



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2393

Appeal PA-040284-1

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 reference letters sent to the Ontario Securities Commission (the OSC) in response to the requester's application for a position on the Continuous Disclosure Advisory Committee (the CDAC).

The Ministry located the responsive records and sought the views of two individuals (the affected persons) whose interests may be affected by a decision to grant access to the records under section 28 of the *Act*. After receiving submissions from the affected persons, the Ministry granted access to the responsive records, in part. Access to the remaining portions of the records was denied on the basis that the information was exempt from disclosure under section 21(1) of the *Act* (invasion of privacy), taken in conjunction with the presumptions in sections 21(3)(f) (information describing an individual's finances etc.) and 21(3)(g) (personal recommendations or evaluations).

The requester, now the appellant, appealed the Ministry's decision to deny access to the complete records. During mediation, the Mediator advised the Ministry that, because the records appeared to contain the personal information of the appellant, as well as the affected persons, the correct exemption to be applied appeared to be section 49(b) of the *Act* (invasion of privacy).

I sought and received the representations of the affected persons and the Ministry, initially. The non-confidential portions of the Ministry's representations were shared with the appellant, along with a copy of the Notice of Inquiry. I decided not to disclose the representations of the affected parties to the appellant owing to the confidential nature of those submissions. The appellant also provided me with representations in response to the Notice.

RECORDS:

The sole records at issue consist of the undisclosed portions of two pieces of correspondence.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history

of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or 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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of “about” the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Representations of the parties

The affected parties submit that the records contain personal information that pertains to them within the meaning of section 2(1). This information includes their addresses and telephone

numbers (section 2(1)(d)), information relating to financial transactions in which they were involved (section 2(1)(b)), as well as their names appearing with other personal information relating to them (section 2(1)(h)).

The Ministry reiterates the submissions of the affected persons with respect to the personal information in the records and also indicates that the records contain the personal information of the appellant. It submits that the records include information pertaining to the personal views or opinions of the affected persons relating to the appellant and that this information qualifies as “personal information” within the meaning of section 2(1)(e).

The appellant appears to acknowledge that the records contain personal information relating to both herself and the affected persons.

Findings

Based on my review of the contents of the records, I find that they contain the personal information of the appellant and the affected persons. The records include the addresses and telephone numbers of the affected persons (section 2(1)(d)), information relating to financial transactions in which they were involved (section 2(1)(b)) and their names, along with other personal information relating to them (section 2(1)(h)).

In addition, because the records contain the views or opinions of the affected persons that relate to the appellant, I find that this information qualifies as the personal information of the appellant under section 2(1)(g).

INVASION OF PRIVACY

General principles

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal information against the other individual’s right to protection of their privacy. Sections 21(1) to (4) provide guidance in determining whether the “unjustified invasion of personal privacy” threshold under section 49(b) is met.

If any of paragraphs (a) to (h) of section 21(3) apply to the personal information in a record, its disclosure is presumed to constitute an unjustified invasion of privacy under section 49(b) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. The list of factors under section 21(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 21(2) [Order P-99].

The representations of the parties

The Ministry claims that the undisclosed portions of the records contain personal information that falls within the ambit of the presumption in section 21(3)(f). The affected persons take the position that the presumptions in sections 21(3)(f) and (g) apply. These sections state:

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;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

I am unable to refer in greater detail to the submissions of these parties on the application of the presumptions under section 21(3) to the personal information in the records without revealing their actual contents or revealing the identities of the affected persons. In addition, the affected persons and the Ministry rely on the considerations listed in sections 21(2)(e), (f), (h) and (i) which, in their view, favour the non-disclosure of personal information. Again, because of the sensitive nature of the representations of the affected persons and the Ministry and the fact that revealing their contents would reveal the substance of the records themselves or identify the affected persons, I am unable to refer to them in greater detail.

The appellant's representations do not address the application of the presumptions in section 21(3) to the personal information in the records but, rather, focus on the application of the considerations listed in sections 21(2)(a) and (d), as well as her view that the disclosure of the information will increase public confidence in the operation of the OSC, an unlisted factor under section 21(2) (Order MO-1469).

The pertinent excerpts from section 21(2) are set out as follows:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The appellant argues that by disclosing the communications received from the affected parties, the Ministry will increase public confidence in the operation of the OSC “since it shows the OSC does not accept and act upon backroom communications”. She adds that:

[The protection of the requested information] creates the perception that the OSC is willing to secretly receive negative references from individuals who commit securities violations, while refusing to appoint individuals to their advisory committees who are whistleblowers or who would not be lenient in the enforcement of securities laws.

The appellant also indicates that she seeks to obtain access to the information in the records in order to assist her in obtaining the CDAC appointment she is seeking and to ensure that the activities of the OSC are seen as fair and not discriminatory.

Findings

I find that the undisclosed portions of Record 1 do not contain any information that falls within the ambit of the presumption in section 21(3)(f). However, the majority of the undisclosed information in Record 2 describes the affected persons’ financial history or activity, and thereby

falls directly within the type of information captured by the presumption in section 21(3)(f). Accordingly, I find that the disclosure of this information is presumed to constitute an unjustified invasion of the personal privacy of the affected persons. In the absence of the application of any of the exceptions under section 21(4) or the “public interest override” in section 23, I find this information to be exempt under section 49(b).

In addition, I find that the undisclosed portions of both Records 1 and 2 also contain the affected persons’ personal evaluations of the qualifications of the appellant for the position she is seeking. Because the evaluations relate solely to the appellant, the affected parties cannot rely on the presumption in section 21(3)(g) as a basis for denying access.

Further, I agree with the position taken by the Ministry and the affected parties that the remaining undisclosed information from Records 1 and 2 was submitted to the OSC by the affected parties with a reasonably-held expectation that it would be treated confidentially, as contemplated by section 21(2)(h). I find that this is a significant consideration favouring privacy protection in this situation.

In addition, I agree that the information in the records is “highly sensitive” within the meaning of section 21(2)(f) as its disclosure could reasonably be expected to cause “excessive personal distress” to the affected parties. Again, because of the nature of the evidence tendered by the affected parties, I am unable to expand on these reasons further. I find that this factor must be given significant weight in determining whether disclosure would result in an unjustified invasion of personal privacy.

Finally, I agree with the affected parties that the disclosure of the remaining information in Records 1 and 2 could reasonably be likely to expose these individuals to pecuniary or other harm under section 21(2)(e). I am again unable to refer to the specific basis for this finding owing to the confidential nature of the information provided by the affected parties but I find that this too is a significant factor favouring privacy protection.

The appellant argues that the disclosure of the remaining portions of Records 1 and 2 will result in greater “public confidence” in the OSC and its appointment process and, by implication, that the consideration listed in section 21(2)(a) relating to public scrutiny of the activities of the Government of Ontario also applies. In my view, the appellant has raised concerns about the OSC’s appointment process, however, those concerns are focussed mainly on the OSC’s reliance on the representations of the affected persons in Records 1 and 2, which she views as being not credible and driven by some animosity unrelated to this process. In the circumstances, I will acknowledge that these considerations are applicable to the undisclosed information in the records, but I do not place a great deal of weight on them.

The appellant also makes arguments that are similar in nature to the consideration in section 21(2)(d), that the disclosure of the information in the records is “relevant to a fair determination” of her rights. For section 21(2)(d) to apply, 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

[Order PO-1764; see also 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.)].

Based on the test described above, I find that the right the appellant is seeking to have enforced is related to a proceeding that has been completed, the appointment by the OSC to the CDAC. Accordingly, I find that this factor is not applicable in the circumstances of this appeal and I am unable to afford it any weight.

Balancing the section 21(2) considerations extant in this appeal, I am persuaded that those factors favouring the protection of the privacy of the affected persons far outweigh those weighing in favour of the disclosure of the information to the appellant. I find that the affected parties' representations on the application of the considerations in sections 21(2)(e), (f) and (h) to be particularly compelling. As a result, I find that the disclosure of the remaining information in Records 1 and 2 would constitute an unjustified invasion of the personal privacy of the affected persons. Accordingly, I find that this information qualifies for exemption under the discretionary exemption in section 49(b).

I have examined the Ministry's representations respecting the manner in which it exercised its discretion not to disclose the remaining portions of Records 1 and 2 and am satisfied that it did so appropriately.

ORDER:

I uphold the decision of the Ministry to deny access to the undisclosed portions of the records.

Original signed by:

Donald Hale
Adjudicator

May 24, 2005