



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

ORDER P-542

Appeal P-9300114

Ministry of Finance



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ORDER

BACKGROUND:

The Ministry of Financial Institutions, (now the Ministry of Finance) (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records held by the Ministry or the Pension Commission of Ontario (PCO), an agency of the Ministry, relating to investigations of Standard Trustco Limited Designated Employees' Retirement Plan (the Plan). The Ministry refused to confirm or deny the existence of such records pursuant to section 14(3) of the Act. The requester appealed the decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Written representations were received from both parties.

In its representations, the Ministry states that if records of the nature requested existed, access to them would be denied pursuant to sections 14(1)(a), (b), (c), (d) and (g), and 14(2)(a) and (c) of the Act. The Ministry also indicates that if the requested records existed and if they contained personal information that relates to the appellant, section 49(a) would apply to withhold the records.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether records of the nature requested, if they exist, would qualify for exemption under sections 14(1) and (2) of the Act.
- B. Whether section 14(3) of the Act applies in the circumstances of this appeal.
- C. Whether section 49(a) of the Act would apply to the records of the nature requested, if they exist.

PRELIMINARY MATTER:

In an appeal from a decision to refuse to confirm or deny the existence of a record, the correctness of the decision is an issue to be determined on appeal (Order M-46). In this appeal, I have reached the conclusion that section 14(3) of the Act is not applicable and I feel that it would be useful to state this conclusion at the beginning, so that I might provide a fuller explanation of the reasons for my decision. Accordingly, I confirm that records exist which are responsive to the appellant's request.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether records of the nature requested, if they exist, would qualify for exemption under sections 14(1) and (2) of the Act.

The records which have been identified by the Ministry as being responsive to the request are:

1. A memorandum from an investigator in the Ministry's Investigations Branch to the Deputy Director of the Branch;
2. A memorandum from a Plan and Investment Auditor of the PCO to Senior Legal Counsel of the PCO; and
3. Handwritten notes of Legal Counsel of the PCO.

The Ministry submits that sections 14(1)(a), (b), (c), (d) and (g), and 14(2)(a) and (c) of the Act apply to the records. These sections state:

- (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
 - (a) interfere with a law enforcement matter;
 - (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
 - (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;

- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (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;
 - (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

In order for the records to be considered for exemption under these sections, the matter which generated the records must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act which reads:

"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);

The Ministry submits that the records at issue relate to an investigation which is being conducted by the PCO pursuant to section 106 of the Pension Benefits Act (PBA). The Ministry submits that this section gives the Superintendent of Pensions or any person designated by the Superintendent broad investigatory and enforcement powers in relation to the administration of the PBA and the regulations under the PBA.

The Ministry advises that the records at issue were prepared by persons designated by the Superintendent. Breaches of the PBA, its regulations or orders made under the PBA are offenses

under section 109 of the PBA, and thus could lead to proceedings in a court where penalties could be imposed under section 110 of the PBA.

Having reviewed the contents of the records, the representations of the Ministry and the relevant provisions of the PBA, I am satisfied that the matter to which the records at issue relate is a law enforcement matter, as the term is defined in section 2 of the Act.

Sections 14(1)(a) and (b)

The purpose of sections 14(1)(a) and (b) is to provide the Ministry with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. The Ministry bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) and in my view, the Ministry discharges this onus by establishing a clear and direct linkage between the disclosure of the specific information and the harm alleged (Orders 188, P-534).

The Ministry's representations regarding the application of sections 14(1)(a) and (b) provide details as to how disclosure of the contents of the records could have the effect of hampering or impeding the investigation of the law enforcement matter referred to earlier in this order.

Having carefully considered the contents of the records and the representations of the parties, in my view, the Ministry has provided sufficient evidence to establish that the disclosure of the records could reasonably be expected to interfere with a law enforcement matter or investigation under sections 14(1)(a) and (b). Accordingly, I find that all of the records qualify for exemption under these sections.

Because I have found that the records qualify for exemption under sections 14(1)(a) and (b), it is not necessary for me to consider the application of the remaining exemptions under sections 14(1) or 14(2) to the records.

ISSUE B: Whether section 14(3) of the Act applies in the circumstances of this appeal.

Section 14(3) of the Act states:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

I have found in Issue A that section 14(1)(a) and (b) apply to the records. The Ministry relies on the interpretation given to section 14(3) in Orders 102, 106 and 198. It submits that section 14(3) can properly be claimed if the records of the nature requested qualify for exemption under section 14(1) or (2) of the Act.

A review of the Commissioner's orders relating to section 14(3) indicates that the interpretation of the section has evolved over time. The earlier orders (Orders 102, 106, 148, 170 and M-46) indicate that where the institution has established that either sections 14(1) or (2) of the Act apply to the record of the nature requested, the exercise of discretion under section 14(3) to

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refuse to confirm or deny the existence of records was automatically available to it. The more recent orders have accorded the section a narrower interpretation by requiring that an institution relying on section 14(3) must do more than merely establish that the records of the nature requested, if they exist, would qualify for exemption under section 14(1) and (2) (Orders P-262, P-338 and P-423).

In a Postscript to Order P-255, former Assistant Commissioner Tom Mitchinson made the following general remarks about the interpretation of section 14(3) of the Act and the type of evidence required to support a claim for the application of the section.

...

A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(3), an institution is denying the requester the right to know whether a record exists, even when one does not. In my view, section 14(3) provides institutions with a significant discretionary power and it is extremely important that discretion under this section is carefully considered and properly exercised.

Whenever this office is faced with an appeal involving section 14(3), the head will be required to provide **detailed and convincing** reasons as to why this section was claimed, in order for the Commissioner/Assistant Commissioner to ensure that the head's decision was made in full appreciation of the facts of each case and upon proper application of the principles of law. [emphasis added]

In Order P-338, Assistant Commissioner Tom Mitchinson established the test for the application of section 14(3) in the following manner:

In my view, an institution relying on section 14(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

It should be noted that, in the context of Order P-338, the institution relied only on the paragraphs of sections 14(1) and (2) which specifically make reference to the term "law enforcement".

Having considered the evolution of the orders, I believe that the test set out in Order P-338 is most consistent with the intent and purposes of the Act, and given the law enforcement context in which it appeared, in my view, its application would be appropriate in the circumstances of this appeal. However, sections 14(1) and (2) also protect other kinds of interests (e.g. the right of a person to have a fair trial or impartial adjudication) and in my opinion, the test should read as follows:

An institution relying on section 14(3) of the Act must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). The institution must establish that disclosure of the mere existence or non existence of such a record would communicate to the requester information that would fall under either section 14(1) or (2) of the Act.

In the circumstances of this appeal, the Ministry submits that if section 14(3) cannot be relied upon, it would be required to provide the appellant with a general description of each record, and to do so "could seriously jeopardize the investigation because the status of the investigation, whether final or ongoing, would be revealed as would potential defendants and witnesses, or possible witnesses in the investigation". The Ministry argues that disclosure of the nature of the investigation could make collecting information and statements more difficult, and have an adverse impact on the reputations of those who are completely innocent.

In his representations, the appellant claims that in response to his inquiry, an official in the Investigative Branch of the PCO had advised him that the Plan was under investigation and had disclosed to him the nature of the allegations being investigated. The Ministry states that it has "no knowledge of the basis of the [appellant's] contention and is therefore not in a position to respond to it."

Based on information I have been provided with during the inquiry, I am satisfied that the Ministry's investigation of the Plan and the nature of the allegations under investigation are public knowledge.

It appears that the Ministry's concerns relate to harms that could occur as a result of the disclosure of the records themselves, rather than the disclosure of their mere existence. It is claiming that it should be able to rely on section 14(3) because otherwise it would be required to provide the requester with a description of the records which would reveal information that it is otherwise authorized to refuse to disclose under the Act.

In my view, the Act does not require the Ministry to provide a description of a record which would reveal exempt information; rather, the records may be described in a general manner with sufficient information to allow the requester to have some knowledge of the nature of the record so that the requester can make an informed decision on whether or not to appeal the decision of the institution to the Information and Privacy Commissioner.

Having carefully examined the Ministry's representations, I am not persuaded that merely confirming the existence of the records and providing a general description would communicate to the appellant information which would fall under either sections 14(1) or (2), in the circumstances of this appeal.

Therefore, I find that section 14(3) is not applicable in the circumstances of this appeal.

ISSUE C: Whether section 49(a) of the Act would apply to the records of the nature requested, if they exist.

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access, including section 49(a).

Section 49(a) provides the Ministry with the discretion to refuse to disclose personal information to the individual to whom the personal information relates where the record qualifies for exemption under the Act, including section 14. In Issue B, I have found that the records qualify for exemption under sections 14(1)(a) and (b).

The Ministry has provided me with representations as to why it refused to disclose the records to the appellant. In reviewing the Ministry's representations, I have found nothing to indicate that the exercise of discretion was improper in the circumstances of this appeal, and accordingly, I will not alter its decision on appeal.

ORDER:

1. I do not uphold the Ministry's decision to refuse to confirm or deny the existence of records.
2. I uphold the Ministry's decision not to disclose the records.
3. In this order, I have confirmed the existence of records responsive to the appellant's request. I have released this order to the Ministry in advance of the appellant in order to provide the Ministry with an opportunity to review this order and determine whether to apply for judicial review.
4. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, I will release this order to the appellant, within five days following the expiry of the 15 day period.
5. In accordance with the requirements of section 54(3) of the Act, I will give the appellant notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to the Ministry.

Original signed by: _____
Asfaw Seife
Inquiry Officer

_____ September 28, 1993