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

ORDER P-1313

Appeal P_9600256

Ministry of Finance

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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Finance (the Ministry). The request was for access to all documentation regarding the appellant's company's registration with the Small Business Development Corporation.

The Ministry granted the appellant access to 658 pages of records. Access was denied to 40 pages of records under the following exemptions:

- law enforcement - sections 14(1)(a), (b), (c) and (d)
- third party information - section 17
- personal information - section 21

The appellant appealed the Ministry's decision to deny access. During mediation of the appeal, the Ministry issued a new decision letter in which it withdrew section 17 as an exemption claim and added sections 14(2)(a) and (c) as additional exemptions. The Appeals Officer was of the view that the records may contain the personal information of the appellant and other individuals and the application of sections 49(a) and (b) was added as issues in this appeal. Notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from both parties.

PRELIMINARY ISSUE:

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

Upon receipt of the appeal, this office provided the Ministry with a Confirmation of Appeal notice. This notice indicated that the Ministry had 35 days from the date of this notice (an expiry date was provided) to raise any additional discretionary exemptions not claimed in the decision letter. Only sections 14(2)(a) and (c) were raised during this period.

Subsequently, in its representations, the Ministry raised the application of the discretionary exemption provided by section 18(1)(d) of the Act. By this time the expiry date provided in the Confirmation of Appeal had passed by 50 days.

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in its original decision letter.

In Order P-658, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption(s) is claimed late in the appeals process, a decision maker has the authority to decline to consider the discretionary exemption(s). I agree with Inquiry Officer Fineberg's reasoning and adopt it for the purposes of this appeal.

The Ministry has provided no explanation for the delay in raising the additional discretionary exemption. In my view, a departure from the 35-day time frame is not justified in the circumstances of this appeal and I will not consider the application of section 18(1)(d) in this order.

DISCUSSION:

LAW ENFORCEMENT

The Ministry claims that sections 14(1)(a), (b), (c), (d) and 14(2)(a) apply to the records. These sections read:

> (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;
>
> (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.

Section 2(1) of the Act defines "law enforcement" as:

> "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 at issue were originally gathered and created in the course of an investigation into allegations that the Small Business Development Corporation Act (the SBDCA) had been contravened. The SBDCA provides that every person or corporation is subject to a penalty if found guilty of making or assisting in making a false or misleading statement in any document required by or for the purposes of the SBDCA. In my opinion, the investigative process under the SBDCA satisfies the requirements of the definition of "law enforcement" under section 2(1) of the Act. Investigations that are conducted under the authority of the SBDCA lead or could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed. The Ministry states, however, that this investigation has now ceased.

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 would interfere with an **ongoing** law enforcement matter or investigation. Sections 14(1)(c), 14(1)(d) and 14(2)(a) are not dependent on whether the law enforcement activity is ongoing.

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

The matter or investigation referred to in the Ministry's representations as being ongoing is not being conducted pursuant to the SBDCA, and is not one which falls within the meaning of "law enforcement". Accordingly, sections 14(1)(a) and (b) do not apply.

Section 14(1)(c)

In Order 170, former Inquiry Officer John McCamus found:

> In order to constitute an "investigative technique or procedure" it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that such compromise would not be effected by disclosure and accordingly that the technique or procedure in question is not within the scope of section 14(1)(c).

The Ministry claims that section 14(1)(c) applies to the last four numbered items on Record 3. The Ministry submits that these items "indicate alternative procedures in an ... investigation at this stage." These items are phrased in the form of questions, and have more to do with options available to the Ministry dependent on its authority than with any **investigative** technique or procedure which might be used to uncover information about a suspected offence. I am not satisfied that disclosure of this part of Record 3 would reveal any investigative technique or procedure, and I find that section 14(1)(c) does not apply.

Section 14(1)(d)

As to the issue of whether it is reasonable to expect that disclosure of the record would reveal the identity of a confidential source, in Order 139 former Commissioner Sidney B. Linden determined that evidence of the circumstances in which the information was given must be tendered in order to establish confidentiality. As the Ministry's representations did not contain

specific details of these circumstances, I contacted the individual identified as the confidential source and confirmed that the information was provided in confidence and that the source expected his/her identity to remain confidential as well. Accordingly, I am satisfied that Records 5A, 8-17, 20-23, 30 and 31 qualify for exemption under section 14(1)(d).

Section 14(2)(a)

In Order 200, Commissioner Tom Wright determined that in order to be a report for the purposes of section 14(2)(a), a record must consist of a formal statement or account of the results of the collation and consideration of information and that, generally speaking, results would not include mere observations or recordings of fact.

Records 2, 3, 5, 6, 7, 18, 19, 24-26, 28, 29 and 32-38 are an account of the results of an investigation of allegations against the appellant, related to the enforcement of the SBDCA and were created by employees of the Ministry. As such, these records qualify as reports prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with a law. Accordingly, I find that all parts of the section 14(2)(a) test have been met.

Record 4 is the third page of a form which appears to have been filled out long before any investigation commenced. Record 27 is an internal e-mail message. Record 39 is a letter to a company. In my view, none of these records qualifies as a report, and section 14(2)(a) does not apply to exempt them from disclosure.

DISCRETION TO REFUSE THE REQUESTER'S OWN INFORMATION

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including sections 14(1)(d) and 14(2)(a), would otherwise apply to that information. Personal information is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual".

I have found that Records 5A, 8-17, 20-23, 30 and 31 qualify for exemption under section 14(1)(d) and that Records 2, 3, 5, 6, 7, 18, 19, 24-26, 28, 29 and 32-38 qualify for exemption under section 14(2)(a). All of these records contain information which relates to the appellant. In my view, each of these records are properly exempt under section 49(a).

INVASION OF PRIVACY

Having reviewed the records, I find that Records 1, 27 and 39 either do not contain personal information of any identifiable individual or contain the personal information of the appellant only. These records cannot, therefore, qualify for exemption under section 21 or 49(b).

Record 4 contains personal information of the appellant and other identifiable individuals.

Section 47(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 49 sets out exceptions to this right.

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 21(4) or if section 23 applies to it. If none of the presumptions in section 21(3) apply, the institution must consider the factors listed in section 21(2) as well as all other relevant circumstances.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. 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 Ministry 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 Ministry submits that section 21(3)(b) applies in the circumstances of this appeal. This section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

Although the personal information found in Record 4 was not recorded during an investigation into a possible violation of law, I am satisfied that it was later compiled and became identifiable as part of an investigation into a possible violation of law. Accordingly, the requirements of section 21(3)(b) have been met. Section 21(4) does not apply, and the appellant has not raised the application of section 23. Accordingly, I find that Record 4 is exempt under section 49(b).

ORDER:

1. I order the Ministry to disclose Records 1, 27 and 39 to the appellant by sending him a copy of these records no later than **December 31, 1996**.

2. I uphold the Ministry's decision not to disclose the remaining records.

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 1.

Original signed by: December 6, 1996
Holly Big Canoe
Inquiry Officer