



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

ORDER P-1321

Appeal P_9600321

Ontario Securities Commission



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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Finance (the Ministry). The request was for access to all records in relation to an investigation by the Ontario Securities Commission (the OSC) of the appellant's complaint about the conduct of a named licensed mutual funds salesperson.

The Minister of Finance is the "head" of the OSC for the purposes of the Act. Requests and appeals under the Act are dealt with on behalf of the OSC by the Ministry. For ease of reference, this order will refer to actions taken by the Ministry on the OSC's behalf as actions of the OSC.

The OSC granted partial access to the responsive records and claimed the following exemptions to deny access to the remainder of the records:

- law enforcement - sections 14(1)(a), (c), (g), 14(2)(a), (c)
- invasion of privacy - section 21

The requester (now the appellant) appealed this decision. The records at issue in this appeal consist of notes, letters, internal memorandums, facsimile transmissions and various other documents covering the time period of January, 1994 to October, 1995.

A Notice of Inquiry was provided to the appellant and the OSC. Representations were received from the appellant only.

Because the records appeared to contain the personal information of the appellant, the Notice of Inquiry raised the possible application of sections 49(a) (discretion to refuse requester's own information) and 49(b) (invasion of privacy) of the Act.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

I have reviewed the records and I find that Records 1, 13, 14, 15, 16, 20, 21 and 22 contain the personal information of the appellant only, Records 2, 4, 6, 7, 8, 9, 11, 17, 19, 27, 30, 33 and 39 contain the personal information of the appellant and another identifiable individual and Records 10, 28, 31, 32, 34, 35, 36, 37, 38 and 44 contain only the personal information of an individual other than the appellant.

Section 47(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 49 sets out exceptions to this right.

Under section 49(a) of the Act, the OSC has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information.

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Where, however, the record only contains the personal information of other individuals, section 21(1) of the Act prohibits an institution from disclosing it except in the circumstances listed in sections 21(1)(a) through (f). Of these, only section 21(1)(f) could apply in this appeal. It permits disclosure if it "does not constitute an unjustified invasion of personal privacy."

Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 21(4) or if section 23 applies to it. If none of the presumptions in section 21(3) apply, the institution must consider the factors listed in section 21(2) as well as all other relevant circumstances.

The appellant submits that the investigation was undertaken as the result of a complaint by her and, therefore, disclosure would not be an unjustified invasion of personal privacy. She submits that disclosure is desirable in order to subject the activities of the OSC to public scrutiny (section 21(2)(a)). She also submits that sections 21(2)(b) (promote public health and safety) and 21(2)(c) (promote informed choice in the purchase of goods and services) are relevant factors in favour of disclosure.

Having reviewed the representations and the records, I have made the following findings:

- (1) The records were compiled and are identifiable as part of the OSC's investigation into the appellant's complaint under the Securities Act and, therefore, the personal information contained in Records 2, 4, 6, 7, 8, 9, 10, 11, 17, 19, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 44 meets the requirements of the presumption found under section 21(3)(b) of the Act. None of the exceptions under section 21(4) apply and the appellant has not raised the possible application of section 23 of the Act.
- (2) As I stated above, the only way a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information. Therefore, even if I were to accept the appellant's arguments that sections 21(2)(a), (b) and (c) are factors in favour of disclosure of the records, these factors cannot overcome the section 21(3)(b) presumption.
- (3) Therefore, I find that Records 10, 28, 31, 32, 34, 35, 36, 37, 38 and 44 are exempt from disclosure under section 21 of the Act, and Records 2, 4, 6, 7, 8, 9, 11, 17, 19, 27, 30, 33 and 39 are exempt from disclosure under section 49(b) of the Act.

Because of the manner in which I have disposed of this issue, it is not necessary for me to consider the application of sections 14(2)(a) and (c) of the Act.

LAW ENFORCEMENT

The OSC claims that Records 1, 13, 14, 15, 16, 20, 21 and 22 are all exempt from disclosure pursuant to sections 14(1)(a) and (c) of the Act and that, in addition, section 14(1)(g) of the Act applies to Records 13 and 22. These sections state:

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

- (a) interfere with a law enforcement matter;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons.

In order for the records to qualify for exemption under sections 14(1)(a), (c) and/or 14(1)(g) of the Act, the matter referred to must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This definition reads:

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

In Order 30, former Commissioner Sidney B. Linden established that investigations of complaints by the OSC under the provisions of the Securities Act are properly considered law enforcement matters. Accordingly, this element of sections 14(1)(a), (c) and (g) has been satisfied.

The purpose of section 14(1)(a) is to provide the institution with the discretion to preclude access to records in circumstances where disclosure would interfere with an **ongoing** law enforcement matter or investigation.

I have not received representations from the OSC and there is no information in the records which indicates that the investigation is still ongoing.

In addition, in neither its decision letter or the records, the OSC has not provided any explanation as to why the information at issue would “reveal investigative techniques and procedures currently in use or likely to be used in law enforcement”, should be considered “law enforcement **intelligence** information” nor how the disclosure of the information could reasonably be expected to interfere with the gathering of law enforcement intelligence information.

Therefore, in my view, the OSC has not established the applicability of sections 14(1)(a), (c) and (g) of the Act to the records for which this exemption has been claimed.

ORDER:

1. I order the OSC to disclose Records 1, 13, 14, 15, 16, 20, 21 and 22 to the appellant by sending her a copy by **January 24, 1997** but not earlier than **January 20, 1997**.
2. I uphold the OSC’s decision not to disclose the Records 2, 4, 6, 7, 8, 9, 10, 11, 17, 19, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39 and 44.
3. In order to verify compliance with this order, I reserve the right to require the OSC to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

December 20, 1996