



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1520

Appeal P-9700238

Ontario Insurance Commission



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ontario Insurance Commission (the OIC). The request was for access to the appellant's "registration file as a life agent" with the OIC.

The OIC issued a decision letter granting partial access to the responsive records. The OIC denied access to the remaining records based on the following exemptions:

- law enforcement - sections 14(1)(b), (c) and (d), and 14(2)(a)
- solicitor-client privilege - section 19
- invasion of privacy - section 21(1)

The appellant appealed the OIC's decision to deny access to the remaining records.

A Notice of Inquiry was sent to the OIC, the appellant and five individuals named in the records (the affected persons). Sections 49(a) and (b) were included as issues in the Notice of Inquiry as some of the records appeared to contain the personal information of the appellant.

Representations were received from the OIC, the appellant and one of the affected persons.

RECORDS:

The records include completed application forms for insurance policies, computer printouts, e-mail messages, investigation reports, letters, memoranda and notes.

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 information in the records and I find that they contain the personal information of the appellant. Record 9, with the exception of the last two pages, and Records 10, 14, 16, 18 and 53-73 contain the personal information of other identifiable individuals as well.

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.

INVASION OF PRIVACY

The OIC submits that Records 18 and 53-73 qualify for exemption under section 49(b) of the Act. As I have found that Record 9, with the exception of the last two pages, and Record 10 also contain personal information, I will include these records in my consideration of the application of section 49(b). This section states that where a record contains the personal information of both the appellant and other individuals and the OIC determines that the disclosure of the

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

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 under section 49(b). 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 argues that section 21(3)(b) applies to the records. This section states:

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.

The OIC submits that the appellant was licensed as a life insurance agent until February 1994, at which time the OIC received complaints about the appellant's business practices. In 1996, the appellant submitted two applications to the OIC for a life insurance agent's licence. The OIC indicates that in these applications the appellant failed to disclose information regarding previous convictions under the Criminal Code. The OIC conducted an investigation in light of the non-disclosures and the previous complaints. The investigation was concluded and a Notice of Hearing was issued by the OIC, calling for a hearing before an Advisory Board on July 23, 1997.

The OIC indicates that the hearing was cancelled when the appellant's sponsoring insurance company withdrew its support of his application. The appellant was subsequently charged with two counts of furnishing false information to the OIC in his applications for a life insurance agent's licence contrary to section 447(2)(a) of the Insurance Act. These charges are currently before the provincial court.

It is clear that the records were compiled as part of the OIC's investigation into possible violations of the Insurance Act. I find that the section 21(3)(b) presumption applies to the personal information of individuals other than the appellant in Records 9, 10, 14, 16, 18 and 53 to 73. I find that sections 21(4) and 23 do not apply to the information in the records which falls under the presumption, and it is exempt under section 49(b).

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. Section 49(a) states:

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

where sections 12, 13, **14**, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information. [emphasis added]

SOLICITOR-CLIENT PRIVILEGE

The OIC submits that Records 11, 12, 13 and 19-52 qualify for exemption under section 19 of the Act. This section consists of two branches, which provide a head 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 OIC submits that these records were either prepared for or sent to legal counsel by the client to ask for legal advice in contemplation of litigation, or prepared by or sent by legal counsel to the client in contemplation of litigation.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
(b) the communication must be of a confidential nature, **and**
(c) the communication must be between a client (or his agent) and a legal advisor, **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

In the absence of further evidence from the OIC, I am unable to conclude that Records 11, 12 and 13 were prepared by or for or were sent to or by legal counsel. On their face, they relate to investigation requests and investigative material with no indication of the involvement of anyone other than Investigations Branch staff.

Records 19-52 are a series of confidential written communications between investigative staff and legal counsel within the OIC, which are all directly related to the seeking, formulating or giving of legal advice. In my view, each of these records qualifies for exemption under Branch 1 of section 19, and I find that section 49(a) applies.

LAW ENFORCEMENT

In order for a record to qualify for exemption under sections 14(1)(b), (c) or (d), 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. Section 2(1) of the Act defines “law enforcement” in the following manner:

“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).

In Order P-302, Assistant Commissioner Tom Mitchinson considered whether OIC investigations of complaints against insurance agents under the Insurance Act satisfy this definition. Based on the powers of the Superintendent of Insurance to convene hearings and impose sanctions in connection with such complaints, he found that OIC investigations of this type meet the definition. I agree, and accordingly, I find that the definition of “law enforcement” has been met in this case.

Section 14(1)(b)

The purpose of section 14(1)(b) is to provide the institution with the discretion to preclude access to records in circumstances where disclosure would interfere with an **ongoing** law enforcement investigation [Orders P-324 and P-403].

In its representations, the OIC states that the proceeding before the provincial court is pending and has not been concluded. However, the submissions of the OIC include no evidence to explain how disclosure of these particular records, some of which contains only basic information about the allegations and the appellant, could reasonably be expected to **interfere** with a law enforcement investigation.

In the circumstances of this appeal, I find that the OIC has provided insufficient evidence to establish the application of section 14(1)(b) of the Act.

Section 14(1)(c)

In order to constitute an “investigative technique or procedure” for the purposes of section 14(1)(c), it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective use. The fact that the particular technique or procedure is generally known to the public would normally lead to the conclusion that disclosure would not compromise its effective use and, accordingly, that section 14(1)(c) would not apply (Order 170).

I have reviewed the records and I am not satisfied that the disclosure of any investigative technique or procedure contained therein would hinder or compromise its effective use. Accordingly, I find that the records do not qualify for exemption under section 14(1)(c).

Section 14(1)(d)

Section 14(1)(d) may apply in two different sets of circumstances, namely, where disclosure could reasonably 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.

In this case, the only individuals who could qualify as “confidential sources” are the complainants. However, the OIC disclosed their identities to the appellant in its letter advising him of the complaints. The complainants were identified a second time in the OIC’s letter to the appellant communicating the results of the investigation. Therefore, I find that disclosure of the record would not serve to identify the confidential sources, because their identity is already known to the appellant. Accordingly, I find that the aspect of the exemption summarized under the first bullet point, above, does not apply.

Under the second bullet point, I note that the essential allegations contained in the complaint letter were also disclosed to the appellant in the OIC’s letter to him in which they advised him of the complaint. With respect to any additional information contained in the records, I am of the view that its source can no longer be considered “confidential” because, as noted above, the identities of the individuals who provided the information to the OIC (i.e. the complainants) have been made known to the appellant by the OIC. Therefore, in my view, the aspect of the exemption summarized under the second bullet point, above, also does not apply.

Since the OIC has not satisfied either aspect of this exemption, I find that the record does not qualify for exemption under section 14(1)(d).

Section 14(2)(a)

In order for a record to qualify for exemption under section 14(2)(a) of the Act, the OIC 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.

[Orders 200 and P-324]

The OIC submits that Records 1-10 and 17 qualify for exemption under section 14(2)(a). Records 2, 3, 5, 6, 7, 8, 9, 10 and 17 do not, in my view, contain any formal accounting of the results of the collation and consideration of information (Order 200). Accordingly, I find that these records do not qualify as a "report" within the meaning of section 14(2)(a) and are not, therefore, exempt under this section.

Records 1 and 4 are Investigation Reports prepared by the investigator assigned to the matter and addressed to the Senior Manager of Investigations and Compliance at the OIC. The reports contain background information, details of the investigation, conclusions and recommendations. In my view, these records contain a formal statement or account of the results of the collation and consideration of information, and thus qualify as a "report". These records were 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 Records 1 and 4 qualify for exemption under section 14(2)(a) and are, therefore, exempt under section 49(a) of the Act.

ORDER:

1. I order the OIC to disclose Records 2, 3, 5, 6, 7, 8, the last two pages of Record 9, and Records 11-17 with the exception of the personal information of individuals other than the appellant in Records 14 and 16, to the appellant by sending him a copy by **March 2, 1998** but not earlier than **February 23, 1998**.
2. I uphold the OIC's decision not to disclose the remaining records.
3. In order to verify compliance with this order, I reserve the right to require the OIC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ January 26, 1998