CITATION: Reference re Municipal Freedom of Information Act (ON)
COURT FILE NO.: CV-10-398716
DATE: 20110114

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE MUNICIPAL FREEDOM OF INFORMATION ACT, R.S.O. 1990, c. M.56 AND IN THE MATTER OF A MOTION ADOPTED BY THE CITY OF TORONTO COUNCIL ON OCTOBER 29 AND 30, 2008 RESPECTING ACCESS TO THE CITY OF TORONTO INTEGRATED BUSINESS MANAGEMENT SYSTEM AND IN THE MATTER OF AN APPLICATION MADE PURSUANT TO RULE 14.05 OF THE RULES OF CIVIL PROCEDURE FOR A DECLARATION AND DETERMINATION OF THE RIGHTS OF CITY COUNCILLORS PURSUANT TO THE SAID MOTION	Martin P. Zarnett and Ronald Hier, Solicitors for the Applicant
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO (Intervener)	David Goodis, Solicitor for the Intervener
	HEARD: October 14, 2010

REASONS FOR DECISION

Corrick J.

Background

[1] The City of Toronto applies for a declaration pursuant to rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, that,

a) the provision by the City of Toronto to members of Toronto City Council of 'read-only' access to the Integrated Business Management System Database [the "IBMS"] operated by the City of Toronto on the terms specified in a motion adopted by the City of Toronto Council on October 29 and 30, 2008, complies with the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 ["MFIPPA"];

b) members of Toronto City Council are 'officers' for purposes of section 32(d) of MFIPPA;

c) the provision of access to personal information in the IBMS database in accordance with the procedures set out in the aforesaid motion complies with section 32(d) of MFIPPA and does not infringe the provisions of MFIPPA; and

d) no employee or officer of the City of Toronto shall be in violation of MFIPPA by implementing the recommendations contained in the aforesaid motion and by providing members of Toronto City Council 'read-only' access to the IBMS database.

[2] The Information and Privacy Commissioner of Ontario ["Commissioner"] was granted leave to intervene in the application. At the outset of the hearing, the court heard submissions from the City and the Commissioner on whether the court should hear the application in light of the doctrine of adequate alternative remedy.

[3] The Commissioner submits that the City did not exhaust its remedies under MFIPPA prior to launching this application, and therefore the court should decline to hear the application. The City submits that the remedy in MFIPPA is not engaged in the circumstances of this case, and the court should determine the issues.

[4] I find that the remedy in MFIPPA is engaged, and the City must exhaust it by appealing to the Commissioner.

Facts

[5] It is necessary to set out the facts in some detail to provide context for the application and the arguments presented on the doctrine of adequate alternative remedy.

[6] During 2007 and 2008, City Council and staff discussed the extent to which individual members of Council could have access to the information contained in the IBMS. The IBMS is a database that contains information, collected or created by the City, related to building permit and planning applications. It is also a law enforcement database for property maintenance, building permit compliance and other investigations conducted under the authority of the *Building Code Act*, S.O. 1992, c. 23, and the City of Toronto Municipal Code. The database contains personal information and law enforcement information, as those terms are defined in s. 2 of MFIPPA. This information includes the names of complainants, and information related to investigations and prosecutions. Individual members of Council do not have access to the IBMS.

[7] Individual councillors are elected representatives. They represent the constituents in the wards in which they are elected. Councillors seek access to the information in the IBMS to allow them to respond to the complaints and concerns of their constituents.

[8] It appears from the Application Record filed by the City that the Government Management Committee of City Council began discussing the feasibility of allowing individual councillors access to the IBMS in April 2007. Between April 2007 and October 30, 2008, the Government Management Committee and City Council discussed the matter on a number of occasions. Conflicting legal opinions and the advice of the Commissioner were obtained and considered.

[9] During the discussions, the City Clerk advised City Council in a memo dated September 23, 2008 that she would treat a direction from City Council to provide councillors with access to the IBMS database on matters within their own ward as a request on behalf of individual councillors for access to the information. She further indicated that she would refuse the access request because the law enforcement and personal information contained in the IBMS could not be redacted, and MFIPPA prohibited her from granting access to such information.

[10] On October 29 and 30, 2008, City Council adopted the Resolution that gives rise to this application. The relevant portion of the Resolution is as follows:

> 1. The City Clerk be directed to provide Councillors with read-only access to the IBMS database on matters within their own ward for lawful uses in discharging their responsibilities as members of Toronto City Council, based on the expert legal opinion with respect to the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA) outlined in the communication (July 8, 2008) from Mr. Martin P. Zarnett, of the Sandler, Gordon, Barristers & Solicitors (communication GM 16.1.8).
>
> 2. Prior to the implementation of #1 above, the City of Toronto apply to, and receive, a favourable decision from the Ontario Superior Court of Justice in a legal proceeding pursuant to the Rules of Civil Procedure and/or under the Judicial Review Procedure Act, for a determination that the recommendations approved by City Council or such other recommendations that counsel may advise or the Court may permit, comply with the provisions of the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).

[11] On October 31, 2008 the City Clerk informed the Mayor and members of City Council that she was treating the Resolution as an access request, and was denying it on the basis that the database contained law enforcement information, personal information and records that were subject to solicitor-client privilege. The City Clerk informed members of City Council that they could ask the Commissioner to review her decision.

[12] Three councillors responded to the City Clerk on November 20, 2008 indicating that they disagreed with her characterization of the Resolution as an access request. They informed her that no appeal to the Commissioner was required. No appeal has been filed with the Commissioner.

Councillor Access to Information in the Integrated Business Management System Database

[13] Individual councillors have access to any information contained in the IBMS that is available to the public. In addition, when councillors sit as members of committees or Council, they receive information from the IBMS that contains personal or law enforcement information on a confidential basis. This information is not available to members of the public or to individual councillors.

Access Requests Under MFIPPA

[14] Under MFIPPA, City Council is the "head" of the City responsible for making decisions about access to records within the custody or control of the municipality: s. 3(3) MFIPPA. As the head, City Council may delegate a power or duty vested in it to an officer of the City: s. 49(1) MFIPPA.

[15] In 1998, City Council delegated to the City Clerk the powers and duties it has under MFIPPA by enacting By-law No. 3-1998. Paragraph 3 of the by-law delegates the powers and duties set out in sections 17, 18, 25, 26 and 34 of MFIPPA to the City Clerk. Paragraph 2 provides that the City Clerk shall have the duties and responsibilities of the Clerks of the former cities of Etobicoke, York, North York, Toronto, Scarborough, the Borough of East York and the Municipality of Metropolitan Toronto. The combined effect of the two paragraphs is that City Council has delegated to the City Clerk the responsibility for making decisions related to requests for access to information in the possession or control of the City.

[16] A person seeking access to a record in the custody or control of the City must make a written request to the City Clerk, providing sufficient detail to enable the City Clerk to identify the record, and must pay a fee: s. 17 MFIPPA. Within thirty (30) days of receiving the request, the City Clerk must notify the person making the request whether access to the record will be given: s. 19 MFIPPA. If access to the record is refused, the Clerk must provide a written notice of refusal indicating why access is refused and informing the requester that an appeal to the Commissioner is available: s. 22 MFIPPA.

Position of the Parties

[17] The Commissioner argues that the court should exercise its discretion and decline to hear this application because the City has not exhausted its administrative remedy of an appeal of the City Clerk's decision to the Commissioner under MFIPPA. In support of this argument, the Commissioner relies on several decisions that permit parties to proceed to the court system only after exhausting all adequate remedies in the statutory process: *C. B. Powell Ltd. v. Canada (Border Services Agency)*, 2010 FCA 61, [2010] F.C.J. No. 274; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] S.C.J. No. 1; *Harelkin v. University of Regina*, [1979] S.C.J. No. 59.

[18] The City submits that City Council's Resolution of October 30, 2008 was not an access request to the City Clerk, and therefore no appeal lies to the Commissioner from the City Clerk's decision. Alternatively, if the court finds that the Resolution was an access request, the City argues that the issue of adequate alternative remedy does not arise because the request was

conditional upon the court finding that individual councillors have a right to access information in the IBMS.

[19] The threshold question is whether the Resolution of Council was an access request under s. 17 of MFIPPA. In my view it was.

[20] The procedure for obtaining access to a record in the possession or control of the City begins with a written request as set out in s. 17 of MFIPPA, which reads as follows:

> 17. (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.

[21] The City argues that the Resolution of Council is not a request, but a direction. It further argues that the term 'person' in s. 17 does not include a municipal council, and therefore s. 17 does not apply in this situation.

[22] In my view, a municipal council is capable of seeking access to a record pursuant to s. 17 of MFIPPA for the following reason. The City of Toronto is a corporation and has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under any Act: sections 7 and 125(1) *City of Toronto Act, 2006*, S.O. 2006, c. 11. The powers of the City are exercised by City Council: s. 132(1) *City of Toronto Act, 2006*. City Council can therefore seek access to a record as a 'person' pursuant to s. 17 of MFIPPA.

[23] Section 17 sets out the first step necessary to obtain access to a record in the possession of the City. Whether the access is requested or directed is, in my view, not relevant. What is relevant is that access to a record is being sought. In this case the head of an institution (City Council) has passed a resolution to enable councillors to obtain access to records that they otherwise do not have. One of the purposes of MFIPPA is to ensure that decisions regarding the disclosure of information are reviewed independently of the institution controlling the information: s. 1(a)(iii) MFIPPA. To permit City Council to avoid the application of MFIPPA by directing access to a record rather than requesting it would thwart one of the purposes of the legislation.

[24] The City argues that the request contained in the Resolution only comes into effect once the court determines that councillors can access the IBMS without violating MFIPPA, and therefore the City Clerk acted prematurely in refusing access. I do not accept this argument. I have concluded that the City's Resolution is a request under s. 17. The City cannot avoid the provisions of MFIPPA by passing a resolution conditional upon court approval. To accept this argument would permit the City to defeat the entire scheme the legislation has put into place.

Adequate Alternative Remedy

[25] Having found that the Resolution of Council is a request for access to a record within the possession of the City, it remains to determine whether the court should refuse to hear the application in light of the adequate alternative remedy doctrine.

[26] An appeal from the City Clerk's denial of access to the IBMS lies to the Commissioner: s. 39(1) MFIPPA. The Commissioner's decision is subject to judicial review: s. 2 *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[27] The Commissioner argues that the City has failed to exhaust its administrative remedies for challenging the City Clerk's decision denying access to the IBMS, and thus the court should refuse to hear the application.

[28] The City argues that the court is better positioned to determine the rights of councillors to access the IBMS because the determination requires the interpretation of legislation and its relationship to the common law.

[29] The Federal Court of Appeal recently examined the doctrine of adequate alternative remedy in the case of *Powell, supra*. Stratas, J. A., speaking for the court, described the doctrine at paragraph 31 as follows:

> ...absent exceptional circumstances, courts should not interfere with ongoing ~~administrative processes~~ until after they are completed, or until the available, effective remedies are exhausted.

[30] In this case, the court must determine whether an appeal to the Commissioner is an adequate alternative remedy to this court application, and if it is, decline to hear the application ~~unless there are exceptional~~ circumstances. It is not necessary to conclude that an appeal to the Commissioner is a better forum than the court; only that it is an adequate forum: *Matsqui, supra.*

[31] In my view, an appeal to the Commissioner satisfies the six criteria for an adequate alternative remedy set out by the Supreme Court of Canada in the cases of *Matsqui, supra* and *Harelkin, supra*. The criteria are as follows:

1. The procedures on appeal including the convenience of the alternative remedy.
2. The nature of the appellate body, *i.e.* its investigatory, decision-making and remedial capacities.
3. The powers of the appellate body and the manner in which they were to be exercised.
4. Expeditiousness and costs.
5. The burden of the previous finding.
6. The nature of the error.

[32] Part III of MFIPPA sets out a comprehensive procedure for appealing a decision to the Commissioner. The process is convenient and inexpensive. The appeal is in writing. The parties have the right to file evidence, make submissions and be represented by counsel. The Commissioner has broad powers to compel witnesses and require the production of documents, giving her the ability to conduct a wide-ranging inquiry into all of the evidence. The Commissioner is required to conduct a *de novo* hearing on the appeal: *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.); aff'd [2005] O.J. No. 4047 (Ont. C.A.). At the conclusion of the hearing, the Commissioner shall make an order disposing of all of the issues raised on the appeal.

[33] The City submits that a wide-ranging inquiry is not warranted in this case; that all of the pertinent information is before the court and no other facts are required, and therefore an appeal to the Commissioner is not necessary. The City relies on the decision of the Ontario Court of Appeal in *Canada Trust Co. v. Ontario Human Rights Commission* (1990), 37 O.A.C. 191, 74 O.R. (2d) 481.

[34] I do not agree that all of the pertinent information is before the court. The City relies on the affidavit of a single councillor as the factual foundation for the application. There is no evidence before the court from citizens whose personal information may be disclosed to individual councillors. In short, there is evidence of only one perspective on the issue before the court.

[35] The City further submits that an appeal to the Commissioner is not an adequate alternative remedy because the Commissioner has no jurisdiction to determine whether MFIPPA has supplanted what the City argues is the common law right of councillors to access the information in the IBMS. Furthermore, the City argues that the Commissioner has no jurisdiction to make a declaration concerning a resolution of City Council.

[36] With respect to the argument that the Commissioner cannot make a declaration concerning a City Council resolution, I have already determined that the City cannot circumvent the process set out in MFIPPA by passing a resolution.

[37] With respect to the jurisdiction of the Commissioner to consider common law principles and their impact on access rights to information under MFIPPA, the Supreme Court of Canada has recognized the ability of administrative tribunals to apply common law rules to a specific statutory context: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 54. The Commissioner cited numerous cases in which the Commissioner had considered and applied common law principles during the adjudication of appeals: see for example *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 149 O.A.C. 213, [2001] O.J. No. 3239; *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.). In my view, the Commissioner can consider any common law rights councillors have to access the information in the IBMS.

[38] Finally, the City argues that the court should hear this application rather than require it to appeal to the Commissioner because the Commissioner has already determined the issue and the

City will be unable to obtain a fair and impartial hearing. This argument is based on an opinion that the Commissioner provided the City during City Council's deliberation on the issue. Section 46 of MFIPPA provides that the Commissioner may comment on the privacy implications of proposed programs of institutions. It appears from the Application Record that the Commissioner was invited by the City to comment on an earlier proposal that councillors be granted access to the IBMS database on matters within their own ward. The Commissioner's opinion was expressed in letters dated July 14, 2008 and September 22, 2008. Both letters pre-date the adoption of the City Council Resolution that gives rise to this application. The Commissioner's letters indicate her view that unfettered, routine access to the IBMS database is not consistent with the provisions of MFIPPA.

[39] The City's position is that the Commissioner was not required to comment, but she did, and she has predetermined the issue. This circumstance, the City argues, is sufficient to have the court hear the application even if it determines that there is an adequate alternative remedy.

[40] Even if the Commissioner has predetermined the issue (and for the reasons that follow, I have not reached that conclusion), that circumstance is not sufficient for the court to interfere with the statutory process established by MFIPPA to determine access to information and privacy rights. Concerns and allegations of bias, procedural fairness and prejudgment are not sufficient to by-pass administrative processes: *Powell, supra*; *Happy Landing v. Ontario (Ministry of Labour, Employment Standards Branch)*, [1998] O.J. No. 2416 (O.C.J. Gen. Div.); *Lorenz v. Air Canada*, [1999] F. C. J. No. 1383 (F.C.T.D.).

[41] The Commissioner has rendered an opinion that unfettered, routine access to the IBMS violates MFIPPA. The direction to the City Clerk in the Resolution is to provide "read-only" access to the IBMS. The Commissioner has not opined on this type of access and has thus not predetermined the appeal.

Conclusion

[42] The City's application to the court is premature. The City must first exhaust its appellate remedy under MFIPPA. This approach ensures the integrity of the scheme the legislation establishes to determine information access rights. It will also provide any future court reviewing the decision of the Commissioner with a full evidentiary record, including the Commissioner's findings. This court will therefore not hear the application.

Corrick J.

Released: January 14, 2011

COURT FILE NO.: CV-10-398716
DATE: 20110114

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE MUNICIPAL FREEDOM OF INFORMATION ACT, R.S.O. 1990, c. M.56

AND IN THE MATTER OF A MOTION ADOPTED BY THE CITY OF TORONTO COUNCIL ON OCTOBER 29 AND 30, 2008 RESPECTING ACCESS TO THE CITY OF TORONTO INTEGRATED BUSINESS MANAGEMENT SYSTEM

AND IN THE MATTER OF AN APPLICATION MADE PURSUANT TO RULE 14.05 OF THE RULES OF CIVIL PROCEDURE FOR A DECLARATION AND DETERMINATION OF THE RIGHTS OF CITY COUNCILLORS PURSUANT TO THE SAID MOTION

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO (Intervener)

REASONS FOR DECISION

Corrick J.

Released: January 14, 2011