ORDER PO-2293

Appeals PA-030325-1, PA-030326-1, PA-030327-1

Ontario Securities Commission

NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received three identical requests on behalf of the Ontario Securities Commission (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 these requests and appeals was channeled through the Ministry. The proper institution in these matters 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 each requester's appeal was assigned a separate appeal number:

Requester A – PA-030325-1
Requester B – PA-030326-1
Requester C – PA-030327-1

Those three appeals are the subject of this order.

One affected party also appealed the OSC's decision to grant access to the identified portions of Record 1. That appeal is the subject of a separate order.

Mediation was not successful and the appeals were transferred to the adjudication stage of the appeal process. Because all three appeals relate to the same information, I decided to deal with them together.

I began my inquiry by sending the OSC a Notice of Inquiry setting out the issues on appeal and seeking written submissions. I received representations in response.

I also sent the Notice to the seven affected parties previously notified by the OSC at the request stage. I received representations from counsel on behalf of one corporate affected party and one individual affected party. Counsel explained that the corporate affected party 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 purposes of this order. The other affected parties did not respond to the Notice.

I then sent the Notice of Inquiry to the appellants, together with a copy of the OSC's representations and the non-confidential portions of the representations submitted by the affected party. Counsel representing all three appellants responded with representations.

RECORDS:

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 Ministry 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)

Records 2 and 3 are financial statements relating to the actual funds held in trust. The OSC has denied access to these two records in their entirety.

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 institution and/or the affected party resisting disclosure (in this case the OSC and/or the one affected party who provided representations) 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

The OSC and the affected party both submit that the records contain "commercial" and "financial" information, as those terms have been defined by this office in previous orders interpreting section 17(1).

With respect to Record 1, the OSC takes the position that the portions of the agreement the OSC intends to withhold, and Schedules B and C, contain information that relates to the settlement, use, transfer, distribution and liquidation of the trust assets, while Schedule D identifies the fees paid to the Trustee for administering the trusts. The OSC argues that this information qualifies as commercial information because it relates to the buying, selling or exchange of merchandise or services.

The OSC also submits that Record 1 contains financial information. In the OSC's view, the severed portions of the agreement, as well as the information contained in Schedules B and C, include "specific dollar amounts, tax information and calculations for the transfer, distribution, and liquidation of trust assets" and also information relating to "the costs of maintaining the …

trusts and the settlement of claims". The OSC takes the position that Schedule D also contains financial information because "the data specifically relates to money and pricing practices".

As far as Records 2 and 3 are concerned, the OSC submits that they contain "information relating to the investment of cash and securities" as well as "financial information as it relates to the price paid for certain investments, disbursements and other profit and loss data", thereby bringing the records within the scope of both commercial information and financial information.

The affected party also takes the position that the records contain 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 affected party'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.
>
> …
>
> [Records 2 and 3] are trust statements. They are simply statements of funds in the trust account. It is clear that these are financial documents and should not be disclosed.

The appellant disagrees, claiming that the affected party's interpretation of what constitutes commercial and financial information is overly broad.

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 accept the submissions of the OSC and the affected party, and 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; and Records 2 and 3 are financial statements of assets relating to activities stemming directly from the Record 1 agreement. 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. I find that some portions of these three records 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. In my view, this type of information clearly meets the definition of "commercial information" and/or "financial information" for the purposes of section 17(1) of the *Act*.

Part 2: supplied in confidence

Supplied

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" and that "[t]he information contained in Schedules B and C was provided to the OSC by the [affected party]."

The affected party 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 affected party] 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.

The appellants take the position that the records were 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 affected party]. 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 affected party] 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 OSC] 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). [appellants' emphasis]

None of the parties made submissions on whether Records 2 and 3 were supplied to the OSC.

I am satisfied that the information contained in Records 2 and 3 and the portions of Record 1 the Ministry intends to withhold were supplied to the OSC by the various affected parties, including the affected party who provided representations in this inquiry. 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 appellants' 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. The OSC has already agreed to disclose a significant portion of Record 1 and, in my view, the remaining portions do not contain information that would have been the subject of negotiations involving the OSC. As far as Records 2 and 3 are concerned, they consist of information that was provided to the OSC in the context of its regulatory functions, and any arguments based on the "negotiated not supplied" theory clearly do not apply to these two records.

In confidence

In order to satisfy the "in confidence" component of part two, the OSC and/or the affected party 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]

Representations of the parties

The OSC takes the position that the portions of Record 1 it intends to withhold contain information that was supplied with a reasonable expectation that it would be held in confidence:

> The information was provided on the understanding that it was to be used for valid regulatory purposes, specifically, for satisfying judgments and settling potential claims against the corporate affected party.
>
> The Regulatory Escrow Agreement and Schedules B and C have not been released to the public by the OSC. Since the agreement was executed, the OSC has received a number of public inquiries relating to its release. The OSC has responded to these requests with a standard form letter which states that "the OSC is only one of the parties to the [Regulatory Escrow] Agreement, and that in order to place it on the public record, consent of all the parties is required. Since the OSC has been unable to obtain consent of all parties, unless required by law, staff cannot release the [Regulatory Escrow] Agreement to you at this time."
>
> …
>
> The Trustee supplied the information contained in Schedule D to the OSC in confidence. Trust fee schedules are not standardized documents, as each is tailored to the specified requirements of the client. Trustees treat all fee schedules as confidential information.
>
> The OSC has never released Schedule D to the public.
>
> …
>
> The Trustee submitted the Trust Account Statements [Records 2 and 3] to the OSC on behalf of [the corporate affected party] in confidence. The Trustee treats client account statements as confidential information. The Trustee held a reasonable expectation at the time it supplied the information that the OSC would keep the information confidential.
>
> The OSC has not released the Trust Account Statement to the public.

The affected party 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 affected party 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 place 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 affected party 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 appellants respond that there is nothing in Records 1, 2, or 3 "that decrees the information should be viewed as confidential in nature". The appellants 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 appellants' position. The OSC, and particularly the affected party, have 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. The fact that the OSC treats the information supplied to it in this regard as confidential to outside parties supports this finding.

Accordingly, I find that Records 2 and 3, and the portions of Record 1 the OSC intends to withhold were supplied to the OSC with a reasonably-held implicit expectation that they 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 OSC and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" if the records are disclosed. Evidence amounting to speculation of possible harm is not sufficient; the OSC and/or the affected party 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

Section 17(1)(a): prejudice of competitive position or significant interference with negotiations

The affected party provides detailed submissions in support of its position that disclosure of the withheld information would prejudice its competitive position and would interfere with ongoing negotiations relating to the disposal of assets:

> First and foremost, because [Record 1] discusses an asset pool from which debts of, and claims against [the affected party] are to be satisfied by the Claims Manager, if meritorious, disclosure of or public knowledge of the size of the asset pool available would cause [the affected party] to suffer irreparable prejudice in its settlement negotiations with current or future litigants. Essentially, disclosure of [Record 1] would allow the litigant or potential litigant to obtain financial information **that is otherwise available only <u>after</u> judgment** and the conduct of a judgment-debtor examination. The disclosure of such information prior to judgment would increase settlement demands and demands for more advantageous settlement terms. Information about a defendant's ability to satisfy a claim **is not** available under the Rules of Civil Procedure in Ontario until after judgment has been granted. In circumstances where a judgment is obtained, and not appealed, the judgment creditor has the right to obtain relevant information as to the assets and liabilities of the judgment debtor through a judgment debtor examination and other means specifically detailed in the Rules of Civil Procedure and there is no need to have recourse to the provisions of [the *Act*]. [affected party's emphasis]
>
> …
>
> [The affected party] will be irreparably harmed if disclosure is made of the claims summary which forms a portion of the Agreement, as it discloses the number of claims, the amounts claimed and [the affected party's] assessment of the likely value of the claim. [The affected party] would be unable to enter into meaningful negotiations to resolve claims if litigants knew in advance how [the affected party] had assessed their claim. This is information which will impair [the affected party's] ability to settle claims and will impair its negotiating power. It

> will also invite allegations to be made against the claims manager or litigation counsel about the handling of claims in an attempt to influence the negotiations…
>
> Disclosure of payment from the trust, including as it would settlement payments, legal fees and budgets is prejudicial. This information would be of great interest and benefit to a litigant litigating against [the affected party] and will hamper [the affected party's] ability to defend claims properly and appropriately. It would provide litigants with the ability to impair [the affected party's] ability to carry on their business in an orderly fashion, impair settlement positions for [the affected party] and improperly influence settlement negotiations, budget delivery and budget payment. The manner and nature of distribution from trust is confidential…

The affected party also submits that disclosure could prejudice one of the other affected parties:

> Disclosure of [the other affected party's] interest in the assets is also harmful. This could adversely affect [the other affected party's] rights in respect of the voting of its shares. Moreover, [the other affected party's] other share rights, if disclosed, could have a potentially negative effect on [the other affected party's] share value, which is contrary to the securities regime in place in Ontario. This in turn, will negatively affected the value of the trust assets to the detriment of trust beneficiaries and [the affected party's] shareholders …

Finally, the affected party submits:

> Disclosure of information relating to the Trustee, the administration of the trust, the representations made by the Trustee and so on is information that is not within the public domain and should not be disclosed. It must be borne in mind that this is a **private trust.** It is prejudicial to [the affected party] and the Trustee to disclose to third parties the obligations of the Trustee, and will increase the cost of the administration of the trust, to the detriment of the shareholders of the [affected party] and the beneficiaries of the trust. [affected party's emphasis]

The OSC's brief representations on section 17(1)(a) support the affected party's position.

The appellants disagree with the affected party, and take the position that disclosing the records could facilitate rather than compromise settlement discussions.

The appellants also submits:

> …[E]ven if it is held that the existence of a reasonable expectation of harm exists with regard to the "asset pool information", the information should still be released. [The appellants'] argument is based on the reasoning of Adjudicator S.

> Liang who commented on the municipal equivalent of section 17(1) [in Order MO-1393] as follows:
>
> > I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the "intimate details of our operation (costs and constraints) to our direct competition". There may indeed be harm to the affected party from disclosure of the information. *Nevertheless, section 10(1) of the Act does not shield the information from disclosure unless it is clear that it originated from the affected party and not of the Town. In these circumstances, the record is not exempt from the Act's purpose of providing access to the government information.* [appellants' emphasis]
>
> [The affected party] has admitted that negotiations took place with the OSC. Thus, even if the Information and Privacy Commission deems the information is harmful, it does not meet the second part of the three-part test for exemption under section 17(1) and therefore based on the reasoning of Order MO-1393, the information must be disclosed.

Finally, the appellants submit that the affected party's representations amount to speculations of potential harm and fail to satisfy the "detailed and convincing" evidentiary standard established by the Court of Appeal for the harms component of the section 17(1)(a) exemption claim.

Analysis and findings

The affected party provides evidence to support its position that the premature disclosure of information relating to the escrow agreement and related documentation could reasonably be expected to interfere with its contractual and other negotiations relating to the sale of its assets. In my view, this evidence is both detailed and convincing, and the arguments provided by the appellants in response do not persuade me that the expectation of harm identified by the affected party is unreasonable, given the nature of the issues in dispute and the timing of the asset sale.

Based on the evidence before me, I am persuaded that disclosing details of settlement discussions prior to completed negotiations could reasonably be expected to significantly interfere with the affected party's settlement negotiations with current and future litigants. The disclosure scheme established by the Rules of Civil Procedure, which appear to apply only after judgment disposing of the asset sales has been rendered, support this finding.

I also accept, based on the affected party's representations and my review of the records, that disclosing the financial statements relating to the administration of the escrow trust account

(Records 2 and 3) could reasonably be expected to prejudice both the Trustee and the affected party, and interfere significantly with the affected party's ongoing settlement negotiations.

As far as Order MO-1393 is concerned, it can be distinguished on its facts. In that order, Adjudicator Liang concluded that the information at issue originated with the institution. In contrast, I have determined in this case that all of the information included within the scope of this inquiry was "supplied" to the OSC by the affected parties.

Accordingly, I find that the requirements of the harms component of section 17(1)(a) have been established, thereby satisfying the third and final part of the test.

Because Records 2 and 3 and the portions of Record 1 the OSC intends to disclose qualify for exemption under section 17(1)(a), it is not necessary for me to consider the section 17(1)(b) or (c) claims.

INVASION OF PRIVACY

The OSC claims that Schedules A and B of Record 1 contain personal information of various individuals identified by name on these records, and that disclosing this information would constitute an unjustified invasion of their privacy.

"Personal information", as defined in section 2(1) of the *Act* includes the following:

> (b) information relating… to the employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (d) the address … of the individual,
>
> (g) the views and opinions of another individual about the individual, and
>
> (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 OSC submits that Schedule A contains the address of an individual and the address for a numbered company that would reveal the address of an individual. The OSC further submits that Schedule B contains the views of the affected party regarding the claims of the identified claimants, and also information relating to financial transactions of several individuals, specifically:

> Legal claims for monetary compensation, particularly where those claims result from past investments constitute financial transactions.

The only representations from the affected party on the "personal information" issue consists of the following statement:

> Disclosure of information in [Record 1] will also lead to disclosure of personal information about [the individual affected party] as shareholder of [the corporate affected party] which is prohibited by the [*Act*].

The appellant's representations do not address this issue.

Having reviewed Schedules A and B, I find that the portions the OSC intends to withhold (which consist of everything other than headings) contain "personal information" of identifiable individuals, as defined in section 2(1) of the *Act*.

Specifically, Schedule A contains the name and address of the individual affected party who responded to the Notice of Inquiry, as well as the name and address of a numbered company. Because the two addresses are the same, I find in the circumstances that disclosing the name and address of the company would reveal personal information about the individual affected party, and that all of Schedule A contains "personal information" for that reason.

Schedule B consists of six pages. Page 1 lists approved claims by the name of the individual claimant, details of each claim amount, the likely settlement amount, and the allocation of likely settlement amounts among claimants. Pages 2 through 6 contain synopses of each claim. I have already determined that the likely settlement amounts and the allocation of likely settlement amounts on page 1 are exempt from disclosure under section 17(1)(a). The only remaining information is the names of the claimants and the synopsis of each claim.

The claimants' names in association with the fact that they have made a claim against the assets of the affected party corporation (page 1), as well as details about the nature of the claim (pages 2-6), would reveal information about these identifiable individuals and therefore qualifies as "personal information" under paragraph (h) of the section 2(1) definition.

Where a requester seeks personal information of another individual, section 21 of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. The only exception with potential application in the circumstances of this appeal is section 21(1)(f), which reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

As noted earlier, the appellants make no submissions on the application of section 21. In the absence of any representations or argument that disclosing the personal information would not

constitute an unjustified invasion of privacy, I find that it would. Accordingly, the mandatory section 21 exemption applies to the portions of Schedule A and B of Record 1 that the OSC intends to withhold.

ORDER:

I uphold the OSC's decision.

Original signed by: June 16, 2004
Tom Mitchinson
Assistant Commissioner