Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 30

Appeal 880072

Ministry of Financial Institutions

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) of the Act, a right to appeal any decision of a head under the Act to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On July 27, 1987, the Ministry of Financial Institutions (the "institution") received a request for access to a "copy of the statement made by the Merrill Lynch representatives" filed with the Ontario Securities Commission (the "O.S.C.") by the Ontario District Council of the Investment Dealers Association of Canada (the "I.D.A"). This statement was made as part of an investigation conducted by the I.D.A. into a complaint made by the requester to the O.S.C. regarding the activities of an investment dealer.

2. By letter dated March 21, 1988, the Freedom of Information Coordinator for the institution informed the requester that the statement would not be released because it had been made by the I.D.A., an organization which, in the view of the institution, qualified as an "agency as described in clause 14(2)(a) (of the Freedom of Information and Protection of Privacy Act, 1987)". The head's position was that disclosure of the report would result in a number of serious harms, some of which they outlined as follows:

"1. Disclosure would jeopardize the sharing of law enforcement information between the Ontario Securities Commission and the I.D.A. and other securities regulatory and enforcement authorities;

2. Disclosure of such reports would interfere with the gathering of intelligence information on registered dealers and their sales persons and would hamper investigations generally;

3. Because persons whose conduct is investigated do not have the protections available to litigants in civil disputes, it would be unfair to the investigated person if investigative reports prepared in a disciplinary context were released to potential litigants in civil actions. Indeed, the FOI Act contains a specific provision allowing for refusal to disclose a record that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability (clause 14(2)(c));

4. The report contains "personal information", the release of which would constitute an unjustified invasion of the personal privacy of [name deleted] and the investigator."

3. The requester appealed the head's decision by letter to me dated April 4, 1988, and I gave notice of the appeal to the institution.

4. The record was examined by an Appeals Officer from my staff, and between April 4, 1988 and June 17, 1988 efforts were made by the Appeals Officer and the parties to settle the case. A settlement was not effected as both parties maintained their respective positions.

5. On July 25, 1988 I issued notices of inquiry to the appellant and the institution, enclosing a copy of the

Appeals Officer's Report and asking for their representations.

6. I received written representations from the institution and the appellant and have considered them in making my Order.

It should be noted, at the outset, that the purposes of the Act as defined in subsections 1 (a) and (b) are:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and necessary exemptions from the right of access should be limited and specific, and,
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head.

The issues arising in this appeal are as follows:

A. Whether the Investment Dealers Association is "an agency which has the function of enforcing and regulating compliance with a law" as defined by subsection 14(2)(a) of the Freedom of Information and Protection of Privacy Act, 1987;

B. If the answer to Issue A is in the affirmative, whether the head properly exercised his discretion with respect to the release of the report for which the exemption is claimed; and

C. If the answer to Issue B is in the affirmative, whether the severability requirements of subsection 10(2) apply to the record in question.

ISSUE A: Whether the Investment Dealers Association is "an agency which has the function of enforcing and regulating compliance with a law" as defined by subsection 14(2)(a) of the Freedom of Information and Protection of Privacy Act, 1987.

Subsection 14(2)(a) of the Act reads as follows:

> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The O.S.C. is a government agency that administers Ontario's Securities Act, R.S.O. 1980, c.466 as amended, together with several other pieces of legislation dealing with securities trading and registration. The O.S.C. also investigates consumer complaints relating to stockbrokers, investment dealers and their employees. The O.S.C. has informally delegated its complaint investigation function with respect to investment dealers to the I.D.A. The I.D.A. is a self_regulating organization which oversees the activities of its member investment dealers and their employees. Section 86 of Ontario Regulation 910 made pursuant to the Securities Act, provides

that all investment dealers must be members of the I.D.A. as a pre_condition of registration with the O.S.C. The O.S.C. has informally delegated authority to review and approve all such applications for registration to the I.D.A.

In its representations, the institution explains that "...all investigation reports and disciplinary decisions of the I.D.A.

and T.S.E. are filed with the O.S.C. so that the O.S.C. can review them to ensure that the matters were properly dealt with even though there is no statutory requirement that this be done". It is for this reason that the investigation report requested by the appellant is in the custody of the institution.

It is clear to me that, if the O.S.C. had itself performed the investigation into the appellant's complaint and produced a report, the report would fall squarely within the parameters of subsection 14(2)(a). In the circumstances of this appeal, the I.D.A. was simply acting as agent for the O.S.C., and in my view its involvement does not alter the status of the report as it relates to subsection 14(2)(a).

ISSUE B: If the answer to Issue A is in the affirmative, whether the head properly exercised his discretion with respect to the release of the report for which the exemption is claimed.

Subsection 14(2)(a) gives the head discretion to release a record which qualifies for exemption under the subsection. In the circumstances of this appeal the head has decided not to do so, citing the following reasons for maintaining the confidentiality of complaint investigation reports:

1. the collection of intelligence by law enforcement agencies is necessary and it cannot be conducted effectively if intelligence files are to be made available to the public or to the subjects of such investigations;

2. releasing such reports might hamper investigations in that subjects of complaints could refuse to cooperate with the investigators, since there is nothing to compel them to cooperate, or they would be less than frank in their remarks or explanations;

3. other agencies and their investigators would not be as cooperative if they knew that their information, given in confidence to the O.S.C. and its agencies, would not be held in confidence by them.

I understand that it may be difficult for the appellant to feel confident that a full and impartial investigation was conducted when there is no opportunity to review the investigation report. However, section 14 of the Act gives the head the power to exercise his discretion to disclose a record or not, and I find nothing improper or inappropriate with the exercise of his discretion and would not alter his decision on appeal.

ISSUE C: If the answer to Issue B is in the affirmative, whether the severability requirements of subsection 10(2) apply to the record in question.

Subsection 10(2) provides:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can

> reasonably be severed without disclosing the information that falls under one of the exemptions.

I addressed the issue of severance in my Order in Appeal No. 880006 released October 21, 1988. At page 13 of that Order, I stated:

> "The inclusion of subsection 10(2) reinforces one of the fundamental principles of the Act, that 'necessary exemptions from the right of access should be limited and specific' (subsection 1(a)(ii)). An institution cannot rely on an exemption covered by sections 12 to 22 of the Act without first considering whether or not parts of the record, when considered on their own, could be disclosed without revealing the nature of the information legitimately withheld from release."

The institution's position is that subsection 10(2) cannot apply to investigation reports which are exempt from disclosure

pursuant to subsection 14(2)(a) because subsection 10(2) refers to the contents of a record while subsection 14(2)(a) prevents disclosure of a class of record, regardless of its contents. It is the institution's position that the type of record is exempted, not just its contents, and that where the entire record is exempt from disclosure on a class basis, subsection 10(2) cannot apply unless the head exercises his discretion to release the entire record.

The key question raised by subsection 10(2) is one of reasonableness. As I found in Appeal No. 880006:

> "In my view, it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the

> request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption."

I have reviewed the record at issue in this appeal and while I do not accept the institution's broad assertion, I have concluded that no information that is any way responsive to the request could be severed from the report and provided to the requester without disclosing information that legitimately falls within subsection 14(2)(a) of the Act.

My Order is therefore, to uphold the decision of the head and to dismiss the appeal.

Original signed by: December 21, 1988
Sidney B. Linden Date
Commissioner