in given fact situations, draft correspondence has been found to qualify for exemption under section 7(1) or its provincial equivalent. In Order PO-1452, for instance, a letter prepared for the Attorney-General's signature was found to qualify as "advice or recommendations" on the basis that it could be approved or rejected.

On my review of the correspondence at Records 145 to 147, Record 145 appears to be the final version of a letter sent by the Minister of Housing to the appellant. Taken alone, it does not contain or reveal advice or recommendations as it reflects the final position taken by the Minister on the matters addressed in the letter. Record 146 does not contain or reveal any advice or recommendations as it simply identifies the employees involved in the correspondence. I accept that Record 147 implicitly reflects the advice or recommendations by employees about its contents, in that it contains a suggested response with which the intended signatory could agree or disagree. Of this group of records, therefore, I find that Record 147 is exempt under section 7(1).

Records 154-155 consist of a letter from the Minister of Housing to a MPP, responding to issues raised in correspondence from the MPP to the Minister. It does not contain or reveal advice or recommendations within the meaning of section 7(1). The letter was not generated within any "deliberative process of government decision-making and policy-making" and in any event contains factual information only.

Record 156 was generated within a process of decision-making; however, it does not contain or reveal the advice or recommendations of the author, and is more in the nature of a cover letter to attached advice.

Records 157 to 158 consist of a briefing note relating to the appellant. The TCHC submits that it is "intended to communicate the background of the file in order to facilitate decision making by persons employed by the institution." I find this an accurate description of the record. I also find that as such, it does not contain or reveal advice or recommendations, but is limited to conveying factual information.

Record 179 consists of draft correspondence prepared for a Minister. Consistent with my findings on Record 147 above, I find that this record is also exempt as it implicitly reflects the advice or recommendations of its author to the intended signatory. My conclusion here is supported by Record 156, which appears to be the cover memo to this draft correspondence.

In conclusion, section 7(1) does not apply to exempt Records 4 to 6, 28, 35, 137 (except for the handwritten portion), 138, 140, 145 to 146, 154 to 155, 156 to 158, 182, 195, 272 and 289. As no other exemptions apply to these records, I will order them disclosed.

I find that the handwritten portion of Record 137, and Records 147 and 179 qualify for exemption under section 7(1) as they contain or reveal advice or recommendations and do not fall under any of the exceptions in section 7(2). I now turn to consider whether section 38(a) applies to these records.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

On my review, I find that Records 137, 147 and 179 contain the personal information of the appellant. Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where section 7, among others, would apply to the disclosure of that information. The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the TCHC failed to do so.

In addition, I may find that the TCHC erred in exercising its discretion if, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In its representations, the TCHC sets out the reasons why it decided to withhold the records. Based on these representations, I am satisfied that it did not exercise its discretion under section 38(a) improperly. Therefore, I find that the handwritten portion of Record 137 and Records 147 and 179 are exempt from disclosure.

I will now consider the TCHC's position that section 12 applies to exempt Records 33 to 34 from disclosure.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the *Act* reads:

> 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 contains two branches, a common-law solicitor-client privilege and a statutory solicitor-client privilege. As this appeal does not turn on any differences between these two branches, it is not necessary to discuss them separately.

The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Records 33 to 34 consist of a letter from a lawyer with the legal services branch of the TCHC. It responds to correspondence from the recipient of the letter, and has been copied to various personnel at the TCHC.

The TCHC submits that the letter was created for the purpose of litigation. It also submits that the letter was used in order to obtain legal advice or in the conduct of litigation. I will therefore consider whether this letter is exempt from disclosure under either solicitor-client communication privilege or litigation privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The TCHC submits that privilege attaches to the entirety of Records 33 to 34, the privilege was never waived, and these documents were used in order to obtain legal advice or in the conduct of a litigation at the time, as enunciated in *Waugh v. British Railways Board* [1979] 2 All E.R. 1169.

I am satisfied that the author of the letter at Records 33 to 34 was acting as counsel to the TCHC at the time the letter was sent. However, the letter represents a communication between the solicitor and a third party, rather than the solicitor and client (the TCHC). I find that the letter lacks the essential quality of having been made in confidence. It does not constitute a "direct communication[s] of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice". Nor does the evidence establish that it forms part of the solicitor's confidential working papers directly related to the seeking, formulating or giving of legal advice. In conclusion, the letter does not qualify for the solicitor-client communication privilege.

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

In Sopinka, Lederman and Bryant, The Law of Evidence in Canada (Toronto: Butterworths, 1992), cited in *General Accident Assurance Co.*, the scope of litigation privilege was described as extending to communications between a solicitor and third parties "if made for the solicitor's information for the purpose of pending or contemplated litigation."

I am satisfied that litigation privilege does not apply to the communication in Records 33 and 34. Although a communication between a solicitor and a third party may be covered by litigation privilege in the circumstances described above, in this case, this communication was not made for the solicitor's information as part of investigation or preparation for pending or contemplated litigation. It was the solicitor's response on behalf of the TCHC to queries by the third party. The rationale for the litigation privilege does not apply to this type of communication.

In conclusion, I find that Records 33 and 34 do not qualify for exemption under section 12.

PUBLIC INTEREST OVERRIDE

The appellant takes the position that section 16 applies in this appeal. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In this case, the only exemption that I have upheld is section 7, in relation to the handwritten portion of Record 137, and Records 147 and 179. I will therefore consider whether section 16 applies to justify their disclosure despite section 7.

Section 16 cannot apply to the records excluded from the scope of the *Act* under section 52(3)3, and it is therefore not necessary to consider these records in this part of my decision.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

I have considered the representations of the TCHC and the appellant on this issue. I agree with the appellant to the extent that *some* of the interests raised in some of the records in this appeal raise issues of a public nature. However, the records equally reflect an interest that is essentially private rather than public, relating to the appellant's employment. I am not satisfied that any public interest reflected in the records (and, in particular, in the handwritten portions of Record 137, and Records 147 and 179) is "compelling" in the sense used in section 16. It has not been shown that there is a broader public interest to be served by disclosure of the information in these records, or that disclosure would advance the purpose of "informing the citizenry about the activities of their government" or add to the body of information the public requires in order to make political choices.

As there is no compelling public interest in disclosure of these records, section 16 has no application in this appeal.

SEARCH FOR RESPONSIVE RECORDS

The appellant claims that the TCHC has not conducted a reasonable search for responsive records in that it should have found two yellow "sticky" notes that he saw attached to some records on an occasion when he reviewed them.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the TCHC's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the TCHC to prove with absolute certainty that further records do not exist. However, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

The TCHC submits that the two "sticky" notes are not responsive to the request. It submits that the two notes became attached to the file during its review in the course of preparing the records for disclosure. At the time the appellant viewed the file they may have been attached to the file, but were not part of the record. The TCHC states that it has no knowledge of what has happened to the notes but believes them to have been destroyed or lost. It has reviewed the entire file for the presence of the notes in question and has not been able to retrieve them.

I am satisfied that the TCHC has conducted a reasonable search for records. Its explanation as to the possible origin and disposal of the notes is plausible and reasonable. I find that the notes were used as temporary placeholders and were not part of the records located in response to the request.

In arriving at these determinations, I have reviewed the appellant's representations and do not find it necessary to address them in detail here. I am satisfied that they do not support a different conclusion from the one I have reached.

The appellant also submits that there are two versions of Record 69, and that the TCHC ought to have provided him with access to both. I have reviewed the material before me. It appears that any issues relating to Record 69 were resolved during the mediation of this appeal. Record 69 was not identified as being in dispute in the Mediator's Report. On this basis, it is unnecessary for me to make any determinations on it. However, since there is evidence before me on the issue, I find that the TCHC has provided a reasonable basis to support its position that there is only one Record 69, which was provided to the appellant in its entirety.

OTHER ISSUES RAISED BY THE APPELLANT

Here, I will deal with some other issues raised by the appellant.

The appellant states that the decision letters issued by the TCHC are inadequate, in that they quote the exemption relied on to deny access, but do not provide reasons. He also refers to a failure to provide details as to the person responsible for making the access decision. He states that the index provided by the TCHC failed to provide sufficient detail to identify the records, and also takes issue with the TCHC's issuance of a revised decision letter following its initial decision.

I am satisfied that these issues do not affect the outcome of this appeal. Even if there was any defect in the decision-making process (which I do not find it necessary to decide), more information was provided through the course of this inquiry. The TCHC made representations which were shared in their entirety with the appellant with the exception of very limited portions. The appellant has had a reasonable opportunity to respond to the representations of the TCHC on its decision to deny access to the records, with an understanding as to the basis of its decision. In these circumstances, it would serve no purpose to review the adequacy of the decision letters or to order any further remedy regarding them.

As to the suggestion that the TCHC is precluded from revising its decision to encompass additional severances, I note that this office has adopted a policy which allows an institution 35 days after an appeal is initiated to raise any new discretionary exemptions not originally claimed in its decision letter: see section 11 of the IPC *Code of Procedure*. Given that the revised decision to which the appellant objects was made well before this deadline, I see no reason to disallow it.

The appellant also objects to what he describes as a lack of sufficient detail in the TCHC's representations with respect to the records at issue. I am satisfied that the appellant has been given an adequate opportunity to respond to the positions of the TCHC. Indeed, in most cases, the appellant has accurately identified the record at issue. I find that despite what the appellant describes as defects in the description of the records, enough detail was provided to enable the appellant to respond to the issues in this appeal.

The appellant states that the TCHC is in breach of section 1, which states that the purposes of the *Act* include "to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information", and requires that exemptions be "limited and specific". He also refers to sections 4(2) (severances), 14(2)(d) (fair determination of rights), 19 (access procedure), 23(1) (provision of a copy of records), 36(1) (access to own information), 36(2) (right of correction), 42 (burden of proof), section 3(3) of Regulation 823 (preservation of records), section 11 of the IPC *Code of Procedure* (additional discretionary exemption claims), and section 14.01 of the *Code* (allegations regarding character). I find that none of these issues require separate determination in itself. Where they are arguably relevant to the issues discussed above, I have considered them in my deliberations.

ORDER:

1. Records 44 to 49, 94 to 95, 169 to 178, 183, 294 to 305, 306 to 312, 314, 315, 316, 331 to 333, 334 to 335, and 345 to 346 are excluded from the *Act* under section 52(3).

2. I order the TCHC to disclose Records 4 to 6, 28, 33 to 34, 35, 137 (except for the handwritten portion), 138, 140, 145 to 146, 154 to 155, 156 to 158, 182, 195, 272 and 289.

3. I order disclosure to be made by sending the appellant a copy of the records by no later than **July 21, 2004**.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the TCHC to provide me with a copy of the information disclosed to the appellant pursuant to this order.

Original signed by: June 23, 2004
Sherry Liang
Adjudicator