CITATION: Vaughan v. Information and Privacy Commissioner, 2011 ONSC 7082
DIVISIONAL COURT FILE NO.: 341/10
DATE: December 6, 2011

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM A.C.J., PARDU and MULLIGAN JJ.

B E T W E E N:	
CORPORATION OF THE CITY OF VAUGHAN Applicant	Daniel J. Michaluk for the Applicant
- and -	
INFORMATION AND PRIVACY COMMISSIONER (ONTARIO Respondent	William S. Challis for the Respondent
	HEARD at Toronto: October 26, 2011

CUNNINGHAM A.C.J.S.C.J.:

Introduction:

[1] The applicant, the Corporation of the City of Vaughan (the "City"), seeks an order quashing a decision of the Information and Privacy Commissioner of Ontario (the "Commissioner") made under the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*") R.S.O. 1990 c. 13, s. 45. This decision required the City to disclose the location

and timing of an employee's entry and exit onto the paid 407 ETR highway, as found on the invoice submitted by this employee for reimbursement by the City.

[2] The issues to be decided are:

(a) What standard of review applies to the Commissioner's decision?

(b) Applying this standard, should the Commissioner's decision be upheld?

(c) If this Commissioner's decision is not upheld, should this matter be remitted to a different decision maker?

Background:

[3] An access request was submitted to the City on October 15, 2008, for disclosure of every invoice submitted for reimbursement by a particular employee of the city (the "employee"), for his use of the paid 407 ETR highway.

[4] On November 28, 2008, the requester was advised the City would be providing partial disclosure of the 407 invoices. Specifically, the City agreed to disclose from the employee's 407 bills, the entry date and toll charges incurred, the distance of each trip taken, the dollar amount of the charges reimbursed by the City, and the number of trips taken by the employee.

[5] The city chose to redact the entry and exit points of the employee on the highway, as well as the times of entry and exit.

[6] This decision to withhold information was appealed by the requester on December 16, 2008, to the Commissioner. After an unsuccessful mediation, the dispute was transferred to adjudication by the Commissioner by way of a written hearing.

Decision of the Information and Privacy Commissioner of Ontario

[7] On May 13, 2010, the Commissioner ordered the City to release the withheld information based on the following analysis.

[8] First, the Commissioner agreed with the City's position that the withheld data met the definition of "personal information" under s. 2(1) of the MFIPPA. This provision states:

> "personal information" means recorded information about an identifiable individual including,
>
> (a) Information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("reseignements personnels").

[9] The 407 bills were held to fall under s. 2(1) since their format made it impossible to differentiate between the employee's business and personal use of the highway. The

Commissioner concluded that where legitimate business interests may reveal personal information, the data will be treated as personal in nature.

[10] The Commissioner then turned his attention to the issue of whether personal information could be released.

[11] Personal information under s. 2(1) can only be released under one of the enumerated exceptions provided in the *MFIPPA* such as s. 14(4)(a), which reads as follows:

> 14.(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;

[12] The Commissioner focused on the word 'benefit' in this provision, and found this term to include "an entitlement received by the employee through an employment relationship, which was received in addition to the base salary."

[13] On application to the facts, the City's reimbursement of the employee's 407 bill was found to be an entitlement. Indeed, the City itself acknowledged in its submissions that the 407 account is a benefit granted to this particular employee.

[14] The Commissioner further explained that the employee's entry and exit points onto the highway were also found to define the toll charges, and thus the quantum of the employee's benefit. As information regarding benefits is subject to disclosure under s. 14(4)(a), despite being personal in nature under s. 2(1), the Commissioner ordered the City to release the redacted information.

[15] The City's argument that the withheld information could reveal the employee's whereabouts, and should therefore remain redacted for safety reasons under s. 13 of the *MFIPPA*, was rejected by the Commissioner for want of sufficient supporting evidence. As such, the withheld information remained subject to disclosure.

Analysis:

Standard of Review

[16] In *Dunsmuir v. New Brunswick* 2008 S.C.C. 9, the Supreme Court defined the process for determining the appropriate standard of review at para. 62:

> [62] In summary, the process of judicial review involves two steps. First, courts must ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[17] The Court in *Dunsmuir* was also clear that when the existing jurisprudence already points to a specific standard, an exhaustive case law review is not necessary.

[18] The existing jurisprudence indicates a standard of reasonableness. In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, [2010] 1 S.C.R. 815 the Supreme Court of Canada at para. 70 assessed the Commissioner's decision to exempt the disclosure of investigatory records under the similar *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*") on a reasonableness standard.

[19] In addition, the Ontario Court of Appeal has also agreed with the adoption of the reasonableness standard. In *Ontario (Minister of Health and Long Term Care) v. Ontario*

(Assistant Information and Privacy Commissioner) (2004), 73 O.R. (3d) 321 (C.A.), the court applied this standard to the Commissioner's interpretation of the definition of personal information under s. 2 of the FIPPA, at paras. 25-39 Similarly, in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 at paras. 2-3 (CA.), the court employed the reasonableness standard in reviewing the Commissioner's analysis of s. 21 of the *FIPPA*, which allows for the disclosure of personal information in the same manner of s. 14 of the *MFIPPA*.

[20] Finally, as Goudge J.A. wrote in *Ontario (Ministry of Health and Long Term Care)*, the relative expertise of the Commissioner in balancing the two fundamental purposes of disclosing information to the public, while protecting the privacy of individuals also calls for a reasonableness standard.

[21] Based on the preceding jurisprudence, we agree that the decision of the Commissioner in the current case warrants a standard of reasonableness. The ambit of the reasonableness standard was explained in *Dunsmuir* at para. 47, where the court noted:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] Having determined the standard of review and its scope, we now turn to the issue of whether the Commissioner's decision was reasonable.

The Role of New Arguments on Judicial Review

[23] The Commissioner describes the City's submissions on appeal as new arguments that were never raised during the original hearing. Indeed, the City's submissions before the Commissioner were limited to the following statement:

> The City of Vaughan acknowledges that a 407 ETR account is a benefit granted to City Commissioners. The information has been readily disclosed in accordance with subsection 14(4)(a). It is the City's position, however, that subsection 14(4)(a) was not intended to disclose personal information that is contained in records related to benefits. The City of Vaughan contends that disclosure of the severed portions of the 407 ETR invoices would constitute an unjustified invasion of privacy.

[24] As the above statement does not engage any of the arguments currently proposed by the City, we agree with the Commissioner that the City has advanced new arguments on judicial review. We disagree with the Commissioner however, that the novelty of these arguments precludes their consideration by this court.

[25] Here, we have chosen to consider the City's new arguments. In *Ontario Public Service Employees Union v. Ontario*, 16 O.R. (3d) 735 at para. 1, the Divisional Court allowed a new argument to be raised on judicial review. This was because additional facts were not necessary to support the new arguments. Moreover, the delay and expense of remitting the matter to an adjudicator to hear the new arguments far outweighed the benefits.

[26] Such considerations are also present in the current case. The City's new arguments rest solely on the facts adduced in the initial inquiry. We are also of the view that the new submissions can be satisfactorily dealt with by this court.

[27] It should be mentioned however, that it is always preferable for a party to present the totality of their arguments to the initial decision maker. In general, it is always possible that the presentation of specific argument in the original hearing may have led to a different conclusion, thus negating the need for judicial review or an appeal It is essential that a party puts forward the whole of its arguments at first instance, as doing so furthers the goals of judicial economy.

[28] Having decided to consider the City's arguments notwithstanding the above concerns, the reasonableness of the Commissioner's decision will now be considered.

The Reasonableness of the Commissioner's Decision

[29] The City argued that the Commissioner's decision should be set aside since it fails to respect the ordinary meaning of the word 'benefit' in s. 14(4)(a), contains an analysis that is not consistent with any principles of statutory constructions, and is based on a flawed reliance on previous Orders made by the Commissioner.

[30] While acknowledging that its employee's 407 highway account is a benefit, the City argues that the redacted information regarding the location and timing of the employee's entry and exit onto the paid 407 highway reveals the employee's whereabouts. As an individual's whereabouts is not a 'benefit' under s. 14(4)(a), the city argues that the Commissioner's decision ordering disclosure was unreasonable.

[31] This narrow interpretation of s. 14(4)(a) as proposed by the City, suggesting that only the terms of an individual's employment ought to be considered would mean that only information found in employment agreements, such as job classification, salary ranges, benefits and employment responsibilities would be captured with s. 14(4)(a).

[32] Under this framework, they submit, the details of an invoice submitted for reimbursement do not constitute terms of employment. Rather, the redacted information only 'relates' to a benefit of employment and should thus remain undisclosed. As the legislature declined to require information 'relating' to the information described in s. 14(4)(a), the City urges this court to quash the decision.

[33] It is also posited by the City that the Commissioner's heavy reliance on previous Orders considering the word 'benefit' lacks justification, transparency, and intelligibility, since these preceding decisions only required written descriptions of employee benefits, and not the underlying details that relate to a benefit.

[34] For the following reasons, we reject the arguments of the City.

[35] To being with, the Commissioner's decision respects the ordinary meaning of the word 'benefit' in s. 14(4)(a) and is consistent with the principles of statutory interpretation.

[36] The guiding principle of statutory interpretation to be applied to the *MFIPPA* is the modern rule, as stated by the Ontario Court of Appeal in *City of Toronto Economic Development Corp. v. Ontario (Information and Privacy Commissioner)* 2008 ONCA 366 at para. 27. Here, the court stated:

> 27 Subsection 2(3) must be interpreted in light of the modern approach to statutory interpretation postulated by Elmer Driedger in *Construction of Statutes* (2nd ed., 1983). At page 87 of his work, Driedger says in his much quoted statement:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be 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.

[37] Specifically, statutory interpretation within the context of privacy legislation has been accepted by the Ontario Court of Appeal in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)* [2004] O.J. No. 163 as facilitating democracy. At para. 66, the court held:

> 66 In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at paras. 61-63, La Forest J. described the importance of access to information legislation to the proper functioning of a democracy:
>
> > The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic processes, and secondly, that politicians and bureaucrats remains accountable to the citizenry. ...
> >
> > Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.

[38] Beyond the democratic purpose behind access information, the Ontario Court of Appeal in *Ontario (Ministry of Health and Long Term Care)* at para. 47, recognized that the *FIPPA* does not provide airtight protection to the disclosure of personal information. Rather, this legislation requires a balancing act between the goals of the public's right to access information, with the privacy rights of the individuals from whom the information is derived.

[39] Guided by the modern rule of statutory interpretation, while being mindful to both the democratizing role of privacy access legislation and the balancing function of the MFIPPA, it is our view that the Commissioner's decision was reasonable.

[40] First, we turn to the Commissioner's analysis of the word 'benefit.' Previous decisions of the Commissioner have held this term to include information regarding pension benefits of an institution's former president; the actual dollar amount paid to a former Police Chief for accumulated sick leave at the termination of the employment contract; and a municipal employee's use of a City vehicle. In all of these circumstances, the requested information was disclosed despite its personal nature, since they fell within the ambit of the term 'benefit.'

[41] In the context of the current judicial review, we view the Commissioner's reliance on these previous decisions as demonstrating no flaw of reasoning. Rather, the Commissioner's review of previous orders made under the *FIPPA* and *MFIPPA* evidenced transparency and intelligibility in the decision-making processes.

[42] Turning to the City's argument about the scope of s. 14(4)(a), we disagree that this section only captures descriptions of an employment agreement. While s. 14(4)(a) may include this information, it is certainly not limited as such. Instead, the clear wording of this section captures information that 'discloses' a benefit. This calls for an expansive interpretation, as a wide variety of information is capable of 'disclosing' a benefit. Indeed, anything from a reimbursed restaurant receipt, to an insurance policy can 'disclose' a benefit.

[43] In the current case, the City concedes that its employee's entitlement to reimbursement for the 407 highway invoices is a benefit. While the City disclosed the total amount of the 407 invoice, the employee's entry and exit points on the highway, which define this total charge, were redacted. In our view, the entry and exit points on the highway define the quantum of the employee's benefit, since the 407 highway charges by distance travelled. As this redacted information clearly relates to a benefit, the Commissioner's decision that it must be disclosed under s. 14(4)(a) is reasonable.

[44] This conclusion is further supported by the overarching goals of transparency and accountability of the *MFIPPA*. As the benefits available to municipal employees are paid from the public purse, it is inconsistent with the democratizing features of the *Act* to withhold the redacted information.

[45] When municipal employees use publically funded benefits for personal use, they must also be aware of their accountability to taxpayers. As stated in a decision of the Commissioner in Order P-256, *Liquor control Board of Ontario*, [1991] O.I.P.C. No. 49 at 9:

> In submitting expense claims for reimbursement, government employees should do so on the basis that they may be called upon to substantiate each and every expenditure, both internally to the management staff of the institution, and externally to the general public.

[46] Where the tax payers of the municipality bear the burden of funding an employee's benefit, and this benefit is used in a personal capacity, they retain the right to know the details of its usage under s. 14(4)(a) of the *MFIPPA*. If the employee did not care for such scrutiny, there remained the options of purchasing a personal transponder for the highway, or reimbursing the City for the personal trips taken. By accepting money from the public coffers to compensate his use of the highway, the employee tacitly accepted the responsibility to substantiate his expenses to taxpayers.

[47] We also disagree with the City that 'benefit' under s. 14(4)(a) cannot include information, such as one's entry and exit time and location onto the 407 highway, which reveals the whereabouts of an employee. In the past, City-paid parking passes issued to Councillors for business purposes that revealed the date, time and location of use were considered to set out the details of a benefit subject to disclosure in Order MO-2567 *Toronto Parking Authority (TPA)*, [2010] O.I.P.C. No. 152. This information clearly reveals the whereabouts of the individuals using them.

[48] Indeed, records of travel expenses such as receipts for transportation, accommodation and food are generally not considered to be 'personal information' under s. 2(1) of the *MFIPPA*.

While such information can typically reveal the whereabouts of an employee, it is routinely disclosed by government institutions.

[49] The overarching goals of transparency and accountability of the *MFIPPA* confirm our determination of the Commissioner's decision as reasonable. By ordering the disclosure of the redacted information, the Commissioner's decision directly reveals the government's expenditure of taxpayer money. Such disclosure holds the government accountable to its constituents and adds greater transparency to its internal budgetary processes, thus upholding the goals of the *MFIPPA.*

[50] Finally, the Commissioner's decision is subject to deference, since it engaged a balancing process between access and privacy. The broad range of balances that may be struck under privacy access legislation that remain within the range of reasonableness was exemplified in Goudge J.A.'s reasoning in *Ontario (Ministry of Health and Long Term Care)* at para. 47:

> [47] This was the conclusion reached by Lang J. where she and I part company with the majority of the Divisional Court is that they would strike the balance between access and privacy differently and would read s. 21(5) to provide airtight protection to the privacy interest so that the Ministerial discretion to refuse to confirm or deny existence of a report could be exercised even if disclosure of that fact constituted little or no invasion of personal privacy. Although that might be another possible interpretation of the grant of discretion in s. 21(5) that would strike a difference balance between access and privacy, it does not render the Commissioner's interpretation unreasonable. Rather the Commissioner's interpretation reflects the same balance between access and privacy that the legislature itself has used in the *Act*.

[51] The above quote evidences a broad range of reasonable balances that may be struck by the Commissioner in weighing the competing goals of access and privacy. As such, even if this court disagreed with the Commissioner's particular balance, this contention alone would not render the decision unreasonable.

[52] Such a concern is not present in this case however, as the court agrees that the Commissioner's particular balance of the requester's right to access and the employee's right to privacy under the *MFIPPA* is reasonable.

[53] In conclusion, this court affirms the Commissioner's decision as reasonable for the reasons reviewed in this judgment. First, the word 'benefit' under s. 14(4)(a) is sufficiently broad to capture information relating to a benefit, such as the location and time of an employee's entry and exit times onto the 407 highway. Second, the Commissioner's reliance on previous orders that supported this view evidenced transparency and intelligence in the decision-making process.

[54] Since the employee's entry and exit points onto the highway define the quantum of the reimbursed 407 invoice, which was conceded to be a benefit, the disclosure of this information is required under s. 14(4)(a) of the *Act*. The Commissioner's decision in this regard is supported by the *MFIPPA*'s goals of transparency and accountability, and is thus reasonable.

[55] For these reasons, the appeal is dismissed without costs.

CUNNINGHAM A.C.J.
PARDU J.
MULLIGAN J.

Released: December 6, 2011

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REASONS FOR JUDGMENT

RELEASED: December 6, 2011