



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-2059-I

Appeal PA-010289-1

Ministry of Finance



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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Finance (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all documents pertaining to his provincial tax file.

The Ministry issued a decision dated July 9, 2001, granting partial access to some of the records requested. Access to the remaining records was denied pursuant to sections 17(1) (third party information), 17(2) (tax information) and 21(1) (invasion of privacy) of the *Act*.

The appellant appealed the Ministry's decision to deny access and also raised the issue of the existence of additional records.

During mediation, the appellant advised the mediator that he believes additional records should exist; in particular, he maintained that there should be at least 65 additional bills of sale and/or ownerships included in his tax audit file. The appellant then sent a clarification letter to the Ministry outlining the specific documents that he was looking for. The Freedom of Information and Privacy Co-ordinator (the Co-ordinator) subsequently advised the appellant that additional records do not exist, and that all responsive records had been previously identified. He also advised the appellant that the Retail Sales Tax Branch had conducted a thorough search of not only audit files, but all branch records, and that nothing additional was located. The appellant maintains that additional records should exist, and therefore, the reasonableness of the Ministry's search remains at issue in this appeal.

Also during mediation, the Ministry advised the mediator that it is willing to provide the appellant with a copy of the bill of sale (indexed as Record A32), since this record had originally been supplied to it by the appellant. The Ministry confirmed that it would send a copy of Record A32 to the appellant. Since the appellant has not contacted this office to indicate that he has not received this record, it is no longer at issue in this appeal.

In addition, the Ministry withdrew its reliance on section 17(1) of the *Act*. This exemption was originally claimed for Records A29–A30 and A31 (from the Retail Sales Tax file (the RST file)) and two unnumbered records that had been located in the Tax Appeals Branch file (the TAB file). Section 17(1) is a mandatory exemption and accordingly, I have reviewed these records to determine whether any third party interests are apparent on their face. Based on my review, I accept the Ministry's decision to withdraw the application of this exemption. Accordingly, section 17(1) is not at issue in this appeal.

Finally, on January 23, 2002, the Ministry advised the mediator that it also relies on sections 14(1)(a), (b), (c) and (d) (law enforcement) of the *Act* with respect to a letter dated June 26, 1995. Since this new exemption claim was raised outside of the 35 day time limit set out in the Confirmation of Appeal, the late raising of additional discretionary exemptions was also identified as an issue in dispute.

Further mediation could not be effected and this appeal was forwarded to adjudication. I decided to seek representations from the Ministry, initially. In reviewing the records at issue, it was not entirely clear whether they contain the appellant's personal information. Accordingly, I decided

to raise the possible application of the discretionary exemptions under sections 49(a) (discretion to refuse requester's own information) and (b) (invasion of privacy) as issues in this appeal.

The Ministry provided representations in response. In its representations, the Ministry indicates that it withdraws its reliance on the discretionary exemptions in sections 14(1)(a), (b), (c) and (d). Accordingly, these exemptions are no longer at issue, nor is the issue pertaining to the late raising of a new discretionary exemption. I revised the Notice of Inquiry to reflect these changes, and sent it, along with a complete copy of the Ministry's representations to the appellant. The appellant submitted representations in response.

Before addressing the issues on appeal, I note that the appellant appears to have some concerns about the fairness of the Inquiry process, stating: "It is very difficult for me to determine what you have asked the [Ministry] when I am not given a copy of your request ... when there is no copy of the requested documents sent to me then I don't find the appeal process to have a system that is fair just or open in its effort".

As I indicated above, the appellant was provided with a copy of the Notice of Inquiry, revised from the original sent to the Ministry to reflect the removal of matters that were no longer at issue, thus not requiring representations from him. All of the issues addressed in this order were outlined in the Notice of Inquiry sent to him, including any questions I asked of the Ministry.

In response to the appellant's second concern, I would point out that disclosure of the records at issue to him is the very issue being adjudicated. Disclosure of the records to the appellant to enable him to make representations on them would ultimately render the issues on appeal moot. The appellant was provided with the complete representations of the Ministry and given an opportunity to address them. In my view, the appellant's concerns about lack of fairness or openness in the Inquiry process are without merit.

RECORDS:

There are nine records at issue consisting of a letter dated June 26, 1995 with attachments (5 pages, not numbered) and a sales listing report (10 pages, not numbered), both from the TAB file, and Ministry of Transportation (MTO) computer printouts (pages A33, A34, A46 to A155) and audit file correspondence (pages A29 to A31 and A156 to A185) which are all located in the RST file. For ease of reference, I have assigned record numbers to each page or group of pages as follows:

- Record 1 – the first five pages consisting of the June 26, 1995 letter and attachments;
- Record 2 – the 10 page sales listing report;
- Record 3 – page A29;
- Record 4 – page A30;
- Record 5 – page A31;
- Record 6 – pages A33-A34;
- Record 7 – pages A46-A155 (with the exception of page A145);

- Record 8 – page A145; and
- Record 9 – pages A156-A185 and mis-numbered page A31.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records that he is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the Ministry 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 Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

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

In his letter of appeal, the appellant notes that the records provided to him do not contain any of the Bills of Sale or transfer of ownership documents for the vehicles that he has been "charged as purchasing and selling and not paying retail sales tax on". He indicates that these transactions were claimed and outlined in the audit report relating to an audit of his business conducted by the Retail Sales Tax Office.

In responding to the search issue, the Ministry indicated that searches were conducted in a number of branches for records responsive to this request. In particular, the Ministry states that the RST Branch searched all of its files, including audit files, and located a number of records, some of which were provided to the appellant, the rest of which were withheld pursuant to the exemptions claimed under the *Act*. The Ministry adds that the Collections and Compliance Branch searched its Integrated Collection System and, in doing so, co-ordinated its search with the RST Branch. The Ministry states that no further records were located as a result of these searches.

The Ministry states further that its Legal Services Branch (the LSB) also conducted a search to determine whether there was an Ombudsman file on this subject or a tax appeal file relating to the appellant. The LSB confirmed that it was unable to locate and thus did not have any responsive records.

Finally, the Ministry indicates that the TAB searched its Tax Appeals Branch Objection and Appeal files and database as well as its Objection and Appeal Tracking System for both electronic and/or hard copy files.

The Ministry notes that, apart from certain severances relating to another taxpayer's personal information and certain RST Branch audit working paper files, all records located in the RST Branch were provided to the appellant.

The Ministry also states that in September 2001, the appellant reformulated his request, and a second search was conducted in the above locations. The Ministry asserts that all responsive records have been located and have either been provided to the appellant or are subject to exemption and thus at issue in this appeal.

In his representations, the appellant states:

[W]hen there is a claim then records must be available to back up the claim anything less than providing those details would fail in rightfully making those charges. I, again have sought this information for almost 10 years now and still they claim records do not exist. Sending me cut and paste copies of the act or the regulations and advising the act is there to address concerns of confidentiality does not serve the interest of the appellant.

The appellant then attached a list of the specific documents/types of documents he is seeking.

In my view, if the records the appellant was seeking did not exist 10 years ago, it is unlikely, barring exceptional circumstances, that they would exist today. Essentially, the appellant believes that because the Ministry claims that he owes taxes on a number of vehicles, the specific documents that he is seeking should exist. Taken by itself, the appellant's belief does not provide a sufficient evidentiary basis to conclude that these records must exist. I also note that the records at issue, which comprise approximately 160 pages, may contain some of the types of information that would answer the questions he is asking.

Based on the Ministry's representations, I am satisfied that thorough searches were conducted in locations that could reasonably be expected to produce records responsive to the appellant's request. In the absence of evidence from the appellant that would lead me to conclude that records are likely to exist in these or any other locations within the Ministry, I find that the Ministry's search for responsive records was reasonable.

PERSONAL INFORMATION

Personal information is defined, in part, as "recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The Ministry appears to take the position that, except where the information relates directly to the appellant, the remaining information in the records does not qualify as his personal information. With respect to the identification of other individuals in the records, the Ministry notes that some of the records contain the personal information: 1) of purchasers of vehicles

(pages A29, A30 and A31 (plus mis-numbered pages A31) and A156-A185); 2) of other registered owners of vehicles (on MTO printouts) with the same last name as the appellant (pages A33 and A34); as well as 3) successive owners of registered vehicles contained in printouts from the MTO database.

All of the records pertain to the RST file concerning the liability for retail sales tax on specific vehicle transactions conducted by the appellant's business (as vendor). It has been established in a number of previous orders that information provided by, or relating to, an individual in a professional capacity or in the execution of employment responsibilities is not "personal information" (Orders P-257, P-427, P-1412, P-1621, M-262).

Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447, M-122, P-1124, P-1344 and MO-1285). In these cases, the records must be viewed contextually (see, for example: Orders MO-1524-I and PO-1983).

In my view, there is a sufficient nexus between the assessment/audit of the appellant's business, its tax liability and the appellant, personally, to render the information in the records at issue "about" the appellant. Accordingly, I find that all of the records contain the appellant's personal information.

The circumstances of this appeal are somewhat unique in that, as part of the appellant's objections to his company's assessment, he has implicated another individual (the affected person). In reviewing the records at issue, I find that some of them pertain to, or are sufficiently connected to the affected person in such a way that any information about the appellant is intertwined with that of the affected person. I find, therefore, that these records contain the personal information of both parties (Records 1 and 2).

Records 3, 4 and 5 comprise letters from purchasers to the TAB with regard to their purchase of one of the vehicles subject to the tax dispute. I find that these records also contain the personal information of the purchasers.

Record 6 comprises a MTO computer printout showing the results of an "enquiry by name". This record not only contains information about the appellant, but also of any other person on the database with the same last name. I find that this record contains the personal information of these other identifiable individuals.

Record 7 also consists of MTO computer printouts showing the results of an "enquiry history". As the Ministry notes in its representations, this record contains information about the successive owners of registered vehicles. It contains the name of each owner and information about the vehicle each one purchased. I find that this record contains recorded information about identifiable individuals, including the affected person.

Record 8 is a one page printout which refers to certain taxable transfers made by the appellant's company. This record does not contain any information about other individuals. Accordingly, I find that it contains only the personal information of the appellant.

Record 9 constitutes identical copies of a Ministry form letter relating to the audit of the appellant's company. Each letter is addressed to an identified purchaser. I find that only the name, address and reference to the vehicle purchase number on these letters qualifies as the personal information of the individuals identified. Once this information is removed, the remaining portions of the record do not constitute the personal information of an identifiable individual other than the appellant.

INVASION OF PRIVACY

I found above that all of the records contain the appellant's personal information. I found further that, except for Record 8, all of the records contain the personal information of individuals other than the appellant. However, I also found that Record 9 could be severed to remove the personal information from the remaining portions of this record. Neither section 21(1) nor section 49(b) is applicable to records (or parts of records) that contain only the personal information of the appellant. Accordingly, I will consider the application of this exemption claim to Records 1, 2, 3, 4, 5, 6, 7 and the portion of Record 9 that contains the personal information of other individuals as determined above.

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. 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 appellant 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.

Sections 21(2) and (3) 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 the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

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

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 [Order PO-1764].

The Ministry takes the position that disclosure of the personal information of individuals other than the appellant would constitute a presumed unjustified invasion of privacy pursuant to section 21(3)(f) of the *Act*. Other evidence in the Ministry's representations and the records themselves raise the possible relevance of the factors in sections 21(2)(f) and (h). These sections provide:

(2) 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,

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The Ministry submits that Records 3, 4, 5, 6, 7 and 9 describe the assets of the individuals referred to therein, such as the type of vehicle purchased and, in some cases, the amount paid for it.

I do not agree with the Ministry's characterization of the term "asset" in section 21(3)(f) as including the type of vehicle purchased. In my view, this term must be read in the context of the overall intent of the section, which refers to information of a "financial" nature. This office has defined the term "financial information" in other sections of the *Act* (sections 17(1) and 18(1)) as information relating to money and its use or distribution which must contain or refer to specific data. Examples of financial information include cost accounting method, pricing practices, profit and loss data, overhead and operating costs (See: Orders P-47, P-87, P-113, P-228, P-295 and P-394, for example).

The application of this definition in interpreting section 21(3)(f) is supported by the other terms used in the section, such as "finances", "income", "net worth", "bank balances" and so on, all of which would in normal usage refer to money and its use and distribution. In my view, there must be some connection to the "value" of the asset in financial terms in order for the presumption to apply to it.

In Order P-1502, Commissioner Ann Cavoukian considered whether the number of initial claims and renewal claims of each physician who prescribed the home oxygen program for patients fell within the presumption in section 21(3)(f). After considering the parties submissions, she concluded:

The Ministry submits that disclosure of the number of home oxygen claims and renewal claims approved for a physician is tantamount to the disclosure of information describing the finances and financial activities of the physicians.

In his representations, the appellant submits that no information is provided regarding such matters as a physician's income nor the amount billed by the physician with respect to the patient's visit.

In reviewing the record, I find that the presumed unjustified invasion of personal privacy in section 21(3)(f) applies to the personal information contained therein. As I stated above, while there is no direct indication of billing information, it is possible to determine with a reasonable degree of accuracy the billing history of a physician from the information contained in the record. Payment to a physician for services rendered is properly characterized as a "financial transaction." In my view, a financial transaction is a sub-component of "financial activity." As the record presents a listing of these transactions for a period of one year, I find that it describes the financial activities in which the physicians were involved.

In the current appeal, I am not persuaded that the amount paid for these vehicles could be determined with sufficient accuracy such that disclosure of the type of vehicle purchased would describe the value of the asset.

I agree with the Ministry, however, that the amount paid for a vehicle would constitute financial information as contemplated by this section. Accordingly, disclosure of some of the information in the records would constitute a presumed unjustified invasion of personal privacy pursuant to section 21(3)(f) of the *Act*.

Elsewhere in its representations, the Ministry notes that the information in Records 1, 2, 3, 4, 5 and 7 was gathered by it for the purpose of determining retail sales tax liability. It is apparent that the Ministry was seeking this information in connection with its audit/assessment of the appellant's company. In my view, it would be reasonable for individuals contacted or implicated in this regard to consider their identities and the information they provide to the Ministry to be confidential. I, therefore, find that the factor favouring privacy protection in section 21(2)(h) is relevant to the personal information in these records as well as the personal information found on Record 9.

In addition, in the circumstances, I find that disclosure of the personal information in all of the records (especially Records 1 and 2) could reasonably be expected to cause "excessive personal distress" (see: Order MO-1340) to those individuals identified in them since it would leave them open to being contacted by the appellant in connection with his dispute; a consequence unlikely

to be expected or welcome. Accordingly, I find the factor in section 21(2)(f) to be relevant to the personal information in the records.

The appellant does not raise any specific factors in favour of disclosure. However, it is apparent that he disputes the assessment and is seeking to determine the basis for it. Section 21(2)(d) of the *Act* provides:

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 relevant to a fair determination of rights affecting the person who made the request;

Assistant Commissioner Tom Mitchinson stated the test for the application of section 21(2)(d) in Order P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]:

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

Although the appellant's reasons for seeking the information would appear to relate to a fair determination of his rights vis-à-vis his tax liability, he has not provided sufficient evidence to establish the requirements of this section. Therefore, I find that section 21(2)(d) is not relevant in the circumstances.

That being said, I am satisfied that the appellant's purpose raises an unlisted consideration in favour of disclosure. In this regard, I find that, consistent with previous orders of this office

(Orders P-597, PO-1641, PO-1723 and PO-1750, for example), the circumstances of this appeal raise certain fairness issues with respect to the appellant's dispute with the Ministry's assessment of his company.

In balancing the consideration favouring disclosure against the factors in section 21(2)(f) and (h) which weigh against disclosure, I find that the factors favouring non-disclosure outweigh the appellant's interest in disclosure. In so finding, I note (as is evident from the records) that the determination of the appellant's tax liability followed an established process, which included procedures for appeal of the initial decision. In my view, the fact that there is this process answers, to some extent, the fairness concerns raised by the appellant, and thus diminishes the weight of this consideration in the overall assessment.

Moreover, it appears that the personal information of other individuals was not necessarily included with their knowledge or because they have an interest in the issues that gave rise to the appellant's assessment. In these circumstances, I find that their privacy interests outweigh the appellant's interest in disclosure.

On this basis, I find that disclosure of the personal information in Records 1, 2, 3, 4, 5, 6, 7 and 9 would constitute an unjustified invasion of privacy of individuals other than the appellant.

Exercise of Discretion under section 49(b)

As I indicated above, the Ministry takes the position that since the portions of the records which contain the appellant's personal information have been disclosed to him, the remaining portions contain only the personal information of other individuals. As a result, the Ministry's representations do not indicate that the head has exercised his discretion under section 49(b) of the *Act*.

In Interim Order MO-1277-I, Assistant Commissioner Tom Mitchinson made the following comments regarding a head's exercise of discretion under Part II of the municipal *Act* (Part III of the *Act*):

As stated earlier, this appeal involves a request that should have been processed by the Police under Part II of the *Act*, which provides the Police with discretion to balance two competing interests - in this case, the appellant's client's right of access to his personal information, and the affected person's right to privacy. If the Police conclude that the balance weighs in favour of disclosure, the records may be released to the appellant, even if the Police have concluded that this disclosure would represent an unjustified invasion of the affected person's privacy.

In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of

the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed.

In Order P-344, I considered the question of the proper exercise of discretion as follows:

... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.

In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

My reasoning in Order P-344 is equally applicable to the exercise of discretion under section 38(b) of the *Act* in the present appeal.

In my view, the comments made by Assistant Commissioner Mitchinson are similarly applicable in the circumstances of this appeal. Based on the Ministry's representations, I find that the head has not turned his mind to the relevant circumstances of this particular case in balancing the appellant's right of access to his own personal information and the other individuals', including the affected person's, right to privacy. Therefore, I have decided to return this matter to the Ministry for the purpose of properly exercising discretion in deciding whether or not to claim exemption for the records at issue pursuant to section 49(b) of the *Act*.

TAX INFORMATION

Section 17(2) of the *Act* specifies that the head of an institution shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

The Ministry claims the application of section 17(2) to all the records except Records 6 and 9. I found above that Records 1, 2, 3, 4, 5 and 7 qualify for exemption under section 49(b). However, I have sent this matter back to the Ministry in order for it to exercise its discretion under that section. Because I have not made a final decision regarding these records, I will consider whether section 17(2) also applies to all of those for which it is claimed.

Section 17(2) is an amendment to the *Act*, which came into force on January 1, 1990. It arose from a comprehensive review of confidentiality provisions conducted by the Standing Committee on the Legislative Assembly in 1989 (in relation to sections 67(2) and (3) of the *Act*). During the review, Management Board of Cabinet identified a number of tax-related confidentiality provisions under other *Acts*, but was of the view that these provisions could be adequately protected by an amendment to section 17. Murray Elston, the then Chairman of Management Board subsequently issued a *Report on [section] 67(2) of the Freedom of Information and Protection of Privacy Act*. The report had this to say about tax records (at pages 12-13):

There are eleven confidentiality provisions in statutes administered by the Ministry of Revenue which provide for the secrecy of information submitted on tax returns and other records relating to the tax liability of taxpayers. With respect to individual taxpayers, such information is strongly protected from disclosure in s. 21(3)(e) of the [*Act*]. However there is no similar provision in the [*Act*] for taxpayers other than individuals (e.g. corporations). While the tax system provides for the mandatory supplying of information to government, the system could not function without a high degree of voluntary compliance since enforcement mechanisms could not realistically be used to force compliance. Furthermore, the applicable exemption in the [*Act*] – s. 17 – is limited since the harms tests of the section are very difficult to apply to the raw financial data contained on such records. The uncertainty inherent in such a result could cause difficulty in ensuring continued compliance.

... The type of information to be protected could be described and included as exempt records in a new subsection 17(2).

In my view, these comments reflect a generalized concern of the Legislature to protect financial information that individuals or corporations must supply to the government for taxation purposes.

The Ministry states:

The information in records A29-A30 and both records A31 was gathered from individuals who were polled on their purchases of vehicles from a named vendor and the consideration and tax they paid for the vehicle for the purpose of determining retail sales tax liability or collecting retail sales tax in respect of those transactions ...

The information in records A46-A155 was also gathered for the purpose of identifying who is liable for retail sales tax on vehicle transactions as they indicate the string of ownership in respect of various vehicles...

The June 26, 1995 letter and attachments constitute a file request, vendor identification detail, assessment detail and RST audit working paper in respect of

another individual taxpayer and that information was gathered for the purpose of determining tax liability or collecting a tax ... The Sales Listing reports ... were also compiled for the purposes of determining tax liability...

The information in these records relates to the tax liability of a taxpayer under the *Retail Sales Tax Act* and the information was gathered as part of an audit under the *Retail Sales Tax Act*. It has been found by the Information Commissioner that records containing information about a company relating to its taxable status and its tax liability was properly exempt under this provision. The information is collected and used by the institution for the purpose of determining the company's tax liability or collecting a tax (See Order PO-1161).

I accept that the records at issue in this discussion were gathered as part of an audit under the *Retail Sales Tax Act* relating to the appellant's company's taxable status and its tax liability. Accordingly, I find that disclosure of the records would reveal information gathered for the purpose of determining tax liability.

My analysis of this issue does not end here, however. The question remains whether the Ministry can apply this exemption as against the very individual or company that is subject to the tax liability. A similar question was canvassed in Order PO-2006, relating to a different exemption claim, and, in my view, the analysis in that order is instructive in determining whether section 17(2) is applicable in the circumstances of this appeal.

In Order PO-2006, Senior Adjudicator David Goodis concluded that a claim of solicitor-client privilege could not be sustained against the requester in circumstances where the requester is the client in the solicitor-client relationship. In that case, the Office of the Children's Lawyer (the OCL) had been appointed litigation guardian for the requester in various proceedings that had occurred a number of years earlier. When the requester subsequently requested access to records relating to her held by the OCL, her request was denied, in part on the basis of section 19 of the *Act* (solicitor-client privilege).

In rejecting this exemption claim, Senior Adjudicator Goodis examined the "rationale" for the privilege. After referring to case law and legal texts, which discussed the purpose of solicitor-client privilege, he found that:

Vis-à-vis the appellant, the rationale for solicitor-client communication privilege does not exist for communications between the OCL and its counsel for purposes of representing the appellant.

It is not reasonable for the OCL to expect that communications between it and its counsel in the ordinary course of the litigation would remain confidential as against the appellant, the individual for whom they are acting. An essential underpinning of the privilege is therefore absent. Disclosure to the appellant would not have a "chilling effect" on "frank and full disclosure" by the OCL to its counsel in future cases. The OCL is not "sharing its story" with its counsel,

because “it does not have a story.” The only “story” to be shared is that of the minor for whom the OCL is acting. Even if disclosure to the appellant could have a chilling effect in future cases, it would be contrary to public policy for the OCL to “keep secrets” from the individual whose rights and interests it is mandated to protect. This principle is, of course, subject to other legitimate exemption claims designed to protect an individual’s privacy (sections 49(b)/21) or health and safety (sections 49(a)/20)).

...

These authorities support the proposition that litigation privilege is meant to protect the adversarial process by preventing counsel for a party from being compelled to prematurely produce documents to an opposing party or its counsel. It does not exist to protect the OCL from the individual it represents. Litigation privilege does not apply to any of the records withheld by the OCL, subject to my findings below under the heading “Records the OCL claims were not prepared for purpose of representing the appellant”.

Taking a similar approach to the application of section 17(2), I note that this provision is contained in section 17 which, broadly speaking, is intended to prevent the informational assets of organizations or businesses from being disclosed to parties outside that entity (see: Orders PO-1805 and MO-1450 with respect to section 17(1), for example). In Order PO-1688, Senior Adjudicator Goodis commented on the purpose of the exemption in section 17(1) of the *Act*:

The purposes of section 17(1) of the *Act* were articulated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen’s Printer, 1980) (the Williams Commission Report):

. . . The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).

It is apparent from the legislative history of the amendment to section 17 (as noted above) that the primary purpose of section 17(2) is to protect information about business entities that the government receives for taxation purposes.

In view of the Legislature's intent, and the purpose underlying section 17 generally, it would be inconsistent and contrary to proper statutory interpretation to apply the protection in section 17(2) to prevent the taxpayer to which the tax liability accrues from obtaining this information upon request.

This view is reinforced by section 17(3), which provides the head of an institution with the discretion to disclose a record otherwise exempt from disclosure under certain circumstances. This section reads as follows:

A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

In the present case, Record 8 and the portions of Record 9 that do not contain personal information of other individuals clearly relate to the appellant, who is seeking access. In my view, the appellant's request for this information essentially constitutes consent of the person to whom the information relates and these two records should be disclosed to the appellant (see also: Order P-1428).

The remaining records also relate primarily to the appellant. However, they also contain information about other individuals. In my view, the interests of individuals other than the taxpayer to whom or to which the records primarily relate are adequately protected by other provisions of the *Act*, most notably sections 21(1) and 49(b). In this case, the tax information relates to the appellant's company, as the object of the audit/assessment. Just as sections 21(1) and 49(b) are not available to prevent a requester from obtaining records or parts of records that contain only his own information, section 17(2) cannot be used to bar a taxpayer requester from obtaining information gathered for the purposes of determining that taxpayer's tax liability or collecting a tax.

Accordingly, I find that the mandatory exemption in section 17(2) does not apply to the records at issue in this appeal.

ORDER:

1. The Ministry's search for responsive records was reasonable and this portion of the appeal is dismissed.
2. I order the Ministry to disclose Record 8 and the portions of Record 9 that do not contain personal information by providing him with copies of these pages by **November 18, 2002**. For clarity, I have highlighted on the copy of page A156 that I am sending to the Ministry's Co-ordinator along with the copy of this order, the portion of this page (which should thereafter be applied to the comparable portions of the other pages that comprise this record) that contain personal information.
3. I order the Ministry consider the exercise of discretion under section 49(b) with respect to Records 1, 2, 3, 4, 5, 6, 7 and the personal information contained in Record 9 and to

provide me with representations as to the factors considered in doing so by **November 18, 2002**. The representations concerning the exercise of discretion should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

4. I remain seized of this appeal in order to deal with the exercise of discretion under section 49(b) by the Ministry.
5. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the material sent to the appellant pursuant to Provision 2.

Original Signed By: _____
Laurel Cropley
Adjudicator

_____ October 30, 2002