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

# Reconsideration Order R-990001

## INTERIM ORDER P-1636

## Appeal P_9800104

## Ontario Securities Commission

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## BACKGROUND:

The Ministry of Finance (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for copies of all records held by the Ontario Securities Commission (the OSC) relating to the appellant and to six named corporations. The appellant clarified that he was interested in obtaining records created by the OSC between 1979 and 1997 relating to any investigations, inquiries or comments with respect either to himself or to any of the corporations. The appellant later narrowed the scope of his request to include only those records which were compiled between 1985 and 1997.

The Ministry's Freedom of Information and Privacy office located a large number of documents responsive to the request and issued a decision granting access to some records and denying access to others, pursuant to the following exemptions contained in the Act:

- advice or recommendations - section 13(1);
- law enforcement - sections 14(1)(a), (b), (c) and (g), 14(2)(a) and (c) and 14(3);
- relations with other governments - section 15(b);
- invasion of privacy - sections 21(1) and 49(b);
- discretion to refuse requester's own information - section 49(a).

The appellant appealed the denial of access to all but one record.

After reviewing the records, the Mediator contacted the Ministry to clarify the existence of certain enclosures and appendices which were referred to in other records, but did not form part of the documents provided to this office. The Mediator also asked for an explanation as to the reason for certain discrepancies between the records and the index which was provided to this office. The Ministry responded, in part, as follows:

> Paragraph 9 of section 67(2) of the Act prohibited it from providing copies of the attachments referred to in Records 24, 29, 31 and 56.

The Mediator advised the Ministry that even if it maintains that section 67 applies to the attachments to Records 24, 29, 31 and 56, it must provide this office with a copy of them in order to enable the Adjudicator to determine whether the confidentiality provisions in sections 16 and 17 of the Securities Act prevail over the Act with respect to this information. Further, the Mediator advised the Ministry that it should issue a revised decision addressing the issue of section 67.

Two Notices of Inquiry were sent to the parties with respect to the issues identified above. Representations were submitted by both parties in response to them. I disposed of the issues in this appeal, in part, in Interim Order P-1636. One of the issues I dealt with in Interim Order P-1636 was whether the Ministry is precluded from disclosing the attachments to Records 24, 29,

31 and 56 to this office because of the operation of section 67(2) of the Act and section 16(1) of the Securities Act.

After considering the representations submitted by the Ministry on this issue, I determined that the Ministry must produce to this office the attachments to Records 24, 29, 31 and 56 so that I may fully dispose of the issues raised under section 67(2) of the Act and section 16 of the Securities Act.

## THE RECONSIDERATION REQUEST

The OSC submitted a request that I reconsider my decision in Interim Order P-1636 on two grounds.
First, the OSC notes that my decision in Interim Order P-1636 was directed to the Ministry. The OSC points out that it is an institution under the Act, and the request was for records in the custody and control of the OSC.

With respect to the second ground for reconsideration, the OSC submits that I made a jurisdictional error in relying on the reasoning in Order P-623 as the basis for my conclusions that I must have the records at issue produced to me in order to make a determination as to whether section 67(2) applies to the records at issue. The OSC submits further in this regard that, pursuant to the wording of section 16 of the Securities Act, it is precluded from providing the records at issue in this reconsideration request to anyone, including the Commissioner.

I decided to invite the parties to address the issue of whether I may reconsider my decision in Interim Order P-1636 in light of the Commissioner's Reconsideration Policy. The parties were also asked to address the substantive issues raised in the reconsideration request. The parties exchanged their representations on these issues, and representations were submitted by both parties in response.

At the OSC's request, I granted an interim stay of Provision 1 of Interim Order P-1636 pending the disposition of the issues in this reconsideration request.

## WHETHER THE INTERIM DECISION SHOULD BE RECONSIDERED

Neither party takes issue with my ability to reconsider my decision in the proper circumstances, although the appellant points out that the exceptions to the doctrine of functus officio are very narrow and submits that they do not apply in this case.

### The IPC's Reconsideration Policy

The reconsideration policy of the Commissioner's office provides, in part, as follows:

> 1.1 A decision-maker may reconsider a decision where it is established that:
>
> (a) there is a fundamental defect in the adjudication process;

(b) there is some other jurisdictional defect in the decision; or

(c) there is a clerical error, accidental error or omission or similar error in the decision.

1.2 A decision-maker will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the decision.

**Issue 1: Accidental or clerical error**

As I indicated above, the OSC claims that Interim Order P-1636 incorrectly identified the Ministry as the proper party to this appeal. The appellant does not dispute that I may or that I should correct what the OSC has raised as a "clerical" or "accidental" error in the Interim Order.

In the Notice of Inquiry which I sent to the parties on April 8, 1999, I indicated that I had reconsidered this aspect of the OSC's reconsideration request on the basis that the Interim Order contained a "clerical error". In this regard, I stated:

> In Order P-1321, Adjudicator Holly Big Canoe made the following observations about a request that was made to the Ministry of Finance regarding records pertaining to the OSC:
>
> > 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.

I have reviewed O. Reg. 478/97 which lists the institutions which are subject to the Act and the OSC is a scheduled institution. I also note that the Ministry's decision refers to this matter as pertaining to the OSC. In my view, the request was made to the Minister of Finance as the "head" of the OSC, not as the "head" of the Ministry, and the Ministry has consistently treated it as such. Therefore, Interim Order P-1636 contained an error of a "clerical nature" in that it incorrectly identified the Ministry as the institution.

I indicated to the parties that upon final resolution of all of the issues in this reconsideration request, I would issue a revised order which reflects the OSC as the proper party, and I will do so in this order.

**Issue 2: Jurisdictional error**

The OSC takes the position that the decision in Order P-623 is distinguishable from the current case. It submits that in relying on this decision, I made a jurisdictional error, that is "an error of jurisdiction" rather than "an error within jurisdiction".

After considering the OSC's arguments on the jurisdictional issue, I have concluded that I did not make a jurisdictional error in applying the reasoning in Order P-623 to the current appeal. I have set out my reasons in the discussion below.

**The arguments**

The OSC indicates that section 16 of the Securities Act prohibits the OSC from disclosing the records at issue to anyone. Moreover, the OSC points out that section 67(2) of the Act provides that section 16 of the Securities Act prevails over the Act. The OSC submits that this alone is sufficient authority to remove the records at issue from the jurisdiction of the Act, and thus from being subject to my review.

Despite this initial position, the OSC recognizes the implications of Adjudicator Holly Big Canoe's decision in Interim Order P-623 as it pertains to the interpretation of section 67(2) of the Act. The OSC takes the position, however, that the facts in that case are distinguishable from the current appeal, and that I have mis-applied the reasoning in that decision. In this regard, the OSC states:

> It is submitted that the principles set out in that decision are aimed at a very specific and narrow problem: who should determine whether the content of a record is such as to bring it within exemptions provided for in the *Act*? The *Minister of Health v. Holly Big Canoe* decision makes it clear that that determination, which is one of interpretation and judgment, should not be left to the institution, but should be made by the Commissioner.
>
> The decision recognizes that it is impossible for the Commissioner to make that determination without looking at the records themselves, and therefore it must follow that the records must be produced to the Commissioner so that the necessary determination may be made.
>
> ... unlike the *Minister of Health v. Holly Big Canoe* case, there is no judgment to be made. Records are produced to the OSC pursuant to section 13 or they are not. The OSC has made it clear that the records at issue in this case were produced pursuant to section 13. No exercise of judgment is required to come to that conclusion. [emphasis in the original]

The OSC explains its investigative structure. Simply put, there are two ways in which documents are put before the OSC; voluntarily by a third party, or pursuant to an order under section 11 or a summons under section 13 of the Securities Act. The OSC states that section 16 of the Securities Act prohibits any person from disclosing information pertaining to an order or summons. Therefore, the OSC submits that if a record was delivered to the OSC pursuant to section 13, then section 67(2) of the Act is operative and the Act does not apply.

The OSC asserts that it has always maintained that the records at issue were received by it pursuant to a summons issued under authority of a section 11 order, and that I have not questioned that assertion.

The OSC concludes that a review of the records at issue does not assist a determination of the applicability of section 16 of the Securities Act. Taking the plain and simple statutory language into account, the OSC submits that I should have concluded that because section 16 of the Securities Act prevails over the Act, I should have found that I had no jurisdiction over these records.

On this point, the appellant states:

> We cannot understand how you can make that determination without seeing the documents in question. Our client does not trust the Commission to make that judgment for you. As the Court have recognized, the purpose of the statute is in no way undermined by allowing you to review the documents.

In response to this argument, the OSC reiterates that there is no exercise of judgment to be made in this case since the records are produced to the OSC pursuant to section 13 or they are not. In this case, the OSC maintains that the records at issue were produced pursuant to section 13 and that no exercise of judgment is required to come to that conclusion.

**My Findings**

To begin, I note that the OSC is correct in pointing out that I did not question the veracity of its statement that any or all of the records at issue were produced to it pursuant to section 13 of the Securities Act. In my view, such a finding would have been premature as I had not yet made a determination on whether or not sections 13 and 16 of the Securities Act applied to these records. The need for me to review the records was the reason for issuing the Interim Order in the first place.

I do not agree with the interpretation given to Order P-623 by the OSC. Nor do I agree that, because it dealt with records under the Mental Health Act as opposed to records subject to section 16 of the Securities Act, the reasoning is distinguishable.

Section 67(2) of the Act states, in part:

> The following confidentiality provisions prevail over this Act:
>
> 9. Sections 16 and 17 of the Securities Act.

Section 16 of the Securities Act states:

> (1) Except in accordance with section 17, no person or company shall disclose at any time, except to his or its counsel,
>
> (a) the nature or content of an order under section 11 or 12; or
>
> (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or

> content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13.

In Order P-623, Adjudicator Big Canoe examined the application of section 65(2)(a) of the Act, which states:

> This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by section 1 of the Mental Health Act, where the record,
>
> > is a clinical record as defined by subsection 35(1) of the Mental Health Act;

Section 35(1) of the Mental Health Act (the MHA) states as follows:

> "Clinical record" means the clinical record compiled in a psychiatric facility in respect of a patient, and includes part of a clinical record.

As I indicated above, the OSC has taken the position that a review of the records themselves will not assist in determining whether section 16 of the Securities Act applies, and therefore, I must rely on its word that section 16 of the Securities Act applies to the records at issue. In my view, this argument could also be made to clinical records under the Mental Health Act. That is, an institution could take the position that the fact that a record is a "clinical record" could also be proven by affidavit or mere assertion.

However, Adjudicator Big Canoe noted in Order P-623:

> Section 1(a)(iii) of the Act provides that one of the purposes of the Act is to provide a right of access to information in accordance with the principle that "decisions on the disclosure of government information should be reviewed independently of government". In keeping with this principle, the Legislature created an independent, expert review authority (the Commissioner) to determine issues relating to access to information.
>
> The appeal provisions of the Act provide that any decision of the head of an institution relating to access to records can be appealed by the requester to the Commissioner. The Commissioner (or his delegate) has the statutory duty to dispose of the issues raised in an appeal, and makes decisions in respect of an appeal by issuing an order pursuant to section 54(1) of the Act, which states:
>
> > After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

> In my view, section 65(2) can apply only to the records which fall within the scope of that section. While the Legislature clearly intended that these records should fall outside the purview of the Act, I do not believe that the Legislature intended to have the threshold issue of whether or not records fall within the scope of this provision determined by a non-independent body, such as the Ministry, whose decision would not be reviewable.

On judicial review, the Divisional Court upheld this decision, stating:

> We are in agreement with the assessment by the Inquiry Officer that s. 65(2) does not prohibit the Inquiry Officer from determining whether she had jurisdiction to entertain the appeal and also with her approach to that issue ... Further, we are of the view that s. 52(4) explicitly authorizes the Commissioner in an inquiry to have produced **any document** and more specifically the pertinent records in this case ... In our view the Commissioner must have the procedural mechanism to decide issues of substance. [emphasis added]
>
> Ontario (Minister of Health) v. Holly Big Canoe, (29 June 1994), Toronto Doc. 111/94 (Ont. Div. Ct.) at p. 4, affirmed [1995] O.J. No. 2477 (C.A.).

In affirming the Divisional Court's decision, the Court of Appeal stated at page 3 of its decision:

> It is our opinion also that s. 52(4) must be construed as being applicable to all inquiries conducted pursuant to the Act ... We agree also with the Divisional Court that the Commissioner is not precluded by ss. 8 and 35 of the Mental Health Act from determining the jurisdiction issue as to whether s. 65(2) is applicable by requiring production of the relevant records pursuant to section 52(4).

In Order P-623, Adjudicator Big Canoe went on to find that this power to compel the production of a record was initially for the purpose of examining whether the record fell within the scope of section 65(2) of the Act. I will address this further below.

However, in my view, it is the principle that the duty of the Commissioner to be satisfied of the relevance and application of an exclusionary provision to the records is "fundamental to the effective operation of the Act, the principle of providing a right of access to information under section 1(a), and **the principle that decisions on the disclosure of government information should be reviewed independently of government under section 1(a)(iii)**" which underlies Adjudicator Big Canoe's decision in Order P-623 [emphasis added]. It is this fundamental principle which the Courts have recognized, and it is this fundamental principle upon which I based my decision in Interim Order P-1636. Therefore, I find that the approach taken by Adjudicator Big Canoe to Mental Health Act records is also applicable to a claim that section 16 of the Securities Act applies.

The history of this matter provides an illustration of why Order P-623 is correct in concluding that exclusions should be independently reviewed.

In this regard, I note that in correspondence to this office subsequent to its request for reconsideration of Interim Order P-1636, the OSC indicates that it began taking steps to prepare the records at issue to this office in the event that I did not grant a stay of the Interim Order. The OSC then goes on to describe, for the first time, the information contained in the attachments to Records 24, 29, 31 and 56 and indicates that it intends to forward a number of these attachments to this office. Further, the OSC now claims the application of a number of exemptions for some of the attachments and identifies that only portions of other attachments may be subject to section 16 of the Securities Act.

It would appear that these decisions were **only** made after Interim Order P-1636 was issued. The only conclusion I can draw from this is that, had I simply accepted the OSC's claim that all of the attachments fell outside the Act, the OSC would likely never have reviewed them in any detail, and I would not be in a position to determine whether these records were either exempt under, or excluded from the jurisdiction of the Act. The very purpose of the Act would thereby have been undermined by an incomplete inquiry into the issues.

I note that the OSC maintains that I should now accept that the remaining records do fall under section 16 of the Securities Act and, therefore, not pursue their production.

Although I do not intend to question the integrity of the OSC, I am not prepared to simply accept its assertions. The OSC states that the fact that some of these records fall under section 16 is not apparent from the documents themselves, and it would not be possible for me to make a finding regarding them simply by reviewing them. That may be, however, in order to fulfill my duty to hold an inquiry into the issues in this appeal, I would like to see the documents for myself and thus be in a position to "inquire" of the OSC as I deem appropriate or necessary.

In my view, this is entirely consistent with the findings in Order P-623. That is, I would like to be able to examine the **content** of the records in order to be able to inquire into the application of section 16 of the Securities Act and section 65(2) of the Act. Consequently, I conclude that I have not mis-construed the reasoning and application of the decision in Order P-623 to the facts of this case.

As a result, I find that I did not make a jurisdictional error in Interim Order P-1636. Therefore, this portion of the OSC's reconsideration request is denied.

Before concluding, I acknowledge the OSC's position that section 16 of the Securities Act prohibits any person from disclosing the records at issue. In this regard, the OSC states:

> In light of all of the foregoing, the reasoning in *Minister of Health v. Holly Big Canoe* is simply not applicable to the facts of this case. In my submission, we are left with the simple and plain statutory language, which provides that section 16 of the *Securities Act* prevails over the Act. It follows, therefore, that the Commissioner simply does not have jurisdiction over these records, and any person who discloses those records to the Commissioner would be committing an offence.

It is clear that the OSC has premised this position on a finding that I have incorrectly determined that I must view the records at issue in order to determine the applicability of section 16 of the Securities Act and section 76(2) of the Act. On this point the OSC states:

> If the principles set out in that decision apply to this case, then the OSC accepts that it must produce the records to the Commissioner. If the principles set out in that decision do not apply, then the OSC is prohibited from producing the records.

As I have found that the reasoning in Minister of Health is equally applicable to the facts in this case and have concluded that I have the authority to compel the OSC to produce the records to this office so that I may view them, it is not necessary for me to address this issue as the OSC concedes that, in these circumstances, it would not be prohibited from producing them.

**Revisions to Interim Order P-1636**

With respect to the identity of the institution, I have attached a revised copy of Interim Order P-1636 which amends the identity of the institution from the Ministry to the OSC. This revised Interim Order replaces the Interim Order issued on March 4, 1999.

## ORDER:

I order the OSC to produce the remaining attachments to Records 24, 29, 31 and 56 to me by **July 27, 1999**.

Original signed by: July 13, 1999
Laurel Cropley
Adjudicator