Court File No.: 200/02
Date: October 15, 2002

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THEN, ELLEN MACDONALD and CZUTRIN JJ.

B E T W E E N:	)	
	)	
TORONTO DISTRICT SCHOOL BOARD	)	*Mary M. Thomson* and *Christine L. Lonsdale*, for the Applicant
Applicant	)	
	)	
- and -	)	
	)	
	)	
LAUREL CROPLEY AND THE INFORMATION AND PRIVACY COMMISSIONER/ONTARIO AND HUMBER HEIGHTS OF ETOBICOKE RATEPAYERS INC.	)	*William S. Challis* and *Rema J. Imseis*, for the Respondent
	)	
Respondents	)	
	)	**HEARD:** October 8, 2002

THEN J.:

[1] The Board applies for judicial review of the Commissioner's Order to disclose portions of the Board's representations to the respondent ratepayers made to her during the course of an appeal under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA).

[2] The respondent ratepayers made a request for documents of the applicants in relation to the lease of Humber Heights School. The applicant supplied some of the information but declined to supply the rest relying on ss. 7, 10 and 11 of the MFIPPA. The ratepayers appealed to the Information and Privacy Commissioner.

[3] During the adjudicative stage, the Commissioner sought the representations or submissions of the parties. Upon receipt of the submissions, the Commissioner expressed her intention to release portions of the submissions to the ratepayers. The Board agreed with this decision save for 11 words that it maintained should not be released. Upon a further review the Commissioner agreed that two of the words not be released but ordered the disclosure of the remaining nine. The Board has brought an application for judicial review of that order.

[4] The application raises two issues:

> 1) Did the Commissioner err in deciding she had jurisdiction to order the release of the Toronto District School Board's representations under s. 41(13)?
>
> 2) Did the Commissioner act unreasonably in ordering the release of the disputed portion of the Toronto District School Board's representations because the disputed portion should have been exempt under s. 11(a)(c) and (d) of the MFIPPA if the information had been contained in a record?

1) The Interpretation of s. 41(13) of the MFIPPA

[5] Section 43(13) reads as follows:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

[6] The applicant submits that properly interpreted s. 43(13) is not a grant of power to the adjudicator to order the disclosure of representations made, but rather, a clear expression of the legislature's intent to override the F.O.I. applicant's right of fairness under the rules of natural justice.

[7] The respondent relies upon the interpretation articulated by former Commissioner Sidney B. Linden, Q.C. in Order 164, Ontario Human Rights Commission, IPC/O April 24, 1990 at pp. 24-26:

> Counsel for the institution argues that these express grants of authority constitute the limits to the Commissioner's discretion, and that I may not arrogate to myself any power not explicitly given.
>
> ... I agree that the words "no person is entitled" to see and comment upon another person's representations means that no person has the right to do so. In my view, the word "entitled", while not providing a right to access to the representations of another party, does not prohibit me from ordering such an exchange in a proper case. Subsection 52(13) does not state that under no circumstances may I make such an order; it merely provides that no party may insist upon access to the representations.
>
> Counsel for the institution is correct when he states that the *Statutory Powers Procedure Act* does not apply to an inquiry under the *Freedom of Information and Protection of Privacy Act*, 1987. Thus, the only statutory procedural guidelines that govern inquiries under the *Freedom of Information and Protection of Privacy Act*, 1987 are those which appear in that Act. However, while the Act does contain certain specific procedural rules, it does not in fact address all of the circumstances which arise in the conduct of inquiries, I must have the power to control the process. In my

> view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.
> ...
>
> Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed ... allow the parties a considerable degree of such disclosure. However, in the context of this statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

[8] The decision of this court in *Gravenhurst v. Ontario (Information and Privacy Commissioner)*, [1994] O.J. No. 2782 (Div. Ct.), is supportive of this approach as are the decisions of single judges of this Court in *Attorney-General v. Mitchinson*, (November 30, 1998) Toronto Doc. 383/98, 681/98, 698/98 at p. 3 (Div. Ct.) and *Solicitor General and Minister of Correctional Services et al. v. Information and Privacy Commissioner et al.* (June 3, Sept. 10, 1999) Toronto Doc. 103/98, 330/98, 331/98, 681/98, 698/98 at pp. 1-2 (Div. Ct.).

[9] In our view, the approach articulated by Commissioner Linden is correct and accordingly it is not necessary to resolve the dispute between the parties as to the appropriate standard of review.

[10] We decline to follow *Rubin v. Canada* (1994), 113 D.L.R. (4th) 275 (F.C.A.) affirmed 131 D.L.R. (4th) 608 (S.C.C.) as we accept that in the legislation there at issue, unlike the Ontario Commissioner, the federal commissioner only has the authority to make a recommendation that a record be disclosed, but does not have an adjudicative function or authority to disclose a record. That authority rests with the Trial Division of the Federal Court under s. 41 of the federal statute.

[11] We do not consider *Grant v. Cropley*, [2001] O.J. No. 749 (Div. Ct.) as authority to the contrary as the Divisional Court upheld the Commissioner's discretion denying a requester access to the representations of its adversary. This case stands only for the proposition that an applicant does not have the right to receive submissions, not for the proposition that the Commissioner does not have the authority to disclose submissions in an appropriate case.

[12] While s. 43(13), properly interpreted, provides a discretion to the Commissioner to disclose representations, a proper interpretation necessarily imposes limitations on its exercise which are consonant with the purposes of the Act. In our view, those limitations are appropriately contained in the guidelines developed by the Commissioner as information contained in the representations of the parties may be withheld by the Commissioner in circumstances where:

> (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded; or

> (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
>
> (c) the information should not be disclosed to the other party for another reason.

[13] In our view, the approach advanced by counsel for the Commissioner is in conformity with the modern approach to statutory interpretation articulated by E.A. Dreidger in "Construction of Statutes" and approved by the Supreme Court of Canada most recently by Iacobucci J. in *Bell Express Vu Limited Partnership v. Rex*, [2002] S.C.J. No. 43 at paras. 26-27 as follows:

> Today there is only one principle or approach, namely, the words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[14] If this court were to adopt the approach advanced by the applicant, the Commissioner would have no discretion to release any submissions whatsoever. Accordingly, there could be an unnecessary denial of natural justice in circumstances where there was no information contained in the submissions which would expose the privacy interests at stake and which therefore were not in need of protection.

[15] On the other hand to interpret the s. 43(13) in the manner advanced by Commissioner Linden would preserve the policy that the section is meant to foster, namely, full and frank submissions, in circumstances where the parties could more fully exercise their rights to natural justice. The Commissioner, as adjudicator, would reap the benefit of shared submissions, limited only, by the exclusion of those submissions which would expose the privacy rights at issue.

2) Did the Commissioner act unreasonably in failing to exclude from disclosure the nine words objected to by the Board?

[16] It is common ground that in failing to exclude the impugned nine words the Commissioner purported to find that the exemptions contained in s. 11(a), (c) and (d) of the MFIPPA did not apply.

[17] It is also common ground that the Commissioner's action in not excluding these nine words is to be reviewed on a standard of reasonableness.

[18] We are all of the view that in not excluding the nine impugned words from disclosure the Commissioner acted unreasonably.

[19] The Commissioner found that of the 11 disputed words, 2 came within the exemptions in s. 11 while the remaining 9 did not. In support of the Commissioner's ruling, the respondent bas sought to characterize the two exempt words as referable to the "content" of the records at issue and the remaining 9 as referable to the "consequence" or "harm" that might result if the exempt words were revealed. In our view, the 9 remaining words are merely a specific elaboration of what is stated

generally in the 2 exempted words and accordingly, all 11 of the disputed words should have been excluded.

[20] Accordingly, we direct the Commissioner to provide the ratepayers with the submissions of the Board in accordance with our endorsement and to continue with her adjudication of the matter.

[21] The application for judicial review is dismissed with respect to the first issue and allowed with respect to the second issue. In light of the issues raised and our disposition of them, this is not a case in which costs should be awarded.

THEN J.
E.M. MACDONALD J.
CZUTRIN J.

October 15, 2002

Court File No.: 200/02
Date: October 15, 2002

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

TORONTO DISTRICT SCHOOL BOARD

Applicant

- and -

LAUREL CROPLEY AND THE INFORMATION AND PRIVACY COMMISSIONER/ONTARIO AND HUMBER HEIGHTS OF ETOBICOKE RATEPAYERS INC.

Respondents

REASONS FOR JUDGMENT

THEN J.

Released: October 15, 2002