



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

# **ORDER P-701**

**Appeal P\_9300167**

**Ministry of Consumer and Commercial Relations**



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## ORDER

### NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of records from the Ministry of Consumer and Commercial Relations (the Ministry) related to the issuance, by the Ministry, of a proposal to refuse the appellant's application for registration as a broker under the Real Estate and Business Brokers Act (the REBBA). These records may be generally described as correspondence, memoranda and notes concerning the circumstances leading up to the Ministry's proposal to refuse the appellant's registration as a broker. They also consist of the documentation prepared by Ministry staff related to the drafting of the proposal.

The records remaining at issue in this appeal are described in Appendix A to this order. My decision will also apply to the duplicates indicated in the Appendix.

In reviewing the records, I have determined that a portion of Records 31(4) and 33(4) refers to individuals other than the appellant who have no connection with the subject matter of the request. These non-responsive portions have been highlighted on the copy of the records which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator (the Co\_ordinator) with a copy of this order. The responsive portion of Record 33(4) should be disclosed to the appellant as the only exemption claimed, section 21(1) of the Act, does not apply to this part of the record.

Although it was not claimed by the Ministry, I have considered the application of the mandatory exemption provided by section 21(1) of the Act to the following records: Records 11, 14 and 17. I have noted this in Appendix A.

As noted in Appendix A, the Ministry has submitted no representations on the application of some of the discretionary exemptions claimed to deny access to certain records. I will not consider these in this order. In addition, in certain cases, the Ministry has submitted no representations at all to explain the basis on which it has denied access to certain records. No mandatory exemptions apply to these records. In these circumstances the following records should be disclosed to the appellant: Records 13, 16, 21(44), 21(55), 21(56), 22, 26, 30 and 35(7).

The Ministry relies on the following exemptions in denying access to the records:

- advice to government - section 13(1)
- solicitor/client privilege - section 19
- law enforcement - sections 14(1)(d) and 14(2)(a)
- discretion to refuse access to requester's own information - section 49(a)

- invasion of privacy - sections 21(1) and 49(b)

A Notice of Inquiry was provided to the parties to the appeal. Representations were received from the Ministry and the appellant.

## **DISCUSSION:**

### **ADVICE TO GOVERNMENT**

Section 13(1) of the Act states that:

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.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The Ministry has provided submissions on the application of section 13(1) to Records 1, 2, 10, 21(4), 21(30), 29, 31(3), 31(4) and 35(9). I have reviewed these records and the representations submitted to me by the Ministry regarding section 13(1) of the Act. In my view, none of the information contained in these records reveal a proposed course of action to be accepted or rejected by its recipient. Rather, they contain information in the nature of comments, statements or discussions on the status of the investigation into and/or the proceedings against the appellant and/or her company.

As no other exemptions have been claimed for Records 1, 2 and 10, they should be disclosed to the requester.

### **SOLICITOR/CLIENT PRIVILEGE**

Section 19 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry indicates in its representations that Records 3, 14, 17, 19, 20, 21(30), 25, 29, 32(3) and 35(2) fall within the first branch of solicitor-client privilege in that they are communications of a written confidential nature between a client and his/her legal advisor directly related to the seeking of, formulating or the giving of legal advice. Having reviewed these records, I find that only the communications in Records 21(30) and 32(3) can be said to be directly related to seeking, formulating or giving "legal advice" as defined in Order 210.

I accept the Ministry's submissions that Record 21(4) is exempt from disclosure on the basis that it was created especially for the lawyer's brief for litigation, the second part of Branch 1 of the section 19 test.

The Ministry submits that Records 15, 23, 24, 31(3), 31(4), 32(5), 35(3) and 35(10) are correspondence or memoranda regarding matters to be attended to in preparation for trial. It claims that Records 32(1), 32(2), 32(4), 32(6), 35(8) and 35(11) contain notes used to assist counsel in preparation for litigation or notes prepared for counsel during litigation to assist the lawyer with the litigation. In my view, these submissions relate to the application of Branch 2 of section 19.

In this case, the anticipated litigation was the proceedings involving the appellant before the Commercial Registration Appeal Tribunal (CRAT) regarding her registration under the REBBA. The fact that the litigation involved hearings before an administrative tribunal, CRAT, rather than a court, does not negate the application of Branch 2 of the section 19 exemption (Orders M-162 and P-677).

Having reviewed the records for which the Ministry has claimed the application of Branch 2 of section 19, I find that only Records 15, 23, 32(1), 32(2), 32(4), 32(6), 35(8) and 35(11) can be said to have been prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

To summarize, Records 15, 21(4), 21(30), 23, 32(1), 32(2), 32(3), 32(4), 32(6), 35(8) and 35(11) qualify for exemption under section 19 of the Act. As no other exemptions have been claimed to apply to them, Records 3, 19, 20, 24, 25, 29, 31(3), 31(4) (the responsive portion only), 32(5), 35(2), 35(3), 35(10) and 35(13) should be disclosed to the appellant.

While I have held that section 19 does not apply to Records 14 and 17, I will consider them further under the discussion of Invasion of Privacy.

## **LAW ENFORCEMENT**

The Ministry has denied access to Records 7, 11 and 18 pursuant to section 14(1)(d) of the Act and has claimed that section 14(2)(a) of the Act exempts Records 12, 21(1) and 21(29) from disclosure. Section 14(1)(d) states:

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

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;

For a record to qualify for exemption under section 14(2)(a) of the Act, the institution must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

In order for a record to qualify for exemption under either section 14(1)(d) or 14(2)(a), the record must relate to a "law enforcement" matter which is defined in section 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).

The Ministry states that the records contain information gathered during an investigation of the appellant which pertained to a possible violation of law. The investigation produced a finding that the appellant may have contravened certain provisions of the REBBA. This finding led to a proposal by the Registrar of Real Estate and Business Brokers to refuse to renew the appellant's registration as a real estate broker.

Once the proposal was filed, the appellant sought a review before CRAT. This matter has yet to be heard.

The REBBA includes a number of provisions which establish the Ministry, through the Registrar of Real Estate and Business Brokers, as the agency responsible for the regulation of real estate brokers and salespersons in Ontario. The statute contains several

specific regulatory provisions including the requirement for registration (section 3) as well as the power of the Registrar to refuse to register applicants or to revoke the registration of a salesperson or broker (section 8). Provision is also made for the appointment of an investigator by the Ministry (sections 14 to 18).

The REBBA further provides that failure to comply with any of its provisions constitutes an offence punishable by fine or imprisonment (section 50). The offences can be prosecuted in Ontario Court (Provincial Division).

Having considered these provisions of the REBBA, I am of the view that the duties and responsibilities of the Registrar of Real Estate and Business Brokers include the conduct of investigations that could lead to proceedings before a court or a tribunal, CRAT, in which the above described penalties and sanctions could be imposed. Accordingly, the definition of "law enforcement" has been satisfied with respect to the records exempted under sections 14(1)(d) and 14(2)(a). Furthermore, I believe that, for the purposes of section 14(2)(a), the Ministry is an agency which has the function of enforcing and regulating compliance with a law, in this case, the REBBA.

The Ministry describes Records 7, 11 and 18 as complaints received by the Registrar of the REBBA and indicates that release of these documents would disclose the identity of a confidential source of information with respect to a law enforcement matter. I find that the Ministry has provided me with sufficient information to conclude that Record 7 qualifies for exemption under section 14(1)(d). Based on the test developed in previous orders, I find that there is a clear and direct linkage between disclosure of Record 7, a letter of complaint, and the alleged harm. However, I have not been provided with such information with respect to Records 11 and 18 and conclude that section 14(1)(d) does not apply to exempt them from disclosure.

Records 12, 21(1) and 21(29) are documents prepared by a Ministry compliance officer and an investigator which contain a formal account of the results of their investigations of the appellant's business activities as well as their conclusions and/or findings. Accordingly, I find that these records constitute reports prepared as part of the actual investigation by the Ministry into the business affairs of the appellant. As they were prepared by the Ministry in the context of its responsibilities to enforce the provisions of the REBBA, I conclude that Records 12, 21(1) and 21(29) qualify for exemption pursuant to section 14(2)(a) of the Act.

## **PERSONAL INFORMATION**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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 Ministry maintains that much of the information contained in the records pertains to the appellant's corporation and, as such, does not constitute her personal information. I disagree.

It is possible that, in some circumstances, information with respect to a business entity could be such that it relates only to an identifiable individual and that information might qualify as that individual's personal information (Order 113). I believe that the facts of this case represent this type of exceptional circumstance. The appellant was the sole shareholder and president of the company whose business affairs and dealings were investigated by the Ministry. Many of the records at issue in this appeal name both the appellant and her company as being the subject of the investigation and proceedings under the REBBA. Because of this nexus, I conclude that the information contained in the records constitutes the personal information of the appellant under section 2(1) of the Act in the circumstances of this appeal.

Having reviewed all the records at issue, I find that Records 12, 15, 21(29), 21(30), 23, 32(1), 32(2), 32(4) and 32(6) contain solely the personal information of the appellant. Records 7, 11, 14, 17, 21(1), 21(32), 32(3), 35(1), 35(8) and 35(14) contain the personal information of the appellant **and** other identifiable individuals. Finally, Records 18, 21(48), 21(49), 21(50), 21(51) and 21(57) contain the personal information of individuals other than the appellant.

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.

#### **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION**

One such exception is found in section 49(a) of the Act. Under section 49(a), the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including law enforcement (section 14) and solicitor-client privilege (section 19) would otherwise apply to that information.

In this appeal, I have found that the law enforcement exemption applies to Records 7, 12, 21(1) and 21(29). I have also found that the solicitor-client privilege exemption applies to Records 15, 21(4), 21(30), 23, 32(1), 32(2), 32(3), 32(4), 32(6) and 35(8). As I have also found that all of these records contain the personal information of the appellant, they are exempt from disclosure under section 49(a).

#### **INVASION OF PRIVACY**

Another exception to individuals' rights of access to their own personal information is found in section 49(b) of the Act. Under section 49(b), where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the

information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits an institution from releasing this information.

In both these situations, sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way in which such a presumption against disclosure can be overcome is where 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 contained in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

I will first consider those records containing both the personal information of the appellant **and** other individuals.

In its representations, the Ministry states that portions of the records relate to an investigation into a possible violation of law (section 21(3)(b)), the employment history of individuals (section 21(3)(d)) and/or describe an individual's finances or financial history or activities (section 21(3)(f)). Therefore, the Ministry states that the release of the information would represent a presumed unjustified invasion of personal privacy.

I find that the personal information in portions of Records 11, 14, 17, 35(1) and 35(14) and in Record 21(32) in its entirety was compiled and is identifiable as part of the Ministry's investigation into a possible violation of the REBBA by the appellant. Certain personal information also relates to financial transactions involving individuals other than the appellant. Therefore, the presumed unjustified invasion of personal privacy found in sections 21(3)(b) and (f) applies.

None of this information falls within the ambit of section 21(4). Nor has the appellant submitted that section 23 of the Act applies to this personal information. Accordingly, the exemption in section 49(b) applies to Record 21(32) in its entirety and the portions of Records 11, 14, 17, 35(1) and 35(14) I have highlighted on the copies of these records provided to the Co-ordinator with this order. The highlighted portions should not be disclosed. I note that portions of Record 35(1) do not contain personal information as the names of various individuals appear on this record in their employment capacity. This information should be disclosed to the appellant.



The remaining records contain the personal information of individuals other than the appellant. These are Records 18, 21(48), 21(49), 21(50), 21(51) and 21(57). Once again, I find that the personal information contained in these records falls within the presumptions in sections 21(3)(b) and/or (f) of the Act and that this presumption has not been rebutted. Accordingly, these records are exempt from disclosure under section 21(1) of the Act.

**ORDER:**

1. I uphold the Ministry's decision to deny access to the portions of Records 11, 14, 17, 31(4), 33(4), 35(1) and 35(14) which are highlighted on the copy of the records that has been sent to the Ministry's Freedom of Information and Protection of Privacy Co\_ordinator with a copy of this order, and the whole of Records 7, 12, 15, 18, 21(1), 21(4), 21(29), 21(30), 21(32), 21(48), 21(49), 21(50), 21(51), 21(57), 23, 32(1), 32(2), 32(3), 32(4), 32(6), 35(8) and 35(11).
2. I order the Ministry to disclose to the appellant the non-highlighted portions of Records 11, 14, 17, 31(4), 33(4), 35(1) and 35(14), and Records 1, 2, 3, 10, 13, 16, 19, 20, 21(44), 21(55), 21(56), 22, 24, 25, 26, 29, 30, 31(3), 32(5), 35(2), 35(3), 35(7), 35(10), and 35(13) in their entirety within fifteen (15) days of the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ June 13, 1994

## APPENDIX "A"

### INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION	DUPLICATE(S)	EXEMPTIONS CLAIMED BY MINISTRY IN ITS RECORD INDEX	DECISION
1	Registration Progress Sheet (entry dated 91/02/07)		13(1)	Disclose
2	Inspection Assignment Control Sheet (1 line)		13(1)	Disclose
3	Memo dated 91/03/14 from Registrar to legal counsel		19	Disclose
7	Letter to Registrar dated December 11, 1990 enclosing complaint letter and listing		14(1)(d)	Decision upheld
10	Letter to Registrar dated April 11, 1991 (notation dated 91/04/18)		13(1)	Disclose
*11	Letter to Ministry dated April 14, 1991		14(1)(d), [21(3)(f)]	Disclose in part
12	Affidavit of Registrar's Designee dated March 8, 1991		14(2)(a)	Decision upheld
13	Director's Investigation Order dated March 12, 1991	35(6)	13(1), 14(2)(a), 19 (no submissions on any exemptions)	Disclose
14	Memo dated April 9, 1992 from Deputy Registrar to legal counsel		19, [21(3)(f)]	Disclose in part
15	Notes of Deputy Registrar		19	Decision upheld
16	Letter to Registrar's office dated March 24, 1992		13(1) (no submissions)	Disclose
17	Memo dated May 15, 1992 from Deputy Registrar to legal counsel		19, [21(3)(f)]	Disclose in part

\* Exemptions in square brackets have been raised by the Commissioner's office.

<b>RECORD NUMBER</b>	<b>DESCRIPTION</b>	<b>DUPLICATE(S)</b>	<b>EXEMPTIONS CLAIMED BY MINISTRY IN ITS RECORD INDEX</b>	<b>DECISION</b>
18	Fax dated May 26, 1992 to Deputy Registrar		14(1)(d), 21(1)	Decision upheld
19	Memo dated June 2, 1992 from Deputy Registrar to legal counsel	31(1)	13(1) (no submissions), 19	Disclose
20	Memo dated June 12, 1992 from legal counsel to Deputy Registrar		19	Disclose
21(1)	Memo dated April 5, 1991 from investigator to Manager, Investigations	21(39)	13(1) (no submissions), 14(2)(a), 19 (no submissions)	Decision upheld
21(4)	Memo dated April 11, 1991 from investigator to legal counsel with chronology	21(43), 32(7) (without chronology)	13(1), 14(2)(a), 19	Decision upheld
21(29)	Memo dated May 6, 1991 from investigator to Registrar	21(65)	13(1) (no submissions), 14(2)(a), 19 (no submissions)	Decision upheld
21(30)	Memo dated May 1, 1991 from legal counsel to investigator	21(66), 35(9)	13(1), 14(2)(a) (no submissions), 19	Decision upheld
21(32)	Letter dated February 7, 1991 to Credit Union	21(52)	13(1), 19 (no submissions), 21(1),	Decision upheld
21(44)	Fax cover page dated February 18, 1991 from Niagara Regional Police Force to Ministry		13(1), 14(2)(a), 19 (no submissions on any exemptions)	Disclose
21(48)	Lawyer's statement of account dated January 14, 1991		13(1), 14(2)(a), 19 (no submissions on these three exemptions), 21(1)	Decision upheld

<b>RECORD NUMBER</b>	<b>DESCRIPTION</b>	<b>DUPLICATE(S)</b>	<b>EXEMPTIONS CLAIMED BY MINISTRY IN ITS RECORD INDEX</b>	<b>DECISION</b>
21(49)	Trust Account Statement		13(1), 14(2)(a), 19 (no submissions on these three exemptions), 21(1)	Decision upheld
21(50)	Statement of Adjustments		13(1), 14(2)(a), 19 (no submissions on these three exemptions), 21(1)	Decision upheld
21(51)	Direction dated December 14, 1990 regarding disposition of proceeds		13(1), 14(2)(a), 19 (no submissions on these three exemptions), 21(1)	Decision upheld
21(55)	Transaction report transmittal dated February 15, 1991		13(1), 14(2)(a), 19 (no submissions on any exemptions)	Disclose
21(56)	Fax covering page to Ministry from Niagara Regional Police Force		13(1), 14(2)(a), 19 (no submissions on any exemptions)	Disclose
21(57)	Building contract dated December 28, 1991		13(1), 14(2)(a), 19 (no submissions on these three exemptions), 21(1)	Decision upheld
22	Memo dated August 14, 1992 to legal counsel		19 (claim dropped)	Disclose
23	Memo dated October 28, 1992 from legal counsel to legal assistant		19	Decision upheld
24	Memo dated 93/01/20 from Deputy Registrar to legal counsel		19	Disclose
25	Memo dated February 5, 1993 from legal counsel to Registration Officer		19	Disclose

<b>RECORD NUMBER</b>	<b>DESCRIPTION</b>	<b>DUPLICATE(S)</b>	<b>EXEMPTIONS CLAIMED BY MINISTRY IN ITS RECORD INDEX</b>	<b>DECISION</b>
26	Memo dated March 17, 1993 from legal counsel to Registrar	31(5) (with fax covering sheet), 35(12)	13(1) (no submissions)	Disclose
29	Memo dated July 23, 1992 from Registrar to solicitor	31(2)	13(1), 19	Disclose
30	Memo dated April 23, 1993 from Co-ordinator Policy Issues to Assistant Deputy Minister		13(1) (no submissions)	Disclose
31(3)	Memo dated March 25, 1993 from Senior Legal Counsel to Registration Officer and Deputy Registrar		13(1), 19	Disclose
31(4)	Memo dated March 19, 1993 from Senior Legal Counsel to Assistant Registrar		13(1), 19	Disclose in part
32(1)	Notes of legal counsel dated February 11, 1992		19	Decision upheld
32(2)	Notes of legal counsel dated October 24, 1991		19	Decision upheld
32(3)	Memo dated October 8, 1991 from investigator to legal counsel		19	Decision upheld
32(4)	Notes of legal counsel dated October 3, 1991		19	Decision upheld
32(5)	Memo dated August 12, 1991 from investigator to legal counsel		19	Disclose
32(6)	Notes of legal counsel		19	Decision upheld
33(4)	Letter dated November 9, 1992 from legal counsel to Ministry of the Attorney General		21(1)	Disclose in part
35(1)	Memo dated May 11, 1993 regarding CRAT - request for hearings		21(1)	Disclose in part

<b>RECORD NUMBER</b>	<b>DESCRIPTION</b>	<b>DUPLICATE(S)</b>	<b>EXEMPTIONS CLAIMED BY MINISTRY IN ITS RECORD INDEX</b>	<b>DECISION</b>
35(2)	Telephone message dated March 11, 1991.		13(1), 19	Disclose
35(3)	Memo dated March 11, 1991 from legal counsel to Registration Officer		19	Disclose
35(7)	Appellant's driving record		14(1)(b) (claim dropped)	Disclose
35(8)	Counsel notes to file		19	Decision upheld
35(10)	Counsel notes		19	Disclose
35(11)	Counsel notes		19	Decision upheld
35(13)	Memo dated January 28, 1993 from counsel to file		19	Disclose
35(14)	Internal Tracking System report (part)		21(1)	Disclose in part