



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

# **ORDER P-548**

**Appeal P-9300018**

**Ontario Securities Commission**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

# ORDER

## BACKGROUND:

The Ontario Securities Commission (the OSC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records about the requester in the institution's custody, as well as any records of complaint filed by the public against him. The OSC agreed to release some of the records but refused to grant access to a total of 218 pages of documentation pursuant to sections 14(2)(a) and 49(b) of the Act. The requester appealed the OSC's decision.

During mediation, the appellant indicated that he was not interested in receiving access to any records which contained information relating exclusively to other individuals or to those records to which he had already been granted partial access. On this basis, there are 18 records which remain at issue that consist of letters, internal memoranda and investigation reports. It should be noted that Records 5A, 6 and 11 are duplicates of Records 2A, 4 and 9. My decision with respect to Records 2A, 4 and 9 will also apply to their duplicates. For ease of reference, I will not refer to Records 5A, 6 and 11 again until the disposition section of this order.

The further mediation of this appeal was not successful and notice that an inquiry was being conducted to review the decision of the OSC was sent to the OSC, the appellant and to one affected person. Representations were received from the OSC only. In its representations, the OSC also raised the application of sections 14(1) and 19 of the Act. The appellant was given an opportunity to provide further representations on the new exemptions which were raised but chose not to do so.

On June 30, 1993, while all of these representations were being considered, the Ontario Divisional Court issued its decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767. This decision interpreted several statutory provisions of the Act in a way which differed from the interpretation developed in previous orders of the Commissioner. Since similar statutory provisions are at issue in the present appeal, it was determined that copies of the Divisional Court decision should be provided to the parties to the appeal along with a statement that the Commissioner's office planned to follow the interpretations established by the Court. (Subsequently, this interpretation was adopted by Commissioner Wright in Order M-170).

Since a new approach to the operation of the Act was being applied, the appellant, the OSC and the affected person were provided with the opportunity to state whether the new approach would cause them to change or to supplement the representations which they had previously made. Additional representations were received from the OSC only.

## ISSUES:

The issues in this appeal are as follows:

- A. Whether any of the information contained in the records qualifies as personal information as defined in section 2(1) of the Act.

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- B. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to Records 1, 2A, 2B, 3A, 4, 5B, 7, 8, 10, 13 and 15.
- C. Whether the discretionary exemption provided by section 14(1) of the Act applies to Records 2A, 2B, 3A, 4, 5B, 8 and 10.
- D. Whether the discretionary exemption provided by section 19 of the Act applies to Record 1.
- E. If the answer to Issue A is yes, whether Records 1, 2B, 5B, 7, 8, 9, 10, 12, 13, 14 and 15 qualify for exemption pursuant to the discretionary exemption provided by section 49(b) of the Act.
- F. If the answer to Issue A is yes, whether Records 1, 2A, 2B, 4, 7 and 15 qualify for exemption pursuant to the discretionary exemption provided by section 49(a) of the Act.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether any of the information contained in the records qualifies as personal information as defined in section 2(1) of the Act.**

The OSC submits that the records at issue contain the personal information of the appellant and other individuals. Section 2(1) of the Act defines personal information 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,
- (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,
- (g) the views or opinions of another individual about the individual, and
- (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;

Following my review of the file, I find that Records 2A and 4 contain the personal information of the appellant only. Records 1, 2B, 5B, 7, 8, 9, 10, 12, 13, 14 and 15, on the other hand, contain both the personal information of the appellant and other identifiable individuals.

The circumstances surrounding Record 3B are somewhat unusual. This is a document prepared by the Criminal Records Branch of the Ontario Provincial Police (the Police) which sets out the charges laid against a named individual and the disposition of these charges. In the covering memorandum (Record 3A), which is attached to Record 3B, the Police stress that the information contained in this record may or may not relate to the appellant. In its representations, the OSC confirmed that it had not taken any steps to verify whether the information pertained to the appellant or to another individual. Since I cannot determine with a level of complete certainty that this information relates to the appellant, I have no choice but to find that the contents of Record 3B do not constitute recorded information about the appellant for the purposes of section 2(1) of the Act. As the appellant has indicated that he is not seeking access to any records which contain information relating to individuals other than himself, I find that the contents of this record fall outside the scope of this appeal.

**ISSUE B: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to Records 1, 2A, 2B, 3A, 4, 5B, 7, 8, 10, 13 and 15.**

The OSC claims that the exemption contained in section 14(2)(a) of the Act applies to a total of 11 records that are at issue in this appeal. This section reads as follows:

A head may refuse to disclose a record,

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;

For a record to qualify for exemption under section 14(2)(a) of the Act, an institution must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

I shall first consider whether the records at issue meet the second and third parts of the test.

The OSC states that, as a result of complaints received by both itself and the Toronto Stock Exchange (TSE), investigations were undertaken into the appellant's trading activities to determine whether there had been any contraventions of the Securities Act or the regulations made by the TSE. The OSC submits that the records for which it has claimed the section 14(2)(a) exemption relate to these complaints and to the subsequent investigations.

Of the 11 records to be considered, some were authored by OSC staff while others were prepared by employees of the TSE. For this reason, the OSC was asked to explain the role and mandate of the TSE with respect to the records at issue. In its representations, the OSC addressed this issue in the following manner:

... It is submitted that the TSE in the circumstances such as those which give rise to this case, acts as agent for the [OSC] ... in enforcing and regulating compliance with the Ontario Securities Act ...

In Order 30, former Commissioner Sidney B. Linden had occasion to consider a fact situation similar to the one raised in this appeal. There, the records at issue pertained to a complaint filed with the OSC and investigated by the Investment Dealers Association of Canada (the IDA). Like the TSE, the IDA investigates public complaints either directly or on behalf of the OSC. In this order, Commissioner Linden described the relationship between the OSC and the IDA in the following fashion:

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).

After considering the circumstances of the present appeal, I find that the TSE was also operating in the capacity of agent for the OSC in investigating the relevant complaints. On the basis that the OSC is an agency which has the function of enforcing and regulating compliance with the law and since the records at issue in this appeal were prepared during the course of such investigations, I find that the second and third parts of the section 14(2)(a) test have been satisfied with respect to these documents.

I must now determine whether the individual records constitute reports for the purposes of the first part of the section 14(2)(a) test. In order to be categorized as a report, a record must consist of **a formal statement or account of the results** of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

I will now apply this test to the various records for which the section 14(2)(a) exemption has been claimed.

### **Record 1**

Record 1 is a three-page memorandum to file, dated August 11, 1992, from a Solicitor employed by the Capital Markets Branch of the OSC. This document reports on the results of investigations on the requester's conduct. I am satisfied that this record constitutes a report for the purposes of part 1 of the section 14(2)(a) test.

### **Records 2A and 2B**

Record 2A is a one-page memorandum, dated June 5, 1992, from the Deputy Director, Registration of the OSC to the Director of Enforcement. This document summarizes the contents of an investigation report prepared by the TSE which was subsequently forwarded to the OSC. The memorandum makes a number of observations concerning the appellant's failure to comply with certain statutory obligations and makes several recommendations concerning the enforcement of those obligations. While Record 2A is styled as a memorandum, I am satisfied that this document qualifies as a report under section 14(2)(a) of the Act.

Record 2B is a 12 page Investigation Report prepared by the TSE respecting the activities of the requester. The report is dated May 28, 1992. Following a review of this record, I am also satisfied that the document, as a whole, falls within the category of a report for the purposes of the section 14(2)(a) exemption.

### **Record 3A**

Record 3A is a one-page letter, dated July 14, 1971, from the Police to the Registrar of the OSC, in which criminal records, which relate to a named individual, have been enclosed. I find that

this document, on its face, does not constitute a report and, accordingly, that the section 14(2)(a) exemption does not apply.

### **Records 4 and 8**

Record 4 is a one-page letter dated July 4, 1988, from the Director, Division of Investigative Services, TSE to the Chief Investigator of the OSC. This document indicates that the TSE has initiated an investigation of a complaint launched against the appellant. Record 8 is letter similar in content to Record 4 and is dated August 20, 1990.

In my view, neither Record 4 nor 8 contain a formal statement or account of the results of the collation and consideration of information. The records simply alert the OSC that an investigation has been initiated. On this basis, I find that Records 4 and 8 do not satisfy the first part of the section 14(2)(a) test and are, consequently, not protected from disclosure under this provision.

### **Record 5B**

Record 5B is a two-page letter, dated May 27, 1992, from the Director, Division of Investigative Services of the TSE to the Manager for Enforcement Inquiries of the OSC. This correspondence indicates that the TSE's investigation into the complaint of a named individual has been concluded. I also find that this document fails to qualify as a report for the purposes of section 14(2)(a) of the Act with the result that this provision of the Act does not apply to the letter.

### **Records 7 and 15**

Records 7 and 15 are Investigation Reports, dated May 5, 1989 and May 28, 1992, respectively, authored by the Investigative Services Division of the TSE. Record 7 was prepared following the receipt of a complaint from the appellant, whereas Record 15 originated from a complaint made by a person other than the appellant.

The OSC submits that both records contain formal statements of the information considered during the investigation, as well as analyses, opinions and conclusions. I have carefully reviewed these two records and find that they qualify as reports for the purposes of section 14(2)(a) of the Act.

Although the OSC has claimed that section 14(2)(a) applies to Records 10 and 13, I propose to deal with these records under my discussion of section 49(b) of the Act.

In summary, I find that Records 1, 2A, 2B, 7 and 15 each satisfy the three part test for exemption under section 14(2)(a) of the Act. Records 3A, 4, 5B and 8, on the other hand, do not meet the first part of the test and are not protected from disclosure under this exemption.

**ISSUE C: Whether the discretionary exemption provided by section 14(1) of the Act applies to Records 2A, 2B, 3A, 4, 5B, 8 and 10.**

The OSC submits that sections 14(1)(a), (b), (d) and (g) of the Act apply to Records 2A, 2B, 3A, 5B, 4, 8 and 10. Under Issue A, I found that Records 2A and 2B are properly exempt from disclosure under section 14(2)(a) of the Act. I also indicated that I would deal with Record 10 in my discussion of section 49(b) of the Act. Therefore, I shall only consider the application of section 14(1) to Records 3A, 4, 5B and 8.

Sections 14(1)(a), (b), (d) and (g) of the Act read as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons.

In its representations, the OSC asserts very generally that it may refuse to release a record if the disclosure could reasonably be expected to interfere with a law enforcement matter or reveal the identity of a confidential source.

In order for the OSC to rely on sections 14(1)(a), (b), (d) and (g) of the Act, it must first establish that the records at issue fall within the definition of "law enforcement" as set out in section 2(1) of the Act. The words "law enforcement" are defined as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

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- (c) the conduct of proceedings referred to in clause (b).

The OSC is an agency of the Government of Ontario with responsibility for the regulation of the securities industry within the province. The OSC's formal investigation powers are set out in Part VI of the Securities Act and include the power to address complaints respecting the contravention of that statute. These investigations could, in turn, lead to proceedings, either before the OSC or the courts, where one of the penalties under Part XXII of the Act could be imposed. Since the appellant in this case was the subject of such an investigation undertaken by the TSE as agent for the OSC, I am satisfied that the records for which section 14(1) have been claimed fall within the ambit of law enforcement.

I must now determine whether the second part of the section 14(1) test has been satisfied. Section 14(1) of the Act provides that an institution may refuse to release a record where disclosure could reasonably be expected to produce the types of harms outlined in subparagraphs (a) through (l) of the section. For an institution to successfully rely on a section 14(1)

exemption, it must demonstrate that there exists a reasonable expectation that the stated harm will probably come to pass. The institution must also prove that there is a clear and direct linkage between the disclosure of the specific information and the harm which is alleged. (Order P-534)

I have previously described Records 3A, 4, 5B and 8 in my discussion of the section 14(2)(a) exemption. In its representations, the OSC argues that the release of the information in Record 3A:

would interfere with the regular co-operative intelligence gathering methods of the police, the OSC and other law enforcement agencies and organizations.

A similar argument is advanced for Records 4 and 8, although the information contained in these documents was supplied to the OSC by the TSE rather than the police.

With respect to Record 5B, the OSC states that:

Disclosure at this time would be untimely, and would identify complainants, reveal opinions and advice of staff, and would therefore interfere with law enforcement matters.

I have carefully reviewed the records at issue and the representations made by the parties. I find that the evidence which the OSC has provided does not establish that there exists a reasonable expectation that the harms set out in sections 14(1)(a), (b), (d) and (g) will probably come to pass if these four records are disclosed. There is also no evidence before me that the OSC's investigation into the appellant's conduct is ongoing which is an additional reason for finding that sections 14(1)(a) and (b) of the Act do not apply to the records at issue. On this basis,

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Records 3A, and 4 should be released to the appellant. Since Records 5B and 8 also contain personal information respecting another named individual, I will deal with these documents more fully under my discussion of section 49(b) of the Act.

**ISSUE E: If the answer to Issue A is yes, whether Records 1, 2B, 5B, 7, 8, 9, 10, 12, 13, 14 and 15 qualify for exemption pursuant to the discretionary exemption provided by section 49(b) of the Act.**

Under Issue A, I found that Records 1, 2B, 5B, 7, 8, 9, 10, 12, 13, 14 and 15 contain personal information of the appellant and other identifiable individuals. Under Issue B, I found that Records 1, 2B, 7 and 15 are properly exempt from disclosure under section 14(2)(a) of the Act.

It is, therefore, not necessary for me to consider the application of section 49(b) to these four records.

The records which remain to be considered in this section are, thus, Records 5B, 8, 9, 10, 12, 13 and 14.

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access. One such exemption is found in section 49(b) of the Act, which states that:

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;

Section 49(b) introduces a balancing principle. The OSC must look at the information and weigh the appellant's right of access to his or her own personal information against another individual's right to the protection of his or her personal privacy. If the OSC determines that the release of the information would constitute an unjustified invasion of another individual's personal privacy, then section 49(b) gives the OSC the discretion to deny the appellant access to the personal information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. In Order M-170, Commissioner Tom Wright addressed the interrelationship between sections 14(2), (3) and (4) of the Municipal Freedom of Information and Protection of Privacy Act (which are similar to sections 21(2), (3) and (4) of the Act) in the following way:

... [W]here personal information falls within one of the presumptions found in section 14(3) of the Act, a combination of the circumstances set out in section

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14(2) of the Act which weigh in favour of disclosure, cannot collectively operate to rebut the presumption.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I adopt this approach for the purposes of this order.

In its representations, the OSC relies on section 21(3)(b) of the Act to support its position that the release of the information contained in these records would constitute an unjustified invasion of the personal privacy interests of other individuals. This provision states that:

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

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;

I will now apply these principles to the seven records which are to be analyzed under this section. Record 5B is a two-page letter, dated May 27, 1992, from the Director, Division of Investigative Services of the TSE to the Manager of Enforcement Enquiries of the OSC. Record 8 is a one page letter, dated August 20, 1990, from a TSE official to an official of the OSC respecting the commencement of an investigation against the appellant. Record 9 is a two-page letter of complaint, dated June 28, 1990, provided to the OSC by a law firm on behalf of a named individual. Record 10 is an eight-page collection of witness statements compiled by a TSE investigator dated October 7, 1991. Record 12 is a two-page letter, dated June 1, 1990, from a law firm directed to a named individual. Record 13 is a seven-page witness statement, dated October 16, 1990, compiled by a TSE investigator. Finally, Record 14 consists of legal documents pertaining to a law suit involving a named individual which was commenced in 1989.

Based on the representations provided to me and my review of the records, I am satisfied that the personal information contained in Records 5B, 8, 9, 10 and 13 was compiled as part of an investigation into a possible violation of law. Accordingly, the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(b) apply to the information in question.

I have considered section 21(4) of the Act and find that none of the personal information contained in these records falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 23 of the Act applies to the facts of this case.

The result is that Records 5B, 8, 9, 10 and 13 are exempt from disclosure in their entirety based on the application of the section 21(3)(b) presumption.

I have considered Records 12 and 14 and find that none of the presumptions contained in the Act apply to these documents. Having reviewed these records, however, I find that their disclosure would constitute an unjustified invasion of the personal privacy of other named individuals and, consequently, that these records are also exempt from disclosure under the Act.

In the result, I find that Records 5B, 8, 9, 10, 12, 13 and 14 are exempt from disclosure in their entirety pursuant to section 49(b) of the Act.

I have reviewed the OSC's exercise of discretion in refusing to disclose these seven records. I find nothing improper in the manner in which this discretion was exercised in the circumstances of this case.

**ISSUE F: If the answer to Issue A is yes, whether Records 1, 2A, 2B, 4, 7 and 15 qualify for exemption pursuant to the discretionary exemption provided by section 49(a) of the Act.**

Under Issue A, I found that Record 2A contains the personal information of the appellant only. Under Issue B, I also determined that Records 1, 2A, 2B, 7 and 15 qualified for exemption under section 14(2)(a) of the Act.

Section 49(a) of the Act provides the OSC with the discretion to refuse to disclose to a requester his or her personal information where certain exemptions, including section 14(2)(a), apply to a record. In all cases where an institution has exercised its discretion under section 49(a) not to release personal information, the Commissioner's office looks very closely at the basis for this decision. I have reviewed the representations provided by the OSC on this subject and find nothing improper in the manner in which this discretion was exercised. Consequently, I would not alter this determination on appeal.

Because of the manner in which I have disposed of the records in this appeal, it is not necessary for me to consider Issue D.

## **ORDER:**

1. I order the OSC to disclose Records 3A, 4 and 6 to the appellant in their entirety within 35 days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
2. I uphold the OSC's decision not to disclose Records 1, 2A, 2B, 3B, 5A, 5B, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

3. In order to verify compliance with the provisions of this order, I order the OSC to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1 **only** upon request.

Original signed by: \_\_\_\_\_  
Irwin Glasberg  
Assistant Commissioner

\_\_\_\_\_ October 7, 1993