



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-2111-I

Appeal PA-020237-1

Ministry of Finance



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NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Finance for access to:

. . . information in my file, specifically the date of registration of the Branch [Managers] Course.

In response, the Ministry stated that it was unable to identify responsive records, and asked the appellant to provide a more detailed description of the records sought.

The appellant then wrote to the Ministry explaining that the additional two letters enclosed should provide sufficient detail to enable the Ministry to identify the responsive records.

The Ministry then conducted a search for responsive records held by the Financial Services Commission of Ontario (FSCO), an agency of the Ministry. In addition, the Ministry asked the Ontario Securities Commission (OSC) (a separate institution under the *Act*, whose head is the Minister of Finance) to search for a record responsive to the appellant's request for "the date of registration of the Branch [Managers] Course". The Ministry located 15 responsive records held by FSCO, but was advised by the OSC that that institution did not have any responsive records relating to the course.

The Ministry advised the appellant that it was granting access in full to 12 of the 15 records, and in part to the remaining three records (Records 6, 9 and 11). The Ministry explained that it was withholding portions of the three records on the basis of the personal privacy exemption at section 21 of the *Act*.

The appellant then appealed the Ministry's decision to this office.

In his letter of appeal, the appellant stated that he wished to appeal the decision to withhold portions of Records 6, 9 and 11, and that he was continuing to seek "all information from my file", and in particular "the contract or agreement showing the commission split between [named brokerage firm (the company)] and authorized agent [the appellant]."

I sent a Notice of Inquiry setting out the issues in the appeal to the Ministry, which provided representations in response. I then sent the Notice of Inquiry, together with a copy of the Ministry's representations, to the appellant. The appellant did not submit representations.

RECORDS:

The records containing the information at issue in this appeal are described as follows:

- | | |
|-----------|--|
| Record 6 | Letter to the Ministry from the company dated June 18, 1996 |
| Record 9 | Letter to the Ministry from the company dated October 19, 1995 |
| Record 11 | Ministry "Request for Criminal Records Check" form dated September 6, 1995 |

DISCUSSION:

PERSONAL PRIVACY

Introduction

The first issue for me to determine is whether or not the records contain personal information and, if so, to whom that information relates. The term “personal information” is defined in section 2(1) of the *Act*, in part, to mean “recorded information about an identifiable individual”.

Personal versus professional/official government capacity

Previous decisions of this office have drawn a distinction between an individual’s personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be “about the individual” within the meaning of the section 2(1) definition of “personal information” [Orders P-257, P-427, P-1412, P-1621].

The distinction between whether information is “about the individual” within the meaning of the section 2(1) definition of “personal information” or whether information is merely associated with a person in his/her professional capacity or official government capacity such that it is not “personal information” rests on whether that information is *personal to the individual* or *personal in nature*. In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner’s approach to this issue and the rationale for drawing this distinction. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385. In applying the principles that he described in that order, Adjudicator Hale came to the following conclusion:

I find 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 that 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 P-1180, former Adjudicator Anita Fineberg stated:

...Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information.

Representations

The Ministry submits that it is "prepared to grant full access" to Record 6.

Regarding Record 9, the Ministry submits:

Record 9 is a letter from [the company] to the Ministry dated October 19, 1995. The letter deals with advertising by two individuals. One of the individuals is the appellant. FSCO has severed the information relating to the other individual as the information is personal information.

Subsection 2(1) defines "personal information" to mean recorded information about an identifiable individual, including . . . (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.

The Ministry goes on to state simply that record 9 contains information "pertaining to another individual."

The Ministry goes on to address Record 11:

Record 11 is a Request for Criminal Records Check, Mortgage Brokers Section. The record lists the names of five individuals for whom a request for criminal record checks was required by FSCO. One of the individuals is the appellant. The record has been released with the names of the other individuals severed from the record.

FSCO continues to withhold portions of record 11 on the basis of the personal privacy exemption at section 21 of the *Act*.

Findings

The Ministry indicates that it is prepared to release Record 6 in full. Although this record contains the names of individuals other than the appellant, it is clear that these names appear solely in those individuals' professional capacity. The purpose of the letter was simply to provide basic information about these individuals' current employment responsibilities with the

company. In the circumstances, I will order the Ministry to disclose this record in full to the appellant.

Record 9 is quite different in nature. This letter addresses a Ministry concern regarding alleged improper advertising by the company itself and two named employees, one of whom is the appellant. In this context, the names of both the appellant and the other individual can be considered to appear in a personal as opposed to a professional capacity. Accordingly, I find that Record 9 contains personal information of both the appellant and another individual.

Record 11 contains the names of the appellant and three other individuals, in the context of a request for a criminal records check to be conducted on these individuals. The names in this record appear in the context of a record that suggests possible wrongdoing on the part of these individuals. In the circumstances, I find that this record contains the personal information of both the appellant and the three other individuals.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/INVASION OF OTHER INDIVIDUALS' PRIVACY

Introduction

Section 47 of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against the other individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption. [See Order PO-1764]

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

Here, the Ministry relies on the application of the factor set out in section 21(2)(f) which reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is highly sensitive;

Representations

The Ministry submits:

. . . [T]he information in record 9 pertaining to the other individual is highly sensitive information within the meaning of section 21(2)(f). The information concerns the actions of another agent of the mortgage broker and should weigh in favour of the protection of the affected person's privacy . . .

.

[With regard to record 11, a] request for a police check on any individual is a highly sensitive matter . . .

Findings

I agree with the Ministry that the personal information relating to the individuals other than the appellant can be considered "highly sensitive" in these circumstances, given the surrounding allegations of misconduct. Accordingly, I find that disclosure of the information pertaining to the other individuals would constitute an unjustified invasion of their privacy. Since none of the exceptions at section 21(4) applies, the information at issue qualifies for exemption under section 49(b) of the *Act*.

In addition, I find that in severing Records 9 and 11, the Ministry disclosed as much information to the appellant as is reasonably possible, without disclosing exempt information.

Exercise of discretion

The Ministry originally relied on section 21 to withhold information in Records 9 and 11, but in its representations indicated that it relies on section 49(b). Since these records contain personal information of both the appellant and other individuals, I agree that the appropriate exemption to consider in this case is section 49(b). However, while section 21 is a mandatory exemption, section 49(b) is discretionary. In the circumstances, it does not appear that the Ministry has exercised its discretion under section 49(b). Accordingly, I will require it to do so.

ADEQUACY OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the institution will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a *reasonable* effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The Ministry submits:

FSCO conducted an extensive search of all the electronic and hard copy files at FSCO that pertain to mortgage brokers.

The search produced fifteen responsive records.

The search did not produce any record that contains the "information in my file, specifically the date of registration of the Branch [Managers] Course" or a copy of the franchise agreement signed in May 1995 as to the commission split between [the company and] the appellant.

The search was performed by a financial analyst, [named FSCO employee]. [She] was the most appropriate person to perform the search as she is the analyst responsible for the mortgage broker sector in the Licensing and Compliance

Division and has been with the Division for many years. [She] is also familiar with the Act and has conducted searches in response to several other FOIPOP access requests during her employment with FSCO. This search followed standard procedure within FSCO's mortgage broker sector . . .

As the search was done on all the files, both electronic and physical files, and performed by the person who is most familiar with the mortgage broker sector files, the search was reasonable in the circumstances of this appeal.

A second search of both the electronic and hard copy files at FSCO that pertain to [the company] was performed by [another named FSCO employee], a Registration Specialist of the Licensing and Compliance Division, on December 17, 2002. This search revealed the same documents as those found by [the first named FSCO employee]. [She] did however find that record 13 has a reverse side that was not included as part of the record [copy attached].

[The second named FSCO employee's] search did not produce any record that contains the "information in my file, specifically the date of registration of the Branch [Managers] Course" or a copy of the franchise agreement signed in May 1995 as to the commission split between [the company and] the appellant . . .

As indicated above, the appellant made no representations. In the circumstances, I am satisfied that the Ministry conducted a reasonable search for records responsive to the request.

However, as the Ministry indicated, it has located an additional responsive portion of Record 13, which apparently was inadvertently not identified as responsive prior to this inquiry. The Ministry has not indicated that it claims an exemption for any portion of this page of Record 13, and it already disclosed the first page of this record to the appellant. I have reviewed this record and find that it does not contain any personal information of an identifiable individual other than the appellant. Therefore, I will order the Ministry to disclose this part of Record 13.

ORDER:

1. I uphold the Ministry's decision to withhold Records 9 and 11, subject to the exercise of discretion under section 49(b) of the *Act* referred to below.
2. I do not uphold the Ministry's decision to withhold Record 6, and I order the Ministry to disclose it no later than **February 26, 2003**.
3. I order the Ministry to disclose the second page of Record 13 to the appellant no later than **February 26, 2003**.
4. I order the Ministry to exercise its discretion under section 49(b) of the *Act* with respect to Records 9 and 11, taking into account all relevant factors and circumstances of this case, and with reference to the principles in Order MO-1498.

5. I order the Ministry to provide me and the appellant with representations on its exercise of discretion no later than **February 26, 2003**.
6. The appellant may submit responding representations on the exercise of discretion issue no later than **March 12, 2003**.
7. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding.

Original Signed By: _____

David Goodis
Senior Adjudicator

February 12, 2003 _____