Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4412

Appeal PA19-00535

Ontario Securities Commission

June 28, 2023

Summary: The appellant sought access to individuals' given and family names contained in a Form 45-106F1, used to report certain exempt distributions of securities, and asserted that it was in the public interest that this information be disclosed. The Ontario Securities Commission (the OSC) took the position that this was personal information and qualified for exemption under section 21(1) of the *Act*. In this order the adjudicator finds that the individuals' given and family names as they appear in the Form 45-106F1 are personal information and are exempt under section 21(1) of the *Act* and that the section 23 public interest override does not apply. He upholds the decision of the OSC and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 2(1) (definition of personal information), 2(3), 2(4), 21(1), 21(3)(f), 23 and 64(2); *Securities Act*, RSO 1990, c S.5, sections 53, 73.3(1) and 73.3(2).

Orders Considered: Order PO-3896.

Cases Considered: *British Columbia Securities Commission v. Branch*, 1995 CanLII 142, [1995] 2 SCR 3; *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184.

OVERVIEW:

[1] When companies seek to raise funds, they do so through a variety of ways, including issuing and distributing shares or securities. These are often accompanied by a prospectus, unless the transaction is exempt from that requirement. Companies,

funds and underwriters in the financial arena must use a Form 45-106F1 to report these exempt distributions of securities issued to individuals and corporations to provincial securities regulators, which in Ontario is the Ontario Securities Commission (the OSC).

[2] The OSC received a request under *the Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information in specified Form 45-106F1's, including each Schedule 1, filed by specific companies from January 1, 2017 to August 19, 2019.

[3] The OSC identified responsive records relating to the specified companies and after notifying them of the request, issued separate access decisions in respect to each of the companies. The OSC granted full access to information relating to two of the notified companies and partial access to information relating to the other notified company, relying on the mandatory exemption at section 21(1) (personal privacy) of the *Act* to deny access to the portion it withheld.

[4] The requester (now the appellant) appealed the OSC's access decision with respect to the withheld information pertaining to the third notified company.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[6] I decided to conduct an inquiry. Representations were exchanged between the OSC and the appellant. In the course of the inquiry, I sought and received representations from a number of affected parties, which were shared with the appellant.

[7] As the appellant raised the public interest override at section 23 of the *Act*, I decided to add the possible application of section 23 as an issue in the appeal. Furthermore, in the course of my inquiry the appellant advised that he was only interested in the withheld family and given names of individuals that appear in the schedules to the responsive Form 45-106F1. Accordingly, the information at issue in this appeal is the withheld family and given names of individuals.

[8] In this order I find that the individuals' given and family names are personal information and are exempt under section 21(1) of the *Act* and that the section 23 public interest override does not apply. I uphold the decision of the OSC to withhold this information and dismiss the appeal.

RECORDS:

[9] Remaining at issue in this appeal are the withheld family and given names of individuals that appear on pages 1-010, 2-010, 3-010 and 4-011 to 4-103 of the responsive record entitled "Form 45-106F1 Report of Exempt Distribution (Non-Investment Fund Issuer)" (hereinafter referred to the Form 45-106F1). These names

appear only in the schedules to the Form 45-106F1.

ISSUES:

A. Do the schedules to the Form 45-106F1 contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

B. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

C. Is there a compelling public interest in disclosure of the information that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

Issue A: Do the schedules to the Form 45-106F1 contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[10] The parties opposing disclosure in this appeal, being the OSC and the affected parties who provided responding representations, maintain that the withheld family and given names of individuals are exempt from disclosure under the mandatory personal privacy exemption in section 21(1).

[11] Under section 21(1) of the *Act,* "a head shall refuse to disclose personal information to any person other than the individual to whom the information relates" unless an exception applies. This mandatory personal privacy exemption only applies to "personal information," which is defined in section 2(1) of the *Act* as recorded information about an identifiable individual, including "information relating to financial transactions in which the individual has been involved" in paragraph 2(b) and "the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual" in paragraph (h).

[12] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[1]

[13] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or

[1] Order 11.

business capacity is not considered to be "about" the individual.[2] See also sections 2(2) and 2(3), which state:

> 2(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.
>
> 2(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.

[14] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[3]

Context of the request

[15] The OSC explains that the general rule under Ontario securities law is that in accordance with section 53 of the Ontario *Securities Act*[4] any security offered to the public must be offered under a prospectus. However, it adds that there also exists an "exempt market" which describes a section of Canada's capital markets where securities can be sold without a prospectus. The OSC states that the statutory exemption applicable to the Schedules to the Form 45-106F1 is found at section 73.3 of the *Securities Act*, which provides an exemption from the prospectus requirements for "accredited investors" who are investing in the exempt market as individuals or companies. In that regard, section 73.3(1) of the *Securities Act* sets out the definition of an accredited investor and 73.3(2) provides that the prospectus requirement does not apply to a distribution of a security if the purchaser purchases the security as principal and is an accredited investor.

[16] The OSC also refers to section 1.1 of National Instrument 45-106 which defines accredited investors to include individuals who, having satisfied certain criteria, such as a net asset level, may purchase the securities of a public issuer without a prospectus. With respect to individuals, the relevant provisions of section 1.1 that pertain to Ontario read:

> 1.1 In this Instrument
>
> "accredited investor" means:
>
> …

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[2] Orders MO-1550-F, P-257, P-427, P-1412, P-1621, PO-2225 and R-980015.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] RSO 1990, c S.5.

> (j) an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable net value that, before taxes but net of any related liabilities, exceeds $1 000 000,
>
> (j.1) an individual who beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $5 000 000,
>
> (k) an individual whose net income before taxes exceeded $200 000 in each of the two most recent calendar year or whose net income before taxes combined with that of a spouse exceeded $300 000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the calendar year,
>
> (l) an individual who, either alone or with a spouse, has net assets of at least $5 000 000,
>
> [or,]
>
> …

[17] "Financial assets" is also defined in section 1.1 and means:

> (a) cash
>
> (b) securities, or
>
> (c) a contract of insurance, a deposit or an evidence of a deposit that is not a security for the purposes of securities legislation.

[18] The appellant also provides context. He explains that a class action was commenced alleging that there may have been violations of the *Securities Act*, including alleged stock manipulation of a specified company that was acquired by a different company, and it is in the public interest to disclose the withheld information in the responsive Form 45-106F1. He submits that it is alleged in the class action that certain insiders were invested in the first company (the company to which the Form 45-106F1 relates) and benefited from the alleged manipulation.

[19] The appellant states that he is seeking the information on behalf of a class of investors in a certified class action and he is not seeking "information about individual investors and their personal investment decisions."

Representations

The OSC's representations

[20] The OSC submits that the information at issue qualifies as personal information

because it falls within the scope of the definition of personal information at paragraphs 2(1)(b) and 2(1)(h) of *FIPPA*. The OSC submits that disclosing the names would enable the appellant to easily identify those specific individuals as well as the fact that these individuals are accredited investors who have purchased securities.

[21] In that regard, the OSC takes the position that the information about individual accredited investors is personal in nature and is not business or professional information because its disclosure would reveal that the individuals made private investment decisions to purchase particular securities. The OSC asserts that the information at issue has no relationship to these individuals in any professional or business capacity. The OSC adds:

> Even if it did, information related to an individual in a business or professional capacity may still qualify as personal information if the information reveals something of a personal nature about the individual. [references omitted]
>
> …
>
> The information being requested by the appellant is not connected to individual investors in any business or professional capacity. Rather, it is about these individuals' private investment choices, unrelated to government.

[22] The OSC states that when responding to the access request it treated the corporate investors and individual investors differently, determining that the corporate purchaser information was not personal information but that the names of individual investors was. It submits that this individual investor information is considered by the OSC, and other securities regulators in Canada, to be personal information.

[23] The OSC explains that:

> Section 2.3(1) of National Instrument 45-106[5], a regulatory requirement, provides that "the prospectus requirement does not apply to a distribution of a security if the purchaser purchases the security as principal and is an accredited investor." Accredited investors include individuals who, having satisfied certain statutory criteria, including net asset level, may purchase the securities of a public issuer without a prospectus.
>
> …
>
> The [Schedules to the Form 45-106F1] at issue in this appeal, contain the family and given names of individual investors along with their contact

[5] The requirement in section 2.3(1) of National Instrument 45-106 is also set out in section 73.3(2) of the *OSA*.

> information, including address, phone number and email address; the number of [named company] securities that each individual investor purchased as well as the statutory provision upon which they relied, in this case that of an accredited investor.

[24] The OSC submits that the Form 45-106F1, used by securities regulators across Canada, contains information about the entity issuing the securities and is generally considered to be public information. The OSC submits that while issuers have no expectation of confidentiality in relation to the form, individual investors who are listed in the schedules to the Form 45-106F1 do, submitting that:

> In contrast to the Form, which is public, the names of individual investors, along with their contact and other information, contained in the Schedules is non-public and is generally not placed on the public file of any securities regulator in Canada, including the OSC. Individual investors provide this information with an expectation that it will be kept private (see the Notice of Collection and Use of Personal Information in Form 45-106F1 [attached as an Appendix to the OSC's representations]).

[25] Furthermore, the OSC submits that section 5.1(2)(a) of the Companion Policy to National Instrument 45-106[6], which gives guidance as to the interpretation of the National Instrument, provides that information filed with the regulator is to be made available for public inspection during normal business hours, except where the regulator determines the information is to be "personal or other information of such a nature that the desirability of avoiding disclosure thereof in the interest of any affected individual outweighs the desirability of adhering to the principle that information filed with the securities regulatory authority […] be available to the public for inspection."

[26] Section 5.1(2) reads, in full:

> Access to information
>
> The securities legislation of several provinces requires that information filed with the securities regulatory authority or, where applicable, the regulator under such securities legislation, be made available for public inspection during normal business hours except for information that the securities regulatory authority, or where applicable, the regulator,
>
> > a. believes to be personal or other information of such a nature that the desirability of avoiding disclosure thereof in the interest of any affected individual outweighs the desirability of adhering to the principle that information filed with the securities regulatory authority

[6] Companion Policy 45-106CP Prospectus Exemptions. The OSC explains that although the Companion Policy is not legally binding, the OSC views it as nevertheless persuasive.

> or the regulator, as applicable, be available to the public for inspection,
>
> b. in Alberta, considers that it would not be prejudicial to the public interest to hold the information in confidence, and
>
> c. in Québec, considers that access to the information could result in serious prejudice.

Based on the above-mentioned provisions of securities legislation, the securities regulatory authorities or regulators, as applicable, have determined that the information listed in Schedule 1 and Schedule 2 of Form 45-106F1 *Report of Exempt Distribution,* discloses personal or other information of such a nature that the desirability of avoiding disclosure of this information outweighs the desirability of making the information available to the public for inspection. In addition, in Alberta, the regulator considers that it would not be prejudicial to the public interest to hold the information listed in these schedules in confidence. In Québec, the securities regulatory authority considers that access to these schedules by the public in general could result in serious prejudice and consequently, the information listed in these schedules will not be made publicly available.

[27] The OSC adds:

> That said, as stated in both the Form and its Schedules, which Schedules are marked as confidential, if a request under *FIPPA* were to be made for the Forms and Schedules, that request would have to be treated in accordance with the requirements of *FIPPA*, including the application of any exemptions that might apply to specific information in the Schedules.

The appellant's initial representations

[28] As set out above, the appellant states that he is seeking the information on behalf of a class of investors in a certified class action and he is not seeking "information about individual investors and their personal investment decisions."

The OSC's reply representations

[29] The OSC adds that the Form 45-106F1 makes clear that the information provided about the individual accredited investors will not be placed on the public file of any securities regulatory authority or regulator.

[30] Finally, the OSC submits that names of insiders of reporting issuers (defined in section 1 of the *Securities Act*, and which includes directors or officers of a reporting issuer and a person having 10% of the voting rights attached to the outstanding voting

securities of the reporting issuer) are publicly available on the System for Electronic Disclosure by Insiders. It asserts that the proper forum to request the names of individual investors is the class action referenced by the appellant and not through the *Act*.

The affected parties' representations

[31] As set out above, I decided to notify a number of parties whose interests may be affected by the disclosure of the requested information, including the individuals whose names are at issue. Some affected parties responded by simply indicating that they did not consent to the disclosure of their information, while others offered very brief reasons for their position. One of the affected parties submitted that his personal information or investment decisions as well as the personal information or investment decisions of any investor should be considered private and privileged. Other affected parties provided more detailed representations.

[32] In their detailed representations some affected parties took the position that the information qualifies as personal information because it falls within the scope of paragraphs 2(1)(b) (information relating to financial transactions in which the individual has been involved) and/or 2(1)(h) (the individual's name or where the disclosure of the name would reveal other personal information about the individual) of *FIPPA*.

[33] An affected party submitted that unlike corporate purchaser information, "the names and contact information for individual purchasers in the schedules is considered by the OSC, and other securities regulators in Canada and myself, to be personal information that must be protected from disclosure under section 21(1) of *FIPPA*." He adds:

> The individual purchaser information in the schedules is clearly personal information about individual accredited purchasers […] and their purchases of the company's securities. This is irrespective of whether the information is redacted personal information in the schedules or is the total number, or a breakdown by name, of those individuals whose last names were provided by the appellant in the original access request.
>
> The appellant is seeking confirmation that named individual purchasers of securities are contained in the schedules. Such confirmation would enable the appellant to easily identify specific individuals whose names and personal contact information are contained in the schedules as well as the fact that these individuals are accredited investors who have purchased [named company's] securities.
>
> It is reasonable to expect that the appellant (and others) will be able to identify me from this information if it is released.

> The information is about me as an individual investor and is personal in nature; it is not business or professional information. The information sought is about my private investment decisions to purchase particular securities and is not related to my professional or business activities.

[34] This affected party submitted that they provided their information to the OSC with the expectation that it would remain confidential.

Analysis and finding

[35] For the information at issue to be exempt under section 21(1), it must qualify as "personal information," as that term is defined in the *Act*. The determination of what is "personal information" is made based on the information itself and the context in which it appears. The parties opposing disclosure of the information claim that the information fits within paragraphs (b) and/or (h) of the definition in section 2(1) which state:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (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,
> >
> > (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[36] The information at issue consists of the given and family names of individuals who were determined to be accredited investors, a concept defined in National Instrument 45- 106, and relied upon by the OSC.

[37] The question is whether each of their names, when connected to the other disclosed portions of the Form 45-106F1, including the schedules, constitutes personal information.

[38] As I noted above, for the information at issue to qualify as personal information, it must be about the individual in a personal capacity. In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[7]

[39] A name, for example, may constitute "personal information" under section 2(1) if it appears with other personal information about an individual [paragraph (h)],

[7] Orders MO-2344, P-1409, PO-2225 and R-980015.

including information relating to financial transactions in which the individual has been involved [paragraph (b)]. However, if the names of individuals who are accredited investors are identified in a business capacity, the exception in section 2(3) applies, unless disclosure of the names would reveal something inherently personal about the individuals, which would bring the names back into the realm of personal information under *FIPPA*.

[40] Individuals invest in securities to for a variety of reasons. In the present appeal, the individuals are accredited investors, a prescribed accreditation that essentially enables an individual to access investments that are not available to the unaccredited investor. However, the definition of accredited investor (reproduced above) does not require an individual to have any special training or licence or to take any special courses to qualify for that status. Rather, an accredited investor may simply be an individual who, either alone or with a spouse, earns or has amassed a sufficient sum of money, assets or investments to satisfy the definition. I am satisfied that, in the circumstances, none of the information at issue is professional information.

[41] The given and family names of the accredited investors, along with the disclosed information about the amount each accredited investor invested, would reveal financial transactions in which the individual has been involved, which falls within the definition of personal information in paragraph (b) of the definition of personal information. In addition, this information reveals that they are accredited investors. In that regard, there is no evidence before me that the names of accredited investors are contained in a form of registry or are otherwise publicly available. I therefore find that the accredited investors' given and family names constitute "personal information" under section 2(1) because they appear with other personal information about an individual [paragraph (h)], including information relating to financial transactions in which the individual has been involved [paragraph (b)].

[42] As I have found the accredited investors' given and family names to be personal information, I will now consider whether the names qualify for exemption under section 21(1) of the *Act*.

Issue B: Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

[43] One of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions.

[44] Section 21(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions. The only exception of relevance in this appeal is section 21(1)(f). Section 21(1)(f) requires the institution to disclose another individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy." Other parts of section 21 must be looked at to decide whether

disclosure of the other individual's personal information would be an unjustified invasion of personal privacy.

[45] If the personal information being requested fits within one of the presumptions under section 21(3) its disclosure is presumed to be an unjustified invasion of personal privacy. Section 21(2) may also be relevant if none of the presumptions apply; it sets out factors to be considered when deciding whether disclosure of the information at issue would constitute an unjustified invasion of personal privacy. If one of the section 21(3) presumptions applies, the personal information cannot be disclosed unless there is a reason under section 21(4) that disclosure of the information would not be an "unjustified invasion of personal privacy," or there is a "compelling public interest" under section 23 that means the information should nonetheless be disclosed (the "public interest override").[8] None of the circumstances under section 21(4) is relevant to the present appeal; I will discuss the public interest override at Issue C.

21(3)(f): information relating to finances

[46] This presumption covers information related to an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. For this presumption to apply, information about an asset must be specific and must reveal, for example, its dollar value or size.[9] Section 21(3)(f) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

The representations

[47] The OSC and some affected parties who provided more extensive representations specifically submitted that the names fall within the section 21(3)(f) presumption and that disclosure of this personal information at issue would constitute an unjustified invasion of personal privacy.

[48] One of the affected parties also submitted that:

> … The Disputed Information is highly sensitive and concerns [the affected party's] personal finances and private investment decisions. This information was also supplied by [the affected party] to the OSC in confidence, including on the basis of the Notice of Collection and Use of

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[8] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, 1993 CanLII 3388 (Div.Ct.).
[9] Order PO-2011.

> Personal Information contained in Form 45-106F1, which expressly states that the "information in Schedules 1 and 2 [of Form 45-106F1] will not be placed on the public file of any securities authority or regulator". In such circumstances, the factors enumerated under section 21(2) of the *Act* support a finding that the disclosure of the Disputed Information would result in an unjustified invasion of [the affected party's] personal privacy. [footnote omitted]

[49] In sur-reply, the appellant sets out excerpts from a number of Supreme Court of Canada decisions discussing privacy considerations, for the most part in the context of the application of sections 7 and/or 8 of the *Charter*.[10] He submits that when relevant contextual factors, such as the nature of the private information at issue and the applicable regulatory and contractual scheme are taken into account, it is clear that as participants in the highly regulated securities market, the individual investors would not have any reasonable expectation of privacy regarding their investments. He submits that the Supreme Court of Canada ruled in *British Columbia Securities Commission v. Branch*,[11] individuals entering the securities market have a low expectation of privacy in relation to information disclosed while engaging in regulated activities. The appellant submits that it is widely known and accepted that the securities industry is highly regulated for the purpose of ensuring the integrity of the securities market and it is to be reasonably expected that disclosure of information related to, or belonging to participants, will become necessary in order to effectively administer the regulatory scheme.

Analysis and finding

[50] I am satisfied that the withheld names of individual accredited investors in the schedules to the Form 45-106F1 falls within the scope of the presumption at section 21(3)(f) of *FIPPA*. This is because disclosing the names in conjunction with the previously disclosed information about the amount of the investment made by each accredited investor would describe an individual's assets or financial history or activities.

[51] I have considered the authorities provided by the appellant, including the *British Columbia Securities Commission v. Branch* case. A large portion of the authorities referred to by the appellant arose in the context of whether compelled testimony in a securities proceeding can infringe section 7 and/or 8 of the *Charter*. The appellant did not challenge the constitutionality of section 21(1) of *FIPPA*, but points to the *Charter*, the highly regulated nature of securities matters and the decisions he references to demonstrate what he asserts is a low expectation of privacy in relation to information contained in the schedules to Form 45-106F1.

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[10] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. Section 7 provides that: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 8 provides that: Everyone has the right to be secure against unreasonable search or seizure.

[11] 1995 CanLII 142 (SCC), [1995] 2 SCR 3.

[52] I am of the view that *FIPPA*'s statutory scheme can function alongside the mechanisms for the investigation and enforcement of securities matters and govern the matter before me. In that regard, I note that section 64(2) of *FIPPA* provides that the *Act* does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

[53] Finally, although some affected parties also provided specific representations on the possible application of factors favoring disclosure as well as non-disclosure at section 21(2) of the *Act*, in light of my finding that the section 21(3)(f) presumption applies it is not necessary to set them out in detail because if section 21(3)(f) applies, it cannot be rebutted by any factors favouring disclosure in section 21(2).[12]

[54] As I have found that section 21(3)(f) applies, disclosing the names would constitute an unjustified invasion of the individual investor's personal privacy and their names qualify for exemption under section 21(1) of the *Act*.

[55] I will now address whether there is a compelling public interest in the disclosure of their names under section 23 of the *Act* in Issue C below.

Issue C: Is there a compelling public interest in disclosure of the information that clearly outweighs the purpose of the section 21(1) exemption?

[56] Section 23 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[57] For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[58] The *Act* does not state who bears the onus to show that section 23 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.[13]

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[12] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[13] Order P-244.

Compelling public interest

Public interest

[59] 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.[14] In previous orders, the IPC has 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.[15]

[60] A "public interest" does not exist where the interests being advanced are essentially private in nature.[16] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[17]

Compelling

[61] The IPC has defined the word "compelling" as "rousing strong interest or attention".[18]

[62] The IPC must also consider any public interest in not disclosing the record.[19] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[20]

Examples of "compelling public interest"

[63] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation;[21]
- the integrity of the criminal justice system is in question;[22]
- there are public safety issues relating to the operation of nuclear facilities;[23]

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[14] Orders P-984 and PO-2607.
[15] Orders P-984 and PO-2556.
[16] Orders P-12, P-347 and P-1439.
[17] Order MO-1564.
[18] Order P-984.
[19] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[20] Orders PO-2072-F, PO-2098-R and PO-3197.
[21] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[22] Order PO-1779.

- disclosure would shed light on the safe operation of petrochemical facilities[24] or the province's ability to prepare for a nuclear emergency;[25]

- the records contain information about contributions to municipal election campaigns;[26]

- the records show how much Ontarians are paying for electricity generated by a nuclear power station over a 49-year period;[27] and

- the records show the salaries of top administrators employed by a municipal institution.[28]

[64] A compelling public interest has been found not to exist where, for example:

- another public process or forum has been established to address public interest considerations;[29]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[30]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding;[31]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[32] and

- the records do not respond to the applicable public interest raised by appellant.[33]

Outweighs the purpose of the exemption

[65] The existence of a compelling public interest is not enough to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the exemption in the specific circumstances.

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[23] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[24] Order P-1175.
[25] Order P-901.
[26] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[27] Reconsideration Order PO-4044-R.
[28] Interim Order MO-3684-I and Order MO-3844.
[29] Orders P-123/124 and P-391.
[30] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[31] Order M-249.
[32] Order P-613.
[33] Orders MO-1994 and PO-2607.

[66] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[34]

The appellant's representations

[67] The appellant's representations focus on the importance of allowing and supporting investor class actions, including the one that resulted in the request at issue before me. He also provides additional details about the matters raised in the class action.

[68] He submits that investor class actions are manifestly in the public interest and protect the integrity of capital markets by allowing investors to enforce disclosure laws through the class action process. He submits that in this sense, the interests of the class of investors and the interests of the OSC are aligned in advancing the public policy goals of investor protection and ensuring the integrity of our capital markets.

[69] Referring to the subject of the class action, he alleges that the conduct of insider investors as detailed in the class action is a matter of significant public concern that goes to the integrity of Canadian capital markets, which depends on full, true and plain disclosure of all material information about reporting issuers. He adds that the failure to make appropriate disclosure of insider interests is contrary to our securities laws and harms investors and capital markets and refers to guidance issued by Canadian Securities Administrators (CSA) Staff Notice "regarding the importance of public disclosure of interlocking financial interests of insiders of the relevant industry in the context of acquisition transactions."[35]

[70] The appellant argues that the information he seeks will reveal the extent of cross- ownership by insiders and their family members of the target company immediately prior to its acquisition.

[71] The appellant submits that the OSC has stated that this sort of disclosure is "…material information for investors… and should be disclosed" which represents, in the appellant's view, "a clear statement of the public policy interest in the disclosure of the information sought by the present *FIPPA* request."

The OSC's representations

[72] The OSC submits that it is not a party to the class action which is a dispute involving the Plaintiff representing the class of those who allegedly suffered financial harm. The OSC takes the position that the interests being advanced in the class action are of a private nature, rather than a public one.

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[34] Order P-1398, upheld on judicial review in *Ontario v. Higgins,* 1999 CanLII 1104 (ONCA), 118 OAC 108.
[35] In that regard, the appellant refers to a CSA Multilateral Staff Notice attached to the appellant's representations.

[73] It adds that:

> … The appellant is not seeking information on Form 45-106F1 itself, which information will be helpful to potential investors in the exempt market. Rather, the appellant is seeking information about individual investors and their personal investment decisions.

[74] Referring to Order PO-3896, the OSC takes the position that disclosing the information at issue in this appeal would not serve the purpose of informing or enlightening the citizenry about the activities of the OSC or add 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.

[75] The OSC submits it is the Court, in the ongoing class action proceeding, that would be the proper forum for the class members to seek disclosure as to which insiders may have been shareholders at the time of the sale. The OSC submits that the IPC has not found a compelling public interest where a court process provides an alternative disclosure mechanism and the reason for the request is to obtain records for a civil or criminal proceeding.

[76] Furthermore, the OSC submits that while potential regulatory misconduct involving reporting issuers is a matter of public concern, courts have interpreted the application of the public interest override to require a very high threshold and this threshold is not met simply because there may have been misconduct in a particular situation. The OSC states that to the extent that there would be an issue of misconduct on the part of reporting issuers, it is its mandate to investigate and take action, if appropriate.

[77] The OSC submits that there is no relationship between the personal information being requested and the OSC's operations or responsibilities such that light would be shed on the OSC if that requested information were to be disclosed by the OSC, rather, the appellant wants to shed light on the actions of the purported insiders.

[78] The OSC further submits that disclosure of the requested information would also be contrary to one of *FIPPA*'s key principles, the protection of personal information.

[79] The OSC asserts that the appellant has failed to meet the "very high threshold" for the application of the section 23 public interest override. The OSC further submits that even if a public interest in disclosure was established, there is no such compelling public interest that would clearly outweigh the purpose of protecting personal information.

[80] The OSC acknowledges that the appellant correctly states in his submissions that the Canadian Securities Administrators Staff Notice provides guidance regarding the public disclosure of interlocking financial interests of insiders of the relevant industry in the context of acquisition transactions. The OSC states, however, that this while it

provides important guidance for companies in the relevant industry related to the disclosure of financial interests in the context of merger and acquisition transactions, the Notice is supplementary guidance and not a Rule or statutory requirement that has legislative effect and can be enforced by the OSC or other securities regulators in Canada.

[81] The OCS further submits that this Notice fails to serve as evidence of a compelling public interest that overrides the privacy protection in section 21 of *FIPPA*.

The affected parties' representations

[82] The affected parties who provided more extensive representations all took the position that the public interest override at section 23 did not apply. They argued that the information does not relate to information about the government's activities but is requested to advance interests that are strictly private in nature, namely to advance the class action. One of the affected parties added that the only interest being advanced by the appellant related to this affected party's private personal investment decisions, which is not a public interest.

[83] One of the affected parties who provided detailed representations submitted that no governmental agency, or regulatory body has been made party to the class action, nor has any governmental agency or regulatory body been accused of any wrongdoing or liability in connection with such litigation. The affected party submits that the existence of a potentially large class of plaintiffs in the class action does not alter the fact that that litigation is inherently between private parties relating to their private investment decisions.

[84] This affected party asserts that disclosing the given and family names does not provide any assistance to scrutinize capital markets, its participants, regulatory bodies, or governmental agencies generally, but rather applies only to certain specified market participants. In addition, this affected party submits that disclosing the given and family names, could potentially and unfairly expose that affected party to unwanted and unwarranted public scrutiny and scorn based upon an unwarranted association with specified market participants in connection with a potentially contentious class action lawsuit. This affected party submits that these reasons for avoiding an invasion of privacy outweigh any potential public interest in disclosure.

[85] Another affected party submitted that the IPC has found that a compelling public interest does not exist where, as in this case, a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding. This affected party submits that the civil litigation process already provides an appropriate mechanism through which the appellant can obtain access to information relevant to the ongoing litigation.

[86] Finally, one of the affected parties submitted that the appellant's stated purpose

for requesting the names of individual investors is for use in a private dispute that is currently in litigation proceedings. This affected party submits that the information being sought is not on behalf of public interest for transparency about the activities of their government or agencies, but for the appellant's private action and private interests. This affected party further submits that the names are of third-party investors who are not parties in the class action litigation, so the existence of this class proceeding does not provide any public interest basis for overriding their important and paramount right to personal privacy.

The appellant's responding representations

[87] The appellant reiterates that the class action alleges serious breaches of the *Securities Act* continuous disclosure regime and that investor class actions are manifestly in the public interest. He states that one of the objectives of the *Securities Act* is to foster a continuous disclosure regime in order to maintain confidence in Canadian capital markets and that for this purpose, the *Securities Act* contains provisions mandating continuous disclosure to capital markets participants, and penalties for failing to do so and relies on certain excerpts from the Ontario Court of Appeal's decision in *1654776 Ontario Limited v. Stewart* (*Stewart*) in support of this submission.[36]

[88] The appellant adds that the *Stewart* decision further explained that the private civil liability regime has as its purpose complementing or supplementing public enforcement of the continuous disclosure regime. He explains that civil liability provisions in the *Securities Act* are an integral part of the continuous disclosure regime. He says that they were introduced in order to strengthen the continuous disclosure regime and foster capital markets integrity and they are complementary to the regulatory provision.

[89] In other words, he says, the OSC is not exclusively responsible for enforcing the continuous disclosure regime and investors have an important and complementary function. In seeking damages for misrepresentation under the *Securities Act*, he adds, such private plaintiffs enhance the integrity of Canadian capital markets, which is manifestly in the public interest, citing *Stewart*.[37]

[90] The appellant repeats that the interests of the class of investors and the interests of the OSC are aligned in advancing the public policy goals of investor protection and ensuring the integrity of our capital markets and that both are in the public interest. He submits that providing access to the requested information advances this public interest.

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[36] The appellant refers to paragraphs 108 and 109 of *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184 (*Stewart*) in support of his position.

[37] The appellant refers to paragraphs 110, 111, 113, 114 and 116 of *Stewart* in support of this submission.

Analysis and finding

[91] For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[92] 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.[38]

[93] I am not satisfied that there is such a relationship here. I accept that investor class actions may sometimes serve a public interest and that private litigation can complement, supplement or inform public enforcement initiatives, and even result in legislative change. However, in this case, the appellant seeks disclosure in order to advance the class action which is at its essence a private civil matter. In that regard, the appellant is interested in the actions of corporate insiders, not the actions of the OSC, the definition of an accredited investor, the use of the Form 45-106F1, the nature of an exempt transaction or the OSC's ability or capacity to enforce the *Securities Act*. In other words, he seeks disclosure to inform or enlighten himself, or the class actions plaintiffs, with respect to the activities of particular investors rather than to enlighten citizens about the activities of the Ontario 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. In my view, disclosing the given and family names of accredited investors would not add 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 in respect of the activities of the OSC.

[94] Finally, even if I were to accept that a compelling public interest in disclosure of the information at issue exists, in order for me to find that section 23 applies to override the exemption at section 21(1), I would have to also be satisfied that the compelling public interest clearly outweighs the purpose of the exemption. The personal privacy exemption in section 21(1) protects the personal information of individuals held by public institutions, which is one of the two central purposes of the *Act*. The records at issue contain withheld individuals' given and family names associated with financial information that has been previously disclosed. I found that the disclosure of this information is presumed to result in an unjustified invasion of personal privacy. In my view, the appellant's rationale for requesting this information, namely for the purposes of the class action, does not establish any compelling public interest that clearly outweighs the purpose of the mandatory personal privacy exemption in section 21(1).

[95] Accordingly, I find that the public interest override provision in section 23 does not apply to override the exemption of the personal information remaining at issue, and

[38] Orders P-984 and PO-2607.

I uphold the OSC's decision to deny access to it.

ORDER:

I dismiss the appeal.

Original Signed by: June 28, 2023

Steven Faughnan
Adjudicator