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

ORDER PO-2397

Appeal PA-040271-2

Ministry of Finance

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NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request dated under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a list of cheques issued by the Government of Ontario in the amount of $2000 or more to corporations in the year 2002 that have not been cashed by their recipients. The Ministry originally prepared a list of all outstanding cheques and denied access to this information, claiming the application of sections 17(1) (third party information) and 17(2) (tax return information) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision. During the mediation stage of the appeal, the Mediator indicated to the Ministry that the records included more information than was actually sought by the appellant. As a result, the Ministry prepared a second list containing only the names of those companies which had not cashed cheques valued at more than $2000. The Ministry also advised the appellant that it continued to rely on the mandatory exemptions in sections 17(1)(a) and (c) and 17(2).

As further mediation was not possible, the file was moved to the adjudication stage of the process. I sought and received the representations of the Ministry, initially. In response, the Ministry chose not to make submissions on the application of section 17(1) to the information contained in the records, only providing representations on section 17(2). I then provided a complete copy of the Ministry's representations and the Notice of Inquiry to the appellant, who also made submissions, which I then shared with the Ministry.

Rather than provide me with Reply representations, however, the Ministry issued the appellant with a new decision letter indicating its reliance on the discretionary exemptions in sections 18(1)(a) and (d), in addition to section 17(2). It also provided me with additional representations respecting the possible application of sections 18(1)(a) and (d) to the information at issue and reply submissions in response to the representations of the appellant. I will address the propriety of the Ministry's late raising of the discretionary exemptions in sections 18(1)(a) and (d) below.

RECORDS:

The record at issue consists of a list of 151 corporations along with the dollar value of the cheque each was issued and the pertinent cheque number and date.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

The Ministry first raised the possible application of the discretionary exemptions in sections 18(1)(a) and (d) at the point in the appeal process where the final submission of representations takes place. In fact, on May 2, 2005 the Ministry had provided me with reply representations that did not include reference to these exemptions but decided to supercede them on May 19, 2005 with a second version in which it relied on sections 18(1)(a) and (d) for the first time. In support of its argument that I ought to apply the discretionary exemptions in sections 18(1)(a) and (d) to the records, the Ministry submits:

> I regret that all the facts, law and analysis were not available to me on May 2 [the date of the Ministry's original Reply representations]; some facts have changed. Please excuse these late additions. As I have successfully argued before in claiming new exemptions at the appeal stage with the previous assistant commissioner, if I did not provide these additions, I would not have represented the case of the taxpayer and the Ministry completely. If these added claims were not considered, the decision maker may have decided without hearing, a fatal mistake from an administrative law point of view. I expect that, in this case, the senior adjudicator [sic] would want to have as much assistance on this matter as possible. I do regret the lateness of this version, but ask the decision maker to exercise his discretion to permit it in the light of new facts and the need for new argument.

Section 11.01 of this office's *Code of Procedure* provides:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Claiming discretionary exemptions promptly is necessary in order to maintain the integrity of the appeals process. Unless the parties know the scope of the exemptions being claimed at an early stage in the proceedings, effective mediation of the appeal will not be possible. In addition, claiming a discretionary exemption for the first time after a Notice of Inquiry has been issued could necessitate re-notifying the parties to give them an opportunity to make representations on the exemption, and delay the appeal. In many cases the value of the information requesters seek diminishes with time, and requesters may be prejudiced by delays arising from late exemption claims (Orders P-658, PO-2113).

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113).

In the present appeal, the claim for the application of the additional discretionary exemptions in sections 18(1)(a) and (d) was not made until late in the inquiry stage of the processing of this appeal. In fact, the Ministry had submitted its Reply representations and the parties were awaiting my decision at the time the Ministry claimed the application of these additional exemptions. I find that the appellant would be prejudiced should I allow the Ministry to raise the

section 18(1)(a) and (d) exemptions at this stage of the process. Should I allow the claim, I would be required to seek additional representations from the appellant regarding the application of sections 18(1)(a) and (d) to the requested information, necessitating further delay in the adjudication of this matter. Furthermore, I find that the Ministry had ample opportunity to consider its position and any additional exemptions it may have wished to claim at an earlier stage of the process.

Based on the representations of the Ministry, I am not satisfied that this is a proper case for me to consider the application of additional discretionary exemptions at this late date. I find that the prejudice to the appellant significantly outweighs any possible benefit that may result from their inclusion in this inquiry process. I will not, accordingly, consider the application of sections 18(1)(a) and (d) to the record.

DISCUSSION:

TAX RETURN INFORMATION

The Ministry claims the application of the mandatory exemption in section 17(2) to the record. This section reads:

> A head 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 record itself consists of four-page chart containing information about 151 cheques issued by the Ministry to corporations as payment to them of tax refunds or rebates. Included is the name of the corporation and various codes denoting the cheque numbers, the "IFIS code number", the amount of the cheque, the date of its issue and an indication that it is "tax related". The Ministry acknowledges that the record does not include information pertaining to the type of tax involved in each of the cheques.

In Interim Order PO-2059-I, Adjudicator Laurel Cropley reviewed the history of the section 17(2) exemption and its purposes as follows:

> 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.
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> … 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.

I agree with the conclusions reached by Adjudicator Cropley pertaining to the nature of the exemption and the purposes behind its enactment and adopt them for the purposes of this appeal.

The Ministry takes the position that the exemption in section 17(2) applies simply because "the information on the list of uncashed cheques reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability." The Ministry then goes on to state:

> There will be no argument about a collection of a tax, as a cheque to a taxpayer is far from the collection process. Former Commissioner Tom Wright described s.17(2) in Order P-263 as broader than the confidentiality sections (in the tax acts) which it replaced. Subsection 17(2) applies to a broader class of record without micro management.
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> The simplest argument is that tax paid minus tax refund equals tax liability. All cheques issued by the Ministry are refunds or rebates of tax. No payments to taxpayers are initiated by the Ministry. Therefore all tax-related cheques issued by the Ministry reveal information that was gathered for the purpose of determining tax liability. An application for a refund is a form of tax return, but in the alternative that it is not construed by the IPC to be a tax return, the refund

> or rebate amount is certainly gathered for the purpose of determining tax liability. Without the refund amount, the amount paid initially by the taxpayer would not be the correct amount of tax liability. Rather the tax paid minus the tax refund equals the tax liability.

The Ministry goes on to point out that the dollar amount of the cheque is specific to the taxpayer who is entitled to it. It also reiterates that rebates and refunds are only generated by the Ministry following a request by a taxpayer. Such payments are not created through an internal Ministry function. The Ministry submits that any such requests for refunds or rebates arise through a taxpayer-initiated process similar to the filing of a return. The Ministry also provided me with additional information pertaining to the types of refunds and rebates that would be reflected in the cheques that comprise the subject record. It indicates that these include payments made pursuant to the *Corporations Tax Act*, *Employer Health Tax Act* and the *Retail Sales Tax Act*.

Finally, the Ministry submits that:

> The dollar amount of the above two kinds of cheque to taxpayers [those issued under the *Corporations Tax Act* and the *Employer Health Tax Act*] would have been mentioned on an annual return submitted at the same time as the tax liability was calculated. Hence the cheque information would reveal information that was obtained on a tax return as well as used in determining tax liability.
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> . . .
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> Even if an application for a refund or rebate is not considered to be tax return, the amount of the cheque as well as the fact of qualification for the refund established on the application are facts used in determining tax liability. Since a refund or rebate is always subtracted from tax paid, they are a necessary element in the calculation used in determining tax liability. The amount on the cheque is that element and it is attributed to an identified taxpayer. The fact that sales tax remittance returns presume no exemption, and exemption must be claimed after the fact on a different form does not alter the fact that the refund amount is used in determining tax liability.

The appellant submits that:

> If the refund request is generated by the taxpayer, it is a result of the difference of what has been paid versus what is due; therefore it is just a mathematical calculation.

The appellant also argues that, in her experience, refund or rebate cheques are not in fact generated because the taxpayer has filed a request for a refund of taxes that were overpaid. Instead, the appellant submits that these refunds and rebates are generated because they are "a result of modifications made by government to tax returns" and "not initiated by the taxpayer."

The appellant also points out that in the past, for the fiscal years 2000 and 2001, she has been able to obtain the requested information.

In its revised reply representations, the Ministry indicates that it takes the position that "even if there is an adjustment to the claim, or a shift from tax payable to a refund claim, that also is information derived from source information submitted on a return for determining a tax liability." The Ministry repeats this claim in the following fashion:

> In the words of section 17(2) the fact of a tax refund in itself is information that is provided on a tax return or used to determine tax liability. There is no other source for this information. Refund information, even just the fact that a large refund is available is taxpayer specific information. . . A refund usually means that a company's income is lower than expected during a period. That implication too is exempt confidential taxpayer specific information.

In its reply representations, the Ministry also refers to other unsubstantiated circumstances that, in its view, could result from the disclosure of the information in the record to the appellant. I am not persuaded that these factors have relevance to the circumstances of this appeal and I will not refer to them further.

Findings under section 17(2)

In my view, on a plain wording of section 17(2), in order for the exemption to apply to a record, it must contain information whose disclosure would reveal either information that was obtained by the Ministry from a taxpayer on a tax return or information gathered by the Ministry for the purpose of determining tax liability or collecting a tax.

In the present appeal, the record contains information about certain refund or rebate cheques prepared by the Ministry for specific taxpayers in order to return overpayments made by these corporations on their 2002 tax returns. The records list the amount of the cheque, the date it was prepared, the payee of the cheque and various administrative and accounting information created by the Ministry. With the exception of the name of the corporation, the list does not appear to contain any information that would appear in that corporation's tax return. Nor have I been provided with sufficient evidence to substantiate a finding that the information in the record was "gathered for the purpose of determining tax liability or collecting a tax."

As a result, I find that the mandatory exemption in section 17(2) has no application to the information contained in the record. I will, accordingly, order that it be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the record to the appellant by providing her with a copy by **July 11, 2005** but not before **July 6, 2005**.

2. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the record that is disclosed to the appellant.

Original signed by: June 3, 2005
Donald Hale
Adjudicator