



Information and Privacy
Commissioner/Ontario

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

ORDER P-1492

Appeals P_9700199 and P_9700200

Ontario Securities Commission



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BACKGROUND:

Two individuals (the appellants) are named as respondents in an ongoing hearing before the Commissioners of the Ontario Securities Commission (the OSC). The hearing was commenced by a Notice of Hearing and involves matters relating to trading in the securities of two corporations. The appellants are alleged to have violated Ontario securities law by virtue of their involvement in the activities of these corporations and their involvement with other individuals connected to these corporations.

In connection with the proceedings before the OSC, it has released to the appellants some 45 volumes of bound materials as well as the materials contained in more than a dozen boxes.

The appellants have brought several motions before the OSC alleging, inter alia, that they have not been given procedural fairness and that the OSC staff have not provided complete disclosure.

NATURE OF THE APPEALS:

The appellants each made a request to the OSC under the Freedom of Information and Protection of Privacy Act (the Act). The requests were for access to information relating to each appellant contained in the OSC's intelligence files.

The OSC located records responsive to both requests and provided partial access to them. The OSC denied access to the remaining records on the basis of the following sections of the Act:

- advice and recommendations - section 13(1);
- law enforcement - sections 14(1)(c), (g) and 14(2)(a).

The appellants, represented by the same counsel, appealed the denial of access. This office opened two appeal files (one for each appellant). However, because the institution and the records are the same and/or similar and the appellants are both represented by the same counsel, the issues in each appeal will be dealt with together in this order.

This office provided a Notice of Inquiry to counsel for the appellants and the OSC. As the records at issue may contain personal information, the Appeals Officer raised the possible application of sections 49(a) (discretion to refuse requester's own information) and 49(b) (invasion of privacy) of the Act. Representations were received from both parties. Attached to the appellants' representations is an affidavit sworn by one of the appellants which sets out in considerable detail the events surrounding the appellants' involvement with the OSC and their views regarding the OSC's motivation in initiating action against them.

RECORDS:

The records at issue in both appeals consist of a Securities Fraud Information Centre (S.F.I.C.) - Violation Report dated September 22, 1992 (Record 1), an undated S.F.I.C. - Violation Report

(Record 2), and three OSC memoranda dated September 9, 10, and 11, 1992 (Records 3, 4 and 5, respectively).

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual.

I have reviewed the records at issue and the representations and find that Records 1, 3 and 5 do not contain personal information. Record 2 contains the personal information of one of the appellants and other individuals. Record 4 contains the personal information of the appellants and other individuals. None of the personal information relates to employees of the OSC or any other related organization.

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.

Under section 49(a) of the Act, the OSC has the discretion to deny access to an individual’s own personal information in instances where certain exemptions would otherwise apply to that information, including sections 13(1), 14(1) and (2).

In order to determine whether the exemption provided by section 49(a) applies in this case, I will begin by considering the OSC’s claims that particular records qualify for exemption under sections 13 and 14, both of which are referred to in section 49(a). My analysis of these two sections will apply equally to those records which do not contain personal information.

LAW ENFORCEMENT

The OSC submits that sections 14(1)(g) and 14(2)(a) of the Act apply to exempt all of the records from disclosure and that section 14(1)(c) applies to exempt Records 1, 3, 4 and 5 from disclosure.

Section 14(2)(a)

This section reads as follows:

A head may refuse to disclose a record,

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.

For a record to qualify for exemption under section 14(2)(a) of the Act, an 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]

Records 1 and 2 are S.F.I.C.- Violation Reports prepared by the OSC. They both set out the particulars of the violation and the resulting action taken. Record 3 is a memorandum to the lead forensic accountant from the chief forensic accountant requesting that certain action be taken. Record 4 is a memorandum to the chief forensic accountant from the lead forensic accountant setting out the results of the work undertaken in response to Record 3. Record 5 is a memorandum to a Director at the OSC from the chief forensic accountant regarding the matters referred to in Records 3 and 4 and sets out the chief forensic accountant's advice regarding how to proceed.

I will begin with the second and third elements of the above test. In order for the records to qualify for exemption under section 14(2)(a) of the Act, they must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This definition reads:

"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).

Previous orders of this office have established that investigations by the OSC under the provisions of the Securities Act are properly considered law enforcement investigations (Orders 30, P-548 and P-1321).

Further, the OSC is an agency which has the function of enforcing and regulating compliance with the law (Order P-548).

Because the records at issue in this appeal were prepared during the course of such investigations, I find that the second and third parts of the section 14(2)(a) test have been satisfied with respect to these records.

With respect to the first element of the test, in order to be categorized as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

In my view, only Records 1 and 2 qualify as “reports” within the meaning of section 14(2)(a). Both of these records contain a formal statement of the collation and consideration of information and arrive at conclusions as a result. The remaining records simply contain observations or recordings of fact. They are communications which do not draw conclusions following the consideration of the information contained therein.

Accordingly, all three parts of the test have been satisfied with respect to Records 1 and 2 and they qualify for exemption under section 14(2)(a). As Record 2 contains the personal information of one of the appellants, this record is properly exempt under section 49(a) of the Act.

Section 14(1)(g)

The OSC submits that section 14(1)(g) of the Act applies to all of the records. I found above that Records 1 and 2 are properly exempt from disclosure under section 14(2)(a) of the Act. Therefore, I shall only consider the application of section 14(1)(g) to Records 3, 4 and 5.

Section 14(1)(g) of the Act reads as follows:

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

interfere with the gathering of or reveal law enforcement
intelligence information respecting organizations or persons.

As with section 14(2)(a), in order for the OSC to rely on section 14(1)(g) of the Act, it must first establish that the records at issue fall within the definition of “law enforcement” as set out in section 2(1) of the Act. The discussion under section 14(2)(a) regarding this issue is similarly applicable to the current discussion.

The purpose of section 14(1)(g) is to provide the institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information. Previous orders have defined intelligence information as:

... information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.
(Orders M-202 and P-650)

The OSC submits that the information contained in the records was gathered by the OSC in relation to various matters which were being investigated and monitored at that time. The OSC also refers to the amount of disclosure already afforded to the appellants. Further, in response to this access request, it has disclosed some additional information from the OSC’s intelligence files. The OSC submits that it is essential that the extent of the OSC’s knowledge about the

individuals, entities and activities referred to in the records at issue remain unknown to the appellants.

I have considered the representations of both parties and am satisfied that disclosure of the information contained in the records at issue would reveal law enforcement intelligence information gathered by the OSC with respect to matters involving the appellants. Accordingly, I find that Records 3, 4 and 5 qualify for exemption under section 14(1)(g). Because Record 4 contains the personal information of the appellants, this record is exempt under section 49(a).

Because of the findings I have made, it is not necessary for me to consider the application of sections 13(1) and 49(b) to the records at issue.

ORDER:

I uphold the OSC's decision.

Original signed by: _____
Laurel Cropley
Inquiry Officer

November 25, 1997