

**ONTARIO COURT (GENERAL DIVISION)
DIVISIONAL COURT**

O'Leary, White, and Stayshyn JJ.

CORPORATION OF THE CITY OF HAMILTON

- and -

TOM WRIGHT, INFORMATION AND PRIVACY COMMISSIONER et al.

E N D O R S E M E N T

The City of Hamilton asks for judicial review of an order made by an Inquiry Officer under the Municipal Freedom of Information and Protection of Privacy Act.

A City employee complained that he had been subjected to non-sexual harassment by two other City employees. The City's Human Resources Centre investigated the complaint.

After promising that what they said would be kept confidential the Resources Centre obtained statements both orally and in writing from the two employees whose conduct was the subject matter of the complaint. Following the investigation the Resources Centre found that the allegation of personal harassment was not sustained.

Thereafter the complainant made an access request for the information collected by the Resources Centre. The two employees complained about objected to the release of the information they had given in confidence.

The City granted the complainant access to some of the information it had collected but denied access to other information including that obtained from the two employees complained about.

The requester appealed and the Privacy Commissioner appointed an Inquiry Officer to deal with the appeal. The Inquiry Officer ordered the City to release considerably more information than the City was prepared to release, including information given in confidence by the two employees.

It is the order of the Inquiry Officer that is the subject matter of this application for judicial review. The complaints of the City of Hamilton as argued before us and our answers to these complaints are as follows:

I. The Privacy Commissioner does not have the power to delegate to an Inquiry Officer his order-making power under the Municipal Freedom of Information and Protection of Privacy Act

The Office of the Privacy Commissioner is created by the Freedom of Information and Protection of Privacy Act. By section 4(1) of that act the Commissioner's powers and duties are those prescribed by that act and any other act.

The Freedom of Information and Protection of Privacy Act by section 56 empowers the Commissioner to delegate a power or duty vested in him to an officer employed by the Commissioner (except for certain powers not here relevant). In our view the right to delegate power to an officer applies to the powers of the Commissioner under the Municipal Freedom of Information and Protection of Privacy Act. The Privacy Commissioner thus had the authority to delegate his power to determine appeals to the Inquiry Officer in this case, as he did on October 1, 1992.

II. That the Inquiry Officer was clearly wrong in the interpretation she gave to section 10(1)(d) of the Municipal Freedom of Information and Protection of Privacy Act

Section 10(1)(d) reads:

"10.--(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute."

The Inquiry Officer found in effect that in order for section 10(1)(d) to apply the information must have been supplied by a source outside the City and that City employees for the purpose of section 10 are not a source outside the City.

We take no issue with that conclusion. That interpretation appears to be consistent with other decisions of the Commissioner. Further, the marginal note to section 10 titles this exemption from disclosure "Third party information", which suggests that section 10 is intended to apply not to information generated wholly within the City but to information supplied to the City by outside parties.

In any event we are of the view that section 10 has no application to this case. The information supplied by the two employees was not labour relations information nor was it given to "a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute" within the meaning of those words as used in section 10(1)(d). The Human Resources Centre was not trying to settle a labour relations dispute nor had the two employees given any labour relations information. The complainant had raised an issue between him and two fellow employees, not an issue between him and his employer, the City of Hamilton. The City has not then lost the benefit to some exemption from disclosure created by section 10 for it is not applicable in this case.

III. The Inquiry Officer erred in her interpretation and application of section 14(2)(h) of the Privacy Act

That section reads in part as follows:

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

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

(2) A head in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether, . . .

(h) the personal information has been supplied by the individual to whom the information relates in confidence.”

On the appeal from the refusal of the City to disclose certain information, the Inquiry Officer was bound by this section of the act to consider and weigh in the balance between the desire to know and

the desire to protect privacy, the fact the information supplied by the two employees was given in confidence. If the Inquiry Officer failed to do this then her decision must be set aside.

In our view the Inquiry Officer did give due consideration to the fact the personal information was given in confidence. To begin with the Inquiry Officer set out subsection 14(2)(h) in full in her reasons. She commented at length on the argument of the City that the information given was highly sensitive and was given in confidence. She did not however let the fact the information was given in confidence determine whether it should be disclosed, nor was she required to. Her obligation was only to take that fact into account.

Her decision was in effect that in spite of the fact that information was given in confidence, that it must be disclosed to the complainant, that otherwise the complainant might be left wondering whether his complaint had been properly investigated and others might be discouraged from making known incidents of harassment.

Unfortunately the Inquiry Officer in holding that section 14(2)(h) did not prevent her from ordering disclosure did not choose her words well. She said "Section 14(2)(h) is a relevant consideration, but . . . not in respect of information provided by the affected persons in direct response to the appellant's complaint."

We are satisfied the Inquiry Officer meant that in the circumstances of this case section 14(2)(h) is not determinative of whether the information must be disclosed, not that the subsection is irrelevant.

The application for judicial review is therefore dismissed. No order as to costs.

Dated: February 9, 1995

"O'Leary J."