COURT FILE NO.: 410/94
DATE: October 30, 1995

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

O'DRISCOLL, DUNNET AND ADAMS JJ.

IN THE MATTER OF the Judicial Review Procedure Act, R.S.O. 1990, c. J.1

AND IN THE MATTER OF the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56

IN THE MATTER OF Order M-321 (Appeal M-9200325)
Donald Hale, Inquiry Officer, Office of the Information and Privacy Commissioner/Ontario, dated May 26, 1994

B E T W E E N:	)	
	)	
THE CORPORATION OF THE CITY OF TORONTO	)	D. B. Leibson for the Applicant
	)	
Applicant	)	
- and -	)	
	)	
	)	
DONALD HALE, INQUIRY OFFICER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER/ONTARIO	)	D. Goodis W. Challis for the Respondent
	)	
Respondent	)	
	)	HEARD: October 18, 1995

O'DRISCOLL J. (ORALLY)

[1] The City of Toronto (the "City") seeks judicial review and an order quashing Order M-321 (Appeal M-9200325) dated May 26, 1994 of Inquiry Officer, Donald Hale, of the Office of the Information and Privacy Commissioner/Ontario.

[2] The impugned order requires the City to disclose certain records or portions thereof from the personnel file of the Requester, a former employee of the City.

[3] In July 1992, the Requester sought from the City, under the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 (the "Act"), the Requester's personnel file from the City's Department of Parks and Recreation and the City's Department of Management Services. The Requester is a former employee of the Department of Parks and Recreation. The Requester's employment had been terminated shortly before the request was made.

[4] The Requester had been involved in an altercation with a fellow worker. The Requester grieved the termination of his employment. He was not reinstated. We are told that the grievance was settled on the date set for the commencement of the arbitration hearing.

[5] Following the request, the City located the documents and:

(1) granted the Requester access to some documents in full;

(2) granted access to some documents in part, and

(3) denied access to other documents.

[6] The City's decision to deny access to certain documents and to parts of other documents is said to be based upon its concern for the physical safety of other employees whose names appear in those documents and by the concern that the information had been received in confidence. In refusing access, the City relied upon s. 13 and s. 38(b) of the Act.

[7] Before us, counsel for the City restricted his arguments to s. 13 of the Act. It was his position that the evidence before the Inquiry Officer showed that there was a tire slashing incident within a month prior to the impugned order and that the Inquiry Officer ignored the incident in his reasons and thus declined jurisdiction.

[8] At p. 10 of Order M-321, the Inquiry Officer said:

> I have carefully considered the representations of the affected persons and the City and all of the other relevant circumstances in this appeal. In support of its claim for the application of section 13 to the records, the City refers to several incidents of unattributed vandalism which occurred against the property of several of the affected persons. These incidents occurred at the same time as the disciplinary proceedings against the appellant were commenced which are the subject of these records.
>
> In my view, and particularly given the lapse of time between these events and this appeal, the possibility that the harm alleged will occur is not sufficient. I am not convinced that there is a reasonable expectation of probable harm and, accordingly, I find that the exemption provided by section 13 of the Act does not apply to Records 38, 54 and 56.

[9] The Clerk of the City of Toronto had written a letter to the Registrar of Appeals on May 6, 1994 and said, in part:

> As Mr. Lease informed you both the Commissioner of Parks and Recreation and I are extremely concerned to protect the employee who was the subject of the attached evidence. We recognize that you are aware of the sensitive nature of this appeal and will not, of course, release any of the attached material to anyone. However, any reference to the specific incident described in the attached material could serve to identify this individual. Consequently, it is of the utmost importance that you do not provide specific details in your order.

[10] Counsel for the City argues that this is a case where the Inquiry Officer should have utilized s. 13 of the Act and "let sleeping dogs lie" because the Requester is the type of person, having regard to his background and personality, whose irrational behaviour will be "set off" by being presented with any of the documents under consideration.

[11] Counsel for the City argues that whatever relevance the documents may have had back in July, 1992, when the Requester's employment at the City was terminated, has long since passed and no useful purpose would be served by producing the documents in 1995 and, so to speak, "throwing gasoline on dormant fires".

[12] The test on judicial review under the Act is that of Re John Doe et al. v. Ontario (Information and Privacy Commissioner et al. (1993), 13 O.R. (3d) 767 (Div. Ct.) (Southey, Campbell, and Dunnet JJ). In the majority judgment of Campbell and Dunnet JJ., the following is found at p. 777:

> In Right to Life [(1991), 86 D.L.R. (4th) 441 a court composed of Callaghan C.J.O.C., O'Brien, and Rosenberg JJ.] Callaghan C.J.O.C. expressed the classic unwillingness of this court to interfere, by way of judicial review, in the work of a statutory tribunal from which the legislature had provided no right of appeal. He held at p. 444:
>
> When approaching the decision of a statutory tribunal such as the Commissioner in this case, this court must be mindful of the limitation of its own jurisdiction. That was probably best stated by Mr. Justice Dickson in S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn. [infra] where he observed:
>
> There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest. But if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene.
>
> We are all of the view that the requested names of the individuals listed in the proposal are "personal information". This is an interpretation of the statute which can be rationally supported. (Emphasis added in original.)

> After briefly reviewing the statute and the commissioner's application of the statute to the facts of the case, the chief justice continued at pp. 445-46:
>
> That interpretation of the Act, in our view, is a construction and interpretation which it may reasonably be considered to bear. The construction is such that we should not intervene.
> ...
>
> In our view, the Commissioner's finding that the release of those names would be an unjustified invasion of personal privacy, is one that should be sustained under the Act.

[13] At p. 778, the majority in John Doe said:

> The Divisional Court will ordinarily follow its previous judgments, unless they have been overruled by a higher authority. We are of the view that Right to Life has not been overruled.

[14] We appreciate the apprehension of counsel for the City and the apprehension of the 18 employees who wrote to the Inquiry Officer expressing their concerns. However, we must bear in mind that this is not an appeal, but it is an application for judicial review.

[15] Applying the test set out in Right to Life (supra), in our view, we must say that the Inquiry Officer acted in good faith and his decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear in this case. Therefore, we refrain from intervening.

[16] Counsel for the City has argued that the Inquiry Officer ignored the April, 1994 tire slashing incident. In our view, the order is equivocal in this regard. But even assuming that the Inquiry Officer did ignore the April, 1994 incident, we are of the view that his failure to consider or to mention the incident would not have been pivotal to the order under review having regard to s. 42 of the Act:

> S. 42: If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

[17] Reference is made to the Nipawin case (1973), 41 D.L.R. (3d) 6, 13:

> A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion.

[18] In another decision of the Supreme Court of Canada, Woolaston et al. v. Canada (Minister of Manpower and Immigration) (1972), 28 D.L.R. (3d) 489, 492, the following is found in the reasons of Laskin J:

> I am unable to conclude that the Board ignored that evidence and thereby committed an error of law to be redressed in this Court. The fact that it was not mentioned in the Board's reasons is not fatal to its decision. It was in the record to be weighed as to its reliability and cogency along with the other evidence in the case, and it was open to the Board to discount it or to disbelieve it.

[19] In conclusion, we wish to say that, this decision is not to be taken as approval of the incorporation of phrases from the Federal legislation nor the introduction of words into s. 13 of the Act, words and phrases not put there by the legislature.

[20] The application is dismissed.

[21] We have asked counsel for submissions as to costs; neither party seeks costs. The cover of the Application Record has been endorsed:

> "This application is dismissed for the oral reasons given for the court by O'Driscoll J. The respondent does not ask for costs. No order as to costs.

O'DRISCOLL J.
DUNNET J.
ADAMS J.

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B E T W E E N:

THE CORPORATION OF THE CITY OF TORONTO

Applicant

- and -

DONALD HALE, INQUIRY OFFICER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Respondent

ORAL JUDGMENT

O'DRISCOLL J.

RELEASED: October 30, 1995