



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2655

Appeal PA-050248-1

Ministry of Finance



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NATURE OF THE APPEAL:

This appeal concerns a request submitted to the Ministry of Finance (the Ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for “a list of cheques that were issued by the Government of Ontario and remain outstanding for the period January 1, 2003 to December 31, 2003 originating from all Ministries except the Ministry of Finance.” The requester specified that she was interested in a list of cheques for amounts greater than \$2,000 that were issued to businesses only (not to individuals), and should include the date, cheque number, payee name and amount.

The Ministry issued a decision letter in which it provided a fee estimate of \$695.00 for processing the request. The requester paid a deposit of \$347.50. However, the Ministry subsequently advised that the actual fee is \$210.00 and refunded the sum of \$137.50. The Ministry denied access to the responsive records pursuant to the mandatory exemptions in sections 17(1)(a), (b), and (c) (third party information) and 17(2) (tax return information), as well as the discretionary exemptions in sections 18(1)(a), (c), and (d) (economic and other interests) of the *Act*.

The requester (now the appellant) appealed the Ministry’s decision to deny access to the information requested on the basis that the Ministry had been ordered to provide the same information to her for the years 2001 and 2002 Order PO-2397 issued by this office.

During the mediation stage of the appeal process, the mediator had discussions with the parties; however, they were unable to reach a resolution of the issues in dispute. Also during mediation, the appellant raised concerns about the right of the Ministry to charge a fee when it ultimately decided to deny the appellant access to the records, in their entirety.

As mediation was not successful, the file was streamed to the adjudication stage for an inquiry. In addition to considering the application of sections 17(1)(a), (b), and (c), 17(2) and 18(1)(a), (c), and (d) to the information at issue, I address the fee issue, raised by the appellant, in this order.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the Ministry. The Ministry submitted representations in response and agreed to share them, in their entirety, with the appellant. In its representations, the Ministry indicated that it had reconsidered its original access decision and had disclosed portions of the information at issue to the appellant. Shortly after submitting its representations the Ministry provided this office with a copy of a revised decision letter issued to the appellant along with two documents, one containing the information disclosed to the appellant and the other containing the information that the Ministry continues to withhold, pursuant to the application of sections 17(1)(a), (b), and (c), 17(2) and 18(1)(a), (c), and (d) of the *Act*.

I then sought representations from the appellant and included with my Notice of Inquiry a complete copy of the Ministry’s representations. The appellant submitted representations in response. I decided that the appellant’s representations raised issues to which the Ministry should be given an opportunity to respond. Accordingly, I shared the appellant’s representations, in their entirety, with the Ministry and sought reply representations. The Ministry submitted

reply representations, which I shared with the appellant, in their entirety. I then sought sur-reply representations from the appellant. The appellant submitted further representations.

RECORDS:

There is one record at issue, consisting of a three-page list of 149 uncashed tax refund cheques issued by the Government of Ontario. The record includes the cheque number, code number of the ministry that issued the cheque, name of business payee, cheque amount and issue date.

DISCUSSION:

TAX INFORMATION

I will first address the application of section 17(2) to the information at issue.

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.

The decision in Order PO-2397

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

In Order PO-2397, Adjudicator Donald Hale addressed the application of section 17(2) to a record comprised of the same type of information that is at issue in this appeal. In Order PO-2397 he concluded that section 17(2) did not apply to the record at issue. In reaching this conclusion, he stated:

[T]he 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.

Parties' representations

In this case, the Ministry states that it has provided representations that establish a basis for deciding this case differently than Order PO-2397.

The Ministry argues that the tax refund amount is information obtained from a tax return. The Ministry states that "it only issues tax refund cheques in response to a request for a tax refund contained in a tax return submitted by a taxpayer or an application for a tax refund." The Ministry also submits that if "no tax return is submitted by the taxpayer, no refund is paid by the government." The Ministry, therefore, asserts that the tax refund amounts at issue in the record appear in the respective taxpayer's tax return. In support of its position, the Ministry included, as schedules to its representations, copies of the current tax return forms under the *Corporations Tax Act (CTA)* and the *Employer Health Tax Act (EHTA)* and marked the sections of each of these returns where the taxpayer would record any refund amount claimed. The Ministry suggests that Adjudicator Hale may not have had copies of these tax returns before him when he was deciding Order PO-2397.

In response, the appellant states 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 are overpaid, but because of a result of modifications made by government to tax returns and not initiated by the taxpayer." This is the same position she took in Order PO-2397. Accordingly, it is the appellant's position that what is entered in the refund box of a taxpayer's return is not necessarily the same as the amount contained in the refund cheque that the taxpayer is ultimately entitled to receive. The appellant submits that the Ministry has not provided evidence to establish that the amounts set out in the 149 cheques at issue in this appeal were obtained directly from tax returns.

In reply, the Ministry acknowledges that, in some cases, the amount of the tax refund may vary from the amount of the refund requested by the taxpayer on the tax return. The Ministry states that this occurs where staff in the Ministry's office arrive at a different calculation of a taxpayer's liability after reviewing the tax return in question. However, the Ministry asserts that on these occasions the tax refund cheques that are ultimately issued by the Ministry "reveal information that was gathered for the purpose of determining tax liability." In support of this statement, the Ministry submits that the fact that a taxpayer is receiving a refund and the amount of the refund "permits assumptions to be made with respect to a corporation's revenues given that corporations typically pay tax on a quarterly basis based on the amount of tax liability in the preceding year." Accordingly, the Ministry asserts that the fact that a refund is payable "permits the drawing of an assumption that the corporation's taxable income was lower."

In response, the appellant maintains that the determination of a refund amount is "just a mathematical calculation", derived from determining between what has been paid in tax and what is due. The appellant states that any refund amount payable is not gathered for the purpose of determining tax liability.

Analysis and findings

The purpose of the section 17(2) exemption, as set out in the Elston Report and reiterated by Adjudicator Copley in Order PO-2059-I, is to provide corporate taxpayers with privacy protection similar to what individuals receive under section 21(3)(e) of the *Act* with regard to financial information that is required to be provided to the government for taxation purposes. The question, therefore, for me to decide is whether any of the information at issue in the record qualifies as information that was either obtained on a tax return or gathered for the purpose of determining tax liability or collecting tax. In Order PO-2397, Adjudicator Hale reached the conclusion, based on the evidence presented by the parties, that the information at issue in that appeal did not qualify for exemption under section 17(2).

This case involves a similar looking record containing the same substantive information. In addition, the same parties are involved in this case and have, to a large extent, presented similar representations. Significantly, however, the Ministry's representations in this case include and draw attention to copies of the current tax return forms used under the *CTA* and the *EHTA*. The Ministry has marked the sections of each of these returns where the corporate taxpayer would record any refund amount claimed.

In Order PO-2397, Adjudicator Hale makes no mention of having received copies of these returns and there is no indication that he had these copies before him when he conducted his inquiry in that case. However, having had the benefit of reviewing these tax returns I find that they provide clear demonstrative evidence that corporate taxpayers, in completing one of the above tax returns, would include both the name of the corporation and the amount of any refund that it is claiming.

Turning to the record at issue, to the extent that a corporation completes one of these returns and, in doing so, calculates and includes a refund amount that mirrors the refund amount in that record, I find that the refund figure would clearly qualify for exemption under section 17(2) since the record "reveals information that was obtained on a tax return". However, as acknowledged by the parties, the ultimate refund amount may vary from what the corporation claims on its tax return, based on the government's own assessment and calculation of that corporation's tax liability. In such circumstances, should the refund amount in the record be treated any differently under section 17(2)? In my view, it should not. In either case, the amount at issue represents a refund calculation that is generated by a completed tax return. In essence, the character of the information is identical. In my view, the Legislature would not have intended to treat the two refund amounts differently. To find one exempt because it appears in the taxpayer's return and the other not exempt because it represents a re-calculation after the submission of the return by the taxpayer would, in my view, lead to an absurd result.

Accordingly, I find that the names of each of the corporate taxpayers (the “business payees”, as they are referred to in the record) and the amounts of the refund cheques in the record qualify for exemption under section 17(2).

I recognize that my interpretation of the application of the section 17(2) exemption to the information at issue in this appeal results in a different outcome than Adjudicator Hale’s decision in Order PO-2397. Having reached the opposite conclusion, I point out that administrative tribunals are not bound by their own precedents [*Weber v. Ontario Hydro*, [1995] 9 S.C.R. 929]. Changes in interpretation occur over time and may be attributable to several factors, including changes in circumstances and new evidence. As alluded to above, in this case, I have reached my decision, in part, after reviewing the current tax return forms used under the *CTA* and the *EHTA* that the Ministry brought to my attention in its representations.

With regard to the remaining information in the record, namely the cheque numbers, the code number of the ministry that issued the cheques and the cheque issue dates, although this information forms part of the appellant’s request, in my view, it is of no use to the appellant without the information I have found exempt under section 17(2). As a result, I will not address the application of the section 17(1) and 18(1) exemptions to this information and I will withhold it from the appellant. [Regarding the non-disclosure of “meaningless information” or “disconnected snippets” see, for example, Orders 24, P-227, MO-1815 and PO-2586].

Finally, I understand that the appellant had asked that I also examine the Ministry’s fee. Having concluded that the record is exempt under section 17(2), I see no need to examine the Ministry’s fee in this case.

ORDER:

1. I uphold the Ministry’s decision to deny access to the record at issue.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ March 31, 2008