

ORDER PO-2294

Appeal PA-030285-1

Ontario Securities Commission

NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received three identical requests on behalf of the Ontario Securities Commissioner (the OSC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a lawyer representing three different clients. Each request was for the Regulatory Escrow Trust Agreement and trust statements relating to the purchase of certain assets belonging to three named companies by another company in 1999.

The OSC is a scheduled institution under the *Act*, but the Ministry's Freedom of Information Coordinator handles requests on behalf of the OSC, and all correspondence concerning this request and appeal was channeled through the Ministry. The proper institution in this matter is the OSC, and I will refer to it rather than the Ministry throughout this order.

Pursuant to section 28 of the *Act*, the OSC identified seven parties that might have an interest in the records (the affected parties), and sought their views regarding disclosure. Some affected parties objected, while others did not respond.

After considering the affected parties' submissions, the OSC informed the three requesters and the various affected parties that it had decided to grant partial access to Record 1 and to deny access to the rest of Record 1 and all of Records 2 and 3 on the basis of the exemptions in sections 17(1) (third party information) and 21 (invasion of privacy) of the *Act*.

All three requesters appealed the OSC's decision, and those appeals are the subject of a separate order.

One affected party (now the appellant) also appealed the OSC's decision to grant access to the identified portions of Record 1. That appeal is the subject of this order.

Mediation was not successful and the appeal was transferred to the adjudication stage of the appeal process.

I began my inquiry by sending the appellant a Notice of Inquiry setting out the issues on appeal and seeking written submissions. I received representations in response from counsel on behalf of the appellant. Counsel explained that the appellant is actually three separate corporate entities. However, because the representations are submitted on behalf of all three entities, I will treat them as one party for the purpose of this order.

I then sent the Notice of Inquiry to the OSC and the three original requesters, together with a copy of the non-confidential portions of the appellant's representations. The OSC responded by relying upon the representations submitted in the context of the appeals involving the three requesters. Counsel representing all three requesters responded with representations.

RECORDS:

Because the OSC denied access to Records 2 and 3 in their entirety, only Record 1 is at issue in this appeal.

Record 1 is a 41-page Regulatory Escrow Trust Agreement, with 10 pages of attached schedules, that addresses how the proceeds of the sale of the corporate assets will be held in escrow and how the funds will be administered. The OSC has agreed to disclose most of the body of the agreement itself, withholding portions of 15 pages. Most of the attached schedules have been withheld in full. They are headed:

- Schedule A - Principal Shareholders (1 page)
- Schedule B - Approved Claims (6 pages)
- Schedule C - Receivables (1 page)
- Schedule D - Trustee Fee Schedule (2 pages)

DISCUSSION:

THIRD PARTY INFORMATION

General principles

Section 17(1) states, in part:

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,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the parties resisting disclosure (in this case the appellant) 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 OSC 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 harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

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

Part 1: type of information

Representations of the Parties

The appellant submits generally that all of the information contained in the records at issue can be characterized as commercial and financial information:

[Record 1] contains detailed financial and commercial information about the asset purchase, including such information as the amount of money paid for the assets and the other consideration (shares) being transferred as part of the transaction. [Record 1] details the creation of certain Trusts, comprised of funds and shares delivered in exchange for the assets purchased, and the purpose of the Trusts. [Record 1] also details how litigation and other claims made against [the corporate affected party] are to be handled, defended and settled, and provides details of how many claims are outstanding and [the appellant's] assessment of those claims, including their likely settlement amount. It also addresses how the trust funds are to be administered. All of these things obviously constitute commercial and financial information. [Record] 1 addresses the issue of operating budgets, approval of claims, the amount of claims, possible settlement amounts, permitted investments, potential payees, the definition of trust property, and the termination date for the Escrow in the definition section. All of which clearly fall within the definition of commercial and financial information as they relate to how the fund is to be administered, paid out and in what manner.

The appellant also makes submissions relating to specific portions of Record 1 that the OSC intends to disclose:

Article 3 - ...describes how claims are to be handled, who is handling the claims and how the claims are to be negotiated.

Article 4 - ... provides information about [the appellant's] assets and how trust assets are to be used.

...

Article 5 - ...is information relating to money to be paid from the trust and the basis for the payment.

Article 6 - ... the disclosure of representations, warranties and covenants was made to others in a private transaction.

The identity of the Trustee and the duties and obligations of the Trustee (Article 9), the Administration of the Trust (Article 10), representations and warranties of the Trustee (Article 11) and Appointment of New Trustee (Article 12) is private confidential commercial information about a third party to the agreement, namely the Trustee.

The remainder of the Articles (Notices – Article 13, and Miscellaneous – Article 14) provides information as to the parties to the agreement and the individual persons who might have knowledge of the details of the Agreement. This is commercial information as well.

The appellant finds it “very disturbing” that the OSC is prepared to disclose the schedule headings, particularly the heading for Schedule B. The appellant submits that the “schedules contain additional commercial and financial information and providing the types of information (by disclosing the headings) begs for trouble.”

The OSC’s representations on part 1 of the test relate to the portions of Record 1 it intends to withhold from the requesters in the related appeals.

The requesters’ submit that “the partial information disclosed by the Ministry in Record 1, does not fall within the specified categories of third party information that qualifies for concealment because, the information does not fall within the definitions of commercial or financial information.”

In response to the appellant’s submissions regarding various articles contained in the Escrow Agreement, the requesters’ submit:

1. Article 13 and 14 only provide the name of the parties to the agreement and the individual persons who might have knowledge of the details of the agreement. Based on the [definition of commercial information], this is not commercial information because it does not relate solely to the business of the Appellants.
2. The disclosure of Schedule B headings cannot fall within the commercial definition because mere headings standing alone do not pertain solely to the buying, selling or exchange of merchandise or services. Further, the

disclosure of headings themselves is not sufficient to fall within the financial information definition.

...

4. Statements about the duties, obligations, warranties and identity of the Trustee, which are found in Article 9, 11 and 12 respectively, may otherwise be considered information about the Trustee. However, based on the [definition], the information lacks the necessary characteristics to be considered commercial information.

Analysis and findings

The terms “commercial information” and “financial information” have been defined in previous orders of this office as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I find that part 1 of the section 17(1) test has been established.

Record 1, the escrow agreement, outlines detailed arrangements among various parties for the conduct of business and the disposal of corporate assets. The relationship between the parties to the escrow agreement is clearly commercial in nature - it relates to the buying and selling of trust assets of corporations which were in the business of trading in securities or mutual funds in industries regulated by the OSC. In my view, the entire content of Record 1 clearly meets the definition of “commercial information” for the purposes of section 17(1) of the *Act*.

Some portions of Record 1 also contain “financial information”, including the purchase price of the trust assets, as well as details about the monetary value of shares to be transferred as part of the consideration for the transaction and information about how the trust funds are to be administered, the Trustee’s service charges for that administration, and financial details about the handling and settlement of claims. However, the portions of Record 1 that contain “financial information” have been withheld by the OSC and are not at issue in this appeal.

Part 2: supplied in confidence

Supplied

The appellant submits that Record 1:

...was provided expressly or impliedly in confidence to the Ontario Securities Commission (OSC) in furtherance of regulatory approval of the asset transaction. The involvement of the OSC did not change the nature of the transaction from private to public. As [the appellant] is subject to the regulatory control of the OSC, they were obliged to disclose information respecting the transaction to the OSC for the purpose of seeking regulatory approval.

In its representations for the requesters' appeals, the OSC submits that the information it intends to withhold from Record 1 was "supplied to the OSC ... by the remaining parties to the Regulatory Escrow Agreement".

The requesters take the position that the information in Record 1 was not supplied to the OSC:

In the present case, the Regulatory Trust Escrow Agreement [Record 1] was the result of negotiations between parties that was mutually generated rather than supplied by [the appellant]. Further, these negotiations were not strictly between two third parties. Rather, they involved the ongoing presence of the Ontario Securities Commission (OSC), which changed the nature of the transaction from a private to a public one. [The appellant] admits in the first paragraph on page six of their submissions that "*a very small number of OSC persons were involved in the negotiations that took place during the creation of the Regulatory Escrow Agreement [Record 1] and the creation of Documents 1, 2, and 3.*" Therefore the Ministry was correct in allowing partial disclosure of Record 1, because as a result of negotiations, it was not "supplied" for the purposes of section 17(1). [requesters' emphasis]

I am satisfied that Record 1 was supplied to the OSC by the various affected parties, including the appellant. Previous orders have found that the contents of a contract involving an institution and a third party would not normally qualify as having been "supplied" for the purpose of section 17(1) based on the reasoning that the provisions of a contract are mutually generated through the course of negotiations [Orders PO-2018, MO-1706]. Although, as the requesters point out, the OSC is technically a party to the Regulatory Trust Escrow Agreement at issue in this appeal, I find that the role it plays is limited to the discharge of public responsibilities as the regulatory body responsible for overseeing the securities industry in Ontario. In light of these circumstances, I accept that Record 1 was provided to the OSC for the purpose of seeking regulatory approval of the asset transaction, rather than "negotiated" by the OSC and the various parties, and I find that the "supplied" component of part 2 of the test has been met.

In confidence

In order to satisfy the “in confidence” component of part two, the appellant must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the OSC on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the OSC
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The appellant states that Record 1 contains confidential information, and that it entered into the Escrow Agreement on the understanding that the details of the transaction and Record 1 itself would remain confidential. The appellant argues:

It was never in the contemplation of the parties to [Record 1], including the OSC, that the Ministry of Finance would have access to the Agreement or attempt to disclose it. Confidentiality was an integral part of the transaction and the OSC respected and encouraged that confidence. No limits were placed upon the confidentiality.

Confidentiality is integral to the securities regime. In its role as public watchdog over the securities industry in Ontario, the OSC obtains confidential, private information respecting the industry it regulates. The OSC makes public only that information that is in the best interests of the public and is otherwise authorized by statute to release. There is no statutory authority permitting the release of [Record 1] by the OSC.

The appellant also points out that Record 1 is not producible under the Rules of Civil Procedure under the *Courts of Justice Act* in the course of litigation, or otherwise available to members of the public.

The OSC’s arguments on the confidentiality component of part two relate to the portions of Record 1 it intends to withhold from the requesters in the related appeals.

The requesters respond that there is nothing in Record 1 “that decrees the information should be viewed as confidential in nature”. They submit:

Under the circumstance, it is not reasonable to argue that an implied level of confidentiality was assumed throughout the protracted negotiations between the third parties and the government institution.

I do not accept the requesters’ position. The appellant has persuaded me that the nature of the arrangements put in place to regulate and administer the purchase and sale of corporate assets in this context carry with them an inherent expectation of confidentiality on the part of the various parties to these arrangements. In my view, the oversight role played by the OSC in these arrangements in no way alters these reasonable expectations of confidentiality. As the OSC points out in its representations in the related appeals, it treats the information supplied to it in this regard as confidential to outside parties, and I find that this supports my finding.

Accordingly, I find that Record 1 was supplied to the OSC with a reasonably-held implicit expectation that it would be treated in confidence, thereby satisfying part 2 of the section 17(1) test.

Part 3: harms

General principles

To meet this part of the test, the appellant must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm” if the record is disclosed. Evidence amounting to speculation of possible harm is not sufficient; the party resisting disclosure must demonstrate that disclosure “could reasonably be expected to” lead to a specified result [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Representations of the parties

The appellant’s representations on the section 17(1)(a) harms deal primarily with the portions of Record 1 that the OSC has withheld from the requesters in the three related appeals. This includes references to the asset pool itself, the claims summary, and payments from the trust, including settlement payments, legal fees and budgets. As far as the portions the OSC intends to disclose are concerned, the appellant submits that disclosing how new claims can be approved:

... will only invite litigants to seek disclosure of this most confidential information which includes legal fees for [the appellant], likely settlement amount, potentially privileged documentation and privileged communications from legal counsel. Such disclosure is contrary to fundamental principles of our common law system, which rely on the sanctity of the solicitor-client relationship and the privilege which attaches to communications between counsel and client. The losses cannot be quantified, but could run into millions of dollars and could continue indefinitely.

The appellant's submissions on disclosing headings in the agreement consist of the following:

Even disclosure of headings, such as was proposed for the schedules, is both problematic and harmful. Litigants should not know that [the appellant] has identified a likely settlement amount for any claim, particularly their own, or the fact that they have made an allocation of settlement funds as between the [various appellant] companies.

As far as the section 17(1)(b) harm is concerned, the appellant identifies the important public policy reasons for full cooperation between the OSC and the various companies it regulates, and goes on to submit:

... it is imperative that the corporations and individuals that are subject to the OSC review trust that the OSC will protect the confidentiality of any sensitive commercial and financial information disclosed to the OSC. One of the principles of the securities regime is that only information that is in the public interest to disclose should be disclosed. If corporations or individuals felt that the confidentiality of information disclosed to the OSC for regulatory purposes could be violated or overridden by [the *Act*], particularly by making a [Freedom of Information] request to the Ministry of Finance, those corporations and individuals would almost certainly be more hesitant to make full and frank disclosure to the OSC. Clearly it is not in the public interest to undermine the trust and integrity of the regime, and make it less likely that the OSC will have access to information from the companies and individuals it regulates.

The appellant also points out that a similar request made directly to the OSC for the same record was denied, and that the Ministry "should not second guess that decision".

The appellant's submissions on the section 17(1)(c) harm relate exclusively to the portions of Record 1 that the OSC has decided not to disclose to the requesters, so they are not relevant here.

The OSC intends to disclose the portions of Record 1 at issue in this appeal and declined the opportunity to respond to the appellant's arguments, pointing out that it reviewed Record 1 and "severed only the information that, in its view, falls within the exemptions from disclosure provided by [the *Act*]".

The requesters take the position that the evidence and argument put forward by the appellant with respect to the section 17(1)(a) harm is “vague and speculative”, and submit that “due to the low quality of the evidence and its lack of cogency, the appellant has failed to satisfy the onus of establishing a reasonable expectation of harm”.

Similarly, for section 17(1)(b), the requesters submit:

As noted, the Ontario Court of Appeal has held that detailed and convincing evidence is necessary in order to discharge the burden of proof under part three of the section 17 exemption test. The appellants, in their submission, have made broad statements about the role of the OSC and have stated concerns about the disclosure of information in general. However, the appellants have not raised a reasonable expectation of harm in the present case and have not established that similar information will no longer be supplied due to the partial disclosure of Record 1.

Analysis and findings

In my view, the appellant has failed to provide the type of detailed and convincing evidence necessary to establish any of the harms in section 17(1) as they relate to the portions of Record 1 the OSC intends to disclose.

The OSC undertook a careful review of the Escrow Agreement and withheld portions that, in its view, could prejudice the competitive position of various affected parties or significantly interfere with negotiations concerning the sale of the corporate assets. The OSC’s decision was appealed by the requesters, and I found in Order PO-2293 that the withheld portions of Record 1 qualify for exemption under section 17(1)(a). The remaining portions of this record are at issue here and, in my view, different considerations apply. The portions the OSC intends to disclose do not contain any financial information concerning the purchase price of the trust assets, details about the monetary value of shares to be transferred as part of the consideration for the transaction, information about how the trust funds are to be administered, the Trustee’s service charges for that administration, or financial details about the handling and settlement of claims. All of this information has been withheld by the OSC and upheld by me in Order PO-2293. The appellant has failed to persuade me that disclosing the remaining information in Record 1, which is more general in nature and, in my view, not inherently sensitive, could reasonably be expected to result in prejudice to its competitive position or cause significant interference with negotiations. The appellant’s arguments about the impact of disclosing how new claims can be approved are speculative at best, as are the submissions concerning release of the various headings in the agreement and schedules.

I also accept the requesters’ position regarding the section 17(1)(b) harm. The appellant’s generalized submissions concerning the role played by the OSC in Ontario’s securities regulation regime and the importance of confidentiality in that context do not convince me that the entire content of Record 1 must be withheld in order to satisfy these public interest considerations. The

fact that the OSC is prepared to disclose portions of Record 1 and raises no argument in support of the section 17(1)(b) exemption is strong evidence that some level of disclosure can be made without resulting in the negative impact envisioned by the appellant.

I should also note in closing that whether the OSC denied access to the Escrow Agreement in a different context has no bearing on its treatment in this appeal. Any such previous decision was apparently not appealed to this office, and therefore the proper treatment of this record under the *Act* has not been determined.

In summary, I find that the harms component of section 17(1) has not been established for the portions of Record 1 the OSC intends to disclose. Therefore, these portions do not qualify for exemption and should be disclosed to the requesters.

ORDER:

1. I uphold the OSC's decision to disclose the identified portions of Record 1, and order the OSC to provide the original requesters with a copy of these portions by **July 22, 2004** but not before **July 16, 2004**.
2. In order to verify compliance with Provision 1, I reserve the right to require the OSC to provide me with a copy of the record that is disclosed to the requesters.

Original copy signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ June 16, 2004