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

ORDER PO-1951

Appeal PA-010116-1

Ministry of Finance

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a twenty-nine part request for access to information under the *Freedom of Information and Protection of Privacy Act* (the *Act*). Specifically, the requester sought information relating to the mediation and arbitration of statutory accident benefit claims by the Financial Services Commission of Ontario (FSCO) pursuant to the provisions of the *Insurance Act*. The appellant represents an Insurer who has launched an appeal of a decision of an Arbitrator with FSCO. The appeal is made to FSCO's Director of Arbitrations or his delegate. One of the grounds for the appeal is that of "institutional bias" on the part of FSCO.

The Ministry located records responsive to portions of the request and granted access to a number of documents, in whole or in part. The requester, now the appellant, appealed the Ministry's decision with respect only to Item 29 of the request which specified that he was seeking access to:

> Documentation as to the name of law firms that are stakeholders and provide the FSCO with "Applications for Mediation" and "Applications for Arbitration" on behalf of insureds, including the numerical or percentage of Applications filed by the law firms on an overall basis since inception.

The records which are responsive to this portion of the request consist of two reports prepared from FSCO's file tracking system (MARS). Access to them was denied pursuant to the following exemptions contained in the *Act*:

- section 17(1)(c) - third party information
- section 18(1)(a) – valuable government information
- section 21(1) – invasion of privacy

Initially, I decided to seek the representations of the Ministry as it bears the onus of proving that the exemptions claimed do, in fact, apply to the records. The Ministry made its submissions and indicated that it was no longer relying on the exemption in section 18(1)(a) to exempt the records from disclosure. Because of the manner in which I have addressed the application of the remaining exemptions claimed to the records, it was not necessary for me to seek the representations of the appellant.

RECORDS:

The records consist of two reports of 179 and 69 pages listing the names of representatives of applicants who have applied for mediation and arbitration respectively with FSCO since 1991, along with the number of mediation and adjudication applications made in each year and the percentage of the total commenced by the representative for each year. The names on each record consist of the lawyers, law firms and paralegal services representing individuals who have applied to FSCO for the resolution of their disputes with Insurers over their entitlement to statutory accident benefits under the *Insurance Act* through the statutory accident benefit schemes in place over the past ten years.

DISCUSSION:

PERSONAL INFORMATION

In order for a record to qualify for exemption under the invasion of privacy exemption in section 21(1), that information must fall within the definition of "personal information" in section 2(1) of the *Act*.

The Ministry's Position

The Ministry takes the position that the information contained in both records qualifies as "personal information". It argues that, at least in part, Record 1 contains information which is not limited to the names of representatives of applicants for statutory accident benefits who are acting a professional capacity. In some cases, the Ministry argues, other individuals who are referred to as the "Insured's son" or "daughter of Insured" are included in this list, along with isolated telephone numbers and addresses of these individuals. The Ministry concedes, however, that this information can be "readily severed" from the record.

The Ministry further argues that an individual who represents injured persons in proceedings before FSCO does so in his or her private capacity. Accordingly, the Ministry submits that this fact constitutes the personal information of the representative under paragraph (h) of the definition of the term "personal information" at section 2(1) of the *Act*. The Ministry also submits that:

> to the extent that the information in the records relates to individuals acting in a professional capacity, it has a personal quality such that it can be said to be about the individual representative.

The Ministry also argues that the names of the individuals contained in the records qualifies as their personal information because it is "of such a quality as to bring it within the realm of personal information about the representative". The Ministry expands on this argument, stating:

> The records would disclose an expansive compendium of an individual's activities in FSCO's proceedings, going back to the inception of the scheme. It encompasses whether, and the extent to which, he or she has acted for one side in a dispute (consumers), the extent of his or her activities, broken down on a year-by-year basis, and the extent of those activities relative to any other entity or individual.
>
> . . . disclosure of such expansive information about an identifiable professional crosses the line between disclosure of information about the person *qua* professional and disclosure of personal information about the individual.

The Ministry concludes its submissions on this issue by taking the position that the information contained in the records also qualifies as the representative's personal information because it relates to that person's employment history (section 2(1)(b)) and that its disclosure would reveal the contents of correspondence sent to FSCO of a confidential nature (section 2(1)(f)).

Analysis

I find that the reference contained on page one of Record 1 to the stand-alone phrase "daughter of claimant" and to a street address in an unidentified municipality do not refer in any other way to an identifiable individual. In my view, this information does not qualify as personal information within the meaning of section 2(1) as it is not "about" an identifiable individual.

In Reconsideration Order R-980015, I had occasion to review the jurisprudence of this office with respect to the distinction between information which qualifies as "personal information" and information which is maintained in the context of an individual's professional life or in the course of their employment. I found that:

> The distinction between personal information and other information associated with an identifiable individual has also been considered by the Commissioner in the context of information relating to an individual's professional, employment or official government capacity in both public and private sector settings. The Commissioner's orders have established that, as a general rule, a record containing information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or a private sector setting, is not the individual's personal information simply because his or her name appears on the document.
>
> In Order P-1409, former Adjudicator John Higgins reviewed the history of the Commissioner's treatment of information associated with an individual's name in his or her employment, professional or official capacity. At page 26 of the order, he concisely summarized the rulings of this office as follows:
>
> > To summarize the approach taken by this office in past decisions on this subject, information which identifies an individual in his or her employment, professional or official capacity, or provides a business address or telephone number, is usually not regarded as personal information. This also applies to opinions developed or expressed by an individual in his or her employment, professional or official capacity, and information about other normal activities undertaken in that context. When not excluded from the *Act* under section 65(6), other employment-related information, whether of an evaluative nature, or in relation to other human resources matters, has generally been found to qualify as personal information.

> It is apparent from various provisions of the *Act* that certain employment and other work-related information is, indeed, intended to fall with the scope of the personal information definition. For example, paragraph (b) of the definition in section 2(1) specifically provides that an individual's employment and educational history is considered to be personal information. This is also reflected in the presumption against disclosure of such information set out at section 21(3)(d). Similarly, certain evaluative information in a personnel context is considered to be the personal information of the individual to whom it relates and is protected from disclosure by the presumption at section 21(3)(g) of the *Act*.
>
> The presumptions at sections 21(4)(a) and 21(4)(b) of the *Act* indicate that certain government employment or work-related information was also intended to be encompassed by the definition of personal information. For example, while "the classification, salary range and benefits, or employment responsibilities of an individual who was or is an officer or employee of an institution or a member of the staff of a minister" would qualify as the personal information of the individual to whom it relates, section 21(4)(a) provides that the disclosure of such information is presumed not to constitute an unjustified invasion of personal privacy. In my view, these examples of personal information in a work-related context do not expand the definition beyond what would normally be considered to be recorded information about an identifiable individual. Rather, they reinforce the conclusion that, in order to qualify under the definition, the information must be about the individual per se, and not simply be associated with the name of an individual in a work-related context.

In the present appeal, the lists which form the records at issue contain only the names of counsel, law firms and paralegals representing statutory accident benefit claimants before FSCO. I find that this information, as it relates to these individuals, cannot be characterized as their personal information for the purposes of section 2(1). The fact that certain counsel or paralegals represent claimants is not information which relates to these individuals in their personal or private capacities. Rather, it relates only to the professional lives of the persons listed, it is not "about" them in their private and personal capacities. As such, I find that this information does not qualify as "personal information" for the purposes of section 2(1) of the *Act*.

As only information which qualifies as "personal information" under section 2(1) can qualify for exemption under section 21(1), I find that this section does not apply to the information contained in either record.

THIRD PARTY INFORMATION

The Ministry submits that the information contained in the records is also exempt from disclosure under the mandatory exemption in section 17(1)(c) of the *Act*, which reads:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in

> confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

For a record to qualify for exemption under section 17(1)(c), the Ministry must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harm specified in subsection (c) of section 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "**detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it

> cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)]

Part 1: Type of Information

The Ministry submits that the information contained in the records qualifies as "commercial information" for the purposes of section 17(1)(c). The term "commercial information" has been defined in previous orders as:

> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.
>
> [Order P-493]

The Ministry states that:

> The information provided through the application forms relates to the hiring of professionals and paraprofessionals by clients in FSCO proceedings, i.e. it relates to the "buying and selling" of professional services and activities for which they were hired. It is descriptive of the business of the representative in relation to FSCO proceedings, of the extent of that business and of the extent of that business relative to other competing businesses.

I cannot agree with the Ministry's submissions. The records do not relate to the commercial transaction surrounding the retaining of professional services by clients requiring representation before FSCO. The records simply list the names of such service providers, they do not describe the nature of the services, the fees charged, the results obtained or any other information beyond the name of the service. I find that this information, even when taken with the number of applications filed by each firm and the percentage of the whole which this comprises, does not qualify as "commercial information" for the purposes of section 17(1). I have not been provided with the kind of "detailed and convincing" evidence required to establish the application of the section 17(1) exemption to this information.

As all three parts of the test in section 17(1)(c) must be satisfied, I find that this exemption does not apply to the information contained in the records.

ORDER:

1. I order the Ministry to disclose the records to the appellant by providing him with a copy by October 31, 2001 but not before October 26, 2001.

2. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: September 26, 2001
Donald Hale
Adjudicator