



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1883

Appeal PA_000146-1

Ontario Securities Commission



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NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records relating to the requester or any companies with whom he had been associated. The Ministry identified that responsive records were held by the Ontario Securities Commission (the OSC). The Minister of Finance is the “head” of the OSC for the purposes of the *Act*, and the Ministry processes requests and appeals under the *Act* on behalf of the OSC. Accordingly, although the Ministry participated in this matter on behalf of the OSC, the OSC is properly considered the institution for the purposes of this appeal.

The request specifically sought access to:

All notes, memoranda, correspondence or any other documentary or electronic records of any kind which disclose information relating to [the requester] personally or relating to [an identified company] or the companies on the attached list and which are contained in the Ministry's files.

The OSC identified 135 responsive records, and provided the requester with access to 116 of them. For the remaining 19 records, the OSC denied access on the basis of one or more of the following exemptions contained in the *Act*:

- section 13(1) (advice or recommendations);
- sections 14(1)(a), (b), (c) and (g) and 14(2)(a) and (c) (law enforcement);
- sections 15(b) and (c) (relations with other governments);
- section 21 (invasion of privacy);
- sections 49(a) and (b) (discretion to refuse requester's own information).

The requester, now the appellant, appealed the OSC's decision.

During mediation the OSC identified that the 19 records were all from the Enforcement and Investigation Branch, and were all compiled as part of an ongoing law enforcement matter.

Resolution of the appeal through mediation was not successful, so the appeal moved to the adjudication stage. I sent a Notice of Inquiry to the OSC initially, and received representations in response. I then sent the Notice of Inquiry, along with the non-confidential portions of the OSC's representations, to the appellant, and received representations from the appellant on the issues.

RECORDS:

The records at issue are numbered 1, 2, 3 and 5 through 20. They include memoranda, affidavits, letters and handwritten notes.

DISCUSSION:

PERSONAL INFORMATION

“Personal information” is defined in section 2(1) of the *Act*, in part, as 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 ... 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,
- ...
- (h) the individual’s name where 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;

In past orders, this Office has determined that information about identifiable individuals in their capacity as representatives of a business or corporation is not considered to be information “about” these individuals, and therefore does not qualify as their “personal information” within the meaning of the definition in section 2(1) (see Reconsideration Order R-980015).

In Interim Order P-1636, Adjudicator Laurel Cropley considered the issue of whether certain information contained in records held by the OSC regarding OSC investigations qualified as personal information. She stated:

The records pertain to several OSC investigations into the activities of a number of companies involved in the buying, selling and promotion of stocks. The OSC investigations examined a large number of transactions involving these firms, which necessitated the compilation of a great deal of information about the trading in securities by many identifiable individuals. As a result, many of the records contain a great deal of information which qualifies as “personal information” within the definition in section 2(1)(b) as it relates to “financial transactions” in which each of these individuals, including the appellant, were involved.

Many of the records also document various computer searches undertaken by the OSC in the course of their investigations using the ONBIS system operated by the Ministry of Consumer and Commercial Relations. When a search of an

individual or company name was made, and a “hit” was registered, other information about that individual, such as their date of birth, home address, social insurance number, employer and place of birth would also appear. This information, which is reflected in many of the responsive records, also qualifies as the personal information of these individuals under sections 2(1)(a), (b), (c), (d) and (h) of the definition.

I agree with Adjudicator Cropley’s analysis, and find it to be relevant to most of the records at issue in this appeal, which all relate to investigations of complaints made to the OSC.

Record 5 does not contain any personal information, either of the appellant or any other identifiable individuals.

Page 2 of Record 20 contains the name of the appellant in his capacity as representative of a corporation, and therefore does not contain his personal information.

The remaining records contain the personal information of identifiable individuals other than the appellant, as defined by the various paragraphs of the definition quoted above. Records 6, 7 and 8 also contain the personal information of the appellant, in addition to one or more other individuals.

INVASION OF PRIVACY/DISCRETION TO REFUSE REQUESTER’S OWN INFORMATION - SECTIONS 21/49(B)

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the *Act*, where a record contains personal information of both the appellant and other individuals, and the OSC determines that the disclosure of the information would constitute an unjustified invasion of another individual’s personal privacy, the OSC has the discretion to deny the appellant access to that information.

Where, however, the record only contains the personal information of individuals other than the appellant, section 21(1) of the *Act* prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it “... does not constitute an unjustified invasion of personal privacy.”

Therefore, for the records that contain the appellant’s personal information, I will decide whether section 49(b) applies; and for all other records, I will decide whether section 21(1)(f) applies.

In both these situations, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that

section 23 of the *Act* applies to the personal information. If none of the presumptions in section 21(3) apply, the OSC must consider the application of the factors listed in section 21(2) of the *Act*, as well as all other circumstances that are relevant to the appeal.

Records which do not contain the appellant's personal information

The OSC submits that Records 1, 11, 12, 13, 14, 17, 18, 19 and 20 all relate to complaints made to the OSC which concern individuals other than the appellant. The OSC maintains that these records contain the personal information of the complainants as well as the individuals who are the subject of the complaints. None of these records contain specific information relating to either the appellant or the companies listed in his request.

Although the OSC does not refer directly to sections 21(2) or 21(3) in its representations, it identifies the records as complaints, and submits that:

... such a complaint, whether provided in writing or otherwise, is implicitly of a confidential nature. Enforcement agencies such as the OSC depend upon the willingness of parties to come forward and bring matters to the agency's attention. Individuals feel, and should feel, comfortable doing so anonymously or on the assumption that the fact of the complaint will form the basis for an investigation but will remain otherwise confidential. To hold otherwise would be to discourage the reporting of misconduct by citizens. ...

The OSC therefore submits that disclosure of the fact of [these] complaint[s], and of the substance of the record[s], would constitute disclosure of personal information regarding the complainant[s].

These representations appear to be based on sections 21(2)(h) (information supplied in confidence) and (f) (highly sensitive), both of which are factors that favour privacy protection.

Record 1 relates to a complaint dated in 1991. I accept the OSC's position that the information contained in this record is highly sensitive. No factors are present favouring disclosure of this record, which does not contain the appellant's personal information, and I find that it qualifies for exemption under section 21 of the *Act*.

Records 11, 12, 13, 14, 17, 18 and 19 all relate to events which occurred in 1993 or 1994. These records also do not contain the appellant's personal information, but instead relate to complaints made to the OSC concerning other identifiable individuals. For the same reasons as Record 1, I find that the information contained in these records is highly sensitive and Records 11, 12, 13, 14, 17, 18 and 19 also qualify for exemption under section 21.

Record 20 consists of four pages of documents concerning a complaint made in 1993. Three pages contain the personal information of individuals other than the appellant. The remaining page (page 2) is a press release issued by the OSC in 1993 which identifies the appellant and others in their capacities as representatives of a corporation. The OSC states that it has no objection to disclosure of this page. I find that section 21 does not apply to page 2, and it should be disclosed to the appellant. The remaining three pages of Record 20 qualify for exemption

under section 21 of the *Act* for the same reasons as Record 1 and the other records discussed above.

Record 2 is a one-page memorandum dated in 1990. The OSC submits that the information in this record relates to the charges, allegations and criminal history of an identifiable individual other than the appellant, and is therefore highly sensitive. I concur, and find that Record 2, which does not contain any personal information of the appellant, qualifies for exemption under section 21.

Record 3 is a memorandum with an attached statement, both of which are dated in 1990. The OSC submits that this record contains various sensitive and confidential information about both the author of the statement and other identifiable individuals, and that the author clearly intended that the contents would be held in confidence. Again, I accept the OSC's position, and find that Record 3, which also does not contain any personal information of the appellant, qualifies for exemption under section 21.

Records containing the appellant's personal information

Records 6 and 7 are each one page in length, and contain the personal information of both the appellant and other identifiable individuals. Record 6, which is undated, is a hand-written note consisting of a listing of names and addresses of individuals other than the appellant, together with highly sensitive personal information about them. Only the last three lines contain the appellant's personal information, which is linked by subject matter to the rest of the record. Record 7, which is dated in 1998, is an internal memorandum which identifies the appellant and another individual, and contains personal information about each of them. The personal information of the other individual, in my view, is accurately characterized as highly sensitive.

I find that, subject to the discussion of severance which follows, the requirements of section 49(b) of the *Act* are present for Records 6 and 7.

Severance

The appellant submits:

In this case, [the appellant] is not seeking any information relating to any individual other than himself. To the extent that any records which are responsive to his request contain the information of other individuals, concerns about the disclosure of such information can easily be addressed by [severing] that personal information where it appears on the records that [the appellant] seeks.

In Order M-1086, Commissioner Ann Cavoukian reviewed the factors to consider in deciding whether it was possible to sever personal information from records. She stated:

As far as the witness statements are concerned, the appellant is not interested in knowing witnesses names, addresses or telephone numbers. Therefore, I must determine whether severing this information is sufficient to remove the remaining parts of these records from the scope of the definition of "personal information."

In Order P-230, former Commissioner Tom Wright stated:

I believe that provisions of the *Act* relating to protection of personal privacy should not be read in a restrictive manner. If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

In applying this reasoning to the witness statements, in my view, even if the names, addresses and telephone numbers are severed, it is still reasonable to expect that the witnesses can be identified. Therefore, I find that these records contain the personal information of the witnesses, with or without the severances.

Much of the information contained in the records relates to investigations undertaken by the OSC, and includes background information and comments of individuals with knowledge of certain events. Applying the reasoning from Order M-1086, I find that simply severing out the personal identifiers from the records would not, in most instances, render the individuals referred to in the records unidentifiable to individuals who may have knowledge of the events. Accordingly, with the exception of Records 6 and 7, I find that it is not possible to sever the remaining records in a manner that would remove the records from the application of section 21.

As far as Record 7 is concerned, I find that if the name of the other identifiable individual which appears in the subject line of the memorandum, as well as the paragraph that contains personal information of this individual in the body of the record, are both severed, disclosure of the portions that remain, which consist of the personal information of the appellant only, would not constitute an unjustified invasion of privacy. Similarly, if the personal information of the appellant contained in the last three lines of Record 6 is severed from the rest of that record, disclosure of the three lines containing only the personal information of the appellant would not constitute an unjustified invasion of privacy. Accordingly, I find that Records 6 and 7, severed as described, do not qualify for exemption under section 49(b) of the *Act*.

DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION - SECTION 49(A)

Under section 49(a) of the *Act*, the OSC has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, **14, 15**, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; (emphasis added)

I will consider whether the remaining records, Records 5, 8, 9, 10, 15 and 16, qualify for exemption under sections 14(1)(g) or 15(b). Because Record 8 and the remaining portions of

Records 6 and 7 contain the personal information of the appellant, I will consider the application of section 14(1)(g) to these records as a preliminary step in determining whether they qualify for exemption under section 49(a) of the *Act*.

RELATIONS WITH OTHER GOVERNMENTS

The OSC claims section 15(b) as one basis for denying access to Records 5, 8, 15 and 16. Section 15(b) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

reveal information received in confidence from another government or its agencies by an institution;

and shall not disclose any such record without the prior approval of the Executive Council.

In Order 210 it was established that, for a record to qualify for exemption under section 15(b), an institution must establish that:

1. the records reveal information received from another government or its agencies; and
2. the information was received by an institution; and
3. the information was received in confidence.

Record 5

Record 5 is a trading printout created in 1990, and contains trading information regarding a particular security. The OSC submits that Record 5 contains information which is not publicly available, and was compiled by the Toronto Stock Exchange (TSE), which at the relevant time was a self-regulatory organization with statutory powers. The OSC states that the information was furnished by the TSE in response to the OSC's request, and that because the record was assembled and compiled solely for the OSC's investigative purposes, it was provided by the TSE in the expectation that confidentiality would be preserved.

For the section 15(b) exemption to apply, the records must contain information provided by "another government or its agencies". The relationship between the body providing the information and the institution receiving it must be intergovernmental (that is between various levels of government) as opposed to between agencies of the same government (Order P-859).

The OSC submits that the TSE qualified as "another government" at the time the record was created.

The relationship between the OSC and the TSE was examined in Order P-548. The records in that appeal also concerned securities investigations. In that order, former Assistant Commissioner Irwin Glasberg found:

Of the ... records to be considered, some were authored by OSC staff while others were prepared by employees of the TSE. For this reason, the OSC was asked to explain the role and mandate of the TSE with respect to the records at issue. In its representations, the OSC addressed this issue in the following manner:

... It is submitted that the TSE in the circumstances such as those which give rise to this case, acts as agent for the [OSC] ... in enforcing and regulating compliance with the *Ontario Securities Act* ...

In Order 30, former Commissioner Sidney B. Linden had occasion to consider a fact situation similar to the one raised in this appeal. There, the records at issue pertained to a complaint filed with the OSC and investigated by the Investment Dealers Association of Canada (the IDA). Like the TSE, the IDA investigates public complaints either directly or on behalf of the OSC.

After considering the circumstances of the present appeal, I find that the TSE was also operating in the capacity of agent for the OSC in investigating the relevant complaints. ...

Although the reasoning in Order P-548 was applied in the context of section 14 as opposed to section 15(b), in my view, it is equally applicable in the context of this appeal as it relates to establishing the role and mandate of the TSE and its relationship to the OSC. I find that the TSE is itself not a government agency and, for the reasons outlined by former Assistant Commissioner Glasberg, I find that the TSE is not “another level of government” for the purpose of the section 15(b) exemption. As such, section 15(b) has no application with respect to Record 5.

Record 8

Record 8 is a one-page memorandum dated in 1991. The OSC submits that it qualifies for exemption under section 15(b) because the information contained in it was received by the OSC from another government agency, the Royal Canadian Mounted Police (the RCMP), in confidence.

Consistent with past orders, I find that the information contained in Record 8 was provided to the OSC by the RCMP, which qualifies as an agency of another government for the purpose of the section 15(b) exemption (see Orders P-124 and P-369). I also find, based on representations provided by the OSC and the nature of the information contained in the record, that the information was received by the OSC in confidence (Order P-1552). Accordingly, the requirements of section 15(b) have been established for Record 8. Because it contains the personal information of the appellant, I find that it qualifies for exemption under section 49(a).

Records 15 and 16

Records 15 and 16 are handwritten notes of telephone conversations. The OSC submits that these records qualify for exemption under section 15(b) because the information contained in them was received by the OSC from another government agency, the British Columbia Securities Commission (the BCSC), in confidence.

I am satisfied that the BCSC qualifies as an agency of the British Columbia government for the purposes of section 15(b). I also find, based on the representations provided by the OSC and my review of the records, that the information contained in Records 15 and 16 was received by the OSC from the BCSC in confidence, or would permit the drawing of accurate inferences with respect to information received on that basis. Accordingly, the requirements of section 15(b) have been established for Records 15 and 16, and I find that they qualify for exemption on that basis.

LAW ENFORCEMENT

The OSC claims that Records 9 and 10, as well as the remaining portions of Records 6 and 7 qualify for exemption under section 14(1)(g).

Section 14(1)(g) provides:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

In order for the records to qualify for exemption under sections 14(1)(g), the subject matter referred to in them must satisfy the definition of the term “law enforcement” as found in section 2(1) of the *Act*. This definition reads:

“law enforcement” means,

- (a) policing,
- (a) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (b) the conduct of proceedings referred to in clause (b).

In Order 30, former Commissioner Linden held that investigations by the OSC under the provisions of the *Securities Act* are properly considered law enforcement matters under the definition of that term in section 2(1). Accordingly, this element of section 14(1)(g) has been satisfied.

Previous orders have determined that the purpose of section 14(1)(g) is to provide institutions with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information. Intelligence information has been defined as:

... information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation or a specific occurrence (Orders M-202 and P-650).

(Order MO-1261)

As a general submission, the OSC states:

As with all information in these records with respect to which this exemption is applied, the information represents information gathered by the OSC (or, where communicated to the OSC by other law enforcement agencies, gathered by those agencies) in a covert manner to assist in the ongoing detection, prevention and prosecution of crime.

As described earlier, Record 6 is an undated memo, and the only portion of this record still at issue is the last three lines which contain the personal information of the appellant.

Record 7 is a memo dated in 1998 and the only portions that remain at issue are those that contain the personal information of the appellant. The OSC submits that:

The form and content of the record, and the identity of the author and particularly the addressee, make it clear that the record constitutes a contribution to the intelligence databank of the OSC.

Record 9 is a memo dated 1991, with various attachments. The OSC submits that this record:

... represents law enforcement intelligence information. It is clear from the identities of the author and the addressee of the record, as well as the substance of the information contained in the record that it represents intelligence information.

Record 10 is correspondence sent in 1991, and the OSC states that, although the record reveals "... little of substance, it is apparent that the OSC had intelligence information regarding the company referred to." The OSC submits that this fact alone constitutes intelligence information.

The appellant makes the following submissions:

In respect of section 14(1)(g), it is submitted that the institution must prove that disclosure would actually interfere with an intelligence gathering function. Given the ability to [sever] the names and addresses of the individuals identified on the records, we question how the institution can succeed in relying on this exemption.

Based on the representations provided by the OSC and subject to one exception I will discuss below, I am satisfied that disclosure of Records 9 and 10, and the remaining portions of Records 6 and 7, would reveal law enforcement intelligence information gathered by the OSC with respect to matters involving the appellant and/or other identified individuals or companies. I further find that Records 9 and 10 cannot reasonably be severed in a manner that would allow partial disclosure. Accordingly, I find that Records 9 and 10 qualify for exemption under section 14(1)(g). Because the remaining portions of Records 6 and 7 contain the personal information of the appellant, I find that they qualify for exemption under section 49(a).

The one exception to this finding is the last paragraph of Record 7. This paragraph contains information provided to the OSC by the appellant and, in my view, disclosing this information would not reasonably lead to the types of harm contemplated by section 14(1)(g). Accordingly, I find that this paragraph does not qualify for exemption under section 49(a) of the *Act* and should be disclosed to the appellant.

Because of the findings I have made, it is not necessary for me to consider the application of section 13(1) to the records at issue.

ORDER:

1. I order the OSC to disclose Record 5, the final paragraph of Record 7 and page 2 of Record 20 to the appellant by **April 11, 2001**.
2. I uphold the OSC's decision to deny access to the remaining records at issue in this appeal.
3. In order to verify compliance with this order, I reserve the right to require the OSC to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ March 21, 2001