Court File No. 789/00
Date: May 10, 2002

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LANE, McCOMBS and LaFORME JJ.

IN THE MATTER OF a decision of the Information and Privacy Commissioner made under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. M.56

B E T W E E N:	)	
	)	
	)	*Paul B. Schabas* and *Catherine Beagan-Flood* for the applicant Phinjo Gombu
PHINJO GOMBU	)	
	)	
Applicant	)	
	)	*William S. Challis* and *Shirley Senoff* for the respondent Tom Mitchinson (Assistant Commissioner)
- and -	)	
	)	
	)	
TOM MITCHINSON, Assistant Commissioner, and THE CITY OF TORONTO	)	*Daryl Smith* for the respondent The City of Toronto
	)	
	)	
Respondents	)	Heard: February 28, 2002

MCCOMBS J.:

Nature of the Application

[1] The applicant Phinjo Gombu, a journalist with the Toronto Star newspaper, seeks judicial review of the November 23, 2000 order of the Assistant Information and Privacy Commissioner (the "Commissioner") made under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 ("*MFIPPA*").

[2] The Commissioner's order upheld the decision of the City of Toronto (the "City") refusing disclosure of an electronic copy of campaign contribution records from the 1997 municipal election. For the reasons that follow, I would allow the application for judicial review and direct that the requested information be disclosed to the applicant.

Factual Background

[3] Mr. Gombu attended at the office of the Clerk of the City, and examined the financial statements, including the lists of campaign contributors and contribution receipts. These materials are public records under s. 88(5) of the *Municipal Elections Act*, 1996, S.O. 1996, c. 32 ("*MEA*"), and were made available to the applicant for his perusal. They are available on a candidate by candidate basis, and comprise thousands of pages[1]. They disclose the names and addresses of the contributors, the amount contributed and the names of the candidates to whom the contributions were made.

[4] Mr. Gombu's objective was to scrutinize the records to determine if there were individuals or corporations who had breached the contribution limits in the *MEA*[2].

[5] Mr. Gombu found that sorting through the thousands of pages of paper records was an arduous process. During his research, he learned that the Clerk maintains an electronic database that lists the campaign donors for the 1997 election. The database is prepared and maintained to assist the Clerk in her obligation under the Regulations made under the *MEA* to administer the program whereby contributors are entitled to rebates of a portion of their campaign contributions[3]. The telephone numbers of the contributors is the only additional personal information in the electronic databank that is not in the paper records made available to the public under s. 88(5) of the *MEA*.

[6] Mr. Gombu decided that access to the electronic databank would facilitate his research by allowing him to quickly and accurately collate and cross-reference the data. He formally requested a computer diskette containing the database information. The City refused, citing s. 15(a) of the *MFIPPA*[4], and asserting that it was not obligated to provide the database, since the information contained therein had already been published. The appellant appealed to the Commissioner.

[7] In his November 23, 2000 decision, the Commissioner agreed with the applicant that the City was wrong to invoke s. 15(a) of the *MFIPPA* because the hard copy materials made available to him were not equivalent to the material in the electronic database. However, he denied access to the database on the basis that it contained "personal information" that was exempt from disclosure pursuant to s. 14 of the *MFIPPA*.

[8] The Commissioner refused disclosure for three reasons of relevance on this application. They may be briefly categorized as follows:

---

[1] There were 419 candidates in the 1997 election, and some 39,000 campaign contributors.

[2] See: *MEA*, ss. 68-82, and see: *City of Toronto Act 1997,* S.O. 1997, c. 2, s. 24.

[3] The Clerk has the obligation to administer the rebate program mandated by s. 10 of the *Ontario Regulation 172/97* (made 'under the [*MEA*]'). Contributors are entitled to a rebate of up to 75 per cent of their contributions.

[4] S. 15(a) of the *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.

(a) That s. 88(5) of the *MEA* (which requires disclosure "notwithstanding anything in the [*MFIPPA*]" had no application to this case, because the database being sought was not prepared by the Clerk "under the [*MEA*]";

(b) That disclosure of the database is precluded by s. 14(1)(f) of the *MFIPPA* because disclosure would constitute an "unjustified invasion of personal privacy"; and

(c) That the "public interest override" provision in s. 16 of the *MFIPPA* does not apply.

Relevant Legislation

[9] The relevant provisions of the *Municipal Elections Act*, Ontario Regulation 172/97 (made under the Municipal Elections Act), and the *Municipal Freedom of Information and Privacy Protection Act* are reproduced at Appendices "A", "B" and "C" respectively.

The Standard of Review

[10] I agree with the position of the applicant that under the "practical and functional approach" mandated by the Supreme Court of Canada[5], the standard of review for the application of exemptions contained in the *MFIPPA* is, with one exception[6], one of reasonableness, and this court is not entitled to interfere unless the Commissioner's decision was clearly wrong[7].

[11] I would, however, hold that a standard of correctness must be applied to the Commissioner's interpretation of the *MEA*, an external statute. Although the *MEA* is linked to the Commissioner's mandate, it is, with respect, not within his particular expertise[8].

The First Issue – Was the Commissioner correct to conclude that the data base was not prepared "under the Act"?

---

[5] *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982 at pp. 1004-05.

[6] The exception to a 'reasonableness' standard of review under the *MFIPPA* relates to a decision as to whether the *MFIPPA* is indeed applicable in the first place. Section 14(1)(d) of *MFIPPA* removes the right to refuse to disclose personal information where the disclosure is made "under an Act of Ontario or Canada that expressly authorizes the disclosure". Determination of the issue of whether disclosure must be made under another statute is subject to a 'correctness' standard of review. See: *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, 203 D.L.R. (4th) 538 (C.A.), at paras. 30 to 40.

[7] *Canada (Director of Investigation and Research) v. Southan Inc.* [1997] 1 S.C.R. 748 at p. 777, 144 D.L.R. (4th) 1 at pp. 19-20, para 57, *Ontario (Worker's Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at pp. 467-73, 164 D.L.R. (4th) 129 (C.A.), *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 at pp. 400-01, pp. 404-05, 181 D.L.R. (4th) 603 (C.A.).

[8] Although the standard of review is one of correctness, some measure of deference should be accorded to the Commissioner's interpretation, because the external statute is related to his mandate. See *Canadian Broadcasting Corp. v. Canada (Labour Relations Board),* [1995] 1 S.C.R. 157 at pp. 187-88, 121 D.L.R. (4th) 385 at p. 404, per Iacobucci J.

[12] The Commissioner held, at pp. 15 and 16 of his reasons, that the database is not a public record under s. 88(5) of the *MEA*, because, in his view, it was not prepared "under the Act".

[13] For convenience, I reproduce s. 88(5) of the *MEA*:

> despite anything in the [*MFIPPA*], documents and materials filed with or prepared by the clerk . . . 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. [emphasis added]

[14] The Commissioner held, at p. 15 of his reasons:

> . . . the specific record at issue in this appeal is not required to be prepared by the clerk, either under the provisions of the *MEA*, the regulations, or under a by-law passed pursuant to the *MEA*. Rather, this electronic record has been prepared by the clerk in order to administer the rebate program and, in my view, section 88(5) cannot properly be interpreted to extend to this record.
>
> Accordingly, I find that no act of Ontario or Canada expressly authorizes the disclosure of the personal information contained in the record, and the exception provided by s. 14(1)(d) of the Act does not apply.
>
> The appellant had referred to section 88(5) of the *MEA* as a section which removed the record at issue from the application of the [*MFIPPA*]. Because of my finding that the record at issue in this appeal is not the type of record referred to in section 88(5) of the *MEA*, I do not accept the appellant's position, and find that the [*MFIPPA*] clearly applies to the record. [emphasis added]

[15] In my view, the Commissioner erred in his interpretation of s. 88(5) of the *MEA*. His conclusion that the database was not prepared "under the Act", and therefore that s. 88(5) was not applicable, was based on his finding that the Clerk is not "required" to prepare the database, but instead had prepared it to administer the rebate program. With respect, the issue is not whether the Clerk is "required" to prepare the database, but whether, as s. 88(5) provides, the material is, in fact, prepared "under the Act" (i.e. the *MEA*).

[16] In my view, the material prepared by the Clerk to administer the rebate program is clearly prepared "under the Act". Section 82(1) of the *MEA* allows a municipality to, by by-law, *provide for rebate payments*. Regulation 172/97, which is "made under the *MEA*", provides in s. 10(1), that a contributor may apply for a rebate. Under s. 10(6)-(9) of the regulations, the Clerk is required to pay the rebates if specified conditions are met, according to an itemized formula. The electronic database that was the subject of the disclosure application was prepared by the Clerk to facilitate the carrying-out of the duties mandated under the regulations made under the *MEA*. Without the database, the Clerk could not fulfil her mandate. Hence, the database was prepared "under the Act", as contemplated by s. 88(5). It is therefore a public record and must be disclosed, "notwithstanding anything in the [*MFIPPA*]". It follows that the Commissioner erred in holding that s. 88(5) of the

MEA did not govern this case, and further erred in holding that the exception in s. 14(d) of the *MFIPPA* did not apply[9].

[17] Having concluded that s. 88(5) of the *MEA* requires disclosure of the database, it follows that the application must be allowed on this ground alone. However, given the importance of the issues in this case, it is appropriate to deal with the other bases upon which the Commissioner held that the material was not required to be disclosed.

The Second and Third Issues – Was it reasonable for the Commissioner to deny access to the electronic database information under s. 14(1)(f) of the *MFIPPA*, and also to conclude that the "public interest override" in s. 16 of the *MFIPPA* did not apply?

(a) The Reasonableness Standard

[18] Before addressing these two issues, it is appropriate to make the following observations about the application of the reasonableness standard to the facts of this case.

[19] In applying a reasonableness standard to the Commissioner's interpretations of the *MFIPPA*, this court should not interfere unless the Commissioner's decision was clearly wrong.

[20] In evaluating the reasonableness of the Commissioner's interpretation, however, it is essential to bear in mind the importance of the context in which the legislation was being interpreted. This notion was succinctly stated by Wilson J., albeit in a different context, in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at p. 645, 68 D.L.R. (4th) 568:

> Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.

[21] The context in this case is in relation to a request for information that would assist in evaluating the integrity of a municipal election. The overarching purpose of access to information legislation is to facilitate democracy. It is fundamental to a healthy democracy that its process be easily scrutinized by the public that it is designed to serve. The importance of transparency and accountability in the democratic process cannot be overemphasized[10]. In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at pp. 432-33, para. 61, 148 D.L.R. (4th) 385, La Forest J. stated:

> 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

---

[9] This latter conclusion is subject to a standard of review of 'correctness'. See footnote 6, *supra*.

[10] See the "Lortie Commission Report": Canada, Royal Commission on Electoral Reform and Party Financing, *Final Report: Reforming Electoral Democracy, Vol. 1* (Ottawa: Minister of Supply and Services Canada, 1991), and see *Harper v. Canada (Attorney General)*, [2001] A.J. No. 808 (Alta. Q.B.) (QL), at paras. 91, 103, 112, 164, 165, and 167.

> the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

[22] A further important contextual consideration is the purpose of the legislation itself. The *MEA*, the regulations made under the *MEA* and the *MFIPPA* cumulatively provide for a scheme designed to ensure the integrity of the democratic process and the accountability of those who seek public office. The stated purposes of *MFIPPA* are set out in s. 1. They underscore the objectives of providing public access to information and limiting the necessary exemptions from access, while at the same time protecting the privacy of individuals. The collective legislative scheme constitutes a policy that recognizes that public accountability in the election process should, where necessary, override individual privacy interests.

(b) The Commissioner's Conclusion under section 14(1)(f)

[23] The Commissioner concluded that disclosure of the database would amount to an unjustified invasion of personal privacy, and applied s. 14(1)(f) of the *MFIPPA*, which provides:

> (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. [emphasis added]

[24] Although the *MFIPPA* expressly equates electronic and paper records[11], the Commissioner gave considerable weight to the perceived danger in the possible inappropriate use of electronic records. He concluded that disclosure of the database would constitute an unjustified invasion of personal privacy that warranted refusal to disclose the material.

[25] At p. 18 of his reasons, the Commissioner stated:

> In the circumstances of the present appeal, I am satisfied that the disclosure of the personal information in electronic form, where it can be massively disseminated, matched and merged, and used for purposes far beyond those for which the information was collected in the first place, is a relevant factor to consider, and weighs significantly in favour of non-disclosure of the personal information in that format.

[26] In my opinion, the view taken by the Commissioner of the dangers of misuse of the database is not reasonable, particularly in the context of the present electronic age in which governments are increasingly moving to electronic information-storing[12]. Moreover, any danger of misuse exists

---

[11] The definition of "record" in s. 2 is as follows:
"record" means any record of information however recorded, whether in printed form, ... by electronic means, or otherwise...

[12] See, for example, the recent *Electronic Commerce Act, 2000*, S.O. 2000, c. 17, which provides in s. 15(1):
> If a public body [defined in s. 1 to include a municipality and its local board] has power to create, collect,

even with the paper version presently available to the public. In today's electronic age, the paper version can be converted to electronic form by use of an electronic "scanner". Once thus converted, the danger of inappropriate use of the material remains.

[27] In my view, it was not reasonable for the Commissioner to interpret s. 14(1)(f) of the *MFIPPA* by holding that disclosure would result in an unjustified invasion of personal privacy. The definition of "record", as previously noted[13] includes information recorded in both paper and electronic form; and, in any event, paper material may be converted to an electronic database. Hence, the distinction drawn by the Commissioner did not provide a reasonable basis for refusal to disclose the requested database. Furthermore, the reasonableness of his interpretation must be considered in light of the importance of freedom of information legislation in furthering the democratic process through public scrutiny and transparency.

[28] In a contextual consideration of the overall legislative scheme, it must be remembered that s. 88(5) of the *MEA*, when read with the accompanying regulations, specifically overrides the privacy interests otherwise required to be considered under the *MFIPPA*, and mandates disclosure of campaign contributors' names, addresses and amounts given. The telephone numbers of the contributors is the only personal information contained in the electronic database that is not contained in the hard copy material already disclosed. In my view, given the availability of an electronic database that may be easily accessed, collated and cross-referenced, its disclosure would achieve the important objective of enhancing the transparency of the political process with only a minimal further intrusion upon the personal privacy of contributors, whose names, addresses and amounts contributed are already subject to disclosure. It was, in my view, unreasonable for the Commissioner to place that minimal intrusion ahead of the importance of furthering public accountability in the political process.

(c) The Commissioner's Conclusion that the "Public Interest Override" in section 16 of the *MFIPPA* did not apply.

[29] The Commissioner also considered the "public interest override" in *MFIPPA*, s. 16, which provides:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13, and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The Commissioner concluded that:

> I find that there is no compelling public interest in disclosure of the personal information contained in the electronic record, and that any public interest that does exist is addressed through the provisions of the *MEA* and does not clearly outweigh

---

receive, store, transfer, distribute, publish or otherwise deal with information and documents, it has power to do so electronically.

[13] See the definition of "record", supra, footnote 11.

> the purpose of the exemption. Therefore, section 16 of the [*MFIPPA*] is not applicable.

[30] Again, in my view, the Commissioner's conclusion was not reasonable. As I have indicated, the disclosed paper documents contain specific private information such as the contributors' names, addresses, amount contributed, and the candidate to whom the contribution was made. The only additional personal information contained in the electronic database that is not in the disclosed paper documents is the telephone numbers of the contributors.

[31] I accept the position of the applicant that the only way that he can meaningfully scrutinize the information about campaign contributions is through the electronic database. Public scrutiny of the democratic election process and the integrity of the process governing political campaign contributions is a matter of significant public importance. In my view, in light of the fact that all but the telephone numbers of the contributors is already required to be disclosed, the public interest in disclosure of the database to enable meaningful scrutiny of the democratic process clearly outweighs other considerations.

[32] It follows that the Commissioner's decision not to apply the public interest override in s. 16 of the *MFIPPA* was unreasonable.

Conclusion

[33] In the result, I would allow the appeal, set aside the decision of the Commissioner, and order that the electronic database sought by the applicant be disclosed.

McCOMBS J.
I agree: LANE J.
I agree: LaFORME J.

RELEASED: May 10, 2002

APPENDIX "A"

RELEVANT PROVISIONS UNDER THE *MUNICIPAL ELECTIONS ACT*

- S. 69(1)
  A candidate shall ensure that,
  . . .
  (f) records are kept of,
    (i) the receipts issued for every contribution,
    (ii) the value of every contribution,
    (iii) whether a contribution is in the form of money, goods or services, and
    (iv) the contributor's name and address;
  . . .
  (k) financial filings are made in accordance with section 78[.]

- S. 70(3)
  (3) Only the following may make contributions:
    (1) An individual who is normally resident in Ontario.
    (2) A corporation that carries on business in Ontario.
    (3) A trade union that holds bargaining rights for employees in Ontario.

- S. 71(1)
  A contributor shall not make contributions exceeding a total of $750 to any one candidate in an election.

- S. 78
  (1) On or before the filing date, a candidate shall file with the clerk with whom the nomination was filed a financial statement and auditor's report, each in the prescribed form, reflecting the candidate's election campaign finances,
  . . .
  (5) No auditor's report is required if the total contributions received and total expenses incurred in the election campaign up to the end of the relevant period are each equal to or less than $10,000.

- S. 82(1)
  A municipality may, by by-law, provide for the payment of rebates to persons who made contributions to candidates for office on the municipal council.

- S. 88(4)
  [The clerk shall retain the financial statements] until the members of the council or local board elected at the next regular election have taken office.

- S. 88(5)
  Despite anything in the [*MFIPPA*], documents and materials filed with or prepared by the clerk . . . 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.

- S. 88(7)

A person inspecting documents under this section is entitled to make extracts from them and, on payment of the fee established by the clerk, to make copies of them.

APPENDIX "B"

RELEVANT PROVISIONS OF ONTARIO REGULATION 172/97 made under the *MUNICIPAL ELECTIONS ACT*, 1996

- S. 1(1)
  This Regulation provides for transitional matters that affect the 1997 regular election and arise out of the restructuring of municipalities and local boards.

- S. 10(1) of *Regulation 172/97*
  An individual, corporation or trade union that, during the regular 1997 regular election, makes a contribution to a candidate for an office on the council of the City of Toronto . . . may apply for a rebate.

- S. 10(6)-(9) of *Regulation 172/97* [made under the *MEA*]
  Note: These provisions require the clerk to compare the contributor's receipt to the candidate's campaign finance filing [s. (6)]; to satisfy him/herself that the documents are in order [s. (7)], and to pay the contributor a rebate calculated according to specific criteria depending, *inter alia*, on the amount and number of contributions [ss. (8), (9)].

APPENDIX "C"

RELEVANT PROVISIONS UNDER THE *MUNICIPAL FREEDOM OF INFORMATION AND PRIVACY PROTECTION ACT*

Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)

- S. 1

  The purposes of this Act are,

  (a) To provide a right of access to information under the control of institutions in accordance with the principles that,

  (i) information should be available to the public,

  (ii) necessary exemptions from the right of access should be limited and specific, and

  (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and

  (b) To protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

- S. 2 (the "definition" section)

  "personal information" means recorded information about an identifiable individual, including,

  (d) the address [and] telephone number . . . of the individual

  "record" means any record of information however recorded, whether in printed form, . . . by electronic means, or otherwise . . .

- S. 4

  Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

  (a) the record or part of the record falls within one of the exemptions under sections 6 to 15

- S. 14(1) Personal Privacy

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

  . . .

  (b) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

  . . .

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

  . . .

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

- S. 14(2) – Criteria re invasion of privacy

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,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

. . .

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive

- S. 14(3) – Presumed invasion of privacy

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

. . .

(f) Describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

- S. 15

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

- S. 16

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13, and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

- S. 23(1)

…a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.

Court File No. 789/00
Date: May 10, 2002

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LANE, McCOMBS and LaFORME JJ.

IN THE MATTER OF a decision of the Information and Privacy Commissioner made under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. M.56

B E T W E E N:

PHINJO GOMBU

Applicant

- and -

TOM MITCHINSON, Assistant Commissioner, and THE CITY OF TORONTO

Respondents

REASONS FOR JUDGMENT

McCOMBS J.

Released: May 10, 2002