



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

ORDER P-670

Appeal P-9300224

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/Téloc: 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 records relating to any investigations undertaken by the Ministry respecting a named real estate broker and/or his company.

The Ministry located a total of 31 records that were responsive to the request and denied access to them in their entirety, pursuant to sections 13(1), 14(1)(b), 14(2)(a), 17(1)(b), 19, and 21(3)(b) and (d) of the Act. In a second decision letter, addressed to the requester, the Ministry also claimed the application of the exemptions contained in sections 14(1)(d) and 14(2)(c) 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 the named real estate broker (the affected person). Representations were received from the Ministry and the affected person only.

In its representations, the Ministry did not address the application of sections 14(1)(b), 14(2)(c) and 19 to the records. I will not, therefore, consider these exemptions in my order. The mandatory exemption provided by section 21(3)(b) was claimed by the Ministry in its decision letter but no representations as to its application were made. In my view, section 21(3)(b) does not apply to the records at issue in this appeal. The Ministry also raised section 21(3)(f) of the Act in its representations and, as it is a mandatory exemption, I will consider its application to the records at issue in this appeal.

The records at issue in this appeal are described in Appendix "A" to this order.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. Whether the discretionary exemptions provided by sections 14(1)(d), 14(2)(a) and 49(a) of the Act apply to the records.
- C. Whether the mandatory exemption provided by section 17(1) of the Act applies to the records.
- D. Whether the discretionary exemption provided by section 13(1) of the Act applies to the records.

- E. If the answer to Issue A is yes, and the information relates to individuals other than the appellant, whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in the records.
- F. If the answer to Issue A is yes, and the information relates to the appellant and to other identifiable individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to the personal information contained in the records.

SUBMISSIONS/CONCLUSIONS:

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

Section 2(1) of the Act provides, in part, that:

"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,
- (d) the address, telephone number, fingerprints or blood type of the 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,
- (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;

I have reviewed record categories 1 through 6 and find that they contain primarily the personal information of the affected person and a number of other identifiable individuals. However, Records 3.3 and 4.12 contain the personal information of the appellant and other identifiable individuals.

I have also reviewed Records 7 through 31 and find that they contain the personal information of the affected person and a number of other individuals. Records 7 through 31 do not contain the personal information of the appellant.

ISSUE B: Whether the discretionary exemptions provided by sections 14(1)(d), 14(2)(a) and 49(a) of the Act apply to the records.

In order for a record to qualify for exemption pursuant to sections 14(1)(d) or 14(2)(a) of the Act, it must first satisfy the definition of "law enforcement" found in section 2(1). This section defines "law enforcement" as:

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

Given the nature of the investigation undertaken by the Ministry into the activities of the affected person, I find that this definition has been satisfied.

Sections 14(1)(d) and 14(2)(a) of the Act state that:

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

- (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;

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;

I will deal with each of these exemptions separately.

Section 14(1)(d)

In its representations, the Ministry submits that Records 7 through 31 are exempt from disclosure under section 14(1)(d) of the Act. All of these records may be characterized as correspondence, memoranda, inspection reports and notices and reports to the Registrar of Real Estate and

Business Brokers which have arisen from complaints made in relation to the operation of the affected party's real estate firm.

In order for the exemption provided by section 14(1)(d) to apply, the Ministry must establish a clear and direct linkage between the information contained in the records and the harm alleged, in this case, the disclosure of the identity of a confidential source of information (Orders P-581, P-590 and M-302).

It is not clear on the face of the records that the complainants involved submitted their complaints with any expectation of confidentiality. Nor have I been provided with any evidence to substantiate that assurances of confidentiality were made by the Ministry to the complainants. Accordingly, I am unable to agree that the disclosure of Records 7 through 31 would result in the disclosure of the identity of a **confidential source**. For this reason, I find, in the circumstances of this appeal, that section 14(1)(d) of the Act has no application to Records 7 through 31.

Section 14(2)(a)

In its representations, the Ministry claims the application of section 14(2)(a) of the Act to exempt from disclosure those records listed in categories 1, 2, 3, 4, 5 and 6.

For a record to qualify for exemption under this provision, the 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 will apply each part of the section 14(2)(a) test to the records at issue individually.

Part One of the Test

The following quotation has been adopted in many previous orders of the Commissioner's office.

The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test i.e. to be 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]

In its representations, the Ministry indicates that:

The documents in question contain the findings of the inspector, as well as outlining several possible courses of action that the Institution may take.

In my view, record categories 1 through 6 qualify as "reports" within the meaning of the Act as they contain a formal statement or account of the result of the collation and consideration of information by the inspector who prepared them. Accordingly, the first part of the section 14(2)(a) test has been satisfied.

Part Two of the Test

In order for a "report" to qualify for exemption under section 14(2)(a), it must have been prepared in the course of law enforcement, inspections or investigations.

The Ministry submits that the documents which comprise record categories 1 through 6 were created in the course of the conduct of Schedule A inspections. The Ministry further states that:

In the Ministry inspection program, Schedule A inspections are the highest priority inspections conducted by the Ministry. Schedule A priority inspections are requested when there is a complaint or other indication of improper conduct by a registrant. Schedule A inspections are not conducted on a periodic or routine basis.

Based on these submissions, I agree that these records were prepared for and are part of a law enforcement investigation undertaken by the Ministry's Real Estate Regulation Branch into certain allegations of improper practices on the part of the affected person's real estate firm. Accordingly, part two of the test under section 14(2)(a) of the Act has been satisfied.

Part Three of the Test

In Order P-621, I had occasion to address whether a record containing information gathered during an investigation into allegations of illegal activity pursuant to the Real Estate and Business Brokers Act (the REBBA) could be characterized as a record prepared by an agency which has the function of enforcing and regulating compliance with a law. At page three of that order, I found that:

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 ...

The reports described as record categories 1 through 6 were prepared in the course of several investigations by the staff of the Ministry's Real Estate Regulation Branch, pursuant to the REBBA. On this basis, and following the approach taken in Order P-621, I find that these records may be properly characterized as reports prepared by an agency which has the function of enforcing and regulating compliance with a law within the meaning of section 14(2)(a) of the Act. Accordingly, part three of the test has been met.

By way of summary, I find that, since all three parts of the section 14(2)(a) test have been satisfied, record categories 1 through 6 are properly exempt from disclosure.

Section 14(4) of the Act provides that reports prepared in the course of routine inspections by an agency are not exempt from disclosure under section 14(2). The Ministry, as quoted in my discussion of part one of the section 14(2)(a) test, indicates that the investigations which resulted in the creation of record categories 1 through 6 were undertaken as a result of specific complaints from members of the public. They did not arise from a routine collection of information in the course of an annual inspection, for example. For this reason, I find that the exception to section 14(2) provided by section 14(4) has no application to record categories 1 through 6.

I have examined the representations of the Ministry concerning the exercise of its discretion under section 14 in not disclosing these records to the appellant and find nothing improper in the manner in which this determination was made.

Under Issue A, I found that Records 3.3 and 4.12 contain the personal information of the appellant and other identifiable individuals.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of institutions covered by the Act. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access, including section 49(a) which reads as follows:

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

where section 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

Section 49(a) of the Act provides the Ministry with the discretion to refuse to disclose an appellant's personal information where section 14 otherwise applies to the information. I have reviewed the factors considered by the Ministry regarding its exercise of discretion in favour of refusing to disclose Records 3.3 and 4.12 to the appellant. I find nothing improper in the determination which has been made and would not alter it on appeal.

ISSUE C. Whether the mandatory exemption provided by section 17(1) of the Act applies to the records.

In its representations, the Ministry claims the application of section 17(1) to several of the records which have already been disposed of under Issue B, as well as Record 14. The affected person, in his representations, maintains that section 17 applies to all of the records which remain at issue, Records 7 through 31. Records 7 to 11, 12 to 26 and 27 to 30 are correspondence and memoranda concerning three separate complaints initiated by three solicitors on behalf of clients of the real estate firm. Record 31 is a letter from a Registration Officer with the Real Estate and Business Brokers Regulation Branch of the Ministry addressed to the real estate broker in his personal capacity.

Section 17(1) of the Act states that:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

It has been held in a number of previous orders that:

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the institution and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

I propose to deal with the application of each part of the section 17 test individually.

Part One of the Test

Records 7 through 30 consist of letters and attachments to and from the affected person's real estate firm, the Registrar of Real Estate and Business Brokers and the solicitors for three clients of the firm who filed complaints with the Ministry. Each complaint concerned the handling of the firm's trust account and other matters relating to the conduct of the firm's business. I find that this information qualifies as commercial information within the meaning of section 17(1) of the Act. Accordingly, the first part of the test has been met insofar as Records 7 through 30 are concerned.

Record 31 does not, in my view, contain any information of a commercial or financial nature and does not, accordingly, qualify for protection under this section.

Part Two of the Test

In his representations, the affected person indicates that the information contained in Records 7 through 30 was "supplied in confidence". The Ministry has chosen to adopt the representations of the affected person regarding the application of section 17 of the Act to these records.

On their face, none of the records contain any indication that they were intended to be treated in a confidential fashion. Nor have I been provided with any evidence as to how records of this sort are normally treated by the Ministry and the parties to such complaints.

Accordingly, I am unable to agree that the information contained in Records 7 through 30 was "supplied in confidence", either explicitly or implicitly within the meaning of section 17(1). As the second part of the test has not been satisfied, I find that Records 7 through 30 do not qualify for exemption under section 17.

ISSUE D: Whether the discretionary exemption provided by section 13(1) of the Act applies to the records.

The Ministry has claimed the application of section 13(1) of the Act to Records 4.1 and 6.1 only. As I have found these records to be exempt from disclosure under Issue B, it is unnecessary for me to address the applicability of section 13(1) to them.

ISSUE E: If the answer to Issue A is yes, and the information relates to individuals other than the appellant, whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in the records.

Under Issue A, I found that Records 7 through 31 contain the personal information of individuals other than the appellant. Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of the personal information to any person other than the individual to whom the information relates, except in the circumstances listed in sections 21(1)(a) through (f) of the Act. In my view, the only exception which has possible application is section 21(1)(f). This section reads:

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.

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 the disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

In its representations, the Ministry claims the application of the presumptions contained in sections 21(3)(d) and (f) of the Act to the personal information contained in Record 31. These sections state that:

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

- (d) relates to employment or educational history;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

Record 31 consists of a one-page letter to which is attached an unsigned copy of an agreement between the Registrar of Real Estate and Business Brokers and the affected person in his personal capacity which addresses the terms and conditions of his licensing by the Registrar. I

find that information contained in this record does not deal with the employment **history** of the affected person, rather it is concerned with the terms and conditions upon which his **future** employment may be based. Accordingly, I find that the presumption under section 21(3)(d) has no application to Record 31.

While page 2 of Record 31 contains information about the financial affairs of a company operated by the affected person, I find that it does not qualify for exemption under the section 21(3)(f) presumption as it does not "describe an **individual's** finances" within the meaning of the Act.

I find that none of the other presumptions contained in section 21(3) have any application to Records 7 through 31.

The appellant has not raised any of the considerations under section 21(2) of the Act which weigh in favour of disclosure of the personal information found in Records 7 through 31. Accordingly, the mandatory exemption provided by section 21 applies to exempt this information from disclosure.

Because of the manner in which I have disposed of the records at issue under Issues B and E, it is not necessary for me to address Issue F.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ May 3, 1994

APPENDIX "A"
LIST OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION
1	Inspection Control 14411 dated March 26, 1980
2	Inspection Control 25398 dated August 13, 1982
3.1	Inspection Control 30481 dated June 7, 1985
3.2	C.R.E.D.I.T.S., List of Employees
3.3	C.R.E.D.I.T.S., List of Employees
3.4	C.R.E.D.I.T.S., Business Information
3.5	Business Card
3.6	List of Closed Trades
3.7	List of Pending Trades
3.8	Bank Reconciliation of Trust Account
3.9	Inspection Deficiency Notice
3.10	Inspection Report
4.1	Inspection Control 41688 dated July 20, 1988
4.2	Trust Bank Reconciliation
4.3	General Ledger
4.4	May Trust Account 1988
4.5	General Ledger
4.6	Trade Analysis Sheet (5 pages)
4.7	Inspection Report
4.8	Inspection Deficiency Notice (2 pages)
4.9	Inspection Assignment
4.10	Duplicate of Record 4.7
4.11	Duplicate of Record 4.8
4.12	List of Salespersons and Employees
4.13	June 1988 Trust Account
4.14	June 1988 Trust

RECORD NUMBER	DESCRIPTION
4.15	May Trust Account 1988
4.16	Term Deposits May 1988
4.17	General Ledger
5.1	Inspection Control 52697 dated December 12, 1991
5.2	Memorandum dated January 10, 1992 from Ministry Compliance Officer to Manager of Compliance Section
5.3	Inspection Deficiency Notice dated December 12, 1991
5.4	Inspection Report dated December 12, 1991
5.5	Memorandum dated September 9, 1991
5.6	Inspection Assignment dated October 9, 1991
5.7	Agent List dated January 13, 1991
5.8	Agent List
5.9	Letter of Ministry dated December 12, 1991
5.10	Bank Statement dated December 31, 1991
5.11	Duplicate of Record 5.2
5.12	Letter to Ministry dated December 13, 1991
5.13	Trust Ledger Report (5 pages) dated December 10, 1991
5.14	Extract of Trust Ledger Report
5.15	Trust Ledger Report (2 pages) dated December 10, 1991
5.16	Duplicate of Record 5.6, with added notation
5.17	Deposit Receipt
5.18	Purchaser's Statement of Disclosure dated November 18, 1991
5.19	Agent's Trade Record
5.20	Cheque dated November 5, 1991
5.21	Bank Statement (3 pages) dated October 31, 1991
5.22	Bank Statement (3 pages) dated September 30, 1991
5.23	Cheques dated July 11, 1991 and September 20, 1991
5.24	Pending Deal Report (5 pages) dated December 9, 1991

RECORD NUMBER	DESCRIPTION
5.25	Bank Statement dated October 31, 1991
5.26	Bank Statement dated September 30, 1991
5.27	Trust Account and Term Deposits dated January 10, 1992
5.28	Business Practices Division, Sentry System (5 pages) dated December 12, 1991
5.29	Notice of Employee Change
5.30	Agent List
5.31	Registration Certificate and Notice of Employee Change
5.32	Notices of Employee Change (12 pages)
5.33	Registration Certificate
5.34	Facsimile Cover Sheet
6.1	Inspection Control 60198, Inspection Report dated January 19, 1993
6.2	Letter to Ministry dated January 21, 1993
6.3	Inspection Deficiency Notice (2 pages)
6.4	Report to Registrar (3 pages)
6.5	Cheque dated August 15, 1992
6.6	Cheque dated November 2, 1992
6.7	Agent's Trade Record
6.8	Trade Analysis Sheet (2 pages)
6.9	List of Names
6.10	Business Practices Division, Sentry System, General Information - Business (3 pages)
6.11	Inspection Assignment
6.12	Statement of Account (2 pages)
6.13	Agent's Trade Record
6.14	Duplicate of Record 6.11 (except for notation)
6.15	Agent's Trade Record
7	Letter (with fax cover sheet) to Ministry dated May 11, 1993
8	Letter from Ministry dated May 13, 1993

RECORD NUMBER	DESCRIPTION
9	Letter dated June 1, 1993
10	Letter dated June 8, 1993
11	Letter to Ministry dated June 9, 1993
12	Letter to Ministry dated April 5, 1993
13	Letter dated April 20, 1993
14	Letter to Registrar dated April 20, 1993
15	Letter (with transaction report) dated April 22, 1993
16	Letter from Ministry (with registered mail receipt) dated April 23, 1993
17	Letter to Ministry dated April 27, 1993
18	Letter to Ministry dated April 27, 1993
19	Letter (with mutual releases and transaction report) dated May 4, 1993
20	Letter dated May 6, 1993
21	Letter dated May 11, 1993
22	Letter dated May 19, 1993
23.1	Letter to Ministry dated May 19, 1993
23.2	Letter dated May 20, 1993
24	Letter from Ministry dated May 20, 1993
25.1	Letter to Ministry dated May 27, 1993
25.2	Letter dated May 26, 1993
26	Letter to Ministry (with two cheques) dated June 1, 1993
27	Letter (with Direction, transaction report, fax cover form) dated March 31, 1993
28	Letter from Ministry dated May 5, 1993
29	Letter (with cheque) dated May 20, 1993
30	Letter to Ministry dated May 20, 1993
31	Letter from Ministry (with undertaking) dated June 10, 1993