



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

ORDER PO-1661

Appeal PA-980178-1

Ministry of Finance



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NATURE OF THE APPEAL:

The appellant provided the following background information to the Ministry of Finance (the Ministry):

I understand that [a specified numbered company, which I will hereinafter refer to as "the Company"] was previously in default of its compliance with the Corporations Tax Act on approximately April 12, 1997. Subsequently, I understand that on or about July 24, 1997, the corporations tax branch discontinued its prior request to cancel the Articles of Incorporation for [the Company] pursuant to Section 241(1) of the Business Corporations Act proceeding.

He then made an access request to the Ministry under the Freedom of Information and Protection of Privacy Act (the Act) for the following information:

- (1) particulars indicating that the Company has, in fact, complied with its obligations under the Corporations Tax Act.
- (2) particulars of the reason why the decision was made to discontinue the Business Corporations Act proceeding.
- (3) an updated report of the tax status of the Company.

The Ministry denied access to any responsive records, "where they exist", pursuant to section 17(2) of the Act (tax information).

In appealing the Ministry's decision, the appellant raised the possible application of the so-called "public interest override" in section 23 of the Act.

During mediation, the Ministry clarified that records relating to part two of the request do not exist. The appellant does not accept this. Therefore, the reasonableness of the Ministry's search for responsive records is at issue in this appeal.

Also during mediation, the Mediator contacted counsel for the Company to determine whether the Company would consent to disclosure of the information contained in the records. The Company did not consent to the disclosure of this information.

I sent a Notice of Inquiry to the appellant, the Ministry and the Company. Representations were received from the Ministry. In its representations, the Ministry acknowledges that records found on its ONBIS database are all public records and are distributed through a regularized channel for which fees are charged. The Ministry indicates that these records, which were originally withheld, will be disclosed to the appellant.

The Ministry also indicates that a further search for responsive records was conducted during the inquiry stage of this appeal and two records were located. The Ministry states that these records, which are copies

of two articles in the Ontario Gazette, are responsive to part two of the request. The Ministry indicates that it intends to issue a new decision to the appellant enclosing the two articles in the Ontario Gazette as well as the ONBIS documents.

The Ministry has not claimed the application of section 22(a) (information published or available) to the records located on its ONBIS database, but rather indicates that they will be disclosed to the appellant. As the Ministry does not indicate that it has already done so, or when this will happen, I will order the Ministry to disclose the following records to the appellant:

- MCCR - Companies Branch - ONBIS - Corporate Inquiry Fundamental Info
- MCCR - Companies Branch - ONBIS - Corporate Document Details (3 pages)
- MCCR - Companies Branch - ONBIS - Corporate Document List
- the two articles dated April 12, 1997 and August 9, 1997 in the Ontario Gazette.

RECORDS:

The records remaining at issue in this appeal consist of four pages of computer printouts entitled:

- Audit Activity Enquiry
- Account Taxation Period List
- Corp Tax Client Enquiry
- CT Return List Screen.

DISCUSSION:

TAX INFORMATION

Background

The Ministry provided considerable background relating to the subject of this appeal as described by the appellant in his request. In this regard, the Ministry states that when a company fails to file a tax return after filing in the previous year, a series of automatic letters are sent asking for a tax return or an explanation. The Ministry indicates further that an information may be laid under the Provincial Offences Act for failure to file.

The Ministry notes that there are a number of reasonable explanations for failure to file, for example, the company may no longer be active, however, the onus is on the taxpayer to provide an explanation. The Ministry indicates that it may lift a company's corporate charter for non-compliance with the Corporations Tax Act (see: section 241 of the Business Corporations Act) or for failure to file corporate information. The Ministry points out, however, that such an action is not mandatory and is only one of many discretionary enforcement measures available to it.

The Ministry indicates that at the time referred to by the appellant, it was experiencing a number of systems deficiencies which resulted in the automatic lifting of a number of corporate charters, and in some cases, inappropriately. The Company was one of those affected. When the problem was discovered, the Ministry reversed the automatic charter removal on a blanket basis.

The Ministry notes that the notice relating to the lifting of the corporate charters appeared in the April 12, 1997 copy of the Ontario Gazette and the public announcement that the default notices were issued inadvertently and were null and void was made in the August 9, 1997 edition of the Ontario Gazette.

Section 17(2)

Section 17(2) of the Act specifies that the head of an institution shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

The Ministry indicates that all four pages at issue contain specific information which identifies the Company for tax purposes. The Ministry claims that this information is known only to the officers of the Company and is used by them in communications with the Ministry in order to demonstrate that they represent the Company and are entitled to tax information about the Company.

In addition, the Ministry indicates that all four pages show the amount of tax owing by the Company. With respect to the particulars of each page, the Ministry provides the following submissions:

CT Return List Screen

This page reviews all of the returns filed by the Company, identifies the business status of the Company and indicates whether there has been a default. The Ministry indicates that this is tax information as required by section 75 of the Corporations Tax Act and is included on tax returns.

Audit Activity Enquiry

The Ministry indicates that this record documents changes made to the Company's status and is used as "an information security measure" to maintain the integrity of its tax records relating to the Company.

Account Taxation Period List

This document records the tax periods which the Company has chosen and is information which is collected on a tax return. The Ministry indicates that this information is used by it to determine when to expect a tax return from the Company.

Corporate Tax Client Inquiry

This record contains information about the type of corporation and whether it is expected to file a tax return. It also contains information regarding whether or not the Company's registration record has been updated with ONBIS. The Ministry indicates that all of this information is gathered by it for the purpose of determining a tax liability and collecting a tax.

I am satisfied that the four pages at issue contains information about the Company relating specifically to its taxable status and its tax liability and that this information is collected and used by the Ministry for the purpose of determining the Company's tax liability or collecting a tax. I am also satisfied that portions of these records contain information which was obtained on a tax return. Accordingly, I find that the records at issue are properly exempt under section 17(2) of the Act.

COMPELLING PUBLIC INTEREST

The appellant has raised the possible application of the so-called "public interest override" in section 23 of the Act. Section 23 of the Act reads as follows:

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]

It has been established in a number of orders of the Commissioner's office that in order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (January 27, 1999), Docs. C29916, C29917 (Ont. C.A.), reversing (1998), 107 O.A.C. 341 (Div. Ct.)].

In Order P-984, Adjudicator Holly Big Canoe described the criteria for the first requirement mentioned in the preceding paragraph, as follows:

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 17(2). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

I agree with these approaches to the analysis under section 23.

[IPC Order PO-1661/March 16, 1999]

It is apparent, from the legislative history of the inclusion of section 17(2) in the Act in 1990, that the Legislature was concerned about protecting financial information that individuals or corporations **must** supply to the government for taxation purposes (See: Report on 67(2) of the Freedom of Information and Protection of Privacy Act, which was issued in 1989 by Murray Elston, the then Chairman of Management Board.). In commenting on tax records, the Report stated at page 12-130:

While the tax system provides for the mandatory supplying of information to government, the system could not function without a high degree of voluntary compliance since enforcement mechanisms could not realistically be used to force compliance. Furthermore, the applicable exemption in the Freedom of Information and Protection of Privacy Act - s.17 - is limited since the harms tests of the section are very difficult to apply to the raw financial data contained on such records. The uncertainty inherent in such a result could cause difficulty in ensuring continued compliance.

The appellant did not submit representations on this issue. I have considered the nature of the information contained in the records and the purpose of the exemption. I have also considered the information which will be disclosed to the appellant. In my view, the appellant will be provided with sufficient information with respect to this matter to "inform him about the activities of the government". Further to that, I have no evidence before me that there is any compelling public interest in disclosure of the information at issue, and I find that section 23 does not apply.

REASONABLENESS OF SEARCH

As I indicated above, the appellant does not accept that records responsive to part two of his request do not exist. I also indicated that the Ministry has subsequently located two records which it now claims are responsive to part two. In part two of the request, the appellant asked for:

particulars of the reason why the decision was made to discontinue the Business Corporations Act proceeding.

The Ministry states that it was in error in originally not considering the copies of the Ontario Gazette to be within its custody and control and, therefore, not including them in its decision. The Ministry indicates that the August 9, 1997 copy of the Ontario Gazette explains that the reason for the reversal of a decision to lift the corporate status was inadvertence on the part of the Ministry. The Ministry states that no other record of the Ministry's reason for reversal has been made.

In cases where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that records do not exist, it is my responsibility to insure that the Ministry has made a reasonable search to identify any records that are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that records do not exist. However, in my view, in order to

properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request.

In my view, the appellant was clearly seeking information about the error created by the Ministry's systems problems. In part two of his request he is asking for the reason for not pursuing the matter referenced in the April 12, 1997 notice in the Ontario Gazette. This notice, given under section 241(1) of the Business Corporations Act, is entitled "Notice of Default in complying with the Corporations Tax Act". I am satisfied that the August 9, 1997 notice, which is given under the heading "Errata Notice", provides an answer to his question and is, therefore, responsive to part two of his request. Having found a record which contains the particulars of why the decision was made to discontinue the Business Corporations Act proceeding, the Ministry has met its obligations in responding to the appellant. Therefore, I find that the Ministry's search for records responsive to part two of the request was reasonable.

ORDER:

1. I order the Ministry to provide the appellant with copies of the following records by sending him copies of them on or before **April 20, 1999** but not earlier than **April 15, 1999**:
 - MCCR - Companies Branch - ONBIS - Corporate Inquiry Fundamental Info
 - MCCR - Companies Branch - ONBIS - Corporate Document Details (3 pages)
 - MCCR - Companies Branch - ONBIS - Corporate Document List
 - the two Ontario Gazette articles dated April 12, 1997 and August 9, 1997.
2. I uphold the Ministry's decision to withhold the remaining records from disclosure.
3. The Ministry's search for responsive records was reasonable and this part of the appeal is dismissed.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ March 16, 1999