

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3033

Appeal PA10-342

Alcohol and Gaming Commission of Ontario

January 10, 2012

Summary: The appellant sought access to a complaint letter. The Alcohol and Gaming Commission of Ontario (AGCO) denied access pursuant to the third party commercial information exemption at section 17(1) and the personal privacy exemption at section 49(b). In the course of adjudication the appellant advised that he did not seek access to personal information except where it relates to the "complainant". The AGCO is ordered to disclose to the appellant the portions of the letter that contain only his personal information. Section 17(1) does not apply to the information in the complaint letter. The balance of the personal information in the letter is exempt under section 49(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1), 17(1)(a), (b) and (c), 21(2)(d), 21(2)(h), 21(3)(b), 21(3)(f), 49(b)

Orders and Investigation Reports Considered: P-1014, PO-2967

OVERVIEW:

[1] The Alcohol and Gaming Commission of Ontario (AGCO) is a regulatory agency established under the *Alcohol and Gaming Regulation and Public Protection Act (AGRPPA)* that is responsible for the administration of the *Liquor Licence Act (LLA)*. The Registrar of Alcohol and Gaming (registrar) is responsible for a variety of functions including ensuring that liquor licensees comply with the provisions of the *LLA*.

[2] The subject of this appeal is a request by the appellant under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to a complaint received by the AGCO.

[3] The AGCO identified a letter as being responsive to the request and it relied on sections 17(1) (third party commercial information) and section 21(1) (invasion of privacy) of the *Act* to deny access to it. At mediation, the possible application of section 49(b) (personal privacy) was added as an issue in the appeal because it appeared that the letter may contain the personal information of the appellant. Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[4] Initially, I invited representations from the AGCO and the appellant. I received representations from the AGCO and the appellant and shared them in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction* number 7. I also sought and received representations from an individual whose interests may be affected by disclosure of the responsive record (the affected party).

[5] In the discussion that follows, I reach the following conclusions:

- section 17(1) does not apply to the information in the complaint letter
- the letter contains the personal information of the appellant and other identified individuals
- only certain portions of the letter qualify for exemption under section 49(b).

ISSUES:

- A. Does section 17(1) of the *Act* apply to information contained in the complaint letter?
- B. Does the complaint letter contain personal information?
- C. Does section 49(b) of the *Act* apply?

DISCUSSION:

A. Does section 17(1) apply to information contained in the complaint letter?

[6] The first issue to be determined in this appeal is whether certain information in the letter is exempt under the mandatory third party information exemption in 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,

- (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

...

[7] For section 17(1) to apply, the AGCO 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.

[8] In its non-confidential representations, the AGCO submits that the letter contains financial information that:

was clearly provided in confidence and its disclosure could reasonably be expected to prejudice the individual record author. Similar information may no longer be supplied to the AGCO if this record is disclosed and that would be against the public interest.

[9] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹ Although one of the central purposes of the *Act* is to shed light on the operations of

¹ *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.).

government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.² In my view the information at issue, contained in a letter written by an individual, is not the type of information that section 17(1) was designed to protect. Furthermore, the AGCO's representations do not provide the level of "detailed and convincing" evidence required to establish a "reasonable expectation of harm" that is sufficient to meet the harms test in the third part of the test under section 17(1) of the *Act*.³

Accordingly, I find that section 17(1) does not apply to the information in the letter.

B. Does the complaint letter contain personal information?

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the letter 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,

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if 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;

[11] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(3) 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.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[12] 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.⁴

[13] 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.⁵

[14] The AGCO states that the record at issue:

... clearly contains the "personal information" of the third party complainant, while the information related to the appellant can be classified as information associated with that individual in his "business capacity".

[15] The AGCO also submits that other individuals are discussed in the records.

[16] The appellant does not specifically address whether the record contains personal information but takes the position that if there are names and addresses, other than that of the complainant, they can be "blacked out". I interpret this to mean that the

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

appellant does not seek access to personal information except where it relates to the "complainant".

[17] I find that the letter contains the personal information of the appellant, as it includes information relating to incidents involving him, as well as other personal information about him [paragraph (h) of the definition]. Although the AGCO argues that the information is associated with him in his "business capacity", I find that because it addresses the propriety of his conduct, the information reveals something of a personal nature about the appellant and crosses over from the business to the personal realm. In that regard, the complainant's views and opinions regarding the appellant's personal conduct that are contained in the letter, in accordance with paragraphs (e) and (g) of the definition of personal information, qualify as only the personal information of the appellant.

[18] The letter also contains the personal information of the complainant. This includes an address [paragraph (c)] and the complainant's views and opinions regarding the impact of incidents detailed in the letter on the complainant [paragraph (e) of the definition].

[19] Finally, the record also contains the personal information of other identifiable individuals. This includes their names, along with other personal information relating to them [paragraph (h)]. As set out above, the appellant does not seek access to this information and I will not address it any further in this order.

[20] 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 exceptions to this general right of access, including section 49(b). Section 49(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the AGCO must look at the information and weigh the appellant's right of access to his own personal information against another identifiable individual's right to the protection of their privacy.

[21] In determining whether the exemption in section 49(b) applies, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy. Section 21(2) provides some criteria for the AGCO to consider in making this determination⁶; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

⁶ The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

[22] As set out above, I have found the complainant's views and opinions about the appellant contained in the letter, qualifies as only the personal information of the appellant. Disclosing this information to the appellant would not constitute an unjustified invasion of another individual's personal privacy. Accordingly, I will order that the personal information of the appellant that is contained in the letter be disclosed to him. I have provided the AGCO with a highlighted copy of the letter indicating that portion which is not exempt.

[23] I will now address the application of section 49(b) to the remainder of the personal information in the complaint letter.

Section 49(b)

[24] Section 49(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

Where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[25] The AGCO states that section 49(b) applies to the letter and its representations refer to the presumptions in sections 21(3)(b) and 21(3)(f) in support of its decision. The affected party asserts that the letter was provided with the "utmost surety" that it would be kept in confidence, thereby raising the potential application of the factor in section 21(2)(h).

[26] Section 21(2)(h) reads:

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,

the personal information has been supplied by the individual to whom the information relates in confidence.

[27] Sections 21(3)(b) and (f) read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the

extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

[28] The AGCO states that the letter was received by the AGCO in its law enforcement role as the regulator of licence holders or applicants for liquor licenses. The AGCO submits that the personal information in the letter was compiled and is identifiable as part of an investigation into a possible violation of law. Furthermore, the AGCO submits that the letter contains information describing an individual's finances.

[29] The appellant's representations are wide ranging but mostly focus on his concerns about the AGCO's processes and procedures and its refusal to issue a liquor licence. He also provides submissions on what he believes are the contents of the letter and why he should obtain access to it. In particular, he submits:

- The AGCO does not want to disclose the complaint letter because it will reveal their wrongdoing
- the letter contains misrepresentations that are libellous and slanderous
- the letter was improperly solicited from the complainant
- portions of the letter formed part of a report (the Report) used as the basis for the refusal of a liquor licence he was interested in obtaining
- he has already been provided with the Report, as well as the name of the author of the letter
- the refusal to disclose the letter "biased" his right to a fair hearing
- a statement of claim in an action commenced against him has the same information that is contained in the letter
- although he withdrew a challenge to the liquor license refusal he is interested in obtaining the letter for the purposes of a defamation action

[30] The appellant also provides submissions on what he views as the impact the letter has had upon his personal life and his business interests. Furthermore, he challenges the AGCO's assertion that it had completed its law enforcement investigation at the time that the letter was provided.

Findings

Sections 21(3)(b) and 21(3)(f)

[31] I have carefully reviewed the letter. As indicated above, it contains the personal information of identifiable individuals other than the appellant, including that of the complainant.

[32] The presumption only requires that there be an investigation into a possible violation of law.⁷ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁸

[33] Previous orders have established that the investigative and compliance functions of the AGCO (and its predecessor, the Liquor License Board of Ontario) with respect to regulating individuals and companies that are licenced under the *LLA*, qualify as law enforcement activities⁹. Therefore, personal information which is compiled as part of an investigation by AGCO staff constitutes an "investigation into a possible violation of law" for the purposes of the presumption at section 21(3)(b).

[34] I accept the evidence of the AGCO that the remaining personal information in the letter was compiled and is identifiable as part of the AGCO's investigation into a possible violation of the *LLA* and its regulations. In that regard, I disagree with the appellant's assertion that the investigation had been completed at the time the letter was provided. In my view, based on the evidence before me, the investigation was still ongoing at that time. The presumption in section 21(3)(b), therefore applies and disclosure of the personal information of the complainant is presumed to constitute an unjustified invasion of their personal privacy under section 49(b).

[35] I also find that there is a discrete amount of information that falls within the scope of section 21(3)(f) because it describes the liabilities, or financial activities of an identifiable individual other than the appellant. Accordingly, disclosing this information is also presumed to constitute an unjustified invasion of personal privacy under section 49(b).

The Listed and Unlisted Factors and Circumstances in Section 21(2)

[36] I will now address the listed and unlisted factors and circumstances in section 21(2) of *FIPPA*.

⁷ Orders P-242 and MO-2235.

⁸ Orders MO-2213 and PO-1849.

⁹ See for example, Orders P-338, P-1297 and PO-1913.

Section 21(2)(h)

[37] In Order PO-2967, I considered the application of the factor in section 21(2)(h) in a case where a complaint was made to a University against a requester/appellant. In that order, I stated:

I accept that the context and the surrounding circumstances of the University's investigation into the matter involving the appellant as a result of the complaints that were made are such that a reasonable person would expect that the information supplied in this context by at least the limited number of individuals who requested confidentiality, would be subject to a degree of confidentiality.¹⁰ Having said this, however, past orders have determined that there are limits to the expectation of confidentiality in relation to information provided in the course of an investigation into workplace conduct.¹¹ In Order M-82, Inquiry Officer Holly Big Canoe stated the following with respect to the application of section 14(2)(h), the municipal equivalent to section 21(2)(h):

In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations.

In that decision, Inquiry Officer Big Canoe found that section 21(2)(h) applied, but that it was only relevant as a consideration with respect to "the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint."¹² Senior Adjudicator John Higgins reached the same conclusion in Order P-1014 that the factor in section 21(2)(h) applied to "all personal information provided by the witnesses and the complainant which pertains to individuals other than the appellant."

In Order PO-2916, Adjudicator Daphne Loukidelis adopted the reasoning set out in Orders M-82 and P-1014 and found that the factor favouring non-disclosure in section 21(2)(h) applies only to the personal information of the affected parties themselves, not the information or views they

¹⁰ Order PO-1910.

¹¹ Orders M-82 and P-1014.

¹² Institution's application dismissed February 9, 1995 in *Hamilton (City) v. Ontario (Information and Privacy Commissioner)*, Hamilton Doc. D246/93 (Ont. Div. Ct.).

shared with the investigator respecting the subject matter of the investigation, which was intermingled with the views and opinions expressed about the requester in that appeal himself.

Although these orders deal with investigations into workplace conduct, given that the current appeal relates to investigations conducted by the CCPS [Campus Community Police Services], the University, or the investigator I find that the reasoning applied in those orders is applicable to the current appeal.

[38] I find that this reasoning also applies to some of the information remaining at issue in the current appeal. Accordingly, I find that the factor favouring privacy protection in section 21(2)(h) applies only to the personal information of the complainant, and generally not to the information the complainant provided respecting the subject matter of the investigation. The factor in 21(2)(h) is a factor weighing strongly in favour of a finding that disclosure of only certain information would constitute an unjustified invasion of personal privacy.

Section 21(2)(d) and "adequate degree of disclosure"

[39] The appellant's representations raise an unlisted circumstance which Senior Adjudicator John Higgins described in Order P-1014 as "adequate degree of disclosure". In that order, he stated that:

This factor ... relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice.

...

In upholding the Inquiry Officer's finding in Order M-82, the Divisional Court stated that, without adequate disclosure, "the complainant might be left wondering whether his complaint had been properly investigated". In my view, adequate disclosure is a fundamental requirement in a proceeding such as a WDHP [Ontario Public Service Workplace Discrimination and Harassment Prevention] investigation. Both the complainant and the respondent in such a proceeding are entitled to a degree of disclosure which permits them to understand the finding that was made and the reasons for the decision.

In a similar vein, individuals such as the appellant, who face accusations which result in administrative or judicial proceedings, are entitled to know the case which has been made against them.

In the circumstances of this appeal, I find that the factor requiring adequate disclosure applies to the personal information in the records (including the undisclosed witness statements) which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.

[40] Although not specifically relied upon by the appellant, by inference the appellant's submissions also raise the possible application of the factor at section 21(2)(d) of the *Act*, which reads:

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

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[41] With respect to section 21(2)(d) the AGCO submits that the appellant has no current dealings with the AGCO and that he withdrew his challenge to the liquor license refusal.

[42] 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 hearing¹³

[43] The appellant is aware of the allegations made against him in the context of the liquor licence proceedings and was given the ability to respond to them. In fact, the appellant acknowledges that he has been provided with a report, which he asserts contains portions of the letter at issue.

¹³ 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.).

[44] Accordingly, for the purposes of the unlisted circumstances in section 21(2) I find that he has been provided with an "adequate degree of disclosure" with respect to any complaint made in the liquor licence proceedings at issue. Accordingly, the unlisted circumstance raised by the appellant carries little weight in favour of disclosure.

[45] That said, however, the factor favouring disclosure at section 21(2)(d) is a relevant consideration in the circumstances of this appeal. The appellant asserts that the letter is required to provide the foundation for a civil action. However, as a result of the liquor licence proceedings, and his receipt of a report that he asserts contains portions of the letter the appellant is generally aware of the allegations contained therein. In my view, this reduces the weight accorded to this factor in the circumstances.

Balancing the presumptions and the listed and unlisted factors and circumstance

[46] Given the application of the factor in section 21(2)(h) and the presumptions in sections 21(3)(b) and 21(3)(f), the little weight accorded to the unlisted circumstance "adequate degree of disclosure" and the reduced weight accorded to the factor in section 21(2)(d), I am satisfied that the disclosure of the remaining personal information in the letter relating to the complainant would constitute an unjustified invasion of the personal privacy of the complainant. Accordingly, I find that this information is exempt from disclosure under section 49(b) of the *Act*, subject to my review of the AGCO's exercise of discretion.

EXERCISE OF DISCRETION:

[47] The section 49(b) exemption is discretionary and permits the AGCO to disclose information, despite the fact that it could be withheld. On appeal, this office may review the AGCO's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.¹⁴

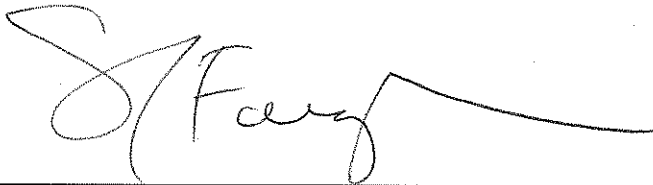
[48] I have reviewed the circumstances surrounding this appeal and the AGCO's representations on the manner in which it exercised its discretion. In all the circumstances, including the amount of information that will be disclosed to the appellant as a result of this order, I am satisfied that the AGCO has not erred in the exercise of its discretion not to disclose the remaining personal information to the appellant.

[49] Accordingly, I find that the balance of the personal information in the record at issue in this appeal qualifies for exemption under section 49(b).

¹⁴ Orders PO-2129-F and MO-1629.

ORDER:

1. I order the AGCO to disclose to the appellant the portions of the complaint letter that I have highlighted on a duplicate copy of the record enclosed with this order by sending it to him by **February 14, 2012 but not before February 8, 2012.**
2. In all other respects I uphold the decision of the AGCO.

A handwritten signature in black ink, appearing to read 'S. Faughnan', with a long horizontal flourish extending to the right.

January 10, 2012

Steven Faughnan
Adjudicator