



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-522

Appeal P-9300161

Ministry of Finance



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Ontario Securities Commission (the OSC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to any records relating to a complaint made to the OSC and the resulting inquiry concerning a certain condominium project.

The Ministry of Financial Institutions (now the Ministry of Finance) (the Ministry) located 27 records responsive to the request. Access was granted to three of the records. Access was denied to the remaining 24 records pursuant to sections 13(1), 14(1)(b), 17(1)(b) and 21 of the Act. Subsequently, the Ministry also claimed section 19 applied to some of the records.

The requester appealed the Ministry's decision. During mediation, certain records were removed from the records at issue. Also during mediation, the Ministry re-considered its decision and disclosed additional records.

Further mediation was not possible, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry, the OSC and the owner of the condominium project (the affected party). Representations were received from the OSC and the affected party.

RECORDS:

The records, by record number, remaining at issue and the exemptions claimed for each are:

1. a memorandum to file dated July 14, 1991 [13(1), 19]
5. a memorandum to file dated April 16, 1991 [13(1), 19]
6. a letter to the OSC dated April 4, 1991 [17(1)(b), 21]
7. an opinion letter dated October 27, 1989, enclosed with Record 6, above [17(1)(b), 21]
8. a letter from OSC dated March 19, 1991 [14(1)(b), 17(1)(b), 21]

ISSUES:

- A. Whether the discretionary exemption provided by section 13(1) of the Act applies.
- B. Whether the discretionary exemption provided by section 19 of the Act applies.
- C. Whether the mandatory exemption provided by section 17(1)(b) of the Act applies.
- D. Whether the discretionary exemption provided by section 14(1)(b) of the Act applies.

- E. Whether the record contains personal information as defined in section 2(1) of the Act, and if so, whether the mandatory exemption provided by section 21 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 13(1) of the Act applies.

The Ministry claimed exemption under section 13(1) for Records 1 and 5. Section 13(1) of the Act provides:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Record 1 is a memorandum to file, with a copy sent to senior counsel. It contains a list of factors supporting a particular argument and draws a conclusion. Record 5 is a hand-written note of a discussion and is not addressed to anyone. It also contains background information and draws a conclusion. Each was prepared by an employee of the OSC.

For a record to fall within the scope of section 13(1), it must reflect a communication. Advice or recommendations must flow from one individual to another (Orders 58 and 94).

The OSC submits that when a complaint is made to the OSC, a preliminary assessment is done through an informal process. Issues are analyzed, ideas are discussed among counsel and a preliminary conclusion is drawn. This recommendation is then considered by more senior personnel who decide if a more formal inquiry is necessary. The reporting vehicle to the senior personnel include memoranda to file and other formal or informal documents which make up the preliminary file.

In Order 128, former Commissioner Sidney B. Linden found that, although records were not addressed to a particular individual, it was evident that they were prepared by public servants to provide advice to senior_level decision_makers and policy_makers within the institution. Similarly, having reviewed the records at issue in this appeal, I find that although the records were not addressed to particular individuals, they were prepared by public servants to set out preliminary conclusions to be considered by senior personnel. In my view, the exemption under section 13(1) of the Act applies to Records 1 and 5.

Section 13(1) is a discretionary exemption. The Ministry has provided representations regarding their exercise of discretion to deny access to the records. Having reviewed these representations,

I find nothing to indicate that the exercise of discretion was improper and would not alter it on appeal.

ISSUE B: Whether the discretionary exemption provided by section 19 of the Act applies.

As section 19 was claimed only for Records 1 and 5, and as I have already disposed of these records in Issue A, above, it is not necessary for me to consider the application of this exemption.

ISSUE C: Whether the mandatory exemption provided by section 17(1)(b) of the Act applies.

The Ministry has claimed exemption under section 17(1)(b) of the Act for the three records remaining at issue. Section 17(1)(b) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

For a record to qualify for exemption under section 17(1)(b), the Ministry and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in section 17(1)(b) will occur.

[Order 36]

Each of Records 6 and 7 contain detailed information about the structure of a sale of condominium units and I am satisfied that these records contain commercial information and part one of the test is met. I am also satisfied, based on representations of the Ministry and the affected party, that Records 6 and 7 were supplied by the affected party to the OSC in implicit confidence.

Records 6 and 7 were supplied to the OSC by the affected party upon request of the OSC. The Ministry stated in its representations that while it is possible that the OSC could have obtained the information without the co-operation of the affected party, this method would be cumbersome, expensive and could create consumer non-confidence. The affected person stated in its representations that it would not co-operate with the OSC in future if these records were not kept confidential. I am satisfied, based on these representations, that disclosure of Records 6 and 7 could result in similar information no longer being supplied to the OSC when it is in the public interest that similar information continue to be so supplied.

Record 8 is a letter from the OSC to the affected party, advising the affected party of the nature of the OSC's inquiry and asking for a response. The OSC submits that the record contains commercial information supplied to the OSC by the complainant, and that complaints are always treated in confidence.

In my view, Record 8 does not contain nor reveal commercial information which was supplied by the complainant or the affected party. Additionally, the OSC has not provided evidence which would convince me that there is a reasonable expectation that similar information would no longer be supplied should this record be disclosed. As a result, I find that parts one, two and three of the test for exemption have not been met, and Record 8 is not exempt under section 17(1)(b).

ISSUE D: Whether the discretionary exemption provided by section 14(1)(b) of the Act applies.

The Ministry has claimed that section 14(1)(b) applies to Record 8. This section states as follows:

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

interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The OSC indicates that the particular investigation for which Record 8 was generated is now closed. As a result, it is my view that disclosure of Record 8 could not interfere with an investigation undertaken with a view to law enforcement.

ISSUE E: Whether the record contains personal information as defined in section 2(1) of the Act, and if so, whether the mandatory exemption provided by section 21 of the Act applies.

Record 8 remains at issue. This is a letter from the OSC to a law firm acting with regard to the condominium sales. I am not satisfied that this Record contains the personal information of any identifiable individuals. As a result, it is not necessary for me to consider the application of the mandatory exemption under section 21.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 1, 5, 6 and 7.
2. I order the Ministry to disclose Record 8 to the appellant within 15 days of the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2 **only** upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ August 25, 1993