

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BENOTTO S.J., DUNN and MCCOMBS JJ.

B E T W E E N:)
)
MUNICIPAL PROPERTY ASSESSMENT) *Mahmud Jamal and Jennifer Lynch* for the
CORPORATION) applicant
)
Applicant) *William S. Challis* for Tom Mitchinson
- and -) (Assistant Commissioner)
)
) *Tamar Witelson and Louis Sokolov* for
TOM MITCHINSON, Assistant) Security Recovery Group Inc.
Information and Privacy Commissioner, and)
SECURITY RECOVERY GROUP INC.) *Leslie McIntosh* for the Attorney General for
) Ontario
Respondents)
- and -)
)
)
ATTORNEY GENERAL FOR ONTARIO)
)
Intervenor) Heard: February 10, 2004

BY THE COURT:

INTRODUCTION

[1] The Assistant Information and Privacy Commissioner has ordered a government agency, the Municipal Property Assessment Corporation¹ ("MPAC"), to hand over to a collection agency an electronic record containing personal information concerning more than ten million Ontario residents. The collection agency, Security Recovery Group Inc. ("SRG"),² asked MPAC for the information, stored on eight CDs, to use to help it find judgment debtors. When MPAC refused,

¹ The information is prepared for each municipality pursuant to the provisions of the *Assessment Act*, R.S.O. 1990 c. A.31.

² SRG is registered under the *Collection Agencies Act*, R.S.O. 1990, c. C14.

SRG appealed to the Information and Privacy Commissioner. The respondent, Assistant Commissioner Mitchinson ("the Commissioner"), allowed the appeal and ordered MPAC to provide the electronic record to SRG, free of charge.³

[2] MPAC now applies for judicial review of the Assistant Commissioner's order. The Attorney General for Ontario has intervened in support of MPAC.⁴

BACKGROUND

(a) MPAC'S LEGISLATIVE AUTHORITY

[3] MPAC is a not-for-profit corporation created under the *Municipal Property Assessment Corporation Act*, 1997, S.O. 1997, c. 43, as amended ("*MPAC Act*"). MPAC administers a province-wide property valuations system based on current value assessment. Among its responsibilities is the annual creation of a municipal assessment roll for each municipality for its use in calculating property taxes. MPAC's mandate to prepare the annual assessment rolls is governed by the *Assessment Act*. Section 14 of the *Assessment Act* specifies the information that MPAC is required to include on the assessment roll. It includes the following:

- A description of the property sufficient to identify it;
- The name and surnames, in full, of all persons liable to assessment in the municipality;
- The person's religion, if they are a Roman Catholic;
- The type of school board the person supports under the *Education Act*;
- The number of acres, or other measures showing the extent of the person's land;
- The current value of the parcel of land;
- The value of land leased to tenants; and
- The name of every tenant who is a supporter of a school board.

³ Order MO-1693, the September 20, 2003 decision of the respondent, Assistant Information and Privacy Commission Tom Mitchinson, Public Record, Vol. 2, p. 488.

⁴ The Attorney General is entitled to intervene as of right, under s. 9(4) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[4] MPAC also collects other personal information about property owners or occupiers pursuant to its duties under other statutes.⁵ The information includes gender, citizenship, year and month of birth, spousal relationship of the owner/occupant, the mailing address of the property, and whether the owner/ occupant is disabled or a senior.⁶ Failure to comply with MPAC's lawful demand for information is an offence under s. 13 of the *Assessment Act*.

[5] MPAC uses forms to gather personal information from individuals. The forms reassure their recipients that the information will be "protected", and used for limited purposes. The following is an example from a "Municipal and School Board Elections" form:⁷

Note: This information is collected under the authority of section 15 of the *Assessment Act* and is protected under the *Municipal Freedom of Information and Protection of Privacy Act*. It will also be used for planning purposes by your municipality and local school board, to generate a list of potential jurors, to update information on Ontario's population and to update property assessment records.

[6] MPAC is required to "deliver the assessment roll to the clerk of the municipality", who then must "make it available for inspection by the public during office hours".⁸

[7] Only a paper copy of the assessment roll is provided by MPAC to the clerk of each municipality. The paper copy is provided for a fee based on a statutory formula.⁹ If the municipality wants the roll in electronic format, it must purchase it from MPAC for an additional fee.¹⁰

[8] MPAC is also authorized to sell information to members of the public for a fee set by MPAC, and upon terms set by MPAC.¹¹ The information that MPAC sells to the public under this authority is, however, stripped of personal information; it is also subject to licence agreements that limit the purposes for which the information may be used, and prohibit its sale or transfer to others.¹²

⁵ The statutes include the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, as amended; the *Education Act*, R.S.O. 1990, c. E.2, as amended; the *Municipal Act, 2001*, S.O. 2001, c. 25 as amended; and the *Provincial Land Tax Act*, R.S.O. 1990, c. P.32, as amended.

⁶ Public Record, vol. 1, pp. 38, 39, 41, 42, 57.

⁷ Public Record, vol. 1, p. 177.

⁸ Section 39(1) & (2) of the *Assessment Act*.

⁹ Sections 12(1) & (2), *MPAC Act*.

¹⁰ Such additional fees are authorized by s. 12(5) of the *MPAC Act*.

¹¹ Section 12(5) of the *MPAC Act*, and s. 53(5) of the *Assessment Act*.

¹² Public Record, vol. 1, p. 187, and vol. 2, p. 392.

(b) THE COMMISSIONER'S DECISION

[9] The Commissioner ordered MPAC to hand over to SRG an electronic record containing the personal information of millions of Ontarians, essentially free of charge and without being subject to the usual licence agreements. The Commissioner accepted that the electronic record contained the personal information of individual residential property owners, pursuant to section 2(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 ("*MFIPPA*"), but found that the exception under section 14(1)(d) of *MFIPPA* applied. Section 14(1)(d) prohibits a head of an institution from disclosing personal information unless another statute expressly authorizes disclosure. The section reads:

14(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure.

[10] The Commissioner found that section 39 of the *Assessment Act* expressly authorizes the head of MPAC to disclose the electronic record. That section provides:

Delivery of roll to clerk

39(1) The assessment corporation shall deliver the assessment roll to the clerk of the municipality and shall do so on or before the date fixed for the return of the roll.

Inspection by public

39(2) Immediately upon receipt of the assessment roll, the clerk shall make it available for inspection by the public during office hours.

[11] The Commissioner also found that MPAC was not entitled to rely on s. 15(a) of *MFIPPA* which provides that a head may refuse to disclose a record if the record or the information contained in the record has been published or is currently available to the public.

ISSUES

[12] There are three main issues in this appeal:

- i) Did the Commissioner err in concluding that s. 39 of the *Assessment Act* expressly authorizes disclosure of personal information, thereby engaging s. 14(1)(d) of *MFIPPA*?
- ii) Did the Commissioner err in finding that MPAC was not entitled to rely on s. 15(a) of *MFIPPA* and refuse to disclose the record on the basis that it had already been published or is currently available to the public?

- iii) Did the Commissioner err in failing to invite submissions or to consider whether disclosure of the electronic record would harm the economic or other interests of MPAC so as to fall under exemptions from disclosure under s. 11 of *MFIPPA*?

STANDARD OF REVIEW

[13] It has been established that the courts should accord a high degree of curial deference to the decisions of the Information and Privacy Commissioner, whose authority to determine freedom of information and protection of privacy issues has been conferred by the legislature.¹³ Generally, the appropriate standard of review of the Commissioner's decision is one of reasonableness, and the court should not interfere unless the commissioner's decision was clearly wrong.¹⁴ Where, however, the issue on appeal is the interpretation of an external statute not within the commissioner's particular expertise, the standard of review is one of correctness. See: *Gombu v. Mitchinson et al.* (2002), 214 D.L.R. (4th) 163; 59 O.R. (3d) 773 (Div. Ct.), at paras. 10 & 11, leave to appeal granted, [2002] O.J. No. 3309.¹⁵ Moreover, where the issue on appeal is the interpretation of judicial precedent, the standard of review is also one of correctness.

ANALYSIS

- A. Did the Commissioner err in finding that there is legislation that expressly authorizes MPAC to disclose information for the purposes of s. 14(1) of *MFIPPA*?

[14] Section 14 of *MFIPPA* begins with the general principle that a head "shall refuse to disclose personal information to any person other than the individual to whom the information relates". However, the section specifies certain exceptions to the general rule prohibiting disclosure. The relevant exception in this case is s. 14(1)(d), which permits disclosure where an Act of Ontario or Canada "expressly authorizes the disclosure".¹⁶

[15] The Commissioner, in finding that the *Assessment Act* expressly authorizes disclosure, held that he was governed by the decision of this court in *Gombu, supra*. That case dealt with disclosure to an investigative journalist of an electronic database containing the names, addresses and telephone numbers of municipal election campaign contributors. The list had been prepared under the *Municipal Elections Act, 1996*, S.O. 1996, c. 32. Under s. 88(5) of that *Act*, such contribution lists

¹³ *Right to Life Association v. Metropolitan Toronto District Health Commission* (1991), 86 D.L.R. (4th) 441 (Ont. Div. Ct.), and *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

¹⁴ See *Canada (Director of Investigation & Research) v. Southam Inc.* (1997), 144 D.L.R. (4th) 1 (S.C.C.) at 19.

¹⁵ The appeal was subsequently abandoned.

¹⁶ S. 14(d) is reproduced in para. 9, above.

are "public records", and are required to be disclosed regardless of the privacy provisions of *MFIPPA*. The section reads:

Despite anything in the Municipal Freedom of Information and Protection of Privacy Act, documents and materials filed with or prepared by the clerk or any other election official under this Act are public records and, until their destruction, may be inspected by any person at the clerk's office at a time when the office is open.

[16] The principal issue before the court in *Gombu* was whether or not the electronic database was caught by s. 88(5) of the *Municipal Elections Act*, and if so, whether that section expressly authorized the disclosure of the database, within the meaning of s. 14(1) of *MFIPPA*. The court held that the electronic database had been prepared by the clerk under the *Municipal Elections Act*, and accordingly s. 88(5) applied and *MFIPPA* had no application. Moreover, the court held that because of the importance of transparency of the democratic process, and the diminished expectation of privacy with respect to the subject information, it was not reasonable for the commissioner to refuse to direct disclosure of the electronic database.

[17] We have concluded that, by holding that *Gombu* was indistinguishable and thus determinative of the issue before him, the Commissioner erred in three respects:

- i) by finding that s. 39 of the *Assessment Act* expressly authorized the disclosure of the electronic record sought by SRG,
- ii) by failing to properly address the purposes of the statutes and the nature of the disclosure requests in both cases, and
- iii) as a result of the first two errors, by finding that since the information sought was available on paper, the electronic version of the information must also be disclosed.

i) Statutory authorization under s. 39 of the Assessment Act

[18] In *Gombu*, s. 88(5) of the *Municipal Elections Act* mandated disclosure of the electronic record. In this case however, the *Assessment Act* contains no such mandate. The *Assessment Act* neither obligates nor authorizes MPAC to do anything besides making the municipal rolls available to the municipal clerk. We do not accept the Commissioner's submission that because the "head" and the "clerk" are part of the same institution, it does not matter who is named in the statute as having the authority to disclose the information. To override the important privacy interests addressed in *MFIPPA*, MPAC must have express authorization to disclose.

ii) Purpose of the statutes and the nature of the disclosure requests

[19] In our view, in finding that *Gombu* was indistinguishable from this case, the Commissioner erred by failing to properly consider the differing contexts of the two cases, and the very different purposes of the legislative scheme under consideration. In *Gombu*, the court emphasized the

importance of transparency in the democratic process, and observed that the legislative scheme under consideration "constitutes a policy that recognizes that public accountability in the election process should, where necessary, override individual privacy interests".¹⁷ In contrast, there are no compelling public policy considerations that override the privacy interests at stake in the case before us. Indeed, the information being sought by the respondent SRG, a collection agency, would be used by it for purely commercial purposes. The information contained in the electronic database was obtained by statutory compulsion and the individuals providing it were told that the information was "protected" under *MFIPPA*.¹⁸ Clearly, members of the public who were required to provide the personal information in question would reasonably expect their legitimate privacy interests to be protected. The information at stake here was gathered for four main purposes: to allow for the creation of assessment rolls for municipalities (*Assessment Act*, s. 14); to identify those entitled to vote in municipal elections (*Assessment Act*, s. 15); to create an annual school support list (*Assessment Act*, s. 16); and to generate a list of eligible potential jurors (*MPAC Act*, s. 9(2)).

iii) Paper vs. electronic records

[20] The Commissioner held that since the requested data in this case was electronic and was also available in paper form, *Gombu* required its disclosure. We have already explained why this interpretation was incorrect, given the differing statutory contexts. *Gombu* did not purport to hold that if paper records were required to be disclosed, it followed that electronic records should as well. *Gombu* held that, in the context of protecting the integrity of the democratic process, the difference between electronic and paper records was not a sufficient basis for refusing to disclose them in electronic form. In the case before us, the context and the competing interests are obviously quite different.

[21] The errors that we have already identified require that we quash the Commissioner's order. We will therefore discuss the remaining two issues only briefly.

B. Did the Commissioner err in holding that MPAC was not entitled to rely on s. 15(a) of *MFIPPA*?

[22] Section 15(a) of *MFIPPA* provides:

A head may refuse to disclose a record if,

(a) the record *or the information contained in the record* has been published or is currently available to the public. (italics added)

[23] The Commissioner held that the record in question in this case does not qualify for exemption under s. 15(a) of *MFIPPA*. Although the electronic record itself is not available to the public, the information contained in the record is available in paper form for the public to inspect.

¹⁷ *Gombu, supra*, at para 22.

¹⁸ See para. 5, above.

We are of the view that in these circumstances, s. 15(a) confers authority upon the head to prohibit disclosure under *MFIPPA*.

- C. Did the Commissioner err in failing to invite submissions or to consider whether disclosure of the electronic record would harm the economic or other interests of MPAC so as to fall under exemptions from disclosure under s. 11 of *MFIPPA*?

[24] The Commissioner submits that we should not address this issue for two reasons. The first is that it has been raised for the first time on appeal. The second and more compelling submission is that the s. 11 exemption raises significant issues about the ownership of government information and harm to the economic or other interests of an institution. These issues, it is submitted, should not be addressed in this court at first instance. In light of the conclusions we have reached upon other grounds raised in this appeal, it is not necessary to consider this issue and we decline to do so.

CONCLUSION

[25] In light of the conclusions that we have reached, it follows that the decision of the Commissioner must be quashed. The matter is remitted to the Commissioner for a new hearing upon proper criteria.

COSTS

[26] All parties (except the intervenor) requested costs. The public interest issues here, coupled with the issues of statutory and precedent interpretation make this a novel case. Costs are not appropriate. Each party will bear its own costs.

BENOTTO S.J.
DUNN J.
McCOMBS J.

Released: May 21, 2004

COURT FILE NO.: 647/03

DATE: May 21, 2004

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B E T W E E N:

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CORPORATION

Applicant

- and -

TOM MITCHINSON, Assistant Information and
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- and -

ATTORNEY GENERAL FOR ONTARIO

Intervenor

REASONS FOR JUDGMENT

BY THE COURT

Released: May 21, 2004