



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

ORDER P-621

Appeal P-9300128

Ministry of Consumer and Commercial Relations



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Ministry of Consumer and Commercial Relations (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the Minutes of Settlement and an attached release executed between the Ministry, two named individuals and a named real estate company. The Ministry located the responsive record, but denied access to the document in full pursuant to the exemptions contained in sections 13(1), 14(2)(a), 17(1)(a) and (c), 18(1)(d) and (e), 19 and 21(3)(b) and (d) of the Act. The requester appealed the Ministry's decision to the Commissioner's office.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, and two affected persons who were signatories to the Minutes of Settlement both personally and as officers of the company. Representations were received from all parties.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in the record.
- C. Whether the discretionary exemption provided by section 13(1) of the Act applies to the record.
- D. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to the record.
- E. Whether the mandatory exemptions provided by sections 17(1)(a) and (c) of the Act applies to the record.
- F. Whether the discretionary exemptions provided by sections 18(1)(d) and (e) of the Act applies to the record.
- G. Whether the discretionary exemption provided by section 19 of the Act applies to the record.

SUBMISSIONS/CONCLUSIONS:

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

Section 2(1)(h) of the Act states that:

"personal information" means recorded information about an identifiable individual, including,

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;

I have reviewed the record and, in my view, it contains recorded information about the two affected persons and qualifies as the personal information of these individuals.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in the record.

Under Issue A, I found that the record contains the personal information of the two affected persons.

Section 21(1) of the Act prohibits the disclosure of personal information to any person other than the individual to whom the information relates, except in certain circumstances listed under the section.

In my view, the only exception to the section 21(1) mandatory exemption which has potential application in the circumstances of this appeal is section 21(1)(f). This section reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

In its representations, the Ministry relies upon the presumptions found in sections 21(3)(b) and (d) of the Act. These provisions state that:

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

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history.

The Ministry states that the record contains information gathered during an investigation of the affected persons which pertained to a possible violation of law. It indicates that this investigation produced a finding that the affected persons may have contravened sections of the Real Estate and Business Brokers' Act (the REBBA). This finding led to a proposal by the Registrar of Real Estate and Business Brokers to refuse to renew and to revoke the registrations of the affected persons.

The Ministry further indicates that, once this proposal was filed, the affected persons sought a review before the Commercial Registration Appeal Tribunal. This hearing was underway at the time that the Minutes of Settlement were executed.

The REBBA includes a number of provisions which establish the Ministry, through the Registrar of Real Estate and Business Brokers, as the agency responsible for the regulation of real estate brokers and salespersons in Ontario. The statute contains several specific regulatory provisions including the requirement for registration (section 3) as well as the power of the Registrar to refuse to register applicants or to revoke the registration of a salesperson or broker (section 8). Provision is also made for the appointment of an investigator by the Minister (sections 14 to 18).

The REBBA further provides that failure to comply with any of its provisions constitutes an offence punishable by fine or imprisonment (section 50).

Upon an examination of the REBBA, it is my view that the duties and responsibilities of the Registrar of Real Estate and Business Brokers include the conduct of an investigation into a possible violation of law, particularly the type of investigation which resulted in the proposal to revoke the registration of the affected persons in the present case.

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The Ministry contends that the disclosure of the Minutes of Settlement may permit the drawing of inferences into the type of allegations made against the two affected persons. The Ministry also submits that the personal information contained in the record was compiled in the course of the investigation of the activities of the affected persons undertaken pursuant to the REBBA. It further indicates that the Minutes of Settlement represent the culmination of a law enforcement investigation, as they provided for the ultimate resolution of the subject matter of the investigation.

I do not agree that the personal information contained in the record falls within the presumption described in section 21(3)(b) of the Act. As the Ministry submits, the record in question represents the **resolution** of this particular law enforcement proceeding. It cannot, in my view, be seen as part of the **investigation** into a possible violation of law as its execution represents the final stage in the **adjudication** of the proceeding. I am also not satisfied that the disclosure of the Minutes of Settlement would reveal the type of sanction possible or permit the drawing of inferences into the nature of the allegations made against the affected persons. Accordingly, section 21(3)(b) of the Act is not applicable in the circumstances of this appeal.

The Ministry further submits that the personal information in the record qualifies as the "employment history" of the affected parties as described in section 21(3)(d) of the Act. The information contained in the record includes information relating to the affected persons' potential future employment only. In Order P-240, Commissioner Tom Wright held that information relating to an individual's current employment could not be characterized as "employment history" within the meaning of the Act. For similar reasons, I find that section 21(3)(d) of the Act cannot apply to exempt from disclosure information which may relate to **future** employment.

I have carefully reviewed the contents of the record and find that none of the other considerations listed in sections 21(3) or in 21(4) of the Act apply to the record at issue.

I will now consider section 21(2) of the Act, which provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. Some of the factors listed favour disclosure while others favour the protection of personal privacy. In interpreting section 21(2), consideration must be given to all the relevant circumstances of the appeal, not only the factors enumerated in the section.

In his representations, the appellant does not refer specifically to any of the section 21(2) factors, but it can be inferred from his submissions that he is referring to the consideration stated in section 21(2)(d) of the Act. The Ministry and the affected persons make reference to sections 21(2)(h) and (i) of the Act as being relevant considerations.

Section 21(2) reads, in part, as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

...

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

...

- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

I will deal with the possible application of section 21(2)(d) to the personal information contained in the record first. In order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right in question is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

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I adopt this test for the purposes of this appeal.

The appellant indicates that after the collapse of a real estate company operated by one of the affected persons and as a result of an investigation by the Ministry, all assets and trust accounts of the company were frozen by the Ministry. The appellant is a party to several lawsuits which resulted, some of which are still on-going. The appellant states that he has not yet had his day in court, and that it is important that he knows all the pertinent facts about what has occurred before

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he goes to court. He further believes that the information contained in the record at issue may affect the outcome of his legal action.

After carefully reviewing the record, I am not satisfied that the personal information to which the appellant is seeking access is required in order for him to prepare for a legal proceeding or to ensure an impartial hearing. Therefore, I am unable to conclude that all four of the criteria required to establish the relevance of section 21(2)(d) have been met. I find, therefore, that section 21(2)(d) is not a relevant consideration in the circumstances of this appeal.

The affected persons have made identical representations regarding the application of sections 21(2)(h) and (i) of the Act. Each of the affected persons state:

When the Minutes of Settlement and the Release were drafted and agreed to, they were understood to be a resolution to all outstanding issues between the parties involved ... Therefore the primary understanding and agreement which had to be reached prior to any resolution to the outstanding issues, was that the Minutes of Settlement and Release were to be confidential and that the confidentiality formed the basis of the resolution.

The release of such information would no doubt unfairly damage my reputation ...

The Ministry submits that the affected persons demanded and expected that the details of the settlement agreement would remain confidential, and that the Ministry provided assurances to them that this would be so. The Ministry submits, accordingly, that it is imperative that the confidentiality of these settlement arrangements be maintained.

After a careful review of the representations of the Ministry and the affected persons, I am of the view that section 21(2)(h) of the Act is a relevant consideration to be taken into account when weighing the appellant's right of access to the record against the affected persons' right to privacy. A degree of confidentiality may also be discerned on the face of the record.

In order for me to find that section 21(2)(i) of the Act applies to the record, I must be persuaded that the disclosure of the information contained therein would **unfairly** damage the reputations of the affected persons. I am not satisfied on the evidence before me that any unfair damage to the affected persons' reputations would result from the disclosure of the record. Accordingly, I find that the consideration described in section 21(2)(i) of the Act is not a relevant consideration in the circumstances of this appeal.

In summary, I have found that there are no considerations under section 21(2) of the Act which may weigh in favour of disclosure. One factor, that described in section 21(2)(h), favours the protection of the privacy of the two affected persons.

In addition, I have considered all of the circumstances of this appeal and find that, on balance, the disclosure of the personal information would constitute an unjustified invasion of the

personal privacy of the affected persons. I, therefore, find that the mandatory exemption provided by section 21(1) of the Act applies to the record at issue, and that it must not be disclosed to the appellant.

Due to my finding under Issue B that the record should not be disclosed, it is not necessary for me to consider Issues C through G.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ February 2, 1994