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

ORDER P-553

Appeal P-9200755

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

The Ministry of Finance (formerly the Ministry of Revenue) (the Ministry), received a request under the Freedom of Information and Protection of Privacy Act (the Act) for information on (1) the number of companies, firms or individuals that have given some form of security for payment of tobacco tax, (2) the dollar amount of any such security given and (3) the number of companies, firms or individuals which pay tax on the basis of tobacco sales rather than purchases. The requester stated that she was not asking for the specific identities of any of these business entities.

In its decision letter, the Ministry responded that no records exist with respect to parts 1 and 3 of the request. With respect to part 2 of the request, the Ministry denied access to the information based on the exemption contained in section 17(2) of the Act.

The requester appealed both the denial of access and the assertion that no records exist which are responsive to parts 1 and 3 of the request. Mediation was not successful and notice that an inquiry was being conducted was sent to the appellant and to the Ministry. Representations were received from both parties.

ISSUES:

The issues in this appeal are:

A. Whether the Ministry has in its custody records that are responsive to parts 1 and 3 of the request.

B. Whether the Ministry's decision letter complies with the requirements of section 29(1)(b) of the Act.

C. Whether the mandatory exemption contained in section 17(2) of the Act applies to the records that are responsive to part 2 of the request.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the Ministry has in its custody records that are responsive to parts 1 and 3 of the request.

Part 1 of the appellant's request reads as follows:

> From May 1, 1991 to May 1, 1992 how many companies, firms or individuals have given a bond, letter of credit or other form of security to the Ontario

> Ministry of Revenue under the Tobacco Tax Act, as security for payment of tobacco tax, in [the categories of wholesalers, manufacturers and exporters].

In its decision letter, the Ministry explains the absence of records that would be responsive to this part of the request in the following fashion:

> [This information] is not entered in any statistical way on our records. Other records may contain information on whether these companies are wholesalers, manufacturers and/or exporters. There is no record which combines the two kinds of information, for example, that X is a wholesaler and that the Ministry has asked X for a letter of credit.

The appellant, on the other hand, submits that the records that are responsive to part 2 of the request (where she seeks the total dollar value of any such security given) must necessarily include the information that she is seeking under the first part of her request.

Part 3 of the appellant's request is worded as follows:

> As of May 1, 1992, how many companies, firms or individuals are paying tobacco tax to the Ontario Ministry of Revenue based upon tobacco sales, instead of the previous practice of paying this tax on tobacco purchases?

In its decision letter, the Ministry supports its position that there are no records responsive to this portion of the request in the following manner:

> [T]ax returns would show whether an individual pays tax on sales or purchases, but the Ministry has no records which analyze or count the two categories of taxpayers. This analysis has simply never been formally written down ...

The appellant once again submits that the records which are responsive to part 2 should also respond to part 3.

The Act does not directly address the fact situation which has arisen in the present appeal. On this basis, the issue of whether the Ministry has responded appropriately to the appellant's request can only be determined by considering the relevant provisions of the Act in conjunction with previous orders issued by the Commissioner's office.

In Order 50, former Commissioner Sidney B. Linden addressed the obligations of institutions when processing access requests where the raw data exists which would respond to the request

but no record exists in the exact format requested. In that order, he addressed the issue in the following fashion:

> ... [W]hen an institution receives a request for information which exists in some recorded format within the institution, but not in the format asked for by the requester, what duty is imposed on the institution?
> ...
>
> In cases where a request is for information that currently exists, either in whole or in part, in a recorded format different from the format asked for by the requester, in my view, section 24 of the Act imposes a responsibility on the institution to identify and advise the requester of the existence of these related records. It is then up to the requester to decide whether or not to obtain these related records and sort through and organize the information into the originally desired format ...
> ...
>
> The Act requires the institution to provide the requester with access to all relevant records, however, in most cases, the Act does not go further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format. In other words, the Act gives requesters a right (subject to the exemptions contained in the Act) to the "raw material" which would answer all or part of a request, but, ... the institution is not required to organize this information into a particular format before disclosing it to the requester.

I agree with Commissioner Linden's comments and adopt them for the purposes of this appeal.

Following my review of the records, I have formed the conclusion that the "raw material" to answer the appellant's request is, for the most part, available. The appellant is correct in her assertion that the records to which the appellant was denied access under section 17(2) are also responsive to part 1 of her request (although the information is not broken down by various categories) and partially to part 3 as well.

Therefore, pursuant to section 24 of the Act, the Ministry had an obligation to advise the appellant that the information which she was seeking is contained in the records responsive to part 2 of the request. On this basis, the Ministry was incorrect in advising the appellant that records which responded to the first and third parts of her request did not exist. It necessarily follows, therefore, that the Ministry has custody of the records which would be responsive to part 1 of the request and, to some extent, to part 3 as well.

ISSUE B: Whether the Ministry's decision letter complies with the requirements of section 29(1)(b) of the Act.

[IPC Order P-553/October 14, 1993]

Having reached this conclusion, it will now be necessary for me to review the adequacy of the Ministry's decision letter which responded to the second part of the request. This portion of the request reads as follows:

> If any such bonds, letters of credit or other forms of security have been given to the [Ministry] (as in request #1 above), please provide the dollar amount per annum of each such bond, letter of credit or other form of security (or a copy thereof). Please note that I am not requesting the name or address of any company.

In its decision letter, the Ministry responded to this request in the following fashion:

> With respect to part 2 of your request, access is denied pursuant to section 17(2) of the Act. This section applies because records responsive to your request were "gathered for the purpose of ... collecting a tax." This being the case, we are mandatorily required to deny access.

When an institution denies access to a record, section 29(1) of the Act prescribes that the institution must issue a notice of refusal to the requester. The contents of this notice (which are conveyed in a decision letter) are more fully described in section 29(1)(b) which reads as follows:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

A number of previous orders issued by the Commissioner's office have commented on the degree of particularity which should be contained in a decision letter. (See, for example, Orders 158, P-298, P-324 and P-482). The general purport of these orders was neatly summarized in Order P-537 as follows:

> In providing a notice of refusal under section 29, the extent to which an institution describes a record in its decision letter will have an impact on the amount of detail required under section 29(1)(b)(ii). For example, should an institution merely describe a record as a "memo", more detailed reasons for denying access would be required than if a more expansive description of the record had been provided. Whichever approach is taken, the key requirement is that the requester must be put in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324).

I adopt this approach for the purposes of this order.

Although the orders indicate that there are several ways in which an institution can comply with its obligations under section 29(1) (b) of the Act, the Ministry has, in this case, failed to provide any description whatsoever of the records which are responsive to part 2 of the request. The result is that the requester has effectively been precluded from making a reasonably informed decision on whether to seek a review of the Ministry's decision.

In its representations, the Ministry argues that, had it chosen to advise the appellant of the number of records responsive to part 2 of the request (and hence the number of bonds and letters of credit outstanding), it would, by default, have revealed the manner in which other collectors of tobacco tax were remitting their taxes. The Ministry expresses its views as follows:

> [The choice of remittance method] is **information gathered** by the Ministry **for the purpose of determining a tax liability and collecting a tax** in the words of section 17(2). Under that section it is also **information gathered on a return**, since there is a different tax return form for the two remittance methods. Since that is the case, even if there were a document which showed the answer to the question, the Ministry would be precluded by law from disclosing it.

Based on the content of these representations, the Ministry appears to be asserting that it has a right (which would be analogous to that contained in section 29(2) of the Act) to refuse to confirm or deny the existence of the records in question. I would address this submission in two ways. First, in its decision letter, the Ministry did not refuse to confirm or deny the existence of records responsive to the request. Rather, it responded that no records existed that were responsive to parts 1 and 3 of the request and that section 17(2) of the Act applied to the records that were responsive to the second part of the request. Second, section 29(2) is only available to an institution in certain defined circumstances where either section 14(3) or 21(5) of the Act is used as the basis for withholding a record. Neither of these exemptions have been claimed in the present appeal. For the reasons provided, I am unable to accept the argument which the Ministry has advanced.

Following a review of the representations and the records at issue, my conclusion is that the Ministry has failed to comply with the requirements of section 29(1)(b) of the Act with respect to the appellant's request.

[IPC Order P-553/October 14, 1993]

In June 1992, the Commissioner's office published an issue of "IPC Practices" which outlines the requirements for a proper decision letter. I would encourage the Ministry to refer to this document for future decisions made under the Act.

To summarize, therefore, I have found that:

(1) The Ministry ought to have advised the appellant that the information contained in the records responsive to part 2 of the request also responded to part 1 of her request and partially to part 3 as well.

(2) The Ministry's decision letter which was issued to describe the records responsive to part 2 of the request did not comply with requirements of sections 29(1)(b)(ii) of the Act.

(3) There are no exemptions contained in the Act which would relieve the Ministry of its obligations under sections 24 and 29(1)(b) of the Act.

On this basis, I must now determine how the appellant should be provided with a general description of the records to which she is entitled under sections 24 and 29(1)(b) of the Act. As I have stated previously, had the Ministry's decision letter contained a proper description of the records which were responsive to part 2 of the request, that information would also have addressed part 1 and, to some extent, part 3 of the request as well. One option which I have is to remit the case back to the Ministry and order that a proper decision letter be issued. Given, however, that it has been many months since the original request was filed, I consider that such an outcome would create further delay and not serve the best interests of the appellant.

Under section 54(1) of the Act, the Commissioner, or his delegate, has the authority, once all the evidence for an inquiry has been received, to make an order disposing of all the issues raised by the appeal. Pursuant to this authority, I have determined that the fairest approach would be for me to generally describe the records responsive to part 2 of the request in a way that satisfies the minimum disclosure requirements contemplated under section 29(1)(b) of the Act. That description is here set out:

> The records at issue consist of an undated reference to a letter of credit issued in favour of the Ministry by a named company with a subsequent renewal dated May 1, 1992 and a second letter of credit from a different named company dated September 23, 1991.

I wish to comment a bit more fully on the third part of the appellant's request. Under section 12(2)(a) of the Tobacco Tax Act, the responsible Minister is provided with the power to demand security from a "collector" of tax revenue should he or she chose to do so. Because the provision of a letter of credit is not mandatory, I am not in a position to determine whether the letters of credit which have been identified would provide the complete answer to part 3 of the request.

I believe that, in the circumstances of this appeal, the most reasonable approach for resolving this issue is for the Ministry to determine from the appellant whether she wishes to make an access request for the individual tax returns of persons remitting tax on the basis of sales. If the appellant expresses such a desire, the institution will be required to issue a proper decision letter.

I will now determine whether the two letters of credit which are at issue in this appeal qualify for exemption under section 17(2) of the Act.

ISSUE C: Whether the mandatory exemption in section 17(2) of the Act applies to the records that are responsive to part 2 of the request.

As indicated previously, the records at issue in this appeal consist of a letter of credit issued in favour of the Ministry by a named company (with a subsequent renewal) and a second letter of credit issued by a different named company. In its representations, the Ministry submits that the mandatory exemption found in section 17(2) of the Act applies to these letters of credit.

Section 17(2) states that:

> A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or **collecting a tax**. (emphasis added)

In interpreting the scope of section 17(2) of the Act, it would be useful to review the legislative history of this provision. When the Act originally came into force on January 1, 1988, it contained section 67(1), which reads as follows:

> (1) The Standing Committee on the Legislative Assembly shall undertake a comprehensive review of all confidentiality provisions contained in Acts in existence on the day this Act comes into force and shall make recommendations to the Legislative Assembly regarding,
>
> (a) the repeal of unnecessary or inconsistent provisions; and
>
> (b) the amendment of provisions that are inconsistent with this Act.
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> (2) This Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.

> (3) Subsection (2) shall not have effect until two years after this section comes into force.

In accordance with the then section 67(1) of the Act, the Standing Committee on the Legislative Assembly undertook a comprehensive review of approximately 130 confidentiality provisions contained in various statutes.

After completing its review, the Standing Committee submitted a report to the Legislative Assembly. In its report, the Committee recommended that certain confidentiality provisions should continue to prevail over the Act. This recommendation was adopted by the Legislature, and is reflected in the wording of the current section 67(3) of the Act.

The Standing Committee also concluded, however, that for the majority of confidentiality provisions identified during the review, adequate protection of the interests which these provisions sought to protect, could be achieved by amending the existing exemptions contained in the Act. One such sphere which the Committee identified involved information which had previously been protected by confidentiality provisions found in 11 tax statutes. The Committee recommended that a new section be inserted into the Act to respond to the confidentiality concerns associated with these statutes. Management Board of Cabinet then proposed an amendment to section 17(2) of the Act, which was ultimately adopted by the Legislature and is currently in force.

In explaining the reasons for introducing the new provision, the then Chairman of the Management Board of Cabinet and the Minister responsible for the Act stated:
There are eleven confidentiality provisions in statutes administered by the Ministry of Revenue which provide for the secrecy of information submitted on tax returns and other records relating to the tax liability of taxpayers. With respect to individual taxpayers, such information is strongly protected from disclosure in s.21(3)(e) of the Freedom of Information and Protection of Privacy Act. However there is no similar provision in the Freedom of Information and Protection of Privacy Act for taxpayers other than individuals (e.g., corporations). ... Furthermore, the applicable exemption in the Freedom of Information and Protection of Privacy Act - s.17 - is limited since the harms tests of the section are very difficult to apply to the raw financial data contained on such records.

> ... [T]he type of information to be protected could be described and included as exempt records in a new subsection 17(2).

At the time of the enactment of section 17(2), section 22(1) of the Tobacco Tax Act contained one of the "eleven confidentiality provisions" referred to by the Standing Committee. This section stated that:

> Subject to subsection (2), no person employed by the Government of Ontario shall communicate or allow to be communicated to any person not legally entitled

> thereto any information obtained under this Act, or allow any such person to inspect or to have access to any written statement furnished under this Act.

In Order P-373, former Assistant Commissioner Tom Mitchinson expressed the following views about the interpretation to be accorded to section 17(2) of the Act:

> The legislative history of the section clearly indicates that the information the Legislature intended to protect from disclosure under section 17(2) was relatively narrow, and was restricted to the type of tax information that was supplied under the tax statutes administered by the Ministry of Revenue ...

In its representations, the Ministry submits that section 17(2) applies to the letter of credits because the release of these records would reveal information gathered for the purposes of collecting a tax.

The appellant contends that section 17(2) of the Act does not apply to letters of credit. She argues that these records are provided as security only, in order to guarantee that tobacco tax will be paid, even if the taxpayer goes bankrupt. She further claims that, in this context, the

information "gathered for the purpose of determining tax liability or collecting a tax" would describe the monthly sales figures filed by licensed tobacco wholesalers and not involve the actual letters of credit.

In determining whether section 17(2) of the Act applies to the letters of credit, a useful first step would be to examine the relevant provisions of the Tobacco Tax Act. Under section 12(1) of the Tobacco Tax Act, the Minister may require that a collector of taxes deposit security for the payment of such taxes on a monthly basis. Section 12(2) then prescribes that, where a collector has failed to collect or remit taxes in accordance with the legislation, the Minister may apply the security to the amounts outstanding. In my view, the companies which submit letters of credit to the Ministry would qualify as collectors for the purposes of section 12(1) of the Tobacco Tax Act.

There is no dispute that the letters of credit, which are the subject of this appeal, are intended to provide security to the Ministry for taxes that are or may become outstanding. These same documents, however, also represent an established vehicle through which the Ministry can **collect taxes** should these payments not be forthcoming.

For the purposes of this appeal, the relevant part of section 17(2) states that an institution shall refuse to disclose a record that reveals **information** that was gathered for the purpose of collecting a tax. On this basis, it will be necessary for me to review the actual contents of the letters of credit. Each of these documents contains information respecting the identity of the company providing the letter of credit, the amount of the security, the name and address of the financial institution which holds the letter of credit and the expiry date of the security.

I have carefully reviewed the contents of these records, the purpose that the letters of credit serve and the general scheme of the Tobacco Tax Act. Based on this analysis, I find that the release of the letters of credit would reveal information which was gathered to enable the Ministry to ultimately collect a tax. For this reason, my conclusion is that the two letters of credit and the renewal document are exempt from disclosure under section 17(2) of the Act.

ORDER:

1. I uphold the Ministry's decision not to disclose the letters of credit.

2. In this order, I have generally described the existence of records which are responsive to part 1 and 3 of the request. Based on the unique circumstances of this case, I have released this order to the Ministry in advance of the appellant. The purpose in so doing is to provide the Ministry with an opportunity to review this order and determine whether to apply for judicial review. The appellant will be informed by letter that the order has been issued.

3. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, this order will be released to the appellant.

4. I order the Ministry to contact the appellant in writing within 25 days of the date of this order if no application for judicial review has been served to determine whether the appellant wishes the Ministry to issue a decision letter respecting access to the individual tobacco tax returns of persons remitting taxes to the Ministry on the basis of sales.

5. I order the Ministry to provide me with a copy of the letter to the appellant, only upon request.

Original signed by: October 14, 1993
Irwin Glasberg
Assistant Commissioner

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