

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3187

Appeal PA08-340

Financial Services Commission of Ontario

April 17, 2013

Summary: The appellant made a request to FSCO for records related to a credit union. FSCO granted partial access to the records, withholding information pursuant to the mandatory exemptions in section 21(1) (personal privacy) and 17(1) (third party information) and the discretionary exemptions in sections 13(1) and 19. During the inquiry, the discretionary exemptions in sections 49(a) and (b) were added. FSCO's decision is partly upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1)(definition of "personal information"), 49(a), 13(1), 19, 17(1), 49(b), 21(1).

Orders Considered: PO-2225.

OVERVIEW:

[1] The appellant¹ made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Financial Services Commission of Ontario (FSCO) for access to the following records:

¹ Appellant is a lawyer representing an individual. However, I treat the request and appeal as it came from the client and not the lawyer.

Documents pertaining to the investigation and information-gathering carried out by [FSCO] with respect to a [specified Credit Union] (the "Credit Union").

1. All records pertaining to the ownership of or payment for a share for the Credit Union by [named individual].
2. All records pertaining to the registration of [named individual] as a member of the Credit Union.
3. All records confirming that [named individual] transacted any business at the Credit Union at least 2 years prior to the date of the annual general meeting of April 17, 2005.
4. The report of the Credit Union's internal auditor [specified individual] who, at the request of the Credit Union's Audit Committee, conducted an investigation in 2005 respecting the status of [named individual] as a member of the Credit Union.
5. All records delivered to FSCO by the Credit Union, constituting the basis of the correspondence dated November 25, 2005 from the Chief Executive Officer and Superintendent of FSCO to [named individual], relating to the status of [named individual] as a member of the Credit Union.
6. All reports of the Credit Union's Election Committee for the period of 2005 – 2007, inclusive.
7. All records pertaining to any steps taken by FSCO as a result of the investigation into [named individual's] status as a member of the Credit Union.
8. All records pertaining to any investigation by FSCO with respect to the elections to the Board of Directors of the Credit Union during the period of 2005 – 2007, inclusive.
9. All records pertaining to [named individual's] removal in June 2007 from the Board of Directors of the Credit Union.
10. All records pertaining to the presence during the Credit Union's 2007 and 2008 election processes of a voting station at the [named] nursing home.

[2] FSCO located the responsive records in the following three areas:

- Chief Executive Officer's (CEO's) office
- Legal Services Branch (LSB)
- Licensing and Market Conduct Division (LMCD)

[3] FSCO issued a decision granting partial access to the records. It denied access to some records, either in full or in part, pursuant to the discretionary exemptions in section 13(1) (advice to government), 14 (law enforcement) and 19 (solicitor-client privilege), 20 (danger to safety or health) and the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy).

[4] During mediation of the appeal, FSCO indicated that it was no longer relying on section 14 to withhold records.

[5] During the inquiry respecting this appeal, the adjudicator sought representations from the appellant, the Credit Union and FSCO. The adjudicator received representations from FSCO and the appellant only. During adjudication, the following occurred:

- FSCO indicated that it was no longer relying on section 20 to withhold LMCD records 30 and 31.
- FSCO withdrew its claim of section 13(1) and 19 for some records, but not others.
- FSCO withdrew its claim of section 17(1) for some but not all of the records.
- FSCO submitted that it would be willing to disclose records which it had claimed were exempt under section 21(1) after notification of the individuals identified in the records.
- The adjudicator raised the possible application of the discretionary exemptions in sections 49(a) and (b).

[6] The appeal was then assigned to me to complete the inquiry and issue an order. Prior to issuing this order, I sought representations from various individuals whose interests may be affected by the outcome of the appeal (affected persons). I received representations from two affected persons who did not consent to the disclosure of their information. I also received the consent from one individual to share information relating to him.

[7] In this order, I partially uphold FSCO's decision.

RECORDS:

[8] The records at issue have been summarized in the following three tables.

Index #1: CEO's Office

Record Number	Description of Record	Page Number(s)	FSCO's decision	Exemptions claimed	Finding
8	Email from FSCO legal counsel to select FSCO staff members (Nov. 1, 2005)	12 – 14	Withheld in full	13(1), 19	49(a), 19
9	Letter dated July 20, 2005	15 – 16	Withheld in full	17(1), 21(1)	21(1)
10	Email dated July 27, 2005	17	Withheld in full	17(1), 21(1)	21(1)
11	Statutory Declaration dated June 13, 2005	18	Withheld in part	21(1)	21(1)
12	Letter to FSCO staff members dated August 4, 2005	19	Withheld in full	17(1), 21(1)	49(b), 21(1)
21	Email to FSCO staff member dated November 7, 2005	52 – 54	Withheld in full	17(1), 21(1)	21(1)
24	Document Status Information Sheet (CEO-27753)	58 – 59	Withheld in part	21(1) ²	Disclose
25	Letter from FSCO CEO dated July 17, 2006	60 – 61	Withheld in full	17(1), 21(1) ³	Disclose
30	Letter to FSCO CED dated June 29, 2006	67	Withheld in full	17(1), 21(1) ⁴	Disclose
31	Report Dated April 23, 2006	68 – 111	Withheld in part	17(1), 21(1)	Disclose
34	Letter to FSCO CEO dated September 19, 2006	115 – 117	Withheld in full	21(1)	Disclose

² FSCO withdrew claim to section 21(1) exemption in its representations.

³ FSCO withdrew claim to sections 17(1) and 21(1) exemption in its representations.

⁴ FSCO withdrew claim to sections 17(1) and 21(1) exemption in its representations.

35	Email from FSCO staff member to another staff member dated October 6, 2006	118	Withheld in part	21(1)	Disclose
38	Email from FSCO CEO dated July 18, 2006	122 – 127	Withheld in full	21(1)	Disclose
39	Letter to FSCO CEO dated July 18, 2006	128 – 130	Withheld in full	21(1)	Disclose
45	Letter from FSCO CEO dated March 24, 2005	139 - 140	Withheld in part	21(1)	21(1)
47	Letter to FSCO CEO dated March 15, 2005 (with attachments)	142 – 154	Withheld in full	21(1)	21(1)
48	Email from FSCO Legal Counsel to FSCO staff members dated March 21, 2005	155	Withheld in full	19	19
59	Document Status Information CEO-19340	172	Withheld in part	19, 21(1)	19
60	Fax to FSCO CEO dated March 18, 2005	173 – 178	Withheld in full	21(1)	21(1)
62	Email exchange dated March 31, 2005	180 – 181	Withheld in full	21(1)	21(1)

Index #2: Legal Services Branch

Record Number	Description of Record	Page Number(s)	FSCO's decision	Exemptions claimed	Finding
19	Email to FSCO staff dated November 7, 2005	50 – 52	Withheld in full	17(1), 21(1)	21(1)
20	Screen Print	53	Withheld in full	19 ⁵	Disclose

⁵ FSCO indicated in its representations that this page will now be disclosed as it has withdrawn its claim on this exemption.

21	Letter dated August 3, 2006	54 – 55	Withheld in part	21(1)	Disclose
25	Email from FSCO staff member to FSCO staff member	61 – 63	Withheld in part	21(1)	Disclose
27	Email to FSCO CEO dated July 18, 2006	65 – 71	Withheld in full	21(1)	Disclose
28	Letter dated June 26, 2006	72 – 73	Withheld in full	21(1)	Disclose
29	Letter from FSCO CEO dated July 17, 2006	74 – 75	Withheld in full	17(1), 21(1)	Disclose
30	Complaint document	76 – 79	Withheld in full	17(1), 19	19
31	Internal FSCO email messages dated July 20, 2006	80	Withheld in full	19	19
33	Email from FSCO Legal Counsel to FSCO staff member dated July 5, 2006	84	Withheld in full	19	19
34	Report	85 – 86	Withheld in full	17(1), 21(1) ⁶	Disclose
38	Letter from Deputy Minister of Finance dated May 18, 2005	133	Withheld in part	21(1)	21(1)
40	Letter to Deputy Minister of Finance	135 – 142	Withheld in part	21(1)	21(1)
42	Letter to credit union dated April 13, 2005	144	Withheld in part	21(1)	21(1)
43	Email from FSCO employee to FSCO CEO dated April 18, 2005	145	Withheld in part	21(1)	21(1)
44	Letter from FSCO CEO dated April 14, 2005	146 – 147	Withheld in part	21(1)	21(1)
47	Letter to FSCO CEO dated March 29, 2005 (with four attachments)	151 – 165	Withheld in full	21(1)	21(1)

⁶ FSCO withdrew claim of section 21(1).

48	Internal email from FSCO CEO dated April 15, 2005	166	Withheld in part	21(1)	21(1)
49	Email from FSCO CEO to FSCO staff member dated April 14, 2005	167	Withheld in part	19 ⁷ , 21(1)	Disclose in part
50	Email from FSCO staff member to other FSCO staff member dated April 14, 2005	168	Withheld in part	21(1)	21(1)
51	Internal email dated April 14, 2005	169	Withheld in part	21(1)	21(1)
52	Email from FSCO staff member to FSCO CEO dated April 14, 2005	170	Withheld in part	21(1)	21(1)
55	Letter to FSCO CEO dated March 15, 2005	173 – 185	Withheld in part	21(1)	21(1)

Index #3: Licensing and Market Conduct Division

Record Number	Description of Record	Total Number of pages	FSCO's decision	Exemptions claimed	Finding
4	Email to FSCO staff member dated October 19, 2005	1	Withheld in full	17(1), 21(1)	21(1)
5	Email from FSCO employee to FSCO employee dated November 4, 2005	2	Withheld in full	21(1)	21(1)
8	Email FSCO employee to another FSCO staff member dated June 21, 2006	1	Withheld in part ⁸	21(1)	21(1)

⁷ FSCO submits in its representations that the portion withheld under section 19 will be disclosed as it has withdrawn its claim of this exemption.

⁸ FSCO's representations state that this record will be severed to take out the personal information. It is not evident that this information has been disclosed to the appellant.

9	Letter to FSCO CEO from three affected parties (with attachment) dated June 29, 2006	24	Withheld in full	17(1), 21(1) ⁹	Disclose
14	Letter from an affected party to FSCO CEO dated July 18, 2006	8	Withheld in full	17(1), 21(1)	Disclose
19	Letter to FSCO dated February 23, 2007	9	Withheld in part	17(1), 21(1)	21(1)
24	Letter to FSCO dated March 25, 2007	4	Withheld in part	17(1), 21(1)	21(1)
27	Email from affected party dated April 19, 2007	2	Withheld in full	17(1)	Disclose
28	Report dated April 22, 2007	8	Withheld in full	17(1), 21(1)	Disclose
30	Harassment Complaint dated April 23, 2007	2	Withheld in full	21(1), 49(b)	49(b)
31	Harassment Complaint dated April 23, 2007	2	Withheld in full	21(1), 49(b)	49(b)
34	Report to the Chair of the Election Committee dated April 25, 2007	3	Withheld in full	17(1) ¹⁰ , 21(1)	Disclose in part
39	Email from lawyer to credit union dated May 23, 2007	2	Withheld in full	17(1), 19, 49(a) and (b)	Disclose in part
40	Email from a lawyer to credit union dated May 24, 2007	2	Withheld in full	17(1), 19 ¹¹	Disclose
41	Correspondence from lawyer to credit union	5	Withheld in full	17(1), 19 ¹² , 49(a) and (b)	Disclose in part

⁹ FSCO withdrew its claim to sections 17(1) and 21(1) in its representations.

¹⁰ FSCO withdrew claim of section 17(1) as record not supplied by Credit Union.

¹¹ FSCO withdrew claim of section 19.

¹² FSCO withdrew claim of section 19

50	Draft of minutes of Board of Directors meeting dated June 7, 2007	5	Withheld in full	17(1), 21(1)	Disclose in part
51	Email from lawyer dated June 11, 2007	2	Withheld in full	17(1), 19 ¹³ , 49(a)	Disclose
52	Email from affected party to lawyer dated June 12, 2007	1	Withheld in full	17(1), 19 ¹⁴ , 49(a)	Disclose
53	Email from affected party to lawyer dated June 13, 2007	1	Withheld in full	17(1), 19 ¹⁵ , 49(a)	Disclose
54	Email from lawyer to the affected party dated June 13, 2007	1	Withheld in full	17(1), 19 ¹⁶ , 49(a)	Disclose
55	Email from lawyer to affected party dated June 15, 2007	4	Withheld in full	17(1), 19 ¹⁷ , 49(a)	Disclose
58	Copy of email from credit union's legal counsel dated June 21, 2007	1	Withheld in full	17(1), 19 ¹⁸ , 49(a)	Disclose
63	Email from the lawyer to the affected party dated June 21, 2007	2	Withheld in full	17(1), 19 ¹⁹ , 49(a)	Disclose
64	Email from FSCO to affected party dated June 26, 2007	3	Withheld in part	17(1) ²⁰ , 21(1)	21(1)
65	Board of Director's meeting minutes dated June 28, 2007	8	Withheld in full	17(1)	Disclose
68	FSCO's response to election complaint	3	Withheld in part	17(1) ²¹ , 21(1)	21(1)

¹³ FSCO withdrew claim of section 19.

¹⁴ FSCO withdrew claim of section 19.

¹⁵ FSCO withdrew claim of section 19.

¹⁶ FSCO withdrew claim of section 19.

¹⁷ FSCO withdrew claim of section 19.

¹⁸ FSCO withdrew claim of section 19.

¹⁹ FSCO withdrew claim of section 19.

²⁰ FSCO withdrew claim of section 17(1).

²¹ FSCO withdrew claim of section 17(1) as information not supplied by Credit Union.

71	Complaint Summary Report dated August 14, 2007	5	Withheld in full	49(a), 13(1), 17(1), 49(b)	Disclose in part
73	Board Minutes dated October 26, 2007	5	Withheld in full	17(1)	Disclose
85	Recommendation Criteria	3	Withheld in full	13(1) ²²	Disclose

ISSUES:

- A. Should FSCO be allowed to claim the discretionary section 19 exemption for CEO Record 8?
- B. Do the records contain "personal information" within the meaning of section 2(1) of the *Act*?
- C. Would disclosure of the "personal information" constitute an invasion of personal privacy within the meaning of section 21(1) or the discretionary exemption in section 49(b)?
- D. Does the discretionary exemption at section 49(a) or the mandatory section 17(1) exemption apply to the records at issue?
- E. Does the section 49(a) or the section 19 exemption apply to the records?
- F. Does section 49(a) in conjunction with section 13(1) apply to the records?
- G. Was FSCO's exercise of discretion proper in the circumstances?

DISCUSSION:

A. Should FSCO be allowed to claim the discretionary section 19 exemption for CEO Record 8?

[9] In paragraph 66 of its representations, FSCO sought to claim the discretionary exemption in section 19 with respect to CEO Record 8 as it had neglected to claim this exemption at the initial stage through staff inadvertence. This issue was raised with the appellant who did not address it in his representations.

[10] The IPC's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period

²² FSCO withdrew claim of section 13(1).

shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[11] The purpose of this policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption outside the 35-day period.²³

[12] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.²⁴ The specific circumstances of each appeal must be considered individual in determining whether discretionary exemptions can be raised after the 35-day period.²⁵

[13] FSCO submits that as the record was withheld initially under section 13(1), there is no prejudice to the appellant in the late-raising of the discretionary section 19 exemption. As stated above, the appellant did not make submissions on this issue. The appellant has been provided with the opportunity to make representations on the late raising of section 19, as well as the application of the exemption to this record. Accordingly, I find that there would be minimal prejudice to the appellant if I were to allow FSCO to claim section 19 for Record 8 of the CEO file. Accordingly, I will consider the application of section 19 to that record below.

B. Do the records contain “personal information” within the meaning of section 2(1) of the *Act*?

[14] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

“personal information” means recorded information about an identifiable individual, including,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or

²³ *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

²⁴ Order PO-1832.

²⁵ Orders PO-2113 and PO-2331.

information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²⁶

[16] FSCO submits that the records at issue contain information relating to the employment and financial history of the appellant and other individuals. The records also contain the views of other individuals about the appellant and about the events which are the subject matter of the records. FSCO also submits that even if the names of the affected persons were removed from the records, the individuals would still be identifiable. FSCO states:

[FSCO] believes the appellant has considerable knowledge and familiarity with many of the relevant Credit Union members and the employees, officers and directors (both current and former) of the Credit Union due to his former position within it. The Credit Union is a relatively small, ethnically based financial institution, in which, [FSCO] believes, the relevant parties are, or are likely to be, acquainted with each other.

[17] FSCO further submits that many of the Credit Union members volunteer in running the Credit Union and thus the information about these individuals relates to them in their personal, rather than in a professional, capacity. FSCO states:

²⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

...some records, which may appear in some cases to be "official" in nature, actually reflect personal priorities and ambitions of Credit Union members and include many accusations of misconduct (which FSCO did not in fact substantiate) made by Credit Union members engaged in a contentious factional struggle over control of the Credit Union. Generally speaking, [FSCO] considers a Credit Union member, or information about the person at a "membership" level, to be personal. While credit unions are, in essence, cooperative financial institutions owned and to some extent "run" by members, the role of a member is, in [FSCO's] view, more analogous to a "personal" account holder than to a substantial shareholder or an employee, officer or director of a publicly traded financial institution such as a bank or insurance company.

[18] The appellant submits that he does not want the financial information of any individual or any "personal information" as defined under the *Act*. The appellant is seeking information relating to the eligibility or lack thereof, for election as Director of the Credit Union. To the extent that an affected person's personal information relates to the election of a Director to the Credit Union, the appellant submits that this is not personal information.

[19] The affected persons submit that the information relating to them is their personal information as it relates to their personal banking information.

[20] I find that the financial information including banking, mortgage or any financing relating to the affected persons is their personal information for the purposes of the *Act*. I wish to emphasize that this information is personal information even if the financial information relates to individuals who were seeking the position of Director of the Credit Union.

[21] I further find that the home address, the home phone number, contact information, and employment history is also the personal information of the affected persons within the meaning of the definition of that term in section 2(1) of the *Act*.

[22] I have reviewed the records and considered whether the information in them relating to the affected persons is their personal information, particularly when they were acting as members of a committee or Board of Directors for the Credit Union. As stated above, information about individuals in their professional, official or business capacity will not normally be found to be personal information. The current approach of this office in determining whether information relates to an individual in a personal or official capacity was set out by the former Assistant Commissioner Tom Mitchinson in

Order PO-2225. This approach has been followed in numerous decisions and essentially involves the consideration of the following two questions:

...the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

...

The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?*" Even if the information appears in a business context, would its disclosure reveal something inherently personal in nature?

[23] I adopt this approach in the current appeal. The names of the affected persons appear in the context of communications and correspondence with other members in the Credit Union and then to FSCO. I find that context is primarily a professional and business one. Furthermore, the individuals whose information is at issue were acting not as personal individual Credit Union members but as members of the Credit Union's board or various committees. Again, I find that the names of the affected persons appear in a business and official context.

[24] The next question I must consider is whether disclosure of the information about the affected persons would reveal something of a personal nature about the individual. Some of the records contain information about the affected persons relating to their duties as board or committee members of the Credit Union. Based on my understanding of the structure of the Credit Union, the various members can either be elected to the board or volunteer for committee work. I find that the fact of an individual's membership on either the board or the committee is not personal information. Furthermore, I find that disclosure of this information would not reveal anything of a personal nature of the affected persons. I also find that information relating to the affected persons in carrying out their board or committee duties is information about them in their official capacity and is not personal information. Accordingly, as I have found that this information is not personal information, section 21(1) does not apply to exempt the following records:

CEO: 24, 25, 30, 31

LSB: 29

LMCD: 9, 28

[25] FSCO did not claim any discretionary exemptions for Record 24 and no other mandatory exemptions apply and thus Record 24 (CEO file) should be disclosed. For

the rest of the records, FSCO initially claimed section 17(1), and then withdrew its claim in its representations. However, as section 17(1) is a mandatory exemption, I will consider its application to those records, below.

[26] On the other hand, some of the records contain information about the affected persons acting in their official capacity where they are making allegations against another member of the Credit Union. In particular, I refer to the information of the affected persons who were election committee members. I find this information to be the personal information of those individuals. Disclosure of the complaints or allegations made by the affected persons, combined with their names, would reveal something of a personal nature about them, as well as those complained about, and I find this information is personal information for the purposes of section 2(1) of the *Act*.

[27] Lastly, I find that some of the records contain recorded information about the appellant and is his personal information as defined in section 2(1) of the *Act*.²⁷ The following records from the Licensing and Market Conduct Division contain the appellant's personal information, along with the personal information of other individuals: 30, 31, 39, 41, 50, 51, 52, 53, 54, 55, 58, 63, and 71. For records 39, 41, 50 and 71, I find that the appellant's personal information can be severed from the rest of the record. As disclosure of this information would not be an unjustified invasion of another individual's personal privacy, I find that this information should be disclosed to him.

[28] In summary, I have found the majority of records contain the personal information of the affected persons only and I will proceed to consider the application of the mandatory section 21(1) exemption to this information. For the records that contain the personal information of both the appellant and the affected persons, I will consider the application of the discretionary exemptions in sections 49(a) and (b) to them.

C. Does the mandatory section 21(1) exemption or the discretionary section 49(b) exemption apply to disclosure of the personal information in the records?

[29] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

²⁷ The index identifies the records that contains the appellant's personal information.

[30] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. See below for a more detailed discussion of the exercise of discretion issue.

[31] Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy."

[32] In both these situations, sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. In the present appeal section 21(4) does not apply but section 21(1)(a) and (f) are relevant.

21(1)(a): consent

[33] For section 21(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.²⁸

[34] Of the affected persons who were given notice, one of them consented to the disclosure of his personal information. Accordingly, I will order the following information relating to him disclosed to the appellant:

CEO: 34, 35, 38, 39

LSB: 21, 25, 27, 28

LMCD: 14 (in part)

Section 21(1)(f)

[35] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[36] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21 or section 49(b). Once a presumed unjustified invasion of personal privacy under section 21(3) is established for records which are claimed to be exempt under section 21(1), it can only be overcome if section 21(4) or the "public interest override" at section 23 applies.²⁹

²⁸ see Order PO-1723.

²⁹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

[37] FSCO submits that the presumptions in section 21(3)(a), (b), (d), (f) should be considered. Section 21(3) states, in part:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

[38] FSCO made representations on the application of the presumption to the specific records. I summarize their arguments here:

- Disclosure of the affected persons' account, credit union membership, and other financial information describes these individuals' finances, assets, liabilities and financial history. As such, disclosure of this information is presumed to be an unjustified invasion of their personal privacy because the presumption in section 21(3)(f) applies.
- Some of the personal information was compiled and is identifiable as part of a FSCO investigation into a possible violation of the *Credit Unions and Caisses Populaires Act*, 1994, S.O. 1994, c. 11 (*CUCPA*). Accordingly, disclosure of this information is presumed to be an unjustified invasion of the affected persons' personal privacy and the presumption in section 21(3)(b) applied to this information.
- One of the records contains the resume of a member and disclosure of the personal information therein is presumed to be an unjustified invasion of the affected person's personal privacy as it is subject to the presumption in section 21(3)(d).
- Portions of one record contain information relating to an affected person's medical evaluation and condition. Accordingly, disclosure of this information is presumed to be an unjustified invasion of the affected person's personal privacy under section 21(3)(a).

[39] The appellant submits that he requires information in order to rectify an issue with the Credit Union's Board of Directors. The appellant also submits that there is a public interest aspect of his request as he is seeking the records in order to aid FSCO in its mandate of ensuring compliance with *CUPCA*. In that regard, I considered the application of the factors favouring disclosure in sections 21(2)(a) and (d). FSCO also submits that disclosure of some of the personal information is highly sensitive, thereby raising the possible application of the factor weighing against disclosure in section 21(2)(f). The factors under section 21(2) referred to above state:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
...
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
...
- (f) the personal information is highly sensitive;

[40] Having considered the factors in section 21(2) and the presumptions in section 21(3), I find the following with respect to the personal information contained in the responsive records:

- The presumption in section 21(3)(f) is relevant to disclosure of the personal information relating to the affected persons' financial history and activity in the following records:
 - CEO: 9, 10, 11, 12, 21, 45, 47, 60, 62
 - LSB: 21, 55
 - LMCD: 4, 5, 28
- The personal information in the following records was compiled and is identifiable as part of an investigation into a possible violation of the *CUPCA*. In particular, FSCO was conducting an investigation into irregularities with the election of certain directors at the Credit Union. Accordingly, I find that the presumption in section 21(3)(b) is relevant to the personal information in the following records:
 - CEO: 9, 10, 11, 12, 21, 31, 45, 47, 59, 60, 62

- LSB: 19, 38, 40, 42, 43, 44, 47, 48, 49 (in part), 50, 51, 52, 55
- LMCD: 4, 5, 8, 14 (in part), 19, 24, 30, 31, 34 (in part), 39, 41, 50 (in part), 51, 53, 54, 55, 58, 63, 64, 68, 71,
- Records 30, 31, 39, 41 from the Licensing and Market Conduct Division contain personal information relating to an affected person's medical condition and is subject to the presumption in section 21(3)(a). Disclosure of this information is presumed to be an unjustified invasion of that individual's personal privacy under section 21(1).
- Disclosure of the medical personal information relating to the affected person in Records 30, 31, 39 and 41 could reasonably be expected to cause significant personal distress to the affected person.³⁰ Accordingly, I find that the factor favouring non-disclosure in section 21(2)(f) is relevant to my consideration of this particular information.
- The factors favouring disclosure in sections 21(2)(a) and 21(2)(d) are not relevant. The appellant has not provided evidence that section 21(2)(d) applies and that disclosure of the personal information is relevant to the fair determination of his rights.³¹ Nor has the appellant established that disclosure of the personal information at issue is necessary to subject the activities of government to public scrutiny such that section 21(2)(a) is relevant.

³⁰ To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

³¹ For section 21(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

[41] Accordingly, based on my review of the factors in section 21(2) and the presumptions in section 21(3), I find that disclosure of the personal information in the records would result in an unjustified invasion of the affected persons' personal privacy and it should not be disclosed under section 21(1). Regarding the records that contain the appellant's personal information intermingled with the personal information of the affected persons, I find that this information should be withheld on the basis of section 49(b), subject to my finding on FSCO's exercise of discretion.

D. Does the discretionary exemption in section 49(a) taken in conjunction with the mandatory section 17(1) exemption apply to the records at issue?

[42] As stated above, section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49(a) an exemption from this right reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[43] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.³²

[44] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[45] FSCO claimed the application of the mandatory third party information exemption for a number of records. However, in its representations, FSCO withdrew its claim for some of the records as it clarified that they were not supplied by the Credit Union to FSCO and, therefore, could not be exempt under the exemption. Moreover, I have found that several of the records for which FSCO claimed the application of section 17(1) to be exempt under section 21(1). Thus, I will consider the application of section 49(a) and 17(1) to the following records only:

- CEO: 25, 30, 31
- LSB: 29, 34
- LMCD: 9, 27, 28, 40, 41, 51, 52, 53, 54, 55, 58, 63, 64, 65, 71, 73

³² Order M-352.

[46] FSCO did not make representations on the application of section 17(1) to these records and, as stated earlier in this order the Credit Union did not provide representations in response to the notice. Section 17(1) 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; or

[47] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.³³ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.³⁴

[48] For section 17(1) to apply, the institution and/or the third party 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

³³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

³⁴ Orders PO-1805, PO-2018, PO-2184, MO-1706.

Part 1: Type of Information

[49] The types of information listed in section 17(1) have been discussed in prior orders and I find that the following are relevant to the records at issue:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- names, duties and qualifications of individual employees [MO-2164]
- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

[50] Records 25, 30 and 31 of the CEO file relate to correspondence and reports sent from the Credit Union to FSCO about the election issues. This information is not commercial information and does not include financial information I find that these records do not contain the type of information protected under section 17(1). As these records do not meet the first requirement under section 17(1), they do not qualify for exemption. FSCO did not claim any discretionary exemptions for these records and they should be disclosed to the appellant.

[51] Record 29 of the Legal Services Branch is correspondence from the Credit Union to FSCO about the election issue. It does not contain any of the types of information protected under section 17(1) and fails to meet the first requirement for the application of this exemption. As FSCO did not claim any discretionary exemptions for this record it should be disclosed to the appellant.

[52] Record 30 from the Legal Services Branch is a chronology of a complaint and relevant legislation. Based on my review of this record it is not apparent that this record contains any of the types of information protected by section 17(1). The chronology of the complaint cannot be characterized as commercial or financial information as the record does not relate to the Credit Union's business or services. I also find that the record does not contain labour relations information as the information does not relate to a Credit Union Employee. The statutory provisions also do not contain any of the types of information protected under section 17(1). I find that Record 30 does not meet the first requirement for the application of section 17(1). I will proceed to consider whether it is exempt under section 19.

[53] Records 9, 27, 28, 40, 41, 51, 52, 53, 54, 55, 58, 63, 64, 71 and 73 from the Licensing and Marketing Conduct Division do not contain any of the types of information protected under section 17(1). The information contained in these records relates to the Credit Union's corporate governance issues and ways in which to deal with these matters. I find that this information does not constitute labour relations or commercial information within the meaning of section 17(1).

[54] Record 65 from the Licensing and Marketing Conduct Division is the Credit Union's Board of Director's meeting minutes for a particular meeting. I find that portions of this record include references to financial and commercial information. The financial information relates donations made by the Credit Union and the commercial information relates to the Credit Union's business. I find that Record 65 meets the first requirement for the application of section 17(1).

[55] Accordingly, as Records 30, 9, 27, 28, 40, 41, 51, 52, 53, 54, 55, 58, 63, 64, 71 and 73 do not meet the first requirement for the application of section 17(1) and all of the requirements must be met, I find that these records are not exempt under section 17(1). I will proceed to consider the application of the other discretionary exemptions which were claimed for these records.

Part 2: Supplied in Confidence

Supplied

[56] The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.³⁵

[57] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.³⁶

In confidence

[58] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.³⁷

[59] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.³⁸

[60] As stated above, neither FSCO nor the Credit Union provided representations on this issue. Based on my review of Record 65 I am unable to find that this record was supplied by the Credit Union to FSCO in confidence. As this record does not meet the second requirement for the application of section 17(1) and all of the requirements must be met, I find that Record 65 does not qualify for exemption under section 17(1).

³⁵ Order MO-1706.

³⁶ Orders PO-2020, PO-2043.

³⁷ Order PO-2020.

³⁸ Orders PO-2043, PO-2371, PO-2497.

[61] As no discretionary exemptions were claimed for Record 65, I find it should be disclosed to the appellant.

E. Does the section 49(a) or the section 19 exemption apply to the records?

[62] FSCO submits that a number of records are exempt under section 19 of the *Act*, which states:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[63] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

Branch 2: statutory privileges

[64] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[65] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "for use in giving legal advice."

Statutory litigation privilege

[66] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "in contemplation of or for use in litigation."

[67] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt

under the statutory litigation privilege aspect of branch 2.³⁹ However, “branch 2 of section 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief.”⁴⁰

[68] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel’s skill and knowledge, are exempt under branch 2 statutory litigation privilege.⁴¹

[69] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.⁴²

[70] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.⁴³

[71] FSCO argues that the records for which it has claimed section 19 are exempt under the Branch 2 solicitor-client communication and litigation privileges and makes the following arguments:

- Record 8 of the CEO file is an email between FSCO legal counsel and FSCO staff members. It is a direct communication between Crown counsel and the client (FSCO) given for the purpose of giving legal advice and forms part of the continuum of communications between Crown counsel and FSCO.
- Record 48 of the CEO File is an email from FSCO legal counsel to FSCO staff members. It is also a direct communication between Crown counsel and the client (FSCO) for the purposes of giving legal advice to FSCO and in contemplation of potential proceedings before the Superintendent and/or the Financial Services Tribunal. FSCO submits that even though not all portions of the record contain legal advice, it forms part of the continuum of communications between Crown Counsel and FSCO and falls within the ambit of the section 19(a) and (b) privilege.
- Record 59 of the CEO file is a “Document Status Information” which contains a handwritten note. A portion of this record has been withheld under section 21(1). FSCO submits that the handwritten note is for the purpose of giving legal advice to FSCO and in contemplation of potential

³⁹ Order PO-2733.

⁴⁰ Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.

⁴¹ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733.

⁴² *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (cited above).

⁴³ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

proceedings before the Superintendent and/or the Financial Services Tribunal.

- Record 31 of the Legal Services Branch file is an internal FSCO email message that FSCO argues is a direct confidential communication between Crown counsel and FSCO for the purposes of giving legal advice. FSCO submits that this email forms part of the continuum of communications between Crown counsel and FSCO and falls within ambit of privilege in section 19(a) and (b).
- Record 33 of the Legal Services Branch file is an email from FSCO legal counsel to a staff member and is a direct confidential communication for the purpose of giving legal advice.
- Record 30 of the Legal Services Branch is a complaint document that consists of Crown counsel's working papers for use in giving legal advice and in contemplation of potential proceedings before the Superintendent and/or the Financial Services Tribunal.

[72] FSCO also submits that there has not been waiver in regard to all of the records claimed exempt.

[73] Based on my review of the records I find them to be exempt under the Branch 2 solicitor-client communication privilege of section 19. I find them to be confidential communications for the purpose of providing legal advice as well as forming part of the continuum of communications between counsel and the client. I find that the privilege has not been waived with respect to any of the records. Accordingly, section 19 applies to exempt this information from disclosure, subject to my finding on FSCO's exercise of discretion below.

F. Does section 49(a) in conjunction with section 13(1) apply to the records?

[74] As stated above, FSCO may withhold the record under section 49(a) where section 13(1) applies to the information. FSCO submits that section 13(1) applies to a portion of Record 71. Section 13(1) states:

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.

[75] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the

deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.⁴⁴

[76] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

[77] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.⁴⁵

[78] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; and
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁴⁶

[79] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited above) that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.⁴⁷

[80] There is no requirement under section 13(1) that the ministry be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.⁴⁸

⁴⁴ Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

⁴⁵ Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

⁴⁶ [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*].

⁴⁷ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

⁴⁸ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*.

[81] FSCO submits that section 13(1) applies to only the portion of record 71 titled "Conclusion" and "Recommendation" and states:

The remaining undisclosed portion of the record, not subject to section 21 or 17(1) of the *Act*, contains advice and recommendations of a public servant to FSCO management. The communication provides specific advice with respect to whether or not the credit union has complied with certain aspects of the CUCPA and what steps FSCO should take in response. The advice suggests a specific course of action that was ultimately to be accepted or rejected by the FSCO clients to whom the advice was sent. Requiring the disclosure of this record would inhibit the free-flow of information and advice between different senior public servants who would no longer be able to speak freely and frankly in giving advice to other public servants.

[82] Based on my review of the portions of the information withheld under section 13(1), I find both the information under "Conclusion" and "Recommendation" contains advice and a recommendation. Record 71 relates to the summary of a complaint and the two portions withheld by FSCO relate to the staff member's conclusion of the report, including a suggested course of action and then the recommendation. I accept FSCO's submission that disclosure of this information would reveal the course of action that was to be ultimately accepted or rejected by the decision-maker. Accordingly, as section 13(1) applies, I find the information to be exempt under 49(a), subject to my finding on FSCO's exercise of discretion.

G. Was FSCO's exercise of discretion proper in the circumstances?

[83] The sections 49(a), 49(b) and 19 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[84] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[85] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴⁹ This office may not, however, substitute its own discretion for that of the institution.⁵⁰

[86] FSCO submits that its representations reveal that it substantially revised its section 13(1) and 19 discretionary exemption claims to disclose further information to the appellant. It states:

In denying access to the remaining records under sections 13(1) and 19 [FSCO] believes it has exercised appropriate discretion, taking into account the purpose of the *Act* and its provisions and basing its decision on relevant factors in good faith.

[87] The appellant's representations do not address FSCO's exercise of discretion, but asks that the appellant be granted access to information that advances his public interest in ensuring proper corporate governance at the Credit Union.

[88] I have considered the parties' representations and I have reviewed FSCO's exercise of discretion in claiming the sections 49(a), 49(b) and 19 exemptions. On this basis, I find that FSCO properly exercised its discretion in the circumstances and properly considered the rights to be protected by the exemptions and the purposes of the *Act*. Accordingly, I uphold FSCO's exercise of discretion.

ORDER:

1. I order FSCO to disclose the records as indicated on the index by providing the appellant with a copy of these records by **May 23, 2013** but not before **May 17, 2013**. Where I have indicated that a record is to be disclosed in part, I have enclosed a highlighted copy of that record indicating the information to be disclosed. To be clear, the highlighted information is to be disclosed.
2. I uphold FSCO's decision to withhold the remaining records as indicated on the index.
3. In order to verify compliance with order provision 1 I reserve the right to require FSCO to provide me with a copy of the records sent to the appellant.

Original signed by: _____
Stephanie Haly
Adjudicator

April 17, 2013 _____

⁴⁹ Order MO-1573.

⁵⁰ section 54(2).