



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

FINAL ORDER P-1636-F

Appeal P_9800104

Ontario Securities Commission



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NATURE OF THE APPEAL:

The Ontario Securities Commission (the OSC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for copies of all records relating to the appellant and to six named corporations. The appellant 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 appellant later narrowed the scope of his request to include only those records which were compiled between 1985 and 1997.

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 appellant appealed the denial of access to all but one record.

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, in part, as follows:

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 should provide this office with a copy of them in order to enable the Adjudicator to determine whether the confidentiality provisions in sections 16 and 17 of the Securities Act prevail over the Act with respect to this information. Further, the Mediator advised the OSC that it should issue a revised decision addressing the issue of section 67.

Two Notices of Inquiry were sent to the parties with respect to the issues identified above. Representations were submitted by both parties in response to them. I disposed of the issues in this appeal, in part, in Interim Order P-1636. One of the issues I dealt with in Interim Order P-1636 was whether the OSC is precluded from disclosing the attachments to Records 24, 29, 31 and 56 to this office because of the operation of section 67(2) of the Act and section 16(1) of the Securities Act.

After considering the representations submitted by the OSC on this issue, I ordered the OSC to produce to this office the attachments to Records 24, 29, 31 and 56 so that I may fully dispose of the issues raised under section 67(2) of the Act and section 16 of the Securities Act. The OSC subsequently requested that I reconsider this decision. I denied this request in Reconsideration Order R-990001 dated July 13, 1999. However, before making my decision regarding the reconsideration request, I invited the parties to submit representations on the issue. These representations were shared between the OSC and the appellant. In a letter dated March 26, 1999 (which was shared with the appellant), the OSC indicated that it was in error in claiming that section 16 of the Securities Act applied to a number of the attachments at issue. It indicated further that it intended to claim a number of exemptions under the Act for these records. The OSC took the position, however, that the remaining records fall within the parameters of section 16 of the Securities Act and provided additional explanation as to why this section applies.

In accordance with Interim Order P-1636, the OSC produced the records at issue to this office. I have reviewed the attachments for which section 16 of the Securities Act has been claimed and considered all of the material before me in arriving at my conclusions regarding them.

PRELIMINARY MATTER:

As I indicated above, the OSC stated in its March 26, 1999 letter that it has withdrawn the claim that section 16 of the Securities Act applies to a number of attachments to Records 24, 29 and 31. It indicated further that it now relies on various exemptions under the Act to withhold these attachments from disclosure. In addition, the OSC indicated that it is unable to locate one document referred to in Record 31. A copy of this letter was provided to the appellant.

There is nothing in the material before me indicating that the OSC has provided the appellant with a decision regarding these attachments. Although the appellant has been apprised of the OSC's intention with respect to these attachments, and determination regarding one document referred to in Record 31, I do not consider this proper notification of the OSC's decision pursuant to the provisions of the Act. Therefore, I will order the OSC to make a decision regarding these attachments and to provide this decision to the appellant.

The following discussion, therefore, will be restricted to the remaining attachments as identified in the OSC's March 26, 1999 letter.

JURISDICTION

Section 67(2) of the Act states, in part:

The following confidentiality provisions prevail over this Act:

9. Sections 16 and 17 of the Securities Act.

Section 16 of the Securities Act states:

- (1) Except in accordance with section 17, no person or company shall disclose at any time, except to his 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 makes the following submissions regarding the attachments to Records 24, 29, 31 and 56 which remain at issue:

Record 24

The copies of interviews are, in their entirety, information obtained pursuant to the section 11 order ... the fact that the information was obtained pursuant to the section 11 order is not apparent from the document itself.

Record 29

The draft section 11 order is not being produced, on the ground that disclosure of that draft effectively constitutes disclosure of the nature of the content of the section 11 order, which is prohibited by section 16 of the Securities Act.

Record 31

The transcripts of examinations, statements of various individuals, and notes of an interview, all contain in their entirety information obtained pursuant to the section 11 order ... the fact that this information was obtained pursuant to the section 11 order is not apparent from the documents themselves.

Record 56

All of the attachments to the letter were obtained pursuant to the section 11 order ... The fact that these documents were obtained pursuant to the section 11 order is not apparent from the documents themselves.

Section 11(1) of the Securities Act states:

The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

- (a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or
- (b) to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction.

The remaining subsections of section 11 and section 13 of the Securities Act set out the scope, authority and powers and duties of the investigators under a section 11 order.

I am satisfied, based on the material before me, including the records, that a section 11 order was made and that the attachments at issue were obtained pursuant to it.

As I have found that all of the records were obtained or made under section 11 of the Securities Act they fall under section 16 of that Act. Consequently, section 67(2) applies to these records and, therefore, they cannot be disclosed to the appellant pursuant to section 10(1) of the Act

ORDER:

1. I uphold the OSC's decision to withhold the attachments identified in the OSC's letter dated March 26, 1999 as follows:
 - Record 24** - item (iii)
 - Record 29** - item (ii)
 - Record 31** - item (iv)
 - Record 56** - in its entirety.
2. I order the OSC to provide the appellant with a decision letter with respect to the remaining attachments as described in the March 26, 1999 letter in accordance with section 26 of the Act, using the date of this Final order as the date of the request, and without recourse to a time extension under section 27 of the Act.
3. I further order the OSC to provide me with a copy of the letter referred to in Provision 2 by forwarding a copy to my attention c/o the Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____
Laurel Cropley
Adjudicator

September 30, 1999