



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

ORDER P-1211

Appeal P-9500748

Ontario Insurance Commission



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NATURE OF THE APPEAL:

The Ontario Insurance Commission (the Commission) received a request for access under the Freedom of Insurance and Protection of Privacy Act (the Act) for copies of memoranda, briefing notes, inspection reports, risk-based analyses and examination findings relating to negotiations between two named companies (the two companies). In particular, the requester also sought access to audits, internal memoranda, correspondence, letters of undertaking and a letter of intent between the two companies. The requester also asked for information related to a trust company.

The Commission granted partial access to the records that it found to be responsive to the request. The requester appealed the denial of access. In his letter of appeal, the appellant indicated that he believed that additional records should exist and that a public interest existed in the disclosure of the records.

To put the request and this appeal in perspective, it is useful to note that the appellant is a member of the press, employed by a business newspaper. In his request to the Commission, the appellant stated that he needs the information as he is writing a book about one of the companies. The events relating to the companies have received significant media attention and continue to be covered in the press from time to time.

During mediation, the appellant agreed to make a separate request for the trust company records that the Commission advised were under the custody and control of the Ministry of Finance.

In response to mediation efforts of this office, the Commission conducted an additional search for records and located 21 records. The Commission has advised this office that it will issue a separate decision letter to the appellant in respect of the 21 records. To avoid any confusion, I will order the Commission to do so in the provisions of this order. The appellant has the right to appeal the decision within 30 days of the receipt of the decision letter. However, the reasonableness of the Commission's search for responsive records still remains an issue for the appellant and I will therefore consider it in my discussion below.

The records which remain at issue in this appeal consist of the withheld portions of two briefing notes (Records 1 and 5) and a backgrounder (Record 3). Access was also denied to a briefing note (Record 2) and two e-mail documents (Records 12 and 13), withheld in their entirety. The Commission denied access to the records pursuant to the following exemptions in the Act:

- advice or recommendations - section 13(1)
- relations with other governments - section 15

A Notice of Inquiry was provided by this office to the appellant and the Commission, inviting submissions on the application of the above exemptions and on the reasonableness of the Commission's search for records responsive to the request. Representations were received from both parties.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

The Commission claims that the relations with other governments exemption in section 15 applies to the following portions of Records 1, 3 and 5:

Record 1 - paragraph 5 under the heading **BACKGROUND**

Record 3 - paragraph under the heading **ISSUE** and paragraph 1 under the heading **CURRENT BACKGROUND**

Record 5 - all information under **CURRENT SITUATION**

The Commission claims that both sections 15(a) and (b) apply to the withheld information.

Section 15 states as follows:

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

- (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
- (b) reveal information received in confidence from another government or its agencies by an institution;

...

I will first consider the application of section 15(b) of the Act to the records.

For a record to qualify under this exemption, the Commission must establish that:

1. the records reveal information received from another government or its agencies; **and**
2. the information was received by an institution; **and**
3. the information was received in confidence.

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With its representations, the Commission has provided an affidavit sworn by its Acting Superintendent of Insurance (the Superintendent) who provides background information on the division of regulatory responsibility for provincially incorporated insurance companies (provincial companies) and federally incorporated insurance companies (federal companies). The Superintendent explains that the Commission is the primary regulator for provincial companies and the secondary regulator for federal companies. He indicates that pursuant to section 40 of the Insurance Act, the Commission can license federal companies that carry on business in the Province but is only concerned with market regulation for these companies. Market regulation includes the interests of consumers, purchasers of insurance, the relationship

between insurer and insured, the regulation of agents and brokers and their respective rights and obligations.

The Superintendent states:

The Office of the Superintendent of Financial Institutions Canada (OSFI) regulates corporate governance, financial reporting and solvency of federally incorporated and foreign insurance companies. Thus OSFI regulates the licencing, sets the solvency standards, establishes the investment rules, conducts the periodic examination of affairs, receives annual and other filings, and sets the requirements for reserves for those companies. In addition, it is responsible for taking control of federally regulated insurers that are in difficulty.

The Superintendent points out that the two companies which are the subject of the request are federally incorporated and regulated insurance companies and that the OSFI has primary regulatory responsibility for the companies. The Superintendent states that all negotiations between the two companies were conducted by OSFI, and that any information provided by OSFI to the Commission was done at its discretion and on the strict understanding that the information was provided in confidence and was to be held as such.

I have carefully reviewed the information in the records together with the representations of the parties. I accept the Commission's position that disclosure of the information withheld in Records 1, 3 and 5 would reveal information received from a federal government agency (OSFI), that the information was received by an institution under the Act (the Commission) and that the information was received in confidence. Therefore, I am satisfied that the requirements for section 15(b) of the Act have been met and the information is therefore exempt from disclosure.

ADVICE OR RECOMMENDATIONS

The Commission has denied access to Records 1, 3, and 5 in part and to Records 2, 12 and 13 in whole, on the basis that section 13(1) of the Act applies. This section of the Act reads as follows:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Previous orders of this agency have established that advice and recommendations, for the purposes of section 13(1), must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act.

I have carefully reviewed the information in the records. I find that each of the paragraphs under **RESPONSE** in Record 1, the **SUGGESTED RESPONSES** in Record 2 and the **RESPONSE** in Records 3 and 5 contain a suggested course of action which will ultimately be accepted or

rejected by its recipient during the deliberative process. I find that the above information contains advice and recommendations and is therefore exempt under section 13(1) of the Act. I find that the remaining portions of Record 2, which includes the **ISSUE** and **BACKGROUND** information does not contain any advice or recommendations and therefore, is not exempt under section 13(1). The Commission has not claimed that any other exemptions apply to this information. No mandatory exemptions apply and this information should be disclosed to the appellant.

I find that the information in both Record 12, which contains questions, answers and key messages and Record 13, which contains an e-mail memorandum, falls within the scope of the “free-flow of advice and recommendations within the deliberative process of government decision-making” which section 13(1) was intended to protect.

Therefore, I find that Records 12 and 13 in their entirety and parts of Records 1, 2, 3 and 5 qualify for exemption under section 13(1). I have considered the mandatory exceptions listed in section 13(2) and I find that none of the exceptions listed therein apply to the records that I have found to be exempt under section 13(1).

I have highlighted the portions of the records that I have found to be exempt under sections 13(1) and 15(b) on the copy of the records provided to the Commission’s Freedom of Information and Privacy Co-ordinator with this order. The highlighted portions should not be disclosed. The remainder of the records should be disclosed to the appellant.

PUBLIC INTEREST IN DISCLOSURE

In his letter of appeal, the appellant indicated that the information sought “is in the public interest and will be used for a thoughtful discussion of the public policy issues involved”. I have found above that the section 13(1) exemption applies to Record 1, 2, 3, 5, 12 and 13. I have also found that section 15(b) applies to parts of Records 1, 3 and 5. I will now consider whether section 23 applies to these records.

Section 23 of the Act states:

An exemption from disclosure of a record under sections **13, 15, 17, 18, 20 and 21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called “public interest override”; there must be a **compelling** public interest in disclosure and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

The Act is silent as to who bears the burden of proof in respect of section 23. The burden in law generally is that a person who asserts a position must establish it. However, where the application of section 23 to a record has been raised by an appellant, it is my view that the

burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, I have reviewed the records with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the sections 13(1) and 15(b) exemptions.

The appellant's representations make no reference to the application of the "public interest override". The Commission also makes no submissions on this section. However, in his letter of appeal, the appellant states that the information sought "is in the public interest and will be used for a thoughtful discussion of the public policy issues involved."

In reviewing the information at issue together with the circumstances of this appeal, I find that there is no compelling public interest in the disclosure of the information that I have found to be exempt under sections 13(1) and 15(b). As I have indicated above, information about the two insurance companies has already been widely disseminated by the press and continues to receive media attention. I agree with the appellant that the events surrounding the companies raise some public policy issues. I also accept that there is, and will likely continue to be some degree of public interest in the events surrounding the two companies. However, this does not constitute the "compelling public interest" in the disclosure of the information at issue required to outweigh the purpose of the exemptions in sections 13(1) and 15(b). I find that section 23 does not apply in the circumstances of this case.

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records that he or she is seeking and the Commission indicates that further records do not exist, it is my responsibility to ensure that the Commission has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Commission to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Commission must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

The appellant states that even though his request had also asked for information on a named trust company, there was no response from the Commission on this aspect of the request. The Commission has indicated that it does not regulate trust companies and that the Ministry of Finance is the institution that would have custody and control over such records. In such cases, sections 25(1) of the Act requires the Commission to transfer the request to the institution having custody and control over the requested records. This was not done. Nor did the Commission attempt to clarify the request. It's position is that the request was clear. Instead, the appellant was asked to submit a new request to the Ministry of Finance for the records relating to the trust company. In my view, the Commission did not comply with its obligations under section 25(1) of the Act. However, since the appellant has submitted a separate request and has since received a decision from the Ministry of Finance, I need not address this further other than to point out that section 25(1) of the Act was intended by the legislature for use by institutions to facilitate the access process in a timely manner.

In his affidavit, the Superintendent states that in response to the request, files in the Corporate Operations Branch, the Office of the Superintendent and the Commission's filing room were searched. The responsive records that were located were addressed in the Commission's decision letter. The Superintendent points out that the request did not need clarification; that the records sought were not the records that the Commission, as a secondary regulator, would expect to receive from the companies.

The Superintendent states that a further search was conducted after the appeal was filed. A third search was conducted upon receipt of the Notice of Inquiry and was extended to the Office of the Commissioner and Legal Services Branch. The Superintendent states that additional records were found as a result of the extended search and that the Commission's decision on access is enclosed with its representations to this office. These are the additional 21 records located by the Commission as a result of their further searches and which I referred to previously. I note that an index of 21 records together with copies of the records has been provided to this office. However, a decision letter is not included and the Commission has yet to issue its decision letter on access to the appellant. I will order the Commission to do so in the order provisions below. The appellant has the right to appeal the Commission's decision, in accordance with the Act.

I have reviewed the representations of the parties together with the affidavit provided by the Commission. Based on the evidence before me, I am satisfied that the Commission has taken all reasonable steps to locate records responsive to the appellant's request.

ORDER:

1. I uphold the Commission's decision to deny access to the parts of the records which I have highlighted on the copy of the records provided to the Commission's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Commission to disclose the remaining (non-highlighted) portions of the records by sending a copy to the appellant on or before **July 4, 1996**.
3. I order the Commission to issue a decision on access on the additional 21 records by sending its decision on access to the appellant on or before **July 4, 1996**.
4. In order to verify compliance with this order, I reserve the right to require the Commission to provide me with a copy of the records which are disclosed to the appellant and a copy of its decision letter pursuant to Provisions 2 and 3.
5. The Commission's search for records was reasonable in the circumstances of this appeal and this part of the appeal is dismissed.

Original signed by: _____

June 19, 1996

Mumtaz Jiwan
Inquiry Officer