COURT FILE NO.: 494/04
DATE: 20061030

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Lawrence David Applicant

- and -

Robert Binstock, Registrar
Information and Privacy Commissioner/Ontario
Respondent

HEARD: October 27, 28; December 19; 2005; January 12; March 27; 2006

BEFORE: Lane, Greer and Epstein JJ.

COUNSEL: Lawrence J. M. David in person
William S. Challis, for the Respondent

REASONS FOR JUDGMENT

LANE J.:

[1] This is one of three related applications[1] that were heard together. They all arose out of the political storm that developed about the selection process for bidders for the contract for the renovation and future operation of the Union Station, the main railway station in Toronto and a landmark historic site. This application involves a request by Mr. David for an order directing the Information and Privacy Commissioner of Ontario ("Commissioner") to investigate and report on his complaint under the *Municipal Freedom of Information and Protection of Privacy Act*[2] that his privacy rights were breached by the Hon. Coulter A. Osborne in his Union Station Review report to the City on May 22, 2003 by reason of certain references to him, identifying him by name. He complained to the City but did not obtain satisfaction. Accordingly he complained to the

[1] The others are: Div. Ct. File No. 24/05, Lawrence David v. Donald Hale (Adjudicator, Information and Privacy Commissioner, Ontario), and Div. Ct. File No. 485/04, Rita Reynolds v. Robert Binstock (Registrar I.P.C.)

[2] R.S.O. 1990, c. M-56 (hereinafter "MFIPPA")

Commissioner who gave the complaint file number MC-030028-1 (hereafter 028) and assigned the respondent to deal with it.

[2] The background to all of this is the action of the City in engaging Mr. Osborne in February 2003 to inquire into the process adopted by the City to develop the Request for Proposals, evaluate the submissions and select the preferred proponent to carry forward the redevelopment of the Union Station. The purpose of the Review was to determine whether the RFP was fair, that is, not slanted toward the interests of one or the other of the two proponents. Mr. Osborne was to report directly to Council. He conducted 58 interviews with 43 persons, including the applicant who was interviewed twice. On May 23, 2003 his report was presented to Council and published by it on the City website. The applicant complained of personal references in the report and also sought to obtain Mr. Osborne's notes in an access proceeding.

[3] Mr. David expected that his complaint would be investigated, that the City would make submissions on compliance and that the Commissioner would publish a report disposing of the matter. Instead, his complaint was dismissed without any investigation. He contends before us that the Commissioner has a duty to investigate complaints and the powers necessary to do so.

[4] The respondent contends that the Commissioner has no statutory duty to investigate complaints of breaches of the privacy provisions of MFIPPA, in contrast to the Commissioner's adjudicative role in dealing with appeals from denial of access to records. This is so, it is said, because the Commissioner's role in privacy matters is not adjudicative but advisory. She receives complaints from the public as to the privacy provisions of MFIPPA as part of her statutory mandate to advise the Legislature on the functioning of those provisions. The respondent contends that because the Commissioner is carrying out her legislative advisory duties and not adjudicative ones, these decisions are not subject to judicial review. In the alternative, the Commissioner contends that she made no error in reaching these decisions.

[5] In the companion case of *Reynolds*, heard by us at the same time, the same submissions were made and both Mr. David and Ms. Reynolds addressed the issues in their respective cases before us. The decision in *Reynolds* is being released concurrently with this decision and for the reasons in that

case, we hold in this case that there is no duty on the part of the Commissioner to hear complaints and decide them. In *Reynolds* we said:

> The Commissioner may or may not be "pushing the envelope" of her Office in mediating privacy complaints, but the scope and supervision of the activities of the Commissioner in gathering information to fulfill her duty as an Officer of the Legislature to report to it on the operation of these Acts is a matter for the House and not for the courts. It follows that we cannot intervene as the applicant asks us to do.

[6] While his complaint 028 was still active at the Commission, Mr. David learned that the City was taking the position that it could not respond to his access request for Mr. Osborne's notes because the notes were not in the possession or under the control of the City. He launched a fresh privacy complaint (MC-030043-1, hereafter 043) on November 17, 2003, alleging that the City was in breach of MFIPPA because it had not required Mr. Osborne to turn over his records to the City or otherwise comply with the Act. He also launched an access appeal to the Commissioner against the City's failure to produce the notes. That appeal ultimately resulted in the *David v. Hale* decision, also released concurrently, in which we hold that Mr. Osborne's records were indeed not in the custody or control of the City:

> By contrast, Mr. Osborne is not a part of the operations of the City. He is a person engaged to study one particular facet of those operations as an independent investigator. His records are not within the control of the City, are therefore not subject to MFIPPA and no question of exemption arises.

[7] At the time when his complaint 043 was launched, the applicant's appeal on the access issue was also pending and the respondent decided to put 043 on hold until the issue in the access appeal was resolved, a decision with which the applicant strongly disagreed but could not persuade the Commission to change its mind. Subject to further appeals, the access issue is decided today, so that the Commissioner's stay of complaint 043 is at an end and the applicant can revive the complaint and ask the Commissioner to hear it. From our perspective, there is no need to give consideration to the request to quash the stay as the issue is moot. However, the findings in *Reynolds* as to the absence of jurisdiction to intervene would equally preclude our intervening in respect of the stay order.

[8] As to the issues of fairness, Mr. David disagrees with the respondent's submission that he had put his opinions in the public domain prior to the publication of the Review, so that there was no basis for complaining of the use that Mr. Osborne made of their discussions. He complains of Mr. Osborne's characterizations of him and of his views as both unwarranted by anything said and as improper disclosure of personal information. But, as in Ms. Reynold's case, the decision was made after hearing the applicant's submissions in full and the existence of the screening process was made known in advance and was conducted fairly. That Mr. David does not agree with the result or with the reasoning does not make the process unfair.

[9] In paragraphs 32 to 39 of his factum, Mr. David asks that we re-weigh the factors referred to by the respondent and decide differently based on giving weight in a different manner, and later asks that we consider whether the Review recorded his views accurately. These are not matters which we can deal with in the present circumstances. Even if we did have jurisdiction to interfere, a judicial review is not an appeal and re-weighing the evidence would not be our function. Mr. David sums up the reasons for the decision not to proceed at paragraph 48 of his factum:

> In the case at bar, the Commission found that Mr. David's personal information is in the public domain and that he put it there.

[10] In my view, having read the evidence before us, that is not an unreasonable conclusion for the respondent to have reached.

[11] For these reasons, I would dismiss the application. Costs, if demanded, may be the subject of written submissions, those of the Commissioner within 30 days and those of the applicant within a further thirty.

Lane J.
I agree. – Greer J.
I agree. – Epstein J.

DATE: October 30, 2006