



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

ORDER P-1273

Appeal P-9600186

Ontario Insurance Commission



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant submitted a request under the Act to the Ontario Insurance Commission (the OIC) for access to all documentation regarding an investigation into her employment practices. In particular, she sought any information which prompted the investigation and all material held by the OIC, including records of any contact the OIC had with a named insurance company (the company).

The OIC located records responsive to the request and denied access to them in their entirety. The appellant appealed this decision.

During extensive mediation which took place during the course of this appeal, a number of issues have been clarified or resolved. The appellant narrowed the scope of the request by eliminating certain records. She further clarified that she was only seeking access to those records held by the OIC which relate directly to her request. In addition, the appellant indicated that, in her opinion, more records exist which are responsive to her request.

On the other hand, the OIC issued a series of supplemental decisions wherein it granted access to certain records, in full or in part and claimed new exemptions for some records. The OIC also withdrew some exemptions for other records. Further, the OIC issued new decisions on records which had not been identified in its original decision.

In order to understand the context in which this appeal has been processed by the OIC, it is important to note that the appellant is currently involved in a hearing before an Advisory Board appointed under section 393 of the Insurance Act, the purpose of which is to ultimately determine whether or not the life insurance agent's licence held by the appellant should be suspended or revoked.

As part of this hearing process, the OIC has disclosed a number of records to the appellant. This disclosure has taken place over the course of this appeal. Unfortunately, there has been inadequate communication between the program area of the OIC responsible for this disclosure and its Freedom of Information unit. This has resulted in confusion as to which records or parts of records the appellant has received. It is also important to note that this disclosure, although occurring simultaneously with the appellant's access request, is not disclosure under the Act.

The appellant has indicated that she is not seeking access under the Act to those records which she has received through the disclosure process. However, she has indicated that she does not believe that she has received full disclosure and she seeks a review by the Commissioner's office of a number of records which have been disclosed to her to ensure that they are, in fact, one and the same. Further, despite the disclosure which the appellant has received, she continues to believe that more records exist. Therefore, the reasonableness of the OIC's search for records remains at issue in this appeal.

Although I appreciate the difficulties the OIC faces in processing the same records in response to two separate and distinct proceedings simultaneously, in my view, many of the problems and resultant delays in this appeal could have been avoided had the two departments within the OIC maintained better communications.

THE ISSUES TO BE DETERMINED IN THIS INQUIRY

This office sent a Notice of Inquiry (NOI) to the OIC and the appellant on May 29, 1996. The NOI raised the issues to be determined in this inquiry as they existed at that time. As the records appeared to contain the personal information of the appellant, the Appeals Officer invited the parties to comment on the application of sections 49(a) (discretion to refuse requester's own information) and 49(b) (invasion of privacy) of the Act in addition to the exemptions applied by the OIC. Representations were received from both parties.

However, it is important to note that the OIC continued to issue supplemental decisions subsequent to the date of the NOI. Therefore, some of the records and exemptions referred to in the NOI are no longer at issue. Further, in its representations, the OIC withdrew its reliance on section 17 with respect to a number of records, and raised the mandatory exemption in section 21(1) in its place. Because of the OIC's change in position, this office notified the appellant who was then afforded an opportunity to provide additional representations on the application of section 21 and/or 49(b) to these records.

As a result of the above, the OIC now relies on the following exemptions to withhold the records which remain at issue in this appeal from disclosure:

- law enforcement - sections 14(1)(a), (b), (d) and 14(2)(a)
- solicitor-client privilege - section 19
- invasion of privacy - section 21(1) and 49(b)
- discretion to refuse requester's own information - section 49(a).

RECORDS:

The records at issue fall into three general categories:

Category One

The records in this category can generally be described as correspondence between the OIC and various individuals and the company, investigator's notes, insurance policies and statements of various policyholders, transcript of a taped interview with a Manager of the company along with a copy of the tapes, and a statement of claim (Records 4 - 13, 19 - 23 and 25 - 32). With the exception of Records 19, 20, 21, 22 and 23, the only information which has been withheld from the records in this category consists of the names (and occasionally, addresses) of policyholders, the policy number and specific personal information about the policyholder or details about the policy. With respect to Record 25, the contents of the statement of claim have been disclosed to the appellant. The only part of this record at issue consists of handwritten notes in the margin which identify policyholders.

Records 19 - 21 have been withheld in their entirety. Except for page 2 of Record 22, the pages of Records 22 and 23 which remain at issue in this appeal have also been withheld in their entirety. The bottom nine lines of page 2 of Record 22 have been withheld.

The OIC claims that section 21(1) applies to all of the records in this category. In addition, the OIC claims that sections 14(1)(a), (b) and (d) apply to Records 19 - 23, 28, 30 and 31.

Category Two

The records in this category (Records 1 and 2) have been withheld in their entirety, and consist of a Ministry of Financial Institutions Investigations Request and an Investigation Report. The OIC claims that sections 14(1)(a), (b) and 14(2)(a) apply to exempt these two records from disclosure.

Category Three

Record 3, the sole record in this category, is a Legal Review Request dated July 26, 1995. The OIC has exempted this record under section 19.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. In general, the records all relate to an investigation of the appellant, and as such I find that they contain her personal information. I also find that, with the exception of Records 1 and 3, the remaining records all contain the personal information of a number of other individuals.

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

Under section 49(a), the OIC has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 49(a) include the exemptions claimed with respect to Records 1, 2, 3, 19 - 23, 28, 30 and 31, namely sections 14 (law enforcement) and 19 (solicitor-client privilege).

LAW ENFORCEMENT

As I indicated above, the OIC claims that Records 1 and 2 are exempt under sections 14(1)(a) and (b), and section 14(2)(a). Further, the OIC has exempted Records 19 - 23, 28, 30 and 31 pursuant to sections 14(1)(a), (b) and (d). In my view, Records 19 - 23, 28, 30 and 31 are more properly dealt with under section 49(b), and I will not address them further in the ensuing discussion. Accordingly, I will restrict my discussion under this section to Records 1 and 2.

Sections 14(1)(a) and (b) and 14(2)(a) provide:

- (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;
- (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.

The appellant indicates in her representations that she was advised by the OIC that its investigation into this matter was completed in October, 1994. Further, she states that she was notified in October, 1994 that no charges would be brought against her under the Provincial Offences Act, as the time for laying of charges for provincial offences had expired. Therefore, she argues that this matter can no longer be considered as law enforcement.

While it is possible that the status of a law enforcement matter or investigation may have some bearing on the application of a particular exemption to specific records, the fact that a matter has been (allegedly) completed does not necessarily take the information outside the scope of the law enforcement exemption. Rather, the application of the law enforcement exemption to the records must be considered in light of the requirements for each exemption which has been claimed.

Section 14(2)(a)

Record 1 is an Investigations Request form. This record is a pre-printed form on which preliminary information regarding the complaint, including the name of the complainant (which, in this case, is not an individual), information about the subject of the complaint (the appellant) and the allegation, has been recorded. In my view, this record does not contain any formal accounting of the results of the collation and consideration of information (Order 200). Accordingly, I find that it does not qualify as a "report" within the meaning of section 14(2)(a). Record 1 is, therefore, not exempt under this section.

Record 2 is an Investigation Report prepared by the investigator assigned to this matter and addressed to the Senior Manager of Investigations and Compliance at the OIC. The Report contains background information, details of the investigation, conclusions and recommendations. In my view, this record contains a formal statement or account of the results of the collation and consideration of information, and thus qualifies as a "report". This record was clearly prepared in the course of an OIC investigation into the appellant's practices as an insurance agent. Previous orders of this office have determined that investigations of complaints against insurance agents under the Insurance Act are law enforcement investigations (Orders P-302 and P-1125). I

agree, and accordingly, I find that Record 2 qualifies for exemption under section 14(2)(a), and is therefore exempt under section 49(a) of the Act.

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

As I have found that Record 2 is exempt, I will restrict my discussion of these two sections to Record 1.

The purpose of the exemptions contained in sections 14(1)(a) and (b) of the Act is to provide the OIC with the discretion to preclude access to the record in circumstances where disclosure of the record could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. The OIC bears the onus of providing evidence to substantiate that, first, a law enforcement matter or investigation is ongoing and second, that disclosure of the records could reasonably be expected to interfere with the matter or the investigation.

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term “law enforcement” found in section 2(1) of the Act. This term is defined 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).

As I noted above, Record 1 is an Investigations Request form. The OIC indicates in its representations that this document initiated the investigation into the appellant’s practices as an insurance agent. I found above that investigations of complaints against insurance agents under the Insurance Act are law enforcement investigations, and accordingly, I find that this record pertains to a law enforcement matter.

In its representations, the OIC states that the hearing before an Advisory Board is pending and has not been concluded. Therefore, the OIC submits that the investigation and law enforcement proceedings have not been concluded. The submissions of the OIC include no evidence to explain how disclosure of the Investigations Request form, which contains basic information about the allegations and the appellant, could **interfere** with the law enforcement matter or investigation. However, I note that, in providing some background to this appeal, the OIC indicates that in order to provide the appellant an opportunity to know the case against her, she was provided with copies of documents relating to the allegations and particulars.

In the circumstances of this appeal, I find that the OIC has provided insufficient evidence to establish the application of section 14(1)(a) or (b) of the Act to Record 1. As no other exemption has been claimed for this record it should be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

The OIC has claimed the application of section 19 to Record 3. This section states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 consists of two branches, which provide the OIC 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).

Record 3 is a Legal Review Request form which has been completed by the Investigations Unit and forwarded to the Ministry of Finance Legal Services Branch. The form sets out the particulars for which legal review is requested. The OIC submits that this form was prepared for legal counsel to ask for legal advice in contemplation of litigation. On its face, Record 3 clearly sets out a request for legal advice and as such, I find that it was prepared for Crown counsel for use in giving legal advice. Accordingly, Record 3 qualifies for exemption under Branch 2 of section 19, and is therefore exempt under section 49(a) of the Act.

INVASION OF PRIVACY

I found above that the remaining records (Records 4 - 13, 19 - 23 and 25 - 32) contain the personal information of the appellant and other individuals. Accordingly, I will consider whether their disclosure would result in an unjustified invasion of the personal privacy of these other individuals pursuant to section 49(b) of the Act, which states:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

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 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 OIC 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.

The OIC submits that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law under the Insurance Act. In this regard, it claims that the presumption in section 21(3)(b) applies to such information.

The appellant claims, generally, that the information contained in the records relates to her and to no-one else. Moreover, she submits that the fact that this information is on file is an invasion of her personal privacy. She argues further that the individuals who consented to be interviewed regarding her practices did so with the knowledge that their evidence could be used, and therefore made public. She submits that, in agreeing to be interviewed, these individuals forfeited their right to privacy.

The appellant raises the following two factors in section 21(2) which, she argues, favour disclosure of the information in the records: section 21(2)(d) (fair determination of rights) and section 21(2)(i) (unfairly damage the reputation of any person). She also argues against the application of a number of factors in section 21(2) which favour non-disclosure of personal information. Because of the findings I have made in this order, however, it is not necessary for me to address these arguments.

With respect to the application of section 21(3)(b), the appellant submits that no violation of law has ever been proven. She argues that the investigation has been completed and has been advised by the OIC that there will be no prosecution against her under the Provincial Offences Act. Therefore, she believes that this section has no application in the circumstances.

Having reviewed the records and considered the submissions of the parties, I find that disclosure of the personal information of the individuals other than the appellant would fall within the presumption in section 21(3)(b) of the Act. The presumption may still apply, even if, as in the present case, no charges were laid (Orders P-223 and P-237).

Even if I were to find that one of the factors in section 21(2) is relevant in the circumstances of this appeal, the Divisional Court's decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767 held that the factors and considerations in section 21(2) cannot be used to rebut the presumptions in section 21(3).

None of the information in the records falls within section 21(4). Nor has the appellant claimed that section 23 applies. Accordingly, the presumptions have not been rebutted.

Therefore, disclosure of this personal information would constitute an unjustified invasion of the personal privacy of the other individuals identified in the records. On this basis, I find that the withheld portions of Records 4 - 13 and 25 - 32, and Records 19 - 23 are exempt under section 49(b) of the Act.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the OIC indicates that such a record does not exist, it is my responsibility to ensure that the OIC has made a reasonable search to identify any records which are responsive to the request. The Act does not require the OIC to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the OIC must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

The appellant submits that there is a gap in the information which has been identified by the OIC. She believes that records prepared by the company between 1989 and 1991, possibly in the nature of memoranda, should exist. While she acknowledges that these records would have been created by a private sector company, and as such would not be subject to the Act, she argues that a full and proper investigation by the OIC should have resulted in more records being obtained by it from the company.

She also believes that transcripts she has received of taped interviews are not accurate reflections of the contents of the tapes. During the inquiry stage of this appeal, the appellant was provided with the tapes for a number of interviews. I have reviewed the remaining tapes (pertaining to the interview of a Manager of the company) and find that the transcript which was made from them is accurate. I note that both the tapes and transcript of this interview end abruptly and it would appear that the interview continued beyond that recorded. In responding to queries regarding this, the OIC indicated that the tape ran out during the interview and the recording of the interview was discontinued at that time. I am satisfied that no further tape or transcript exists regarding this interview.

The OIC has submitted the sworn affidavits of the investigator assigned to investigate the appellant and a legal assistant in the Legal Services Branch of the OIC. These two employees were responsible for conducting the search to locate responsive records. The affidavits indicate that all records responsive to the request have been located.

The appellant's submissions raise a number of concerns about the authority and power given to the OIC to investigate matters, and the manner in which the OIC conducts its investigations into complaints against insurance agents. While I understand the appellant's concerns in this regard, these issues are beyond the scope of this appeal.

I have considered the representations of the parties and I find that the OIC's search for records responsive to the appellant's request was reasonable in the circumstances of this appeal.

ORDER:

1. I order the OIC to disclose Record 1 to the appellant by providing her with a copy of this record on or before **October 29, 1996**.
2. I uphold the OIC's decision to withhold the remaining information.

3. The search for records responsive to this request was reasonable and this portion of the appeal is dismissed.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the OIC to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ October 9, 1996