



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2408

Appeal PA-040349-1

Ministry of Finance



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NATURE OF THE APPEAL:

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

Copies of documents with respect to any Notices of Appeal, Statement of Defence, pleadings or other public documents that have been filed with a court in Ontario pertaining to the requirement of a non-resident person to register as a vendor for Ontario Retail Sales Tax purposes, what constitutes “presence” in Ontario, whether a non-resident person is carrying on business in Ontario, and/or the failure of a non-resident person to collect Ontario RST on sales to customers in Ontario. We are seeking such documents for the period from January 1, 2003 to the present. We understand that [a named individual] is the Crown lawyer who has carriage of these matters on behalf of the Province of Ontario.

The Ministry located responsive records and issued a decision denying access to them, claiming the application of the mandatory exemption in section 17(1) and the discretionary exemption in section 19 of the *Act*. The requester, now the appellant, appealed the Ministry’s decision.

Mediation was not successful and the appeal was moved to the adjudication stage of the appeals process. I initially sought the representations of the Ministry and two parties whose interests might be affected by the disclosure of the information in the records (the affected parties) by providing them with a Notice of Inquiry. One of the affected parties consented to the disclosure of information relating to it to the appellant. I received submissions from the Ministry but not from the other affected party. The Ministry’s representations addressed the application of section 17(2) to the records and I shared them with the appellant, along with a copy of the Notice. The appellant also provided me with representations which were shared with the Ministry. I then received additional representations from the Ministry by way of reply.

RECORDS:

The records consist of five Notices of Appeal filed on behalf of one of the affected parties in response to a Notice of Assessment received by the affected party from the Ministry.

DISCUSSION:

TAX RETURN INFORMATION

Section 17(2) states:

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.

In Order PO-2059-I, Adjudicator Laurel Cropley commented on the legislative history of this provision 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.

... 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 adopt this approach to the interpretation of section 17(2) for the purposes of the present appeal.

Representations of the parties

The Ministry submits that the information contained in the Notices of Appeal that comprise the records at issue fall within the ambit of section 17(2) as they:

1. reveal taxpayer specific information which was obtained on a tax return (the refund claim or assessment in a specific amount, for example, and other parts of the Facts generally) and;
2. reveal information gathered for the purpose of determining tax liability (the Law and Reasons why the goods and services should be taxable and other Facts).

The Ministry goes on to state that:

When a copy of the Notice of Appeal is provided simultaneously to the court and the Ministry it is for the purpose (among others) of making an even better case to the Ministry for determining tax liability, often with the help of a lawyer for the first time and promoting settlement. Settlement is always possible in court actions up to the moment the parties reach the court house door. When there are two ways of interpreting a statute the taxpayer is given a new Ministry audience (the lawyer), the Ministry may still be persuaded by this often better argument. It is submitted and obtained for the purpose of determining a tax liability.

...

Absent settlement or simply reaching some agreement regarding tax liability, the information in the pleadings [the Notices of Appeal at issue] is for the purpose of having a court make a decision about the tax liability, and the information is still for the purpose of determining tax liability.

The Ministry then refers to the provision in the *Retail Sales Tax Act* which governs appeals of tax assessments and argues that the disclosure of the pleadings in which a taxpayer seeks to have an assessment vacated or varied would result in the disclosure of information “obtained on a tax return or gathered for the purpose of determining tax liability.”

The appellant takes the position that information contained in the Notices of Appeal at issue is public information and is not subject to the exemption in section 17(2). He notes that the Notices are filed with the Ontario Superior Court of Justice and are publicly available to anyone who has either the litigants’ name or the file number and that the court files have not been ordered sealed. The appellant also points out that he is not seeking access to information that was “obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax”, as is required by section 17(2). Rather, he is seeking access only to information that is in the public domain.

In its reply representations, the Ministry acknowledges that without the name of the taxpayer or the court file number attached to the records, it is impossible to access them through the disclosure provisions in the *Courts of Justice Act*. However, it recognizes that if that information is made available, the records are publicly available to anyone who asks for them. Again, the Ministry re-iterates that the records contain information which was obtained from the taxpayer for the purpose of determining its tax liability or in order to collect retail sales tax. For this

reason, the Ministry is of the view that the information is exempt under section 17(2), regardless of the fact that the appellant is entitled to have access to the records through section 137 of the *Courts of Justice Act* upon payment of the appropriate fee, so long as he can cite either the name of the taxpayer or the court file number.

Findings

I adopt the reasoning contained in Adjudicator Cropley's decision in Order PO-2059-I and agree that the purpose behind the enactment of section 17(2) was to correct the anomaly whereby information provided by an individual taxpayer was protected from disclosure by the operation of the presumption in section 21(3)(e) while similar information relating to other entities, such as partnerships and corporations, received no such protection. The words "obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax" in section 17(2) are similar to those in section 21(3)(e), reflecting that intent.

In order to determine whether the section 17(2) exemption applies to the information contained in the records, it is necessary to carefully examine exactly what that information entails, as well as its source and the purpose for its inclusion in the record.

I find that the Notices of Appeal filed by the affected party with the Superior Court of Ontario do not "reveal information that was obtained on a tax return", as contemplated by the first part of the section 17(2) exemption. Rather, the information contained in the Notices pertains solely to an appeal of various assessments of retail sales tax liability issued by the Ministry against the affected party. Accordingly, the information cannot be exempt under the portion of section 17(2) which addresses "information obtained on a tax return" as the information in the record originated with the Ministry and represents the end result of a calculation of tax payable that it has made against the affected party.

I do not accept the Ministry's arguments that the information contained in the records was "gathered for the purpose of determining tax liability or collecting a tax", within the meaning of section 17(2). The information in the records was prepared by the affected party taxpayer and represents its pleadings in five proceedings in the Superior Court of Justice pursuant to section 25 of the *Retail Sales Tax Act*. These pleadings serve to initiate appeals of certain assessments of tax liability made by the Ministry. The information was not, however, gathered by the Ministry in order to assist it in the determination of tax liability or to assist in collecting a tax. The Ministry has already performed its determination of tax liability and that assessment is the subject of the appeals that are reflected in the records. Accordingly, I find that the information does not fall within the ambit of that contemplated by section 17(2) and ought to be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the records to the appellant by providing him with copies by **August 30, 2005** but not before **August 25, 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 records that are disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

July 25, 2005 _____