



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

INTERIM ORDER P-1636

Appeal P_9800104

Ontario Securities Commission
(Revised)



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NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for copies of all records held by the Ontario Securities Commission (the OSC) relating to the requester and to six named corporations. The requester clarified that he was interested in obtaining records created by the OSC between 1979 and 1997 relating to any investigations, inquiries or comments with respect either to himself or to any of the corporations. The requester later narrowed the scope of his request to include only those records which were compiled between 1985 and 1997.

The Minister of Finance is the "head" of the OSC for the purposes of the Act. Requests and appeals under the Act are dealt with on behalf of the OSC by the Ministry. For ease of reference, this order will refer to actions taken by the Ministry on the OSC's behalf as actions of the OSC.

The OSC located a large number of documents responsive to the request and issued a decision granting access to some records and denying access to others, pursuant to the following exemptions contained in the Act:

- advice or recommendations - section 13(1);
- law enforcement - sections 14(1)(a), (b), (c) and (g), 14(2)(a) and (c) and 14(3);
- relations with other governments - section 15(b);
- invasion of privacy - sections 21(1) and 49(b);
- discretion to refuse requester's own information - section 49(a).

The OSC provided the requester with an index describing each responsive document and the exemptions which it applied to each. The OSC also stated that a fee of \$36.40 was being charged for photocopying of those records which it proposed to disclose. The requester, now the appellant, appealed the OSC decision.

During the mediation of the appeal, the Mediator confirmed with the appellant that he was not appealing the fee quoted by the OSC and was not interested in receiving the records which the OSC was prepared to disclose, as he already has these documents. The appellant also indicated that he was not interested in obtaining access to Record 36. Accordingly, this record is no longer at issue in this appeal.

After reviewing the records, the Mediator contacted the OSC to clarify the existence of certain enclosures and appendices which were referred to in other records, but did not form part of the documents provided to this office. The Mediator also asked for an explanation as to the reason for certain discrepancies between the records and the index which was provided to this office. The OSC responded as follows:

- (1) The attachments listed in Record 38 were not provided to the Commission by the Toronto Stock Exchange (the TSE) and therefore, the Ministry does not have a copy of the attachments.
- (2) The information listed in Record 81 is contained in Records 78 through 244.
- (3) Records 80, 126, 146, 158, 201 and 216 constitute each of the individual pages of an OSC memo dated October 3, 1997.
- (4) Record 193 is the result of a database search. Only that page contains information which is relevant to the request.
- (5) Paragraph 9 of section 67(2) of the Act prohibited it from providing copies of the attachments referred to in Records 24, 29, 31 and 56.

The Mediator advised the OSC that even if it maintains that section 67 applies to the attachments to Records 24, 29, 31 and 56, it must provide this office with a copy of them in order to enable me to determine whether the exclusion in section 67 properly applies to this information. Further, the Mediator advised the OSC that it should issue a revised decision addressing the issue of the late raising of section 67.

A Notice of Inquiry was provided to the OSC and the appellant seeking their representations on the issues raised by this appeal. Submissions were received from both parties. The OSC subsequently contacted this office and left the Mediator with the impression that it did not have custody or control of the attachments to Records 24, 29, 31 and 56. This office sent a Supplementary Notice of Inquiry to the OSC and the appellant. This Supplementary Notice asked the parties to address the issue of the OSC's custody or control over these records. Representations were received from both parties. The appellant raised serious concerns about the apparent change in the OSC's position regarding these records. The OSC did not agree with the characterization of this issue as one of custody or control. The OSC's Freedom of Information and Privacy Co-ordinator clarified that he did not have a copy of these records for the Commissioner's review because section 16 of the Securities Act forbids their disclosure. The OSC referred to its original representations on this issue. I am satisfied that there is no question whether the OSC has custody or control of the attachments to Records 24, 29, 31 and 56. Rather, the issue regarding these records is whether the OSC is precluded from disclosing them to this office because of the operation of section 67(2) of the Act and section 16(1) of the Securities Act. I will address this issue below.

PRELIMINARY ISSUE:

As I noted above, the OSC indicated that it did not have copies of the attachments to Records 24, 29, 31 and 56 and that, even if it had copies of these documents, it is precluded from disclosing them to this office because of the operation of section 67(2) of

the Act and section 16(1) of the Securities Act. As a result, the OSC also declined to issue a decision letter with respect to these records.

Paragraph 9 of section 67(2) of the Act provides that:

The following confidentiality provisions prevail over this Act:

9. Sections 16 and 17 of the Securities Act,
Section 16(1) of the Securities Act states:

Except in accordance with section 17, no person or company shall disclose at any time, except to his, her or its counsel,

- (a) the nature or content of an order under section 11 or 12; or
- (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13.

The OSC's sole submission in support of this contention is the following:

It is the respondent's submission that certain records which are not itemized herein and which fall within the categories enumerated in subsection 16(1) of the *Securities Act* are exempt from disclosure pursuant to section 16(1).

The appellant did not address this issue in his submissions.

In Order P-623, which was upheld by both the Ontario Court of Justice (Divisional Court) (Minister of Health et al. v. Holly Big Canoe, Inquiry Officer et al. [(29 June 1994), Toronto 111/94]) and the Court of Appeal for Ontario [(May 8, 1995) Toronto Doc. C20757]), Adjudicator Holly Big Canoe made the following findings in determining a similar question with respect to mental health records. She found that:

The first issue which arises, then, is whether the words "This Act does not apply" in section 65(2) of the Act mean that the whole Act does not apply to these records, including the appeal process and section 52(4) of the Act.

Section 1(a)(iii) of the Act provides that one of the purposes of the Act is to provide a right of access to information in accordance with the principle

that "decisions on the disclosure of government information should be reviewed independently of government". In keeping with this principle, the Legislature created an independent, expert review authority (the Commissioner) to determine issues relating to access to information.

The appeal provisions of the Act provide that any decision of the head of an institution relating to access to records can be appealed by the requester to the Commissioner. The Commissioner (or his delegate) has the statutory duty to dispose of the issues raised in an appeal, and makes decisions in respect of an appeal by issuing an order pursuant to section 54(1) of the Act, which states:

After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

In my view, section 65(2) can apply only to the records which fall within the scope of that section. While the Legislature clearly intended that these records should fall outside the purview of the Act, I do not believe that the Legislature intended to have the threshold issue of whether or not records fall within the scope of this provision determined by a non-independent body, such as the Ministry, whose decision would not be reviewable.

While the Ministry must determine at first instance whether section 65(2) applies precluding access to the requester, the Commissioner, too, must be satisfied of the relevance and application of the provision to the records upon receipt of an appeal. This duty of the Commissioner is fundamental to the effective operation of the Act, the principle of providing a right of access to information under section 1(a), and the principle that decisions on the disclosure of government information should be reviewed independently of government under section 1(a)(iii).

In my view, notwithstanding a claim by the Ministry that the records in question fall within the scope of section 65(2), the Commissioner (or his delegate) does have the power to compel the production of records claimed to be covered by section 65(2).

This power to compel initially would be exercised for the limited purpose of determining whether or not the records fall within the scope of section 65(2) of the Act. If, having reviewed the records, I determine that the Ministry's claim is correctly made, pursuant to section 65(2) the records would be returned to the Ministry and the appeal would be closed, since I would not have the jurisdiction to conduct a further inquiry. However, if I determine that the Ministry's claim is not validly made with respect to some or all of the records (i.e., that section 65(2) does not apply to some

or all of the records), then I will be required to proceed with the inquiry and determine the application of the Act to the records.

I adopt the reasoning and the approach outlined above for the purposes of this appeal. The first question for me to determine is whether the attachments to Records 24, 29, 31 and 56 contain information which falls within the ambit of section 16(1) of the Securities Act and, accordingly, outside the ambit of the Act as a result of the operation of paragraph 9 of section 67(2). Without having the opportunity to examine these documents, which the OSC has identified as being responsive to the request, I am unable to make such a determination and am unable to review the OSC's claim that these records fall within the ambit of section 65(2).

I will, therefore, order the OSC to produce to this office the attachments to Records 24, 29, 31 and 56 which are referred to in the index provided by the OSC so that I may determine whether I have jurisdiction to conduct a further inquiry with respect to them, or whether they properly fall within the ambit of the confidentiality provision in section 16(1) of the Securities Act which is referred to in paragraph 9 of section 67(2).

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act defines the term "personal information" as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,

- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

I have carefully reviewed each of the records at issue in this appeal. I find that many of them contain only the personal information of identifiable individuals other than the appellant. Other records do not contain any personal information whatsoever as they relate only to various corporations or refer to individuals solely in their professional or employment capacities.

In Reconsideration Order R-980015, former Adjudicator Donald Hale reviewed the jurisprudence relating to the definition of the term "personal information" as it relates to individuals who act as the representative of their employer organization. He found that:

... the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.

In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for

speaking on its behalf. Individuals expressing the position of an organization act simply as a conduit between the intended recipient of the message and the organization. The voice is that of the organization rather than that of the individual delivering the message. In the usual case, the views expressed are those of the organization, as opposed to the personal opinions or views of the individual within the meaning of section 2(1)(e) of the Act. Further, this information will not be considered to be “about” the individual, for the reasons set out above.

In my view, much of the information contained in the records which refers to employees of the OSC, various corporations, the TSE or the Canadian Dealing Network Inc. (the CDN) is not “personal information” within the meaning of section 2(1). Rather, it relates to these individuals only in the context of their employment or professional responsibilities in carrying out their normal duties. Similarly, information which identifies individuals as officers or directors of incorporated entities cannot be considered to be their “personal information” for the purposes of section 2(1). Where that information is linked to other personal information, however, such as a home address or telephone number, that personal information falls within the ambit of the definition of that term in sections 2(1)(d) and (h).

The records pertain to several OSC investigations into the activities of a number of companies involved in the buying, selling and promotion of stocks. The OSC investigations examined a large number of transactions involving these firms, which necessitated the compilation of a great deal of information about the trading in securities by many identifiable individuals. As a result, many of the records contain a great deal of information which qualifies as “personal information” within the definition in section 2(1)(b) as it relates to “financial transactions” in which each of these individuals, including the appellant, were involved.

Many of the records also document various computer searches undertaken by the OSC in the course of their investigations using the ONBIS system operated by the Ministry of Consumer and Commercial Relations. When a search of an individual or company name was made, and a “hit” was registered, other information about that individual, such as their date of birth, home address, social insurance number, employer and place of birth would also appear. This information, which is reflected in many of the responsive records, also qualifies as the personal information of these individuals under sections 2(1)(a), (b), (c), (d) and (h) of the definition.

The records may be classified into 13 categories of documents, depending on their content. I have listed each of these below, along with my findings with respect to whether they contain “personal information” and, where they do, to whom it relates.

Record Category 1

Records 1, 3, 5, 6, 8 and 9 relate to a specific complaint received by the OSC of improper trading. Records 1, 3, 5 and 6 contain only the personal information of individuals other than the appellant. Record 8 contains only the personal information of the appellant

while Record 9 does not contain any personal information within the definition in section 2(1).

Record Category 2

Records 10, 11, 12 and 19 relate to a specific query received by the OSC and contain only the personal information of individuals other than the appellant.

Record Category 3

Records 20, 21, 22, 24, 25, 26, 28, 29, 30, 34, 53, 60, 79, 80, 83, 126, 131, 146, 149, 158, 168, 173, 193, 201, 216, 227 and 229 consist of various interoffice memoranda, and individual pages of memoranda, prepared by staff of the OSC, the TSE and the CDN relating to the investigations which each had undertaken. Records 20, 26, 29, 30, 79, 131 and 173 contain the personal information of the appellant and other identifiable individuals. Records 21, 22, 24, 25, 26, 34, 53, 60 and 83 do not contain any personal information within the meaning of section 2(1). Records 28, 80, 126, 146, 149, 158, 168, 193, 201, 216, 227 and 229 contain the personal information of individuals other than the appellant.

Record Category 4

Records 23, 32, 33, 35, 39, 40, 41, 44, 49, 51, 57, 58, 62 and 77 consist of notes taken by various OSC staff in the course of their investigations. Records 23, 44, 51, 57 and 62 contain the personal information of the appellant and other identifiable individuals. Records 32, 33, 35 and 49 include the personal information of individuals other than the appellant. Records 39, 40, 41, 58 and 77 do not contain personal information as defined by section 2(1).

Record Category 5

Records 27, 37, 55, 56, 61, 63, 162, 218, 222, 231 and 232 are correspondence received or prepared by staff of the OSC, TSE or CDN. Records 37, 61, 162, 231 and 232 contain only the personal information of individuals other than the appellant. Records 27, 55, 56, 63, 218 and 222 do not contain any personal information. None of the records which comprise Record Category 5 contain any of the personal information of the appellant.

Record Category 6

Record Category 6 consists of Records 31, 38 and 48 which are investigation reports. Records 38 and 48 contain only the personal information of individuals other than the appellant. Record 31 contains the personal information of the appellant.

Record Category 7

Records 45, 52, 132, 150, 155, 205, 213 and 214 are entitled "Market Surveillance - Timely Disclosure Analysis" and were prepared by various regulators within the securities industry in the course of their investigations into allegations of improper trading activities. Record 45 does not contain any personal information while Records 132, 150, 155, 205, 213 and 214 contain only the personal information of individuals other than the appellant. Record 52 includes the personal information of the appellant.

Record Category 8

Records 42 and 129 are corporate records which are prepared and filed with the Ontario Government's Ministry of Consumer and Commercial Relations. Record 42 contains the home address and telephone number of an identifiable individual, thereby satisfying the definition of personal information contained in section 2(1)(d). Record 129 does not contain any personal information.

Record Category 9

Records 54, 130, 174, 175, 179, 198, 200, 219 and 233 are stock trading reports prepared by various brokerage firms at the request of the securities regulators who conducted the investigations which are the subject of the records. Records 174, 175, 198, 200 and 233 contain the personal information of individuals other than the appellant. Records 54 and 179 contain the personal information of the appellant while Records 130 and 219 do not contain any personal information within the meaning of section 2(1).

Record Category 10

Record 78 is an "Investigation Opening Slip" prepared by the OSC which contains the personal information of the appellant and other identifiable individuals.

Record Category 11

Record 81 is an index prepared by the OSC which contains the personal information of the appellant.

Record Category 12

Records 128, 134, 161, 180, 206, 208, 217, 230 and 235 are "New Client Application Forms" which are completed by investors at the time they register with an individual brokerage firm. Records 134, 161, 206, 208, 230 and 235 contain the personal information of individuals other than the appellant. Record 180 contains the personal information of the appellant while Records 128 and 217 contain only information relating to a corporation and do not, accordingly, qualify as "personal information" within the meaning of section 2(1).

Record Category 13

Records 82, 84, 85, 86, 87, 88, 89, 122, 124, 125, 133, 145, 147, 148, 151, 152, 154, 156, 157, 159, 160, 163, 164, 167, 169, 170, 171, 172, 176, 177, 178, 192, 194, 195, 196, 197, 199, 203, 204, 207, 209, 210, 211, 212, 215, 220, 221, 223, 224, 225, 226, 228, 234, 236, 238, 239, 240, 241, 242, 243 and 244 are printouts of searches conducted of the Ontario Ministry of Consumer and Commercial Relations ONBIS system. Records 84, 85, 86, 89, 133, 145, 148, 154, 156, 157, 159, 160, 163, 164, 167, 168, 170, 171, 172, 176, 177, 192, 194, 195, 196, 197, 199, 203, 204, 207, 209, 210, 211, 212, 215, 220, 223, 224, 225, 226, 228, 234, 238, 239, 240, 241, 242, 243 and 244 contain only the personal information of individuals other than the appellant. Record 178 contains the personal information of the appellant while Records 82, 87, 88, 124, 125, 135, 147, 151, 152, 221 and 236 do not contain any information which qualifies as personal information within the meaning of section 2(1).

By way of summary, the following are my findings with respect to the content of each of the records:

1. Records 1, 3, 5, 6, 10, 11, 12, 19, 28, 32, 33, 35, 37, 38, 42, 48, 49, 61, 80, 84, 85, 86, 89, 126, 132, 133, 134, 145, 146, 148, 149, 150, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 170, 171, 172, 174, 175, 176, 177, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 220, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 238, 239, 240, 241, 242, 243 and 244 contain the personal information of a number of identifiable individuals other than the appellant.
2. Records 8, 20, 23, 26, 29, 30, 31, 44, 51, 52, 54, 57, 62, 78, 79, 81, 131, 173, 178, 179 and 180 contain the personal information of the appellant and other identifiable individuals.
3. Records 9, 21, 22, 24, 25, 27, 34, 39, 40, 41, 45, 53, 55, 56, 58, 60, 63, 77, 82, 83, 87, 88, 124, 125, 128, 129, 130, 135, 147, 151, 152, 217, 218, 219, 221, 222 and 236 do not contain any information which qualifies as “personal information” under the definition of that term in section 2(1).

INVASION OF PRIVACY

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.

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the OSC 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.

Where, however, the record only contains the personal information of other individuals, section 21(1) of the Act prohibits an institution from disclosing it except in the circumstances listed in sections 21(1)(a) through (f). Of these, only section 21(1)(f) could apply in this appeal. It permits disclosure if it "does not constitute an unjustified invasion of personal privacy."

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 OSC 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 OSC must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The OSC submits that the personal information contained in the records was compiled as part of various OSC investigations into possible violations of the Securities Act conducted between 1985 and 1997. It argues that the disclosure of such information is presumed to constitute an unjustified invasion of personal privacy under section 21(3)(b).

The appellant suggests that any privacy concerns which may arise in the context of sections 21(1) and 49(a) and (b) with respect to the personal information contained in the records may be addressed by severing the personal information in the requested documents.

Having reviewed the representations and the records, I have made the following findings:

1. The records were compiled and are identifiable as part of the OSC's investigations under the Securities Act and, therefore, the personal information contained in Records 1, 3, 5, 6, 8, 10, 11, 12, 19, 20, 23, 26, 28, 29, 30, 31, 32, 33, 35, 37, 38, 42, 44, 48, 49, 51, 52, 55, 57, 61, 62, 78, 79, 80, 81, 84, 85, 86, 89, 126, 131, 132, 133, 134, 145, 146, 148, 149, 150, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 220, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 238, 239, 240, 241, 242, 243 and 244 meets the requirements of the presumption found under section 21(3)(b) of the Act. None of the exceptions under section 21(4) apply and the appellant has not raised the possible application of section 23 of the Act.
2. Therefore, I find that the personal information contained in Records 1, 3, 5, 6, 10, 11, 12, 19, 28, 32, 33, 35, 37, 38, 42, 48, 49, 61, 80, 84, 85, 86, 89, 126, 132, 133, 134, 145, 146, 148, 149, 150, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 170, 171, 172, 174, 175, 176, 177,

192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 220, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 238, 239, 240, 241, 242, 243 and 244 is exempt from disclosure under section 21 of the Act, and the personal information contained in Records 8, 20, 23, 26, 29, 30, 31, 44, 51, 52, 54, 57, 62, 78, 79, 81, 131, 173, 178, 179 and 180 is exempt from disclosure under section 49(b) of the Act. I have highlighted in yellow on the copy of the records which I have provided to the OSC's Freedom of Information and Privacy Protection Co-ordinator those portions of the records which are exempt under these sections.

3. The information remaining in each of the records described in paragraph 2 which does not qualify as "personal information", as well as the information contained in Records 9, 21, 22, 24, 25, 27, 34, 39, 40, 41, 45, 53, 55, 56, 58, 60, 63, 77, 82, 83, 87, 88, 124, 125, 128, 129, 130, 135, 147, 151, 152, 217, 218, 219, 221, 222 and 236, which I found above did not contain "personal information", is not exempt from disclosure under either sections 21(1) or 49(b).

LAW ENFORCEMENT

The OSC has claimed the application of sections 14(1)(a), (b), (c) and (g) and 14(2)(a) and (c) of the Act to the remaining records. These sections state:

- (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;
 - (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;

- (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

Sections 14(1)(a), (b), (c) and (g)

In order for the records to qualify for exemption under sections 14(1)(a), (b), (c) and/or 14(1)(g) of the Act, the subject matter referred to in them 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).

In Order 30, former Commissioner Sidney B. Linden held that investigations by the OSC under the provisions of the Securities Act are properly considered law enforcement matters under the definition of that term in section 2(1). Accordingly, this element of sections 14(1)(a), (b), (c) and (g) has been satisfied.

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

The OSC has not provided me with any evidence which would indicate that the law enforcement matters or investigations reflected in the records remain ongoing. In fact, the records indicate clearly that in several of the subject investigations, the OSC had concluded its investigation.

In addition, beyond simply asserting that the disclosure of some of the records would reveal investigative techniques or interfere with the gathering of or would reveal investigative techniques of the OSC, the OSC has not provided any explanation as to why or how the disclosure of the information in the records would “reveal investigative techniques and procedures currently in use or likely to be used in law enforcement” as

required by section 14(1)(c). Nor has the OSC provided any evidence as to why this information should be considered “law enforcement **intelligence** information” or how the disclosure of the information could reasonably be expected to interfere with the gathering of law enforcement intelligence information under section 14(1)(g). Neither do the records themselves contain any information which would enable me to make a finding that their disclosure would give rise to the harms contemplated by sections 14(1)(c) or (g).

Accordingly, in my view, the OSC has not established the applicability of sections 14(1)(a), (b), (c) and (g) of the Act to the records for which this exemption has been claimed.

Section 14(2)(a)

The OSC has claimed that Records 1, 8, 20, 21, 22, 24, 25, 26, 28, 29, 30, 31, 34, 38, 45, 48, 51, 79, 80, 83, 126, 131, 132, 146, 149, 150, 155, 158, 168, 173, 201, 205, 213, 214, 216, 227 and 229 qualify for exemption under section 14(2)(a). In order for a record to qualify for exemption under section 14(2)(a) of the Act, the OSC 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.

Part One of the Test

In Order 200, former Commissioner Tom Wright made the following comments about part one of the test:

The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be 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.

In my view, the information recorded in those portions of Records 1, 21, 22, 24, 34, 45, 80, 83, 126, 131, 132, 146, 150, 155, 158, 168, 173, 201, 205, 213, 214, 216, 227 and 229 which is not exempt under section 21(1) does not qualify as a “report” within the meaning of section 14(2)(a). These records consist only of observations or recordings of fact which do not include any formal statement or account of the results of the collation or consideration of information. As a result, they do not meet the first part of the test and

cannot qualify for exemption under section 14(2)(a). The remaining records to which the OSC has applied the exemption in section 14(2)(a) meet the requirement that they be a formal statement or account of the results of the collation and consideration of information, however.

Part Two of the Test

Records 8 and 149 are reports prepared by the CDN for the OSC following CDN's investigation of possible insider trading in the securities of one of the companies named by the appellant in his request, in contravention of the provisions of the Securities Act. I find that these reports were prepared in the course of a law enforcement investigation within the meaning of section 14(2)(a). Therefore, Records 8 and 149 meet the second part of the test in section 14(2)(a).

Records 20, 25, 26, 28, 29, 30, 31, 48, 51 and 79 are internal OSC reports prepared in the course of various inspections and investigations which it undertook into the activities of the appellant and the companies named in the request. As these reports were prepared in the course of the OSC's law enforcement investigations, they also satisfy part two of the test.

Record 38 is an investigation report prepared by the TSE, a copy of which was provided to the OSC. I find that it too was prepared in the course of its law enforcement investigation into the activities of one of the companies named in the appellant's request. The second part of the section 14(2)(a) test has been met with respect to this document, as well.

Part Three of the Test

In order to meet the third part of the test, the OSC must establish that the agency which prepared the report has the function of enforcing and regulating compliance with a law. Previous orders of the Commissioner's office have established that the OSC qualifies as such an agency (Orders 30, P-548, P-1321 and P-1492). I am satisfied that Records 20, 25, 26, 28, 29, 30, 31, 48, 51 and 79, all of which are reports prepared by the OSC, meet the requirements of the third part of the test and qualify for exemption under section 14(2)(a). Because Records 26, 29, 30, 31, 51 and 79 contain the personal information of the appellant, they are exempt from disclosure under section 49(a).

In Order P-548, the TSE was found to be acting as agent for the OSC in the conduct of an investigation into allegations of violations of the Securities Act. Similarly, I find that Record 38 was prepared by the TSE in its capacity as agent for the OSC and that the investigation report was, therefore, prepared by an agency which has the function of enforcing and regulating compliance with a law, as contemplated by section 14(2)(a).

The CDN is a subsidiary of the TSE which operates the over-the-counter equities market for companies which are unable to meet the capitalization requirements of the TSE due to their small size. At the time that the investigations which are the subject of Records 8

and 149 were undertaken, the CDN did not have the legal authority to sanction dealers and promoters of securities but would conduct investigations into inappropriate or illegal activities and report on them to the TSE and OSC. I find that in the circumstances surrounding the creation of Records 8 and 149, the CDN was also acting as agent for the OSC in its capacity as a subsidiary of the TSE, in much the same fashion as was the case in Order P-548.

In the present case, following its investigation into the activities of the company, the CDN provided copies of both Records 8 and 149 to the OSC to enable the OSC to take any steps it might deem necessary. As noted above, the CDN acted as the agent for the OSC, an agency which has the function of enforcing and regulating securities legislation. The third part of the section 14(2)(a) test has been satisfied with respect to Records 8 and 149 and they qualify for exemption under that section. As these records contain the personal information of the appellant, they are exempt under section 49(a).

Section 14(3)

The OSC has also claimed the application of section 14(3) to a number of the records which it has listed in the index which it provided to the appellant. This section states:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

The OSC has not, however, refused to confirm or deny the existence of any of the records at issue in this appeal. The appellant was provided with an index describing in some detail the nature of each of the responsive records. In the circumstances, it would be absurd to consider the application of section 14(3) since the OSC has already confirmed their existence.

ADVICE OR RECOMMENDATIONS

The OSC has claimed the application of the section 13(1) exemption to Records 1, 9, 25, 26, 29, 30, 31, 37, 38, 48, 51 and 79. I have found above that part of Record 1 is exempt under section 21(1) and that Records 25, 26, 29, 30, 31, 38, 48, 51 and 79 are exempt in their entirety under the law enforcement exemption in section 14(2)(a). Accordingly, it is only necessary for me to determine if the remaining portions of Record 1 and Records 9 and 37 are subject to the section 13(1) exemption.

Section 13(1) provides:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The “advice or recommendations” exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making [Orders 94 and M-847]. Put another way, its purpose is to ensure that:

... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head’s ability to take actions and make decisions without unfair pressure [Orders 24 and P-1363].

Previous orders of this office have stated the following with respect to the meaning of the words “advice” and “recommendations” [Orders 118, P-348, P-363 and P-883]:

“Advice” for the purposes of section 13(1) of the Act must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. “Recommendations” are to be viewed in the same vein.

Record 1 is a memorandum dated December 14, 1995 from OSC Counsel to the Manager of Enforcement Inquiries. I find that paragraph 3 of this document contains the recommendation made by one public servant to a senior public servant who was in a position to accept or reject it during the deliberative process and, therefore, meets the criteria for the exemption in section 13(1). Paragraphs 1 and 2 of Record 1 contain factual background information which does not amount to advice or recommendations. Nor would their disclosure reveal any such information. As I indicated above, paragraph 4 is exempt under section 21(1).

Record 9 is a record of a conversation which took place between staff at the CDN and the OSC in which an employee of the CDN recommends a line of questioning to be pursued by the OSC in investigating a company. In my view, the information contained in Record 9 qualifies as the recommendation of a suggested course of action of an individual acting on behalf of an institution which will ultimately be accepted or rejected by its recipient during the deliberative process. Therefore, this information falls within the ambit of section 13(1).

I have found above that portions of Record 37 are exempt from disclosure under section 21(1). I find that the remainder of this record does not contain, nor would its disclosure reveal, either advice or recommendations as described by section 13(1). Record 37 is not, therefore, exempt under section 13(1).

RELATIONS WITH OTHER GOVERNMENTS

The OSC has claimed the application of section 15(b) to Records 167, 170, 178, 195, 196, 199, 210, 223, 241 and 242. Section 15(b) states:

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

- (b) reveal information received in confidence from another government or its agencies by an institution;

and shall not disclose any such record without the prior approval of the Executive Council.

In order for a record to qualify for exemption under section 15(b), the OSC must establish that:

1. the records reveal information received from another government or its agencies; and
2. the information was received by the Ministry in confidence.

The OSC submits that the records are comprised of information received in confidence by the OSC from the RCMP, the Ontario Ministry of Consumer and Commercial Relations and the Ontario Ministry of the Attorney General. It suggests that the non-disclosure of these records protects the free-flow of information from other governments or their agencies to Ontario institutions.

Records 167, 170, 178, 195, 196, 199, 210, 223, 241 and 242 appear to have originated with the Ontario Government's ONBIS database, which is maintained by the Ministry of Consumer and Commercial Relations which is a ministry of the Government of Ontario, and would, therefore, not qualify as "another government" (Order P-210). In my view, the only other "government" identified by the OSC would be the RCMP. However, I have not been provided with any evidence beyond the OSC's assertion described above to support its' contention that the source of this information was another government or one of its agencies. Rather, based on the content of these records, it appears to have been obtained from another Ontario Government ministry's records. As such, because the information did not originate with another government or one of its agencies, section 15(b) can have no application to it.

ORDER:

1. I order the OSC to provide me with copies of the attachments to Records 24, 29, 31 and 56 by **March 25, 1999**.
2. I order the OSC to disclose to the appellant those portions of Records 1, 3, 5, 6, 10, 11, 12, 19, 23, 32, 33, 35, 37, 42, 44, 49, 52, 57, 61, 62, 78, 80, 81, 84, 85, 86, 89, 126, 131, 132, 133, 134, 145, 146, 148, 150, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 220, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234,

235, 238, 239, 240, 241, 242, 243 and 244 which are **not** highlighted on the copy which I have provided to the OSC's Freedom of Information and Protection of Privacy Co-ordinator, as well as Records 21, 22, 24, 25, 27, 34, 39, 40, 41, 45, 53, 55, 56, 58, 60, 63, 82, 83, 87, 88, 122, 124, 125, 127, 128, 129, 130, 135, 147, 151, 152, 217, 218, 219, 221, 222 and 236 in their entirety, by providing him with a copy by **April 8, 1999** but not before **April 5, 1999**.

3. I uphold the OSC's decision to deny access to those portions of Records 1, 3, 5, 6, 10, 11, 12, 19, 23, 32, 33, 35, 37, 42, 44, 49, 52, 55, 57, 61, 62, 78, 80, 81, 84, 85, 86, 89, 126, 131, 132, 133, 134, 145, 146, 148, 150, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 220, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 238, 239, 240, 241, 242, 243 and 244 which are highlighted on the copy which I have provided to the OSC's Freedom of Information and Protection of Privacy Co-ordinator, as well as Records 8, 9, 20, 25, 26, 28, 29, 30, 31, 38, 48, 51, 79 and 149 in their entirety.
4. In order to verify compliance with the terms of this Interim order, I reserve the right to require the OSC to provide me with a copy of the records and portions of records which are disclosed to the appellant pursuant to Provision 2.

Laurel Cropley
Adjudicator

March 4, 1999