



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER P-1508**

**Appeal P-9700218**

**Ontario Insurance 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 request was for access to a copy of all correspondence between the Law Society of Upper Canada (the Law Society) and the Ontario Insurance Commission (the OIC) respecting the Law Society's position that it was acting as an agent and/or manager on behalf of its members with respect to the administration of a self-insured retention layer.

The OIC located records responsive to the request and determined that the interests of third parties would be affected by disclosure of the information. The OIC notified the third parties pursuant to section 28 of the Act. Following receipt of submissions, the OIC issued a decision to disclose three records. The OIC denied access to the remaining seven records on the basis of the following exemptions:

- third party information - sections 17(1)(a), (b) and (c).

The appellant appealed the denial of access.

This office sent a Notice of Inquiry to the OIC, the appellant, the Lawyers' Professional Indemnity Company (LPIC) and the Law Society. Representations were received from the appellant and LPIC. The Law Society indicated that it had reviewed the representations provided by LPIC, and would rely on them as well. The OIC indicated it would not be submitting representations.

In its representations, LPIC also indicated that it objected to the disclosure of Record 2 on the basis of section 19 of the Act (solicitor-client privilege).

## **RECORDS:**

The records at issue in this appeal are described as follows:

- Record 1: Letter dated August 25, 1989 from a named company to the Office of the Superintendent of Insurance.
- Record 2: Letter dated May 14, 1990 from a named law firm to the Office of the Superintendent of Insurance.
- Record 3: Memo dated June 14, 1990 from the Law Society to the OIC.
- Record 4: Letter dated February 10, 1992 from the OIC to the Law Society.
- Record 5: Letter dated July 13, 1992 from the Law Society to the OIC.
- Record 6: Letter dated June 24, 1993 from the Law Society to the OIC.
- Record 7: Attachment to Record 6 dated June 21, 1993 from the Law Society.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

Section 17(1) of the Act states, in part:

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.

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the party resisting disclosure, in this case the Law Society and LPIC, 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 section 17(1) will occur.

[Order 36]

### **Part One**

LPIC submits that the records contain commercial and financial information in that they discuss the Law Society's entitlement to incorporate LPIC and carry on an errors and omissions programme. The Law Society is LPIC's sole shareholder, as well as the "named insured" under LPIC's policy of insurance

The appellant submits that the records do not contain commercial information, as the Law Society is a not-for-profit corporation under the Law Society Act, and is also governed by the Corporations Act. The appellant submits that, as a not-for-profit body, the Law Society is not engaged in trade or commerce and accordingly the records do not contain commercial information.

In Order P-493, former Inquiry Officer Anita Fineberg defined the term “commercial” as it is used in section 17(1) of the Act. She stated:

In my view, commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term “commercial” information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

I agree, and find that the definition can apply to non-profit organizations.

The appellant argues that the Law Society is not carrying on a commercial venture, rather, the Law Society is a regulatory body charged with regulating the legal profession in Ontario. The appellant submits that it is clear from affidavits filed by the Law Society with the Ontario Court of Justice (General Division) that the commercial aspect of regulating lawyers’ insurance is carried on by LPIC which, although wholly owned by the Law Society, is a distinct legal entity.

Having reviewed the records and the representations, I find that the records contain detailed information about the operations of LPIC. I find that these records clearly contain commercial and financial information. Accordingly, part one of the section 17(1) test has been satisfied with respect to this information.

## **Part Two**

In order to satisfy part two of the test, the OIC and/or LPIC must show that the information was **supplied** to the OIC, either implicitly or explicitly **in confidence**.

LPIC submits that the dissemination of these records has been tightly controlled within the Law Society and LPIC themselves. They were supplied in the strictest confidence to the OIC as part of the ongoing discussions concerning the licensing of LPIC. LPIC submits that these records contain information that is not customarily disclosed to the public by individual insurers. That being the case, LPIC and the Law Society submit that they had every reason to believe when they supplied the documents to the OIC, that they would be held in confidence. They add that the OIC never in any way indicated, prior to this application, that such documents might be subject to disclosure under the Act.

Based on my review of the records and the representations, I am satisfied that the records were supplied to the OIC. In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been

reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

In the circumstances of this appeal, I accept that the information found in the records was supplied to the OIC implicitly in confidence and that the expectation of confidentiality on the part of LPIC was reasonably held. As such, the second part of the section 17(1) test has been met.

### **Part Three**

The appellant submits that section 17(1)(a) does not apply since the Law Society is a regulatory body which does not compete with others. Moreover, he argues that disclosure would not interfere with any contractual or other negotiations of the Law Society. The appellant also states that it is clear that section 17(1)(c) does not apply since disclosure of the records would not result in any undue loss or gain to the Law Society.

LPIC submits that disclosure of this information to third parties would be prejudicial to both the Law Society and LPIC. In particular, LPIC argues that it aggressively competes in an open market environment in the area of title insurance as well as innocent partner and tail coverage exposures. Other areas of competition are also anticipated in the future. The release of this information, particularly as it relates to losses within the \$200,000 group deductible, reinsurance structure and capital requirements, would provide its competition with invaluable information about the exposure and pricing of competitive products.

In my view, LPIC has described a set of circumstances in which harm to its competitive position could reasonably be expected to result from the disclosure of the information contained in the records. I find that the disclosure of this information could reasonably be expected to prejudice significantly LPIC's competitive position, as contemplated by section 17(1)(a). As the third part of the section 17(1) test has been met with regard to this information, I find that it is properly exempt from disclosure.

### **ORDER:**

I uphold the OIC's decision.

Original signed by: \_\_\_\_\_

Holly Big Canoe  
Inquiry Officer

December 29, 1997