

CITATION: Xu v. Town of Oakville, 2024 ONSC 524
COURT FILE NO.: CV-18-7823
DATE: 2024-01-23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mu Xu, Plaintiff

AND:

The Corporation of the Town of Oakville and CSL Group Inc., Defendants

BEFORE: Justice Mills

COUNSEL: A. Rozumek, Counsel for the Plaintiff

S. E. Hamilton, Counsel for the Defendant Town of Oakville

No one appearing for the Defendant CSL Group Inc.

HEARD: December 7, 2023

ENDORSEMENT

[1] The real issue on this undertakings and refusal motion is the confluence of the *Municipal Freedom of Information and Protection of Privacy Act*¹ (“*MFIPPA*”) and the *Rules of Civil Procedure*²; specifically, whether a litigant may obtain a court order compelling the disclosure of information without first making a formal *MFIPPA* request and exhausting the statutory appeal process provided therein where the request is denied.

[2] The defendant, The Corporation of the Town of Oakville, relied on *MFIPPA* to refuse disclosing the last known addresses of two former municipal employees who might reasonably be expected to have knowledge of the events in issue in the litigation. The plaintiff filed a Freedom of Information request which was denied by the Town, but she has not pursued an appeal of the decision to the Information and Privacy Commissioner of Ontario (“*IPC*”), as provided in s. 39 of

¹ R.S.O. 1990, c. M.56

² R.R.O. 1990, Reg. 194

MFIPPA. Rather, she brought this motion to compel the Town to answer the questions refused at the examination for discovery of the Town representative.

[3] I am satisfied that a party to litigation may obtain a court order compelling disclosure of relevant and appropriate information without first fully complying with the *MFIPPA* regime, including the requirement of an appeal of any negative decision to the IPC.

[4] The purpose of *MFIPPA* is to provide individuals with a right of access to information held by government institutions and to protect the private information of individuals in the custody or control of government institutions.³ It is intended to balance the competing interests of open and public access to government information, against the right of citizens to have their personal information within the control of government held in private and maintained as confidential. Unless subject to an exemption or if found to be a frivolous or vexatious request, every person has a right of access to a record or part of a record in the custody or under the control of an institution.⁴ Several exemptions to the right of access are enumerated, including Section 14 which addresses personal privacy and the protection against unjustified invasions of personal privacy. Section 32(e) also permits disclosure of personal information where it is permitted or required by law.

[5] Section 51 of *MFIPPA* specifically addresses the interplay of the legislation with the civil justice system. It provides that the Act does not impose any limitation on the information otherwise available by law to a party engaged in litigation, and it does not affect the power of a court or tribunal to compel a witness to testify, or to order the production of a document.

[6] The *Rules of Civil Procedure* permit a party to obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of the transactions or occurrences in issue in the action.⁵ The confidentiality of the information is protected by Rule 30.1.01(3), the deemed undertaking rule. The parties and counsel are deemed to undertake not to use evidence or information disclosed in the discovery process for any purposes other than those of the proceeding in which the evidence was obtained. This offers individuals the privacy

³ S. 1 *MFIPPA*

⁴ S. 4 *MFIPPA*

⁵ Rule 31.06(2)

protections contemplated by *MFIPPA* while ensuring proceedings are advanced in the most efficient and cost-effective manner. Proportionality and expediency should never trump an individual's right to the protection of their private information, however the deemed undertaking rule ensures the right to privacy is protected while a legal proceeding is advanced through the civil justice system to a timely and efficient determination on its merits.

[7] There have been conflicting judicial decisions as to the appropriate procedure to follow.

[8] In the case of *Gargari v. Toronto Catholic District School Board*⁶, the plaintiff sought disclosure of documents containing personal and private information of certain individuals. Master Muir held that “some resort” to the *MFIPPA* process must be followed before seeking an exemption pursuant to s. 51 of the Act.⁷ As the plaintiff failed to appeal this decision, Master Graham later held it was binding on the plaintiff and that the *MFIPPA* appeal rights must also be exhausted before seeking an order from the Court for disclosure.

[9] Conversely, in *Deuzeman v. Elgwaily*,⁸ the late Justice Heeney relied on the wording of s. 51(2) and held that the power of the court to order production under Rule 19(11) of the *Family Law Rules*⁹ is unaffected by the provisions of *MFIPPA*. The requested disclosure was held to be relevant to a fair determination of the rights affecting the person who made the request, which is a specific exemption enumerated in s. 14(2)(d) of *MFIPPA*. Rule 19(11) of the *Family Law Rules* addresses the production of documents in the possession of a non-party and is analogous to Rule 30.02 of the *Rules of Civil Procedure*. The principle of the decision is therefore equally applicable to civil proceedings. Provided the requested information is relevant to an issue to be determined, a litigant may obtain production through the judicial process without first complying with the *MFIPPA* regime.

[10] The Divisional Court in *Henery v. London (City)* held that *MFIPPA* is subject to the proper demands of the civil rules and the process of litigation. It was expressly stated that an

⁶ 2018 ONSC 7009; 2020 ONSC 6903

⁷ 2018 ONSC 7009, at para. 4

⁸ 2021 ONSC 7060

⁹ O.Reg. 114/99

application under the *MFIPPA* procedure is not a condition precedent to the disclosure of documents requested by a party to litigation.¹⁰

[11] Justice Dawe in *Canadian Flight Academy Ltd. v. Oshawa (City)*¹¹ was satisfied that the provisions of *MFIPPA* did not bar the Court from ordering production of documents which included the private and personal information of individuals who were not parties to the litigation.

[12] I find the very succinct wording of the Divisional Court in *Henery v. London (City)* to be compelling. Compliance with the provisions of *MFIPPA* is not a condition precedent to disclosure that would otherwise be appropriate in a litigation process.

[13] The various exemptions referenced in the *MFIPPA* to judicial proceedings relieves litigants of first making a freedom of information request and undertaking an appeal if the request is denied. The privacy safeguards mandated by the *Rules of Civil Procedure* and enforced by judicial oversight are sufficient to satisfy the intentions of *MFIPPA* while also ensuring a litigant's right to a fair trial is protected. Obviating a litigant's need to first comply with *MFIPPA* adjudication regime will contribute to securing the just, most expeditious, and least expensive determination of a civil proceeding on its merits.¹²

[14] I am satisfied the information sought by the plaintiff is relevant to an issue in the proceeding and that it should be produced. The Town shall provide the personal contact information for the two former employees identified by the plaintiff. The information shall be held in the strictest confidence and used only in accordance with the deemed undertaking rule.

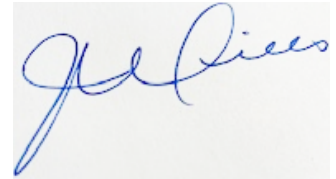
[15] Having regard to the conflicting caselaw on this issue, I cannot find the Town acted improperly by requiring the plaintiff to comply with the *MFIPPA* process prior to bringing this motion. The issue required a definitive resolution not only for this matter but for future litigation where parties seek disclosure of private and confidential information in the possession of

¹⁰ 2007 CanLII 51338 (ONSC DC), at paras 16 and 17

¹¹ 2023 ONSC 1906, at para. 76

¹² *Rules of Civil Procedure*, Rule 1.04(1)

institutions and subject to *MFIPPA*. It was a narrow and novel issue to be determined. Therefore, there shall be no order as to costs.

A handwritten signature in blue ink, appearing to read "J.E. Mills J.", is shown within a rectangular box.

J.E. Mills J.

Date: January 23, 2024