



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

ORDER P-1607

Appeal P_9800010

Ontario Insurance Commission



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NATURE OF THE APPEAL:

The Ontario Insurance Commission (the OIC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to a named individual (the affected person). The requester provided the OIC with the affected person's consent to disclose his personal information to the requester. The OIC identified the responsive records and granted partial access. The OIC denied access to the remaining records, in whole or in part, pursuant to sections 14(1) (law enforcement), 19 (solicitor-client privilege) and 21(1) (invasion of privacy). The requester appealed the decision to deny access.

The requester, now the appellant, represents 16 named individuals who had retained the services of the affected person as an insurance agent. As a result of allegations of criminal misconduct against the affected person, an investigation was conducted by the OIC and its predecessor, the Ministry of Financial Institutions. The 15 records at issue relate to the allegations and the resulting investigation.

The records consist of memoranda, letters and reports as described on the Index of Records provided by the OIC to the appellant and to this office. The OIC denied access to Records 1-14 in their entirety and to Record 15 in part.

This office provided a Notice of Inquiry to the appellant and the OIC. Representations were received from the OIC only. The OIC indicates that it has reconsidered its earlier decision and is now granting access to Records 2, 8 and 12 in whole and to Records 13, 14 and 15 in part. Therefore, these records or parts are no longer at issue in this appeal. Therefore, I will only address the application of the exemptions claimed by the OIC to Records 1, 3-7, 9, 10, 11, 13, 14 and 15.

Subsequent to the receipt of representations, the OIC indicated that it had located 20 additional responsive records and has issued a decision regarding access. Should the appellant object to the OIC's position regarding access to these records, he may file a separate appeal.

In its representations, the OIC indicates that it is also applying the discretionary exemption provided by section 19 to Record 9. I will consider this matter as a preliminary issue below.

PRELIMINARY MATTER:

LATE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTION

Upon receipt of the appeal, this office provided the OIC with a Confirmation of Appeal notice. This notice provided that the OIC had 35 days from the date of this notice (i.e. up to February 18, 1998) to raise additional discretionary exemptions not claimed in the decision letter. No additional exemptions in respect of any of the records were claimed during this period.

Subsequently, in its representations, the OIC stated that it was also claiming the application of section 19 to Record 9. By this time, the expiry date set out in the Confirmation of Appeal had passed by over five months.

It has been determined in previous orders that the Commissioner has the power to control the process by which an 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 may raise new discretionary exemptions not claimed in its decision letter.

In Order P-658, former 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 the Inquiry Officer's reasoning and adopt it for the purposes of this appeal.

The Ministry states that the section 19 was not claimed for Record 9 due to an oversight and submits that a chronological review of the records shows that the record is related to other records for which section 19 has been claimed. In my view, the OIC has not provided an adequate explanation for the delay in raising the additional discretionary exemptions. In my view, a departure from the 35-day timeframe is not justified in the circumstances of this appeal. Therefore, I will not consider the application of section 19 to Record 9.

DISCUSSION:

LAW ENFORCEMENT

In order for a record to qualify for exemption under sections 14(1)(a), (c), (d), (g) or 14(2)(a), the matter to which the record relates must 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.

The OIC claims that the exemptions in sections 14(1)(a), (c) and (g) apply to Records 3, 7 and 9 and that section 14(1)(d) applies to Records 4 and 5.

The OIC has also applied the exemption in section 14(2)(a) to withhold access to Records 1 and 6. These sections read as follows:

- (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
 - (a) interfere with a law enforcement matter;
 - (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 a confidential source;
 - (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (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 OIC submits that disclosure of Records 4 and 5 would reveal the confidential source of a complaint made against the affected person. The OIC states that the regulation of insurance agents depends on the ability of the public and other interested parties to make complaints without fear of having their identity disclosed. The OIC refers to section 116 of the Insurance Act which provides that information or records disclosed to the OIC concerning a person licenced or applying for a licence is privileged and cannot be used as evidence in any court proceeding brought by or on behalf of the person.

The OIC goes on to state that while the investigation is no longer ongoing, disclosure of Records 3, 7 and 9 would reveal techniques and procedures used by the OIC to investigate similar offences and that it would also affect its ability to gather information from insurance companies and the public at large.

With respect to Records 1 and 6, the OIC states that the records are investigation reports prepared by its Investigations section as part of investigations into possible breaches of the Insurance Act. The OIC submits that the reports contain the findings of the investigators and their recommendations as to the courses of action to be taken.

Section 14(1)(a)

The purpose of the exemption contained in section 14(1)(a) 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 that matter.

It is clear, both from the face of the records and from the representations of the OIC that the investigation of the OIC has been completed and is not ongoing. Therefore, the exemption provided by section 14(1)(a) of the Act has no application to Records 3, 7 and 9.

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).

The records consist of an internal handwritten memo, a request for investigation and a request for litigation. Having reviewed the records, I find that they do not contain information about techniques or procedures that are not generally known to the public. I am not satisfied that disclosure of Records 3, 7 and 9 would hinder or compromise the effective use of investigative methods employed by the OIC. I find, therefore, that the records do not qualify for exemption under section 14(1)(c) of the Act.

Section 14(1)(g)

In order to qualify for exemption under this section, the OIC must demonstrate how disclosure of the information in the record could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons.

I have reviewed the records. I find that there is nothing on their face which could lead me to conclude that disclosure could reasonably be expected to result in the harms specified by the section. The OIC has confirmed that its investigation has ended and the file is closed. I find, therefore, that the exemption in section 14(1)(g) does not apply to the records.

The OIC has not claimed any other exemptions for Records 3 and 7; as no mandatory exemptions apply, these records should be disclosed to the appellant. With respect to Record 9, I have already determined that I will not allow the OIC to raise an additional discretionary exemption at this stage of the inquiry; no mandatory exemptions apply to this record and it should be disclosed to the appellant.

Section 14(1)(d)

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

- (1) disclose the identity of a confidential source of information in respect of a law enforcement matter, **or**
- (2) disclose information furnished only by the confidential source.

Record 4 is a letter to the OIC from a former sponsor of the affected person. Record 5 is a Notice of Termination of Agent standard OIC form which relates to the affected person. The information contained in the two records pertains to the consequences of the affected person's alleged wrongdoing and is information that is known both to the appellant and the affected person. In the circumstances of this case, I find that the former sponsors of the affected person do not qualify as "confidential sources".

Under the second requirement set out above, the information is known to the appellants and the affected person and can no longer be considered to be information furnished only by the confidential source. Therefore, in my view, Records 4 and 5 do not qualify for exemption under section 14(1)(d). The OIC has not claimed any other discretionary exemption for these records; no mandatory exemptions apply and they should be disclosed to the appellant.

Section 14(2)(a)

In order for Records 1 and 6 to qualify for exemption under section 14(2) 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-234]

I have reviewed the records. I note that both the records were prepared by investigators of the OIC and 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 qualify as "reports" for the purpose of section 14(2)(a). Accordingly, they qualify for exemption under this section.

SOLICITOR-CLIENT PRIVILEGE

The OIC submits that Records 10 and 11 are exempt 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 Record 10 was prepared by legal counsel for her client (the OIC) and includes a draft letter to be used by the client. The OIC submits that Record 11 is a memorandum containing a legal opinion from Legal counsel to her client. The OIC submits that the records qualify for exemption under both branches of the section 19 exemption.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the OIC 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]

Record 11 is a memorandum from legal counsel to the Deputy Superintendent of Insurance which contains a legal opinion. Record 10 is a memorandum between the same parties which includes a draft letter, referred to in the opinion (Record 11). I am satisfied that the records qualify as confidential written communications between a legal advisor and her client, which are directly related to the seeking, formulating and giving of legal advice. I find that Records 10 and 11 qualify for exemption under Branch 1 of section 19 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. The OIC has withheld access to the severed portions of Records 13, 14 and 15, on the basis that their disclosure would be an unjustified invasion of personal privacy. I have reviewed this information and find that it relates to individuals other than the appellant and the affected person and that it qualifies as the personal information of those individuals.

INVASION OF PRIVACY

The OIC has not provided any submissions with respect to the application of section 21(1), a mandatory exemption, of the Act other than to state that all the information in the records which relates to the appellant and the affected person has been disclosed and the remaining parts related only to other individuals.

I have already determined that the withheld parts of the records contain the personal information of other identifiable individuals. I have not been provided with any representations from the appellant. In the absence of evidence to show that disclosure of the information would not be an unjustified invasion of personal privacy, I find that it would constitute an unjustified invasion of the personal privacy of individuals other than the appellant and the affected person. I find, therefore, that section 21(1)(f) does not apply and the undisclosed portions of Records 13, 14 and 15 are exempt under section 21(1).

ORDER:

1. I order the OIC to disclose Records 3, 4, 5, 7 and 9 to the appellant by sending him a copy by **September 17, 1998**.
2. I uphold the OIC's decision to withhold access to the remaining records, in whole or in part.
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: _____
Mumtaz Jiwan
Adjudicator

August 27, 1998