

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3159-I

Appeals PA07-409 and PA08-127

Ministry of Finance

January 29, 2013

Summary: The requester sought access to records related to reassessments under the *Corporations Tax Act*. Following the issuance of Interim Order PO-3130-I, the ministry was instructed to exercise its discretion with respect to two records found subject to the discretionary solicitor-client privilege exemption in section 19. The ministry disclosed all of one record and portions of the second record. This order upholds the ministry's exercise of discretion with respect to the undisclosed information in the remaining record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 19.

Orders and Investigation Reports Considered: PO-3006-I, PO-3107-R, PO-3130-I.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] S.C.J. No. 23.

OVERVIEW:

[1] The Ministry of Finance (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information related to the audit and proposed reassessment under the *Corporations Tax Act* (*CTA*) of a named corporation. The requester also sought access to records between the Ministry of Finance (Ontario) and any other federal or provincial taxing authority.

Finally, the requester sought access to records in respect of an amendment made to subsection 2(2) of the *CTA*.

[2] The Ministry of Finance had split into two ministries on February 21, 2007, just before the request was made. These two ministries consisted of the Ministry of Revenue (MOR) and the Ministry of Finance (MOF or the ministry). In 2011, the Ministry of Revenue was absorbed back into the Ministry of Finance.¹

[3] The MOR located responsive records and granted partial access to them. Some of the records were withheld, in whole or in part, pursuant to sections 13(1) (advice or recommendations), 15 (relations with other governments), 17(2) (tax information), 18(1) (economic and other interests), and 19 (solicitor-client privilege) of the *Act*.

[4] The requester (now the appellant) appealed MOR's decision to this office, which then opened appeal file PA07-409.

[5] During the mediation of appeal PA07-409, additional responsive records were also located within the Ministry of Finance and a decision letter was issued. The ministry granted partial access to the responsive records and denied access to others pursuant to sections 12(1)(e) and (f) (Cabinet records), 13(1) (advice or recommendations), 15(a) (prejudice to intergovernmental relations), 17(2) (tax information), 18(1)(d) (injury to financial interests), and 19 (solicitor-client privilege) of the *Act*. This decision was also appealed by the requester (the appellant in appeal file PA07-409), which resulted in appeal file PA08-127 being opened by this office.

[6] The appellant advised that it wished to pursue access to all of the records that were withheld, in full or in part, except for the information that was deemed to be non-responsive to the request and the information withheld pursuant to the personal privacy exemption in section 21(1) of the *Act*.

[7] As mediation did not resolve the issues in these files, they were transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. I sought representations from the ministry and the appellant. The parties' representations were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] I then issued Interim Order PO-3006-I. In that order, I found certain records or portions of records exempt by reason of the mandatory exemptions in sections 12(1)(f) and 17(2) and subject to the discretionary exemptions in sections 13(1), 15(a) and/or (b), 18(1)(d) and 19. I ordered the ministry to re-exercise its discretion with respect to the records that I found subject to discretionary exemptions.

¹ In this order, any reference to the ministry is a reference to the Ministry of Finance as the MOR has been absorbed into this ministry.

[9] In Interim Order PO-3006-I, I also found certain records, or portions of records, not exempt and ordered the ministry to disclose them.

[10] The ministry disclosed the information at issue in three records and filed a reconsideration request for the remaining information that I ordered disclosed. The ministry and the appellant provided representations with respect to the ministry's reconsideration request. In response to Interim Order PO-3006-I, both parties also provided representations with respect to the ministry's exercise of discretion. All of these representations were shared in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[11] Next, I issued Reconsideration Order PO-3107-R, in which I found additional records subject to the discretionary exemption in sections 15(a) and/or (b). In that order, I ordered the ministry to exercise its discretion concerning the disclosure of these records.

[12] In response to Reconsideration Order PO-3107-R, both parties provided representations with respect to the ministry's exercise of discretion. These representations were shared in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[13] I then issued Interim Order PO-3130-I, which included a finding that Records P9B and Y7 were subject to the application of the discretionary solicitor-client privilege exemption in section 19 of the *Act*. This order included the following provision:

I order the ministry to exercise its discretion with respect to Records P9B and Y7 and to advise the appellant and this office of the result of this exercise of discretion, in writing. If the ministry continues to withhold all or part of these records, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The ministry is required to send the results of its exercise of discretion, and its explanation to the appellant, with the copy to this office, by no later than **November 27, 2012**. If the appellant wishes to respond to the ministry's exercise of discretion and/or its explanation for exercising its discretion to withhold information, it must do so within 21 days of the date of the ministry's correspondence by providing me with written representations.

[14] Following the issuance of Interim Order PO-3130-I, the ministry advised that it had already disclosed all of Record Y7 and parts of Record P9B to the appellant in the discovery process undertaken in the litigation the parties had been involved in.

[15] The ministry decided to continue to deny access to the remainder of Record P9B. The ministry provided the appellant with an explanation of the basis for exercising its discretion to withhold the remaining information at issue in Record P9B. The appellant

responded to the ministry's explanation. I provided a copy of this explanation to the ministry and sought and received reply representations. Next, I provided a copy of the ministry's reply representations to the appellant and sought and received sur-reply representations.

[16] In this order, I uphold the ministry's exercise of discretion.

RECORDS:

[17] At issue in this order is whether the ministry properly exercised its discretion with respect to the withheld information in the following record:

Record No.	Description
P9B	Title: Position Paper: Captiveco ² Passive Interest Income (135 pages)

DISCUSSION:

EXERCISE OF DISCRETION

Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[18] The section 19 exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[19] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

² Described by the ministry as a subsidiary corporation that has been incorporated in a tax haven. See paragraph 15 of Interim Order PO-3006-I for further details.

[20] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[21] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[22] The ministry submits that it exercised its discretion not to disclose the information at issue as the entire record is solicitor and client privileged. The ministry states that:

The purpose of the exemption is to protect communications between clients and legal advisors. This protection is central to the administration of justice and allows all clients, even those subject to access to information legislation, to speak freely and frankly with their counsel without fear that the advice will be disclosed. This privilege is so deeply entrenched in Canadian jurisprudence that the SCC has stated that even "a judge must not interfere...except to the extent absolutely necessary...to achieve the ends sought by the enabling legislation" (*Goodis v. Ontario (Ministry of Correctional Services)* (2006), 271 D.L.R. (4th) 407, at para. 15.)...

[23] The ministry also considered the following considerations as reviewed in Interim Order PO-3130-I:

1. Is this information which should be made available to the public?
No, this legal analysis is only of interest to the offshoring community and the tax authorities who oppose them.
2. Is this the requester's own information or that of his client?
No.
3. Is the solicitor and client privilege still important in view of ongoing litigation?
Yes.
4. Does the requester have a sympathetic or compelling need for the information?
No. The requester will do his own case analysis attempting to come to different conclusions.
5. Will disclosure increase public confidence in the institution?
No. The public benefits from government practices which protect the confidentiality of privileged information or all relevant governments. The solicitor and client privilege in relation to early analyses may constitute a defence for the government's tax appeal position, as it allows the government to speak with one voice in court as determined by the litigator. As the *Proceedings Against the Crown Act* mandates at s. 17, the Crown is entitled to all defences afforded other defendants.

6. Is the information significant or sensitive to the Institution?

Yes, it is significant, because the cases are significant, and protecting the privilege is proportionately more important as an element of protecting the ministry's precedential cases with huge dollar values at stake. It has been conceded by a parallel requester in another Captiveco request that proceeds of the request are not to be sheltered by the requester but shared among the wider group of companies and their lawyers and accountants subscribing to Captiveco schemes...

[24] The appellant relies on the representations it previously made on the issue of discretion and particularly submits that:

...the ministry is relying on a discretionary exemption to ground highly selective disclosure of the underlying record. Under the common law, the doctrine of implied waiver will often apply to deem any privilege in such records to be waived when there is an indication that the claimant is attempting to take unfair advantage or present a misleading picture of a document or circumstance through selective disclosure. Since there are numerous redactions in the record now in dispute, it is difficult for the appellant to determine the nature of the excerpts over which the discretionary exemption is being claimed. As such, the appellant ...requests that you carefully consider the nature of the undisclosed information to determine whether the ministry's actions present a misleading picture of the ministry's position or the existence of an underlying policy as to the interpretation of the tax provisions in issue in the appellant's parallel Superior Court tax appeals.

Analysis/Findings

[25] Record P9B is a 135 page paper entitled, "Position Paper, Captiveco: Passive Interest Income TCROB³ Tax Avoidance Audit - Draft - For discussion at the Ontario GAAR [General Anti-Avoidance Rule] Committee."

[26] The ministry described the record in previous representations as:

...a discussion paper for the Anti-Avoidance Committee of the ministry discussing all of the various approaches that the ministry could take in making the assessments and the strengths and weaknesses of each approach. It was meant to inform the ministry's internal and confidential discussions and is not an official, authoritative final version of the ministry's internal deliberations on those issues.

³ Tax Compliance and Regional Operations Branch.

[27] The ministry stated that this record was written by its Senior Tax Avoidance Specialist, acting without legal representation, in reasonable contemplation of litigation. The ministry states that the author's intention was to create "legal dissertations" in full contemplation of litigation.

[28] In Interim Order PO-3130-I, I found that Record P9B was created for the dominant purpose of reasonably contemplated litigation because it contains an analysis of the statutory and case law as it applies to reassessments of taxes and subsequent appeals and makes reference to discussions with the ministry's Legal Services Branch.

[29] As such, I determined that this record was subject to litigation privilege and that section 19(a) applies to this record. As the ministry had not provided representations on its exercise of discretion in withholding this record, I ordered it to do so in Interim Order PO-3130-I.

[30] I have carefully reviewed the ministry's severances from Record P9B and its explanation in support of its decision to continue to withhold the information at issue. The withheld information includes significant information of the ministry related to the tax assessments that followed the amendment to the *CTA*. I find that the ministry exercised its discretion in a proper manner taking into account relevant considerations. These relevant considerations include those set out above.

[31] As stated by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*:

The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency

and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed [emphasis added by the court].

[32] I determined in Interim Order PO-3130-I that the section 19 exemption was properly claimed for the entire record, Record P9B. I have now determined that the ministry has properly exercised its discretion with respect to the information it has withheld from this record. I am unable to substitute my discretion for that of the ministry. Accordingly, I will uphold the ministry's decision that the information at issue in the record is exempt under section 19.

ORDER:

I uphold the ministry's exercise of discretion concerning the undisclosed information in Record P9B.

Original Signed by: _____
Diane Smith
Adjudicator

_____ January 29, 2013