Court File No. 213/95

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

STEELE, FELDMAN and MACPHERSON JJ.

B E T W E E N:	)	Appearances:
	)	
TORONTO BOARD OF EDUCATION	)	John Field and
	)	Scott Williams
Applicant	)	for the Applicant
- and -	)	
	)	
DAVID BURK and MUMTAZ JIWAN	)	William S. Challis
	)	for the Respondent
Respondents	)	Mumtaz Jiwan
- and -	)	
	)	
SHIBLEY RIGHTON	)	Craig Lewis
	)	for the Intervenor
Intervenor	)	
	)	
	)	Heard: February 19 and 20, 1996

E N D O R S E M E N T

MacPHERSON J.

[1] The Applicant, the Toronto Board of Education ("the Board"), seeks judicial review of Order M-500 of the Information and Privacy Commissioner/Ontario issued by the Respondent Mumtaz Jiwan ("Jiwan") on March 27, 1995. In her decision, Jiwan ordered the Board to provide a former employee, David Burk ("Burk"), with a list specifying documents held at the office of Shibley Righton, one of the external law firms retained by the Board. Since the Board had previously provided Burk with lists containing his personal information (over 400 items), the practical effect of Jiwan's order was that the Board would have to mark on these lists the ones located at Shibley Righton.

[2] The Board seeks judicial review of Jiwan's decision, essentially on three grounds. It asserts that her decision was incorrect because:

(1) the Municipal Freedom of Information and Protection of Privacy Act ("the Act") does not give people the right to learn the location of their records;
(2) permitting Burk to know which of his personal records were located at Shibley Righton would violate the solicitor-client privilege; and
(3) there was no evidence to support some of her factual findings concerning the personal information that had not been provided to Burk.

[3] I will deal with these three arguments in turn.

(1) Access does not include location

[4] The Act specifically permits location-specific requests for information. Section 37(1) provides:

> 37(1) An individual seeking access to personal information about the individual shall make a request for access in writing to the institution that the individual believes has custody or control of the personal information and shall identify the personal information bank or otherwise identify the location of the personal information. (Emphasis added).

[5] In this case, Burk first made a general request for all personal information held by the Board. He received some records. Later he made a second general request. The Board said that it had already answered his request. He appealed. An Inquiry Officer, acting pursuant to the Act, ordered the Board to conduct additional searches for responsive records. The additional search discovered a further 106 items. Part of the Board's response to Burk's general request was that it had conducted a search at Shibley Righton. The Board informed Burk:

> Mr. John P. Bell of the firm Shibley, Righton has advised me, in writing, that "we do not have a file respecting this matter". Consequently, I am of the opinion that Shibley, Righton does not have custody of any personal information about you.

[6] Burk was not satisfied with the Board's response to his second general request. He appealed. During the processing of the appeal, Burk specifically alleged that Shibley Righton had custody of documents in the control of the Board which might be responsive to his request. In June, 1994 Burk wrote to the Appeals Officer to suggest that his request for Shibley Righton records should be considered part of his general request for all his personal information.

[7] In September 1994 Burk submitted a separate request to the Board for, inter alia, all records containing his personal information held at the offices of Shibley Righton. The Inquiry Officer's record indicates that one of the reasons for the separate request was that the Board had insisted that the Shibley Righton records be treated separately.

[8] The Board's response to Burk's Shibley Righton-specific request was to release 11 additional responsive documents and to tell Burk that all other information that might be responsive to this request had already been released in its responses to Burk's general requests. These responses totalled more than 400 items. The Board refused to inform Burk which of those items were responsive to the Shibley Righton request. It took the position that the Act does not require it to identify the location of documents.

[9] Burk appealed. The matter came before Inquiry Officer Jiwan who ordered the Board to identify which records were held at Shibley Righton.

[10] In my view, since the Act explicitly contemplates, in s. 37(1), a location-specific request for personal information, the nature and contents of a response to such a request is a matter within the jurisdiction of the Inquiry Officer. Accordingly, curial deference to the administrative decision-maker is appropriate: see Right to Life Assn. of Toronto and Area v. Metropolitan Toronto District Health Council (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.).

[11] In the factual circumstances described above, Jiwan's decision to order the Board to indicate which items from the general lists of over 400 were held at Shibley Righton was not an unreasonable one. The chronology of events supports Burk's resort to a Shibley Righton-specific request. And Jiwan's decision was a reasonable application of the Act in light of that chronology.

(2) Solicitor-Client Privilege

[12] The Applicant asserts that Jiwan's order violates solicitor-client privilege. It contends that disclosure of the location of information, if the location is a legal office, is as protected by the privilege as disclosure of the contents of the information.

[13] The standard of review on this aspect of Jiwan's order might be problematic. Because solicitor-client privilege is such an important concept, and because inquiry officers under the Act may not be legally trained, it might be thought that the standard would be correctness. On the other hand, s. 12 of the Act deals explicitly with refusal to disclose information on the ground of solicitor-client privilege. This might suggest that the issue of solicitor-client privilege in the context of access to personal information governed by the Act is a matter that must be dealt with in a manner similar to the other matters under the Act, which would include curial deference to the decision of the inquiry officer.

[14] In my view, it is not necessary to decide this matter on this application. The Board's conduct estops it from being entitled to draw the solicitor-client line where it seeks to draw it. Several factors lead me to this conclusion. First, the Board failed to find a great deal of Burk's personal information in its early searches. Second, Burk's Shibley Righton-specific request was in effect provoked, both by the Board's inadequate searches relating to Burk's general requests and by its indication that it wanted the matter of records held at Shibley Righton to be dealt with separately. Third, the Board carried out a search at Shibley Righton after Burk's specific request. It then provided a list of 11 additional items but refused to say whether or not they were in the possession of Shibley Righton. It is a reasonable assumption that they were. Fourth, in its earlier responses to Burk's general requests, the Board identified a great many legal documents and provided fairly detailed descriptions of them before claiming solicitor-client privilege as a ground for not releasing them. As well, the

Board at one point informed Burk that "Shibley Righton does not have custody of any personal information about you". These responses belie the Board's concern about disclosing the location of legal documents.

[15] In these circumstances, for the Board to say that other records relating to the Shibley Righton-specific request might be found in the 400 plus items previously released in response to Burk's general request, and to refuse to identify which they are, was, in my view, unwarranted. In short, the Board has long ago let the horse out of the barn. Its attempt to recapture it at this late stage trivializes the genuinely important doctrine of solicitor-client privilege.

[16] My conclusion is not altered by the fact that the Board contends that one of the reasons it does not want to disclose which of the 400-plus items are at Shibley Righton is that Burk is contemplating suing Shibley Righton. It is true that in a letter to the Board dated November 2, 1994 Burk said:

> Mr. Bell's actions in dealing with previous requests under the "act" as well as certain advice he gave in 1990 are under serious consideration for action outside the F.I.P.P.A.

[17] I do not attach much significance to this sentence. It was written one day after the Board told him that its response to his Shibley Righton-specific request, which had been provoked in part by the Board, was that responsive items, if any, were somewhere in the 400-plus items previously identified and refused to tell him which ones they were. The sentence was, probably, born in frustration; it is insufficient to ground a serious claim of solicitor-client privilege when set against all the other events and Board responses detailed above.

(3) No Evidence

[18] The Board asserts that Jiwan's conclusions about the Board's unresponsiveness to Burk's requests was made without any evidentiary basis. It says that it did respond to Burk's requests; those responses are contained somewhere in its responses to his general requests.

[19] This argument ignores the fundamental point that Burk's Shibley Righton-specific request was a new and different request. The Act permits such a request. Moreover, the Board's legal position and conduct had provoked the new request. Accordingly, Jiwan made the reasonable conclusion that the Board's response to Burk's general request was not, in the circumstances of the chronology of the Board-Burk relationship, a sufficient response to his new request.

Conclusion

[20] The application for judicial review is dismissed without costs.

MacPHERSON J.
I agree. – STEELE J.
FELDMAN J.

Released: March 6, 1996