Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 157

Appeal 890173

Ministry of Financial Institutions

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and procedures employed in making this Order are as follows:

1. On October 22, 1988, the requester wrote to the Ministry of Financial Institutions (the "institution") to request access to "All information gathered in 1988 by the Ontario Securities Commission, or anyone acting on its behalf, which directly or indirectly pertains to me or my family."

2. Upon receipt of the request, the institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") wrote to the requester to advise that "a time extension of 46 days... is required to process your request. This extension is necessary because of the large number of records that must be searched through, and the consultations that are needed, to complete your request." The requester did not appeal this time extension.

3. Subsequent to a telephone conversation in which the requester clarified his request, the Co-ordinator wrote to the requester on February 6, 1989 and advised that "we are

continuing to review the other personal information records relevant to your request, and hope to have an answer for you on this no later than February 24, 1989."

4. During the months of March and April of 1989, the requester was involved in grievance proceedings with the Ontario Securities Commission (the "O.S.C."). Apparently, the requester's employment with the Commission was terminated following an investigation by the Commission. It is this investigation that generated the records at issue in this appeal.

5. On April 14, 1989, the institution's Co-ordinator wrote to the requester enclosing copies of records which the requester had submitted to the Commission. Further, the Co-ordinator advised that records which previously had been exempted from disclosure would be reviewed given the completion of grievance proceedings.

6. On June 5, 1989, the Co-ordinator wrote to the requester and provided access to certain records. Access to other records was denied, either in whole or in part, pursuant to subsections 14(1)(a), (c), (d), 14(2)(a) and 49(c).

7. On June 7, 1989, the requester wrote to me appealing the decision of the head and I sent Notices of Appeal to the institution and the appellant on June 15, 1989.

8. Upon receipt of the appeal, the Appeals Officer assigned to this case obtained and reviewed the requested records. The Appeals Officer spoke with the appellant who outlined his concerns and reasons for appealing. The Appeals Officer

also met with the Co-ordinator to discuss the application of the various exemptions cited by the institution to deny access. As a result of this discussion, on September 20, 1989 the institution released to the appellant copies of certain records which were found to be publicly available. The institution maintained its position with respect to the remaining records and a mediated settlement was not possible.

9. By letters dated September 22, 1989, I notified the institution and the appellant that I was conducting an inquiry to review the decision of the head. In accordance with my usual practice, the Notice of Inquiry was accompanied by a report prepared by the Appeals Officer. This report is intended to assist the parties in making the representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any other parties, to be relevant to the appeal. Those sections of the Act paraphrased in the report include the exemption sections cited by the head in refusing access to a record or a part thereof. The report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the report.

10. Representations were received from the institution only and I have considered them in making my Order.

The records at issue in this appeal can generally be described as follows:

- Correspondence between the O.S.C. investigator and third parties (exempted in their entirety pursuant to subsections 14(1)(a), (d) and 49(c));

- Records received by the investigator in the course of his investigation from various sources (exempted in their entirety pursuant to subsections 14(1)(a), (c) and (d));

- Handwritten notes of the investigator (exempted in part pursuant to subsections 14(1)(a), (c), (d), 49(c), and 21(1));
- Draft and final versions of the investigator's report (exempted in their entirety pursuant to subsection 14(2)(a)).

The issues arising in this appeal are as follows:

A. Whether the information contained in the records qualifies as "personal information" as defined by subsection 2(1) of the Act.

B. Whether any of the requested records would fall within the exemptions provided by subsections 14(1)(a), (c), (d) and 14(2)(a) of the Act and, if so, whether the exemption provided by subsection 49(a) of the Act applies.

C. Whether any of the requested records fall within the discretionary exemption provided by subsection 49(b) of the Act.

D. Whether any of the requested records fall within the discretionary exemption provided by subsection 49(c) of the Act.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. This provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions, and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution.

Before considering the issues arising in this appeal, I believe that it would be helpful to provide some background to the investigation which resulted in the creation of the records at issue. I have been advised that the institution received information from the RCMP respecting possible breaches of security by the appellant. As a result of information received an investigation was commenced by the institution pursuant to the Public Service Act, R.S.O. 1980, c.418, as amended. This investigation considered the alleged wrongdoing as well as suspected misrepresentations in the appellant's resume and application for employment. Following this investigation, the appellant's employment was terminated by the institution. The appellant then initiated grievance proceedings which were resolved by a settlement.

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined by subsection 2(1) of the Act.

In Order 37 (Appeal Number 880074), dated January 16, 1989, I stated that in all cases where the request involves access to personal information it is my responsibility, before deciding whether the exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act, and to determine whether this information relates to the appellant, another individual or both.

Subsection 2(1) of the Act states:

> "personal information" means 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 the education or the medical, psychiatric, psychological, criminal or employment history of the individual or 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,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(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;

The request for access form signed by the appellant on October 22, 1988 was entitled "Request for Access to Personal Information". On the form, the appellant requested access to "information... which directly or indirectly pertains to me or my family". Not surprisingly, therefore, a review of the requested records which were withheld from disclosure indicates that they contain information about the appellant, which information is personal information, as defined in subsection 2(1) of the Act. Certain of these records also contain personal information about individuals other than the appellant.

Subsection 47(1) of the Act gives individuals a general right of access to:

(a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and

(b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

However, this right of access under subsection 47(1) is not absolute. Section 49 provides a number of exceptions to this general right of access to personal information by the person to whom it relates.

Section 49 of the Act provides that:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
>
> (c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
>
> (d) that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;
>
> (e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence; or
>
> (f) that is a research or statistical record.

In this appeal, the institution has claimed that sections 14, 49(b), and 49(c) of the Act apply to exempt the requested records from disclosure, either in whole or in part.

ISSUE B: Whether any of the requested records would fall within the exemptions provided by subsections 14(1)(a), (c), (d) and 14(2)(a) of the Act and, if so, whether the exemption provided by subsection 49(a) of the Act applies.

I turn first to the various provisions of subsection 14(1) of the Act, cited by the institution to deny access. These provisions are subsections 14(1)(a), (c) and (d) and they read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> ...
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> ...

The words "law enforcement" are defined in subsection 2(1) of the Act as follows:

> "law enforcement" means,
>
> (a) policing,

> (b) 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
>
> (c) the conduct of proceedings referred to in clause (b);

In its representations, the institution submitted that "Internal security of a government institution is clearly included within the word 'policing'. The investigation related to internal security at the O.S.C. and disclosure of information collected could jeopardize that internal security."

This was an investigation into the background and activities of an employee following up on an allegation that the employee might have breached his contract of employment. In my view, the word "policing" was not intended to cover as broad a range of investigative activities as suggested by the institution. Rather, the expansion of the definition to include those activities identified in clauses (b) and (c) suggests to me that the word "policing" has a narrower meaning than that proposed by the institution.

Although not argued by the institution, I have also considered whether an investigation conducted within the context of internal security at an institution satisfies the second part of the definition noted above (i.e. investigations or inspections that lead or could lead to proceedings in a court or tribunal...).

Where an employer has conducted an investigation and determines that there is cause to terminate an employee, it is my view that

the investigation or inspection was not one that could lead to proceedings in a court or tribunal. Certainly, the employee may choose to sue the employer for wrongful dismissal or may initiate proceedings under the collective agreement, such as a grievance, but such actions would be at the instance of the employee. The investigation or inspection was not conducted with a view to providing a court or tribunal with the facts by which it would make a determination of a party's rights, but rather, was conducted with a view to providing the employer with information respecting its employee. In this latter instance, the employer can go on to impose an employment penalty without recourse to a court or tribunal.

While it is true that the O.S.C. has a mandate to conduct investigations in the course of administering the Securities Act, R.S.O. 1980, c.466, as amended (which investigations I have found to satisfy the definition of "law enforcement"; see for example Order 30 (Appeal Number 880072), dated December 21, 1988), it was as administrator of the Securities Act that it did so. Here, the investigation was conducted by O.S.C. as an employer, not as a securities regulator or law enforcement agency.

As it is my view that the investigation which generated the records at issue in this appeal does not satisfy the definition of "law enforcement" as found in subsection 2(1) of the Act, it is not possible that subsections 14(1)(a), (c) or (d) can apply to exempt any of the records from disclosure. This is because each of those exemptions requires the satisfaction of this definitional threshold; subsections 14(1)(a), (c) and (d) protect "law enforcement matters", "investigation techniques used in law enforcement", and "confidential sources of

information in respect of law enforcement matters" respectively. Accordingly, I do not uphold the head's decision to exempt from disclosure any records pursuant to subsections 14(1)(a), (c) and (d) and as a result the head is unable to rely on subsection 49(a).

I turn now to the application of subsection 14(2)(a) of the Act. The institution has cited this provision to exempt both a draft and a final version of the investigator's report.

Subsection 14(2)(a) reads as follows:

> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
>
> ...

I have already concluded that this investigation report was not prepared in the course of "law enforcement", so the question for me to determine is whether the record is a report prepared in the course of an "inspection or investigation by an agency which has the function of enforcing and regulating compliance with a law".

As I concluded above that an employment-related investigation is not an investigation that "could lead to proceedings in a court or tribunal" so as to satisfy the definition of "law enforcement", similarly I do not believe that this investigation was conducted by the institution in the course of enforcing and

regulating compliance with a law. As I have already stated, the investigation was conducted by the O.S.C. as employer, not as a securities regulator. Indeed, nowhere in the report is there a reference to the Securities Act or the suggestion that the Securities Act was being enforced.

In Order 98 (Appeal Number 880287), dated September 28, 1989, I had the opportunity to comment on the application of subsection 14(2)(a) of the Act to a similar fact situation. In that Order I stated:

> The provisions of subsection 14(2) deal, broadly speaking, with the confidentiality that necessarily surrounds law enforcement investigations in order that institutions charged with external, regulatory activities can carry out their duties. (emphasis added)

In the circumstances of this appeal, I do not find that the investigation was conducted by the O.S.C. in pursuance of its external, regulatory activities. Accordingly, I do not uphold the head's exemption of the draft and final investigator's report pursuant to subsection 14(2)(a) of the Act. As a result, the head is unable to rely on subsection 49(a).

ISSUE C: Whether any of the requested records fall within the discretionary exemption provided by subsection 49(b) of the Act.

I have found under Issue A that all of the records at issue in this appeal contain "personal information" about the appellant. In some instances, the records also contain "personal information" about other individuals as well.

The institution maintains that certain portions of the investigator's handwritten notes contain personal information about individuals other than the appellant. Although the institution's decision letter of June 5, 1989 failed to mention that access to portions of the investigator's handwritten notes was denied under either subsection 21(1) or 49(b), it became clear to the Appeals Officer that section 21 was being invoked by the institution when he reviewed the record and observed several section 21 notations thereon. The Appeals Officer's Report noted this fact and, in light of the fact that the exempted records contained personal information about the appellant, also noted that the head was taken to have intended on exempting this information pursuant to subsection 49(b) of the Act.

Subsection 49(b) of the Act introduces a balancing principle. The head must look at the information contained in the records and weigh the requester's right of access to his own personal information against another individual's right to the protection of personal privacy. If the head determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then subsection 49(b) gives the head the discretion to deny access to the personal information of the requester.

Subsection 21(2) of the Act provides guidance in determining if disclosure of personal information would constitute an unjustified invasion of personal privacy. Subsection 21(2) sets out some criteria to be considered by the head:

> 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 Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

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

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The institution submitted that subsection 21(2)(h) applies in support of the head's decision to deny access to personal information of individuals other than the appellant. This information constitutes the names, addresses and telephone numbers of those individuals contacted by the investigator.

I have reviewed the severances of the investigator's handwritten notes and, in my view, they contain the kind of personal information which, if disclosed, would result in an unjustified invasion of personal privacy. The names and telephone numbers of the other individuals identified by the records were supplied to the institution in confidence and may well be perceived by the individuals concerned as "sensitive" information under subsection 21(2)(f). Therefore, I uphold the head's exercise of discretion under subsection 49(b) of the Act only with respect to the names and telephone numbers of other individuals. I do not uphold the severing of the comments of these individuals.

I acknowledge that the protection of these other individuals' personal privacy runs counter to the appellant's right of access to his own personal information. However, despite upholding the head's exercise of discretion in this regard, the appellant is still being provided with access to the comments, where provided, of the individuals identified in the records. In Order 37 (Appeal Number 880074), dated January 16, 1989, I stated:

> In applying the subsection 49(b) balancing test to the circumstances of this appeal, I am mindful of the fact that the records under consideration were originally produced in the course of an employment-related complaint concerning the appellant. In such situations, fairness demands that the person complained against be given as much disclosure of the substance of the allegations as is possible. The degree of disclosure would depend on the circumstances of each particular case, but should be more extensive if the complaint is likely to result in discipline.

In the circumstances of this appeal, the appellant has already exercised his right of grievance, which proceeding resulted in a

settlement with the institution. Accordingly, there is no likelihood of further disciplinary proceedings.

In addition to the investigator's handwritten notes, I have reviewed all other records at issue in this appeal which I found under Issue B above not to be exempt under section 14 of the Act with a view to determining whether disclosure of these records would disclose personal information of individuals named therein and, if so, whether such disclosure would unjustifiably invade those individuals' personal privacy, pursuant to subsection 49(b) of the Act.

In all instances, except for one portion of the investigator's report (both draft and final), either these records are publicly available (such as Personal Property Security Act searches, Land Titles Act searches, Corporations Information Act records) or the records identify individuals in their professional or business capacities. Letters from the appellant's previous employers, for example, are signed by individuals as corporate or Ministry representatives. Names and telephone numbers of individuals in this latter context cannot be categorized as "personal information" as defined in subsection 2(1) of the Act and do not qualify for personal privacy protection.

The only exception I have found is within the investigator's report (part of pages 4 and 5 in the draft and part of page 5 in the final report). In my view, the last paragraph of page 4 and the first paragraph of page 5 of the draft report and the first full paragraph on page 5 of the final report under the heading "Investigation", contain personal information, the disclosure of which would constitute an unjustified invasion of personal

privacy and, are therefore exempt under subsection 49(b) of the Act.

ISSUE D: Whether any of the requested records fall within the discretionary exemption provided by subsection 49(c) of the Act.

The institution has claimed that subsection 49(c) of the Act applies to exempt certain records within the investigation file. Typical of the records exempted pursuant to this provision are letters from previous employers of the appellant outlining the appellant's employment history with the particular organization. In the institution's representations, it was noted that the records exempted under 49(c) are "essentially in the nature of reference letters".

The institution's representations in support of its claim noted the following:

> The correspondence exchanged with [the appellant's previous employers] was compiled solely for the purpose of determining [the appellant's] suitability, eligibility and qualifications for employment as a compliance officer with the O.S.C. These were essentially in the nature of reference letters. The investigator assured these former employers that their identity and the information provided by them would be kept confidential.
>
> In addition, letters sent by the investigator to the former employers and notes of conversations with the former employers should not be disclosed because they would reveal the identity of a confidential source and the nature of the information provided by that source.

To qualify for exemption under subsection 49(c), the personal information contained in a record must satisfy each part of a three-part test:

1. The personal information must be evaluative or opinion material;

2. The personal information must be compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;

3. Disclosure of the personal information would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

If it is to be inferred from the institution's representations that personal information which has been used for the purpose enumerated in the second part of the test must necessarily be evaluative or opinion material, then I must disagree. In my view, the use to which the personal information is put does not determine whether or not it is evaluative or opinion material. The personal information itself must be evaluative or opinion material.

To qualify for exemption each part of the test must be satisfied. Failure to satisfy a single part of the test means that the personal information contained in the record cannot be exempted pursuant to subsection 49(c). In my view, this interpretation is consistent with the principles of the Act noted at the outset of the Order - that necessary exemptions to the right of access should be limited and specific and that individuals should have a right of access to personal information about themselves.

As noted, the records that have been exempted under subsection 49(c) are letters from the appellant's previous employers. These letters are similar to reference letters in that they outline the appellant's history with each of the organizations.

Having determined that the use put to a record does not, for that reason alone, determine its nature, it then becomes necessary for me to determine whether the personal information contained in the records is "evaluative or opinion material".

The Concise Oxford Dictionary, seventh edition, defines "opinion" as:

> judgement or belief based on grounds short of proof, provisional conviction, view held as probable...

and defines "evaluate" as:

> ascertain amount of; find numerical expression for; appraise, assess...

In my view, the words "evaluative" and "opinion" connote a personal or subjective interpretation of an objective set of facts and circumstances. Typical of evaluative or opinion material would be test scores, ratings, and grades. None of the records containing personal information which has been exempted pursuant to this provision contain such material nor do they contain "opinions" of the authors as to characteristics of the appellant which may relate to his employment suitability. Rather, these records reveal factual material such as employment position, dates, reasons for termination. In each instance, the author of the record let the institution determine for itself whether the factual material revealed by the record rendered the appellant suitable for employment.

Since each part of the three-part test under subsection 49(c) of the Act must be satisfied in order for the exemption to apply, I do not uphold the head's decision.

In summary, my Order is as follows:

1. I uphold the head's exercise of discretion pursuant to subsection 49(b) of the Act to sever and exempt from disclosure the names and telephone numbers of individuals other than the appellant identified in the investigator's handwritten notes.

2. I order the head to sever the last paragraph of page 4 and the first paragraph of page 5 of the draft investigator's report and the first full paragraph on page 5 of the final investigator's report under the heading "Investigation".

3. I do not uphold the head's decision to exempt from disclosure, whether in whole or in part, any of the records at issue in this appeal pursuant to subsections 49(a), by way of section 14, and 49(c) of the Act.

4. I order the head to release to the appellant within twenty (20) days of the date of this Order all of the information which is at issue in this appeal with the exception of the names and telephone numbers of individuals other than the

appellant identified in the investigator's handwritten notes and the last paragraph of page 4 and the first paragraph of page 5 of the draft investigator's report and the first full paragraph on page 5 of the final investigator's report under the heading "Investigation". I further order the head to advise me in writing, within five (5) days of the date of disclosure of the records, of the date on which disclosure was made.

Original signed by:
Sidney B. Linden
Commissioner

March 29, 1990
Date