Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3012

Appeal PA10-70

Financial Services Commission of Ontario

November 23, 2011

Summary:

The appellant sought access to the names of the members of the Canadian Lawyers Liability Assurance Society (CLLAS) for the year 2002. The institution relied on section 17(1) to deny access to the information. Section 17(1)(c) is found to apply to the names of the members of CLLAS in the responsive records and the institution's decision is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(3), 17(1)(c) and 23; *Law Society Act, R.S.O. 1990, c. L.8*, *Canadian Charter of Rights and Freedoms.*

Orders and Investigation Reports Considered: P-76, P-1184 and PO-1816.

Cases Considered: *R. v Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Ontario Securities Commission v. Sides* [1996] O.J. No. 5101 (Ont. S.C.); *Ontario (Public Safety and Security) v. Criminal Lawyers Association* 2010 SCC 23, [2010]1 S.C.R. 815.

OVERVIEW:

[1] The Canadian Lawyers Liability Assurance Society (CLLAS) is a reciprocal insurance exchange licensed by the Financial Services Commission of Ontario (FSCO). FSCO explains that a reciprocal insurance exchange can be described as a private, contractual insurance arrangement where the members collectively self-insure against

potential losses, instead of insuring against potential losses through a commercial insurance company. FSCO further states that a reciprocal insurance exchange does not offer insurance services to the general public, only to its members.

[2] Originally at issue in this appeal was a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to a list of the members of CLLAS for the years from 2001 to 2009. In a cover letter accompanying the request, the requester advised that he wished "to learn of the members of this group since 2001 to the present on an annualized basis."

[3] After notifying a third party and receiving their objection to disclosure, an access decision was issued. The mandatory exemption at section 17(1) (third party information) of the *Act* was relied upon to deny access to the responsive records, in full.

[4] During mediation, the mediator was advised that no actual list of CLLAS members exists, and policy documents that contain members' names were identified as being responsive to the request. In turn, the appellant confirmed that he only seeks access to the names of CLLAS members and narrowed the scope of his request to be for the names of CLLAS members (in the responsive records) for the year 2002. As a result, this remains the only information at issue in this appeal. In addition, the appellant advised the mediator that disclosure of the requested information is in the public interest, thereby raising the potential application of the "public interest override" at section 23 of the *Act*.

[5] I invited representations on the facts and issues in the appeal. I received representations from FSCO [1], the appellant and a third party and shared them in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction* number 7.

PRELIMINARY MATTERS

[6] In support of his position that the CLLAS members' names should be disclosed, amongst other things, the appellant points to provisions of the *Canadian Charter of Rights and Freedoms* [2] and refers to the Supreme Court of Canada decision in *R. v Conway* [3]. However, he did not allege that the relevant *FIPPA* provisions violate the *Charter*, provided little support for a *Charter* challenge and did not provide a Notice of

[1] Although this appeal initially involved the Ministry of Finance, in its representations, FSCO, which is a designated institution under the *Act*, stated that CLLAS is a reciprocal exchange licensed by it. Accordingly, the Ministry of Finance was replaced by FSCO as the responding institution in this appeal.

[2] Sections 2(b) and 24(1).
[3] 2010 SCC 22, [2010] 1 S.C.R. 765.

Constitutional Question.[4] In any event, I am not satisfied that the appellant's rights under the *Charter* have been breached. Accordingly, I will address this issue no further in this order.

[7] The appellant also submits that section 2(3) of *FIPPA* [5] "binds the IPC to disclose the record sought by the appellant" and further relies on Order P-1184 in support of his position. The third party submits that Order P-1184 is distinguishable because it addressed whether the names at issue in that appeal qualified as personal information and were therefore exempt under the personal privacy exemption at section 21(1) of *FIPPA*; whereas in this appeal the position is that the members names are commercial information and exempt under section 17(1). In my view, section 2(3) of *FIPPA* and Order P-1184 are not relevant to my determinations in this appeal. There is no suggestion that the information qualifies as personal information under the statutory definition of personal information, which might trigger consideration of section 2(3). Furthermore, the names in the records at issue are those of law firms and not individuals.

[8] Finally, the appellant asserts that the names of the members of CLLAS are publicly available. FSCO and the third party take issue with that assertion, which is addressed in the section 17(1) discussion below.

RECORDS:

[9] The responsive records at issue consist of correspondence, endorsements and declarations containing the names of members of CLLAS. Only the members' names are at issue in this appeal.

DISCUSSION:

[10] The sole issue to be determined in this appeal is whether the names of CLLAS members that are found in the records at issue are exempt under section 17(1). This provision states, in part, as follows:

> 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,

[4] See section 109 of the *Courts of Justice Act*, R.S.O., c. C.43, as amended and section 12 of the IPC Code of Procedure.

[5] Section 2(3) reads: Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

> (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; or
>
> …

[11] For section 17(1) to apply, FSCO and/or the third party 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 institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the information 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.

Do the members' names qualify as a trade secret or scientific, commercial, financial or labour relations information?

[12] Both FSCO and the third party submit that the member's names qualify as commercial information. They both assert that the members' names in the records constitute, in essence, CLLAS' customer list. FSCO submits that because CLLAS is a reciprocal insurance exchange, its members "are, at once, both members and customers/insureds of the exchange". FSCO submits that the responsive information "relates to the mutual exchange of insurance facilitated by the exchange's contract" and is valuable confidential information.

[13] In support of his position that the names should not be found to be commercial information the appellant relies on Order P-1184, *Ontario Securities Commission v.*

Sides [6] (*Ontario Securities Commission*) and *Ontario (Public Safety and Security) v. Criminal Lawyers Association* [7] *(Criminal Lawyers Association)*.

[14] In my view, in the circumstances of this appeal, the names of the members of CLLAS that are contained in the responsive records qualify as commercial information for the purposes of section 17(1) of the *Act*. Past orders of this office have defined what constitutes commercial information for the purposes of section 17(1) [8]. I accept the characterization of the names as being in the nature of a customer list [9]. I find that because the names represent, at the same time, both insurers and insured of the reciprocal insurance exchange, the names relate to the buying, selling or exchange of services, namely insurance. Accordingly, in the circumstances of this appeal, the names of the members of CLLAS in the responsive records qualify as "commercial information" for the purposes of section 17(1) of the *Act*.

[15] In my opinion, the authorities cited by the appellant in support of his position are not relevant to my determination that the information at issue in this appeal qualifies as "commercial information". As discussed above, Order P-1184 addressed whether the names of the individuals at issue in that matter qualified as personal information. The application of *FIPPA* was not an issue in *Ontario Securities Commission*. The excerpt from that decision quoted by the appellant relates to an order provision requiring that "an opinion of a firm of Ontario solicitors that is a member of the [CLLAS]" be obtained with respect to a particular type of transaction. Finally, the discussion cited by the appellant from *Criminal Lawyers Association* is also not specifically related to the application of section 17(1). That said, the notion that an Ontario Court has directed that an opinion from a member of CLLAS may be required in relation to a particular type of transaction, and the broad principles discussed in *Criminal Lawyers Association*, will be considered in the section of this Order regarding the application of the "public interest override", below.

[16] I therefore find that the information at issue in this appeal qualifies as "commercial information" for the purposes of section 17(1) of FIPPA.

Were the members' names supplied in confidence either implicitly or explicitly?

[17] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of

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[6] [1996] O.J. No. 5101.
[7] 2010 SCC 23, [2010]1 S.C.R. 815.
[8] 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]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
[9] See in this regard Order P-76.

third parties [10]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [11].

[18] FSCO submits that the records that contain the names are provided to FSCO voluntarily and in confidence. FSCO submits:

> These documents are not required to be filed, or disclosed to the public, by any FSCO administered regulatory statute. FSCO does not disclose this type of document upon request nor does FSCO make such documents available on its website or otherwise.

[19] Although the records were not explicitly marked confidential, FSCO submits:

> …they were provided to FSCO with a reasonable expectation of confidentiality which is implicit to the relationship between FSCO as a regulator and the third party as a reciprocal insurance exchange providing private, self-insurance type services to its law firm members.

[20] The third party submits that the names of the insured members of CLLAS are not publicly available and are supplied to FSCO in confidence as part of FSCO's process of facilitating oversight of insurers. The third party submits that CLLAS treats this information confidentially and that:

> …dissemination of this information is restricted to insureds (i.e. those who are insured under the insurance policies), CLLAS' reinsurers (i.e. those who assume a portion of the risks insured under the insurance policies) and FSCO (i.e. the regulatory entity charged with overseeing the operations of CLLAS). In supplying the names of the insured members of CLLAS to FSCO, CLLAS has always reasonably expected that the confidentiality of the information would be maintained by FSCO.

[21] The appellant disagrees. He takes the position that members of CLLAS are identified publicly in a variety of ways, including:

- The webpage for a partner at a law firm indicating that she is an advisory board member and audit committee member for CLLAS.
- The webpage for a partner at another law firm indicating that he was a member of the CLLAS advisory board, past chair of its claims committee and member of its executive committee

[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.

- An assertion that a web search result for "CLLAS" listed an individual as an executive member of CLLAS
- The curriculum vitae of a retired justice stating that he was a founding director and member of the executive committee of CLLAS and served as its chairman
- The identification of certain law firms as CLLAS members in newspaper reports covering court proceedings
- The annual publishing of the name of the complaint officer for CLLAS
- The annual listing of the attorney of record for CLLAS in the Ontario Gazette since 1987

[22] The appellant also points to the practice of other reciprocal insurers and insurance associations that disclose a list of its members. The appellant further asserts that a similar organization to CLLAS, the Canadian Lawyers Insurance Association (CLIA) discloses its members (by law society). The appellant submits that the practice of CLLAS not to disclose its members names is "inconsistent and contradictory to the practice" of all other Canadian lawyers and law societies across our nation and to the practice of the CLIA.

[23] In reply, the third party submits that:

- CLLAS has consistently advised newspaper reporters that it is "a private insurer and does not disclose its membership"

- The appellant refers to unsubstantiated (and in some cases inaccurate) newspaper articles to support his assertions

- CLLAS has a policy that references to membership in CLLAS should not be made and when it becomes aware of such references, it requests their removal [12]

[24] The third party submits that CLLAS has consistently treated its membership list as confidential and has taken steps to protect that confidentiality where appropriate.

[25] FSCO submits in reply that while the appellant appears to have identified the names of individual lawyers who have served CLLAS in various leadership capacities at different times:

> It appears the appellant has confused these individuals with the subscribers to, or members of, CLLAS. [FSCO] notes that the Records at Issue contain only the names of private law firms and not the names of individuals.

[12] The third party advises that three of the four references referred to by the appellant have been removed. It submits that CLLAS has no control over the biographies of individuals like that of the retired justice.

[26] In the circumstances of this appeal, I accept the position of FSCO and the third party that the information at issue was supplied by CLLAS to FSCO with a reasonably-held expectation of confidence. The appellant relies on the disclosure of a small number of individual or law firm names in support of his contention that the members' names are publicly available. One does not flow from the other. The evidence of FSCO and the third party is that steps are taken to preserve confidentiality and members are instructed not to disclose their membership. If they do, they are asked to remove any such reference. The references cited by the appellant span a number of years, and are not focused on the year in question. I also agree with FSCO that the members' names listed in the records at issue are those of law firms, not individuals. Finally, evidence that other organizations have different disclosure policies and that other minimal information about CLLAS may have entered the public domain is not germane to the issue of whether, in the circumstances of the appeal before me, the information at issue was supplied in confidence to FSCO.

[27] Accordingly, I find that the CLLAS members' names in the records before me were supplied by CLLAS to FSCO with a reasonably-held expectation of confidentiality.

Would disclosure of the members' names give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b) and/or (c) of section 17(1) will occur?

[28] FSCO and the third party claim that disclosure could reasonably be expected to prejudice significantly CLLAS' competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization, or result in undue loss being suffered by FSCO.

[29] FSCO submits that disclosure would facilitate strategic targeting and soliciting of CLLAS members by competitors such as insurers and insurance brokers with the goal of breaking up or reducing the membership of CLLAS.

[30] The third party submits that CLLAS' competitors are brokers and other insurers and their interest is to persuade insured law firms to leave CLLAS' insurance program. The third party submits, in particular:

> In the past, many attempts have been made by competitors to solicit individual law firms which are members of CLLAS. As noted above, CLLAS' membership in essence constitutes CLLAS' customer list and is considered to be highly confidential information. In this case, the confidentiality is necessary to protect CLLAS against brokers and insurers seeking to entice business away from CLLAS. As an entity whose sole focus is the insurance of its members, CLLAS requires stability of membership and a certain critical mass in order to prudently spread risk and arrange cost-effective reinsurance.

[31] In response, the appellant refers to the practice of other reciprocal insurers, insurance associations and the CLIA in disclosing a list of the names of their members or board members as evidence that no harm could reasonably be expected to arise from the disclosure of the names of the members of CLLAS. Furthermore, the appellant asserts that "more sensitive" information about CLLAS is listed in FSCO's annual report. The appellant asserts that this reflects that the practice of the CLLAS is an anamoly. The appellant also takes the position that the information at issue is of a historical nature and commercially outdated. Finally, the appellant also takes the position that a reciprocal insurer like CLLAS is not an insurer and can therefore have no "insureds".

[32] With respect to this last point, in reply the third party submits that this is "simply incorrect" and that section 42(1) of the *Insurance Act* provides, in part:

> Upon due application and upon proof of compliance with this Act, the Superintendant [Superintendent of Financial Services] may issue a license to undertake and carry on business in Ontario to any insurer coming within one of the following classes:
> …
> 7. Reciprocal Insurance exchanges.

Analysis and Findings

[33] To meet the section 17(1)(c) test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [13].

[34] 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 [14].

[35] Having considered the representations, I am satisfied that disclosure of the names in the records could reasonably be expected to result in the harms identified in section 17(1)(c). Specifically, I find that disclosing the names could allow other insurers or competitors to solicit individual law firms which are members of CLLAS with a view to taking the reciprocal insurance business away from CLLAS. This could then adversely affect the stability of the membership of CLLAS and the critical mass required in order to prudently spread risk and arrange cost-effective reinsurance, negatively impacting

[13] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[14] Order PO-2020.

CLLAS' long-term viability. In my view this could reasonably be expected to result in undue loss to CLLAS under section 17(1)(c) of the *Act* [15].

[36] Accordingly, I find that the names qualify for exemption under section 17(1)(c) of the *Act*.

[37] As I have found that section 17(1)(c) of the *Act* applies it is not necessary for me to also consider whether sections 17(1)(a) and/or (b) are also applicable.

Does the Public Interest Override in Section 23 of the *Act* Apply?

[38] The appellant suggests that there is a public interest in the disclosure of the names of the members of CLLAS. The public interest override found at section 23 of the *Act* reads as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[39] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[40] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [16]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[17]

[41] The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [18].

[42] Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the

[15] See Order P-76.
[16] Orders P-984 and PO-2607.
[17] Orders P-984 and PO-2556.
[18] Order P-984.

exemption [19]. Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [20]. 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 [21].

[43] FSCO submits that CLLAS does not offer insurance services to the general public but rather only to its members. FSCO takes the position that disclosure of the names would not further the *Act*'s central purpose of shedding light on the operations of government because there is no governmental activity reflected in the records where the members' names are found. FSCO submits that in the circumstances of this appeal the appellant is advancing a private, as opposed to a public interest in disclosure.

[44] The third party submits that any concerns regarding the proper regulation of the insurance industry have been entrusted to FSCO by the provincial legislature and there is no relationship between the disclosure of the names of the members of CLLAS and the *Act*'s central purpose of shedding light on government.

[45] As set out above, the appellant asserts that it is in the public interest that the members' names be disclosed for a number of reasons, including:

- Judicial recognition in *Ontario Securities Commission* that an opinion from a member of CLLAS may be required in relation to a particular type of transaction

- The principles discussed in *Criminal Lawyers Association* that he says support his submission that government documents may be disclosed if it can be shown that suppressing them precludes meaningful public discussion on matters of public interest

- Sections 4.2, 5(4) and 13 of the *Law Society Act* [22] which, the appellant submits, operate to provide a statutory right to the requested information

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[19] Order P-1398.

[20] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

[21] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[22] Section 4.2 reads: In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.

- The estimated number of lawyers who are members of CLLAS
- The public interest regarding the regulation of the legal profession
- Various quotes from an article in the Law Times
- The business relationship between the Lawyers' Professional Indemnity Company (LawPRO) and CLLAS which results in a "profound conflict" between the Law Society of Upper Canada's (LSUC) regulatory and commercial functions in relation to its desire to protect the public against negligence of lawyers and LawPRO and CLLAS "profit[ing] from a resistance to negligence claims against - but especially among – Canada's dominant law firms".

[46] With respect to this last point the third party submits in reply:

> CLLAS is a private insurance operation. It is completely separate from the LSUC and LawPRO (an insurance company owned by LSUC which provides insurance to all Ontario lawyers). CLLAS is no different in this regard from a multitude of insurers which provide insurance to Ontario Lawyers [in] excess of the limits provided by LawPRO. This can be seen by referring to LawPRO's on-line reporting form which asks for the identity of a lawyer's excess insurer and lists (in a drop down menu which appears by answering 'yes' to Question 7) some 15 insurers and brokers including [four named companies], as well as CLLAS and LawPRO itself.
>
> …
>
> CLLAS is not related to or affiliated with the LSUC or LawPRO. The duties of LSUC and LawPRO, whatever they may be, have no bearing on CLLAS.

> 3. The Society has a duty to protect the public interest.
> 4. The Society has a duty to act in a timely, open and efficient manner.
> 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

Section 5(4) reads: The Society may own shares of or hold a membership interest in an insurance corporation incorporated for the purpose of providing professional liability insurance to licensees and to persons qualified to practice law outside Ontario in Canada.

Section 13 reads: The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario, and for this purpose he or she may at any time require the production of any document or thing pertaining to the affairs of the Society.

[47] In my view, the appellant has not established the existence of a compelling public interest in the disclosure of the information at issue in this appeal. It should be borne in mind that CLLAS is not an institution under the *Act*, and it acts as a private reciprocal insurance exchange subject to the oversight of FSCO. The submissions of the appellant focus on how disclosure would allow there to be a better scrutiny of CLLAS.

[48] CLLAS is a private insurer. CLLAS' services are not available to the general public. Furthermore, I accept the evidence that CLLAS is not related to or affiliated with the LSUC or LawPRO.

[49] Therefore, while disclosing the names of the members of CLLAS might serve the purpose of somehow allowing the appellant, and perhaps others, to better scrutinize the activities of CLLAS, in my view, it would not "serve the purpose of informing the citizenry about the activities of government".

[50] Finally, as this is an access to information request under *FIPPA*, that statute governs the manner of access and my powers. In my view sections 4.2, 5(4) and 13 of the *Law Society Act* do not operate to provide a separate right to access or provide a basis for the application of the "public interest override", in the circumstances of this appeal.

[51] Accordingly, in all the circumstances, I am not persuaded by the evidence that there exists a public interest in the names of the members of CLLAS sufficient to override the section 17(1)(c) exemption.

ORDER

I uphold the decision and dismiss this appeal.

Original Signed By: November 23, 2011
Steven Faughnan
Adjudicator