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Citation: Kitmitto (Re), 2020 ONSEC 15
Date: 2020-06-02
File No. 2018-70

IN THE MATTER OF
MAJD KITMITTO, STEVEN VANNATTA, CHRISTOPHER CANDUSSO, CLAUDIO CANDUSSO, DONALD ALEXANDER (SANDY) GOSS, JOHN FIELDING AND FRANK FAKHRY

REASONS AND DECISION ON A MOTION

Hearing:	February 20, 2020	
Decision:	June 2, 2020	
Panel:	M. Cecilia Williams	Commissioner and Chair of the Panel
Appearances:	Frank Addario Samara Secter	For John Fielding
	Wendy Berman John M. Picone Stephanie Voudouris Erin Minuk	For Donald Alexander (Sandy) Goss
	Ian Smith Andrew Guaglio	For Majd Kitmitto
	Matthew Britton Katrina Gustafson	For Staff of the Commission

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REASONS AND DECISION ON A MOTION

I. OVERVIEW

[1] Staff of the Ontario Securities Commission (**Staff** of the **Commission**) alleges that Majd Kitmitto, Steven Vannatta, Christopher Candusso, Claudio Candusso, Donald Alexander (Sandy) Goss (**Goss**), John Fielding (**Fielding**) and Frank Fakhry (collectively, the **Respondents**) carried out illegal insider tipping and trading in Amaya Gaming Group Inc. (**Amaya**) in contravention of the *Securities Act*[1].

[2] Fielding and Goss (the **Moving Parties**) request that the Commission order Staff to disclose the following:

a. all relevant, non-privileged investigator notes, handwritten or otherwise, including notes taken during interviews and hearings;

b. all relevant, non-privileged internal communications at the Commission; and

c. a log of all relevant but privileged documents and information that has not been disclosed, with enough information to allow the Respondents to understand the decision to withhold and to be able to challenge that decision.

[3] Fielding and Goss submit that there are significant gaps in Staff's disclosure, which is inconsistent with Staff's obligation under Rule 27 of the Commission's *Rules of Procedure and Forms* (**Rules**)[2] and undermines their ability to make full answer and defence to the serious allegations made against them.

[4] Specifically, Fielding submits that Staff's disclosure does not reflect the scale, complexity, or length of the investigation into this matter. He cites, for example, that only 46 of the 76,600 documents are investigator's notes, that the notes begin at a point well into the investigation, and that the production database of disclosure includes very few internal communications.

[5] Fielding initially submitted that Staff ought to be required to provide a log identifying all the information Staff refuses to disclose pertaining to the investigator's notes or the investigation, pursuant to Rule 27. Fielding later clarified in oral submissions that a log of only privileged information was being sought.

[6] Goss submits that Staff's obligation is to produce all relevant documents, regardless of whether the same information is contained in a different form and is available elsewhere. Goss submits that relevant documents not produced to the Respondents are known to exist, based on the cross-examination of one of Staff's investigators, Christine George (**George**), including internal emails and handwritten notes of investigators, electronic and other documents made for George's own use, and internal correspondence.

[1] RSO 1990, c S.5
[2] (2019) 42 OSCB 9714

[7] Goss further submits that not all the documents were evaluated by Staff for relevance, and certain categories of documents were excluded from Staff's review.

[8] Staff's submits that they have met their disclosure obligations, erring on the side of inclusion, and that Fielding and Goss have failed to establish that there is relevant, undisclosed investigatory information.

[9] Staff submits that a privilege log is unnecessary because Rule 27(1)(b) is limited to "things in Staff's possession that are relevant to an allegation." Staff maintain that all the documents sought by the Moving Parties are irrelevant.

[10] For the reasons set out below I deny the motion. Therefore, Staff is not required to make the additional disclosure requested by the Moving Parties.

II. BACKGROUND

[11] Staff's review of trading in Amaya began on February 25, 2015.

[12] There were three main investigators involved in Staff's investigation – George, Stuart Mills and Anne Paiement (**Paiement**). Staff advised that they intend to call each of these investigators as witnesses in the hearing.

[13] Two other individuals played a role in Staff's investigation – Robert Sanchioni (**Sanchioni**) who played a limited role and Mike Bordynuik (**Bordynuik**) who was a resource on an as-needed basis.

[14] Staff has disclosed over 76,000 documents, including 100 summons, 100 s.19 directions, numerous emails (including approximately 200 email threads involving the investigators), 41 transcripts of interviews and notes of communications entered in the Enforcement Information System (**EIS**). The first investigator note disclosed is dated May 28, 2015.

[15] Staff's initial disclosure included 46 EIS entries but no hand-written notes from investigators.

[16] George, the lead investigator, was cross-examined on her affidavit for this motion dated February 11, 2020 by the Moving Parties.

[17] In response to this motion and the cross-examination of George, Staff subsequently disclosed 25 hand-written notes underlying 27 of the 46 EIS entries and a handwritten note from Paiement. Staff confirmed that all hand-written notes underlying the disclosed 46 EIS entries have now been disclosed.

III. ISSUES

[18] This motion presents the following issues:

a. Are Staff's investigator notes and internal communications relevant and therefore required to be disclosed in an enforcement proceeding?

b. Is Staff required to do a document-by-document relevance review?

c. Should Staff be required to provide a log of privileged material that has not been disclosed?

IV. LAW AND ANALYSIS

A. Disclosure standard

[19] Rule 27(1) of the Rules requires Staff to provide every other party "copies of all non-privileged documents in Staff's possession that are relevant to an allegation". This rule embodies a disclosure standard like that imposed on the Crown in criminal proceedings by *R v Stinchcombe* and adopted by the Commission in enforcement proceedings.[3]

[20] Staff must initially assess which non-privileged documents it considers to be relevant to an allegation. In exercising that judgment, which is later reviewable by the Commission, Staff must:

a. include not only documents on which Staff intends to rely, but also documents that might reasonably assist a respondent in making full answer and defence to Staff's allegations, including by helping the respondent make tactical decisions;

b. assess the relevance of documents in the context of the specific allegations being made by Staff;

c. reasonably anticipate defences or issues that a respondent might properly raise, in order to inform Staff's assessment of relevance;

d. include both inculpatory and exculpatory documents; and

e. err on the side of inclusion.[4]

[21] Staff need not produce what is clearly irrelevant and they bear the initial obligation to separate the "wheat from the chaff" before making disclosure.[5]

[22] The parties agree that this is the applicable disclosure standard but disagree about its application in this case.

[23] Following Staff's initial disclosure, the burden lies with the Moving Parties to articulate a basis for requesting further disclosure.[6] They need to demonstrate the relevance of the documents in question by establishing a sufficient connection between those documents and their ability to make full answer and defence to Staff's allegations.[7]

B. Are Staff's investigator notes and internal communications relevant and therefore required to be disclosed in an enforcement proceeding?

[24] The main issue in this motion is whether Staff's investigator notes and internal communications are relevant and should be disclosed to satisfy Staff's disclosure obligation.

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[3] [1991] 3 SCR 326 (***Stinchcombe***); *Philips (Re)*, 2012 ONSEC 43, (2012) 35 OSCB 10957 at para 13 (***Philips***); *Biovail Corp (Re)*, 2008 ONSEC 14, (2008) 31 OSCB 7161 at paras 15, 32, and 40 (***Biovail***)

[4] *BDO Canada LLP (Re)*, 2019 ONSEC 21, (2019) 42 OSCB 5239 (***BDO***) at para 14; *Biovail* at paras 15, 32, 40, 41; *Shambleau (Re)*, (2002) 25 OSCB 1850 at para 16; *R v Taillfer* [2003] 3 SCR 307 at para 59

[5] *Stinchcombe* at para 20

[6] *BDO* at para 16

[7] *BDO* at para 17

[25] Staff asserts that many of the documents being requested by the Moving Parties are considered internally-generated documents, rather than material gathered in the course of the investigation and are therefore not subject to disclosure.

1. Staff's "analysis, commentary, opinion or discussions about commencing proceedings"

[26] Staff submit that the Moving Parties' request for investigator notes and internal communications encompasses internal Staff analysis, commentary, opinion or discussions that case law confirms is irrelevant.

[27] In *Philips*, the Commission dismissed, in part, a motion for further documentary disclosure ruling that "internally-generated documents…evidencing Staff's analysis, commentary, opinion or discussions about commencing proceedings ("Staff work product")" were not disclosable.[8]

[28] The parties proffer different interpretations of *Philips* on the issue of what internally-generated documents must be disclosed for Staff to comply with their disclosure obligations.

[29] The Moving Parties submit the words "analysis, commentary, opinion or discussions" are qualified by the phrase "about commencing proceedings" and that all other investigator analysis, commentary, opinion or discussions during an investigation is relevant and should, in their view, be disclosed. Staff submits this is a misinterpretation of *Philips,* and subsequent decisions applying *Philips*.

[30] In *Philips*, the Panel considered documents in six categories, which were not limited to documents concerning whether to commence proceedings. They included, among other categories:

a. drafts of an undertaking and correspondence, both internal and external, regarding the undertaking;

b. Staff's commentary, in internal emails or otherwise, about an independent accountant's report; and

c. documents evidencing meetings between Commission Staff and counsel for the independent accountant, including notes taken during the meeting and internal emails following the meeting.[9]

[31] The interpretation of *Philips* proposed by the Moving Parties gives the decision too narrow a reading that is unsupported by the language of the decision and the cases in which it was subsequently adopted and applied.

[32] The broader point established by *Philips* and adopted by the Commission in *BDO* is that internal analysis, commentary, opinion or discussions, even by a non-expert fact witness, and even if squarely on the issue to be determined by the Commission, would have no probative value before the Commission.[10] The Alberta Securities Commission (**ASC**) in *Fauth (Re)* took a similar position.[11]

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[8] *Philips* at para 39
[9] *Philips* at para 8
[10] *Philips* at para 34; citing *Shambleau v Ontario (Securities Commission),* (2003) 26 OSCB 1629 (Div Ct); *BDO* at para 43
[11] *Fauth (Re)*, 2017 ABASC 3 (***Fauth***)

[33] The fact that a document is internally generated is not the determinative factor. Rather, it is whether the content of the document contains analysis, commentary, opinion or discussions.[12]

[34] I now turn to a consideration of specific documents sought by the Moving Parties.

i. Internal Communications

[35] The Moving Parties seek all, non-privileged, emails between OSC Staff relating to Staff's investigation. The Moving Parties assert that Staff's disclosure included almost no emails between the investigators or between the investigators and other OSC Staff. Fielding states that it is "implausible that the investigators communicated so infrequently with each other and other OSC staff over the course of the investigation".[13]

[36] George provided evidence that internal email is not typically used to record evidence. George stated that investigators typically use internal email to discuss the administration and the process of the investigation. Staff's position is that such communications are internal commentary or opinion and, therefore, irrelevant.

[37] The Moving Parties' belief that, given the scale of Staff's investigation, there should be more internal communications is not sufficient to establish that there are relevant communications Staff has not disclosed.

[38] Goss further submits that there are internal communications about the facts underlying the investigation that were not provided to the Respondents in disclosure and never considered for disclosure. Goss bases this on an admission by George in her cross-examination, that the communications were not disclosed because they were not, in Staff's view, the "better record" of the facts which they contained.

[39] According to Goss, these internal communications relate to background information about the Respondents that is contained in George's witness statement and that she intends to testify about at the hearing on the merits, including the Respondents' employment status and background, residence, contact information, trading statements and account opening documents, line of credit and bank statements, phone records, and connections among the Respondents, and family members, friends, and colleagues.

[40] Goss argues all internal communications involving information about the investigation, specifically background information from the investigation, should be disclosed.

[41] Under cross-examination, George stated that any internal communications containing evidence were disclosed. George did say that the "better record is the actual transcript or the underlying document".

[42] Staff's obligation under Rule 27 is to disclose all relevant documents. The fact that a relevant document has been transcribed into another format, thereby

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[12] *BDO* at para 22

[13] Factum of the Moving Party John Fielding dated February 13, 2020 at para 26 (**Fielding Submissions**)

creating another version of the document, does not alter the relevance of the original document.

[43] The hand-written notes underlying the 46 EIS entries are a good example of this principle. Staff originally withheld these hand-written notes on the basis that the EIS entries were the "best and most complete record" of the information.

[44] The Moving Parties demonstrated during oral argument that the EIS entries differed from the underlying hand-written notes.

[45] Where there are two different versions of the same relevant document Staff should not be deciding which version should be disclosed. If a document is relevant, both versions should be disclosed.

[46] Conversely, an internal communication that forwards or refers to relevant information contained in a document is not another version of that document. Internal emails forwarding or referring to relevant information that is otherwise disclosed are properly among the "chaff" that Staff has an initial obligation to exclude.[14] Disclosing all such internal communications, that are not themselves otherwise relevant, would be redundant and burdensome for all parties.

[47] Staff is not required to disclose any commentary or observation by investigators in such an internal communication.

ii. Documents Created by Staff Investigators for Personal Use

[48] Goss points to the fact that Staff's disclosure does not include memos to file and notes that George may have made for her personal use between February 25, 2015 and May 11, 2015. Goss submits that this is a gap in Staff's disclosure and is evidence of relevant notes that should have been disclosed to the Respondents. Staff submits that these documents were not provided as they were not relevant on the basis that they were opinions.

[49] In my view, Staff is not required to disclose documents prepared by an investigator for their own use, regardless of their format (jot, bullet point, hand-written or electronic) because these fall within the category of analysis, commentary or opinion that are not disclosable.

[50] Fielding submits that Staff must disclose to-do lists and notes of leads and follow-ups because the Moving Parties have the right to understand the scope and course of the investigation. Fielding submits that understanding what steps the investigators considered, whether they were pursued and what, if any, follow-ups occurred would provide a basis for cross-examination of Staff's investigator witnesses about the accuracy of their evidence.

[51] Staff's position is that this information falls within the category of internal opinion and commentary about the evidence and is, therefore, irrelevant.

[52] It is the role of the panel at the hearing on the merits to determine whether Staff has adduced sufficient evidence to support the allegations against the Respondents. What steps, leads, follow-ups the investigators considered and whether they acted on them is internal commentary or opinion about the

[14] *Stinchcombe* at para 20

evidence and would have no probative value. It is, therefore, irrelevant and not subject to disclosure.

[53] Fielding also submits that to-do lists and notes about the scope and course of the investigation may form the basis of an argument that the investigation suffered from tunnel vision or bias. He further submits that the potential existence of bias in the investigation could be important to the Moving Parties' cross-examination of Staff's witnesses.

[54] Fielding has not made an allegation of bias. Nor was there anything on the face of the submissions in this motion to suggest bias. It is not, appropriate, therefore, to overlook that these materials are irrelevant and require them to be disclosed so the Moving Parties may assess if bias has played any role in the investigation.

iii. Spreadsheets and Analyses Prepared by Investigators

[55] The Moving Parties seek disclosure of spreadsheets and analyses prepared by investigators and all documents reflecting the inputs to those spreadsheets and analyses. They know these documents exist because George admitted on cross-examination that she had prepared spreadsheets of trading and profits in Amaya by the Respondents, and her witness statement indicates that she prepared spreadsheets listing trades and profits in Amaya by the Respondents and others.

[56] Paiement's witness statement also indicates that she will speak to analyses she prepared comparing trading by the Respondents in Amaya to their trading in other securities.

[57] Staff confirmed in oral argument that the spreadsheets and analyses they are intending to introduce at the hearing through George and Paiement and the source documents underlying them have been disclosed. The Moving Parties did not dispute this.

[58] Any analyses prepared by investigators and intended to be relied on by Staff to support the allegations are relevant. As are any source material "to the extent ultimately incorporated or reflected" in such analyses that "could potentially assist...in understanding the...(disclosed) final products".[15]

[59] However, consistent with the ASC's decision in *Fauth*, early drafts of those same analyses need not be disclosed.[16] Similarly, other analyses performed by investigators that are not intended to be presented as evidence at the hearing, and their underlying source material, are not disclosable. This latter category falls within internal analysis that Staff is not required to disclose.

2. Investigator observations, impressions, and interpretation of the evidence

[60] The Moving Parties request all investigator notes and information, which they say contain investigators' observations, impressions about the Respondents and witnesses, interpretations of the evidence, or view of what facts were material.

[61] Goss refers to the Commission's decision in *Azeff (Re)*[17], stating:

[15] *Fauth* at para 73
[16] *Fauth* at para 74
[17] *Azeff (Re)*, 2015 ONSEC 11, (2015) 38 OSCB 2983 (***Azeff***)

> "Understanding how the investigators interpreted the evidence, what facts they considered material, and how they intend to weave those facts into a mosaic (*Azeff* at para 47) of evidence supportive of the allegations will be crucial in allowing the Respondents to properly prepare their defences and cross-examine each witness."[18]

[62] The panel in *Azeff* was speaking about their role in interpreting the mosaic of circumstantial evidence to decide whether there is sufficient, firmly established circumstantial evidence on which to base a finding of insider trading and tipping. *Azeff* is consistent with the principle derived from *Philips* that internal analysis, commentary or opinion have no probative value.

[63] The Moving Parties' request for documents containing investigator observations, impressions, and interpretation of the evidence is denied on the basis they have no probative value and are therefore irrelevant.

i. Investigator Information from February 2015 to May 28, 2015

[64] Staff's disclosure does not include any investigator notes for the period from the commencement of their review in February 2015 to May 28, 2015. The Moving Parties are requesting all notes from this period.

[65] According to Fielding, it is "implausible that the investigators were not making observations, communicating with one another (in writing or otherwise), or making notes during the first months of the investigation".[19]

[66] When questioned about this early phase of Staff's investigation, George advised that there were hand-written notes, EIS entries, email and other correspondence that had been reviewed for relevance and not disclosed.

[67] I accept George's evidence that Staff considered investigatory material from this period in their relevance review and disclosed the relevant documents. Staff is not required to disclose any "observations" by the investigators, as discussed above.

ii. Investigator Notes Taken at Transcribed Interviews

[68] The Moving Parties request access to all investigator notes, which they state include investigator notes taken during witness interviews. They are aware that investigator notes like this may exist based on a hand-written note from Paiement which was disclosed the night before this motion hearing. The Moving Parties suggest that this indicates that there is still relevant outstanding information that has not been provided to the Respondents.

[69] Staff submit that the official transcripts of the interviews are the original record of those interviews, and that investigators do not attempt to take a handwritten record of interviews and merely note words or phrases for their working purposes. The transcripts of these interviews have been disclosed. In the one instance where a witness was interviewed by phone and no transcript was

[18] Memorandum of Fact and Law of Donald Alexander (Sandy) Goss dated February 18, 2020 at para 29

[19] Fielding Submissions at para 21

created, Staff have now disclosed Paiement's hand-written notes from that interview.

[70] The Moving Parties submit that the fact that information may be contained elsewhere is not a basis to withhold disclosure of otherwise relevant documents. In addition, Fielding submits that original and contemporaneous notes are important to the right of full answer and defence.

[71] The official transcripts of the interviews are the original and contemporaneous notes of the interview.

[72] Where there is a court reporter creating an official transcript, investigators are not attempting to record the interview. To the extent any such investigator notes contain impressions or observations about the witness' evidence, Staff is not required to disclose them.

3. Other requested disclosure

i. Investigator Notes Taken During Interlocutory Attendances

[73] Fielding seeks investigator notes taken during interlocutory attendances in this proceeding. He submits that "it is reasonable to assume that the investigator's hearing notes contain relevant information about their investigation of the case."

[74] I do not find Fielding's assumption to be reasonable. Interlocutory hearings are typically about procedural and other case management issues. No evidence is gathered or heard. The transcripts from those hearings are the original record. The Moving Parties have those records. Investigator notes from these hearings are not part of the investigative process. Any such investigator notes would be irrelevant and, therefore, not disclosable.

ii. Other Investigators' Notes

[75] The Moving Parties also seek disclosure of any notes created by the other two investigators involved in this matter, Bordynuik and Sanchioni. No hand-written notes nor EIS entries for either individual was part of Staff's disclosure. I find that the Moving Parties have not established that there are relevant notes from either of these investigators that have not been disclosed.

[76] Bordynuik is no longer with the Commission. He did not create any EIS entries. It is not known if he created any hand-written notes during the investigation. Staff provided evidence that Bordynuik played an internal role and had no contact with third parties. As a result, Staff submits that even if he had created any hand-written notes, they would not be relevant.

[77] In their response to an undertaking from George's cross-examination, Staff confirmed that Sanchioni did not take any hand-written notes or create any EIS entries. I find this to be consistent with the characterization of his role in the investigation as being limited.

4. Conclusion

[78] *Phillips and Azeff* do not stand for the proposition that every internally generated document during an investigation is irrelevant. As the parties agree, what

determines relevance is the content of the document in question.[20] To the extent that the investigator notes and internal communications of Staff contain relevant information, they should be disclosed. If, however, investigator notes and internal communications contain analysis, commentary or opinion, they are not relevant and Staff is not required to disclose them. The documents sought by the Moving Parties in this instance fall within the category of analysis, commentary or opinion and are not required to be disclosed.

C. Is Staff required to do a document-by-document relevance review?

[79] Goss submits that Staff responsible for making the final decision about relevance did not review all documents and excluded entire categories without adequately considering them or considering them at all. He bases this in part on George's admission under cross-examination that internal communications were never considered for disclosure.

[80] George also responded to some questions during cross-examination about what investigators typically include in internal communications and what typically is the formal record of investigator communications. Goss submits that George's reference to Staff's usual practices suggests Staff uses a categorical approach to disclosure rather than an assessment of each document for relevance.

[81] I agree with the ASC's observation that the *Stinchcombe* obligation does not require perfection in disclosure provided the underlying objective is overall fairness to the respondent.[21] Staff must exercise considerable judgment in making disclosure decisions. The Commission's role in this motion for additional disclosure is to assess, given all the circumstances of the case, whether the objective underlying the disclosure obligation, fairness to the Respondents, is being achieved.

[82] It is not the Commission's role to dictate the actual steps or the means by which Staff meets the disclosure standard set out in Section IV above. I do not consider it appropriate, therefore, to decide whether Staff needs to conduct a document by document review for relevance in every instance.

D. Should Staff be required to provide a log of privileged material that has not been disclosed?

[83] The Moving Parties request that Staff be required to provide a privilege log containing enough detail to allow the Moving Parties to understand what has been withheld.

[84] Staff's position is that a privilege log is not required as no documents are being withheld on the bases of privilege, only irrelevance. However, Staff reserved the right to raise privilege claims with respect to any documents ordered to be disclosed as a result of this motion.

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[20] *BDO* at paras 22-24
[21] *Fauth* at para 35

[85] As I am not ordering any of the requested documents be disclosed, Staff has not raised any privilege claims and it is not necessary to decide whether Staff is required to provide a privilege log.

V. CONCLUSION

[86] For the reasons set out above, I concluded that the documents sought by the Moving Parties are irrelevant and therefore not subject to disclosure. I, therefore, dismiss the motion.

[87] I thank the parties for their thorough submissions and able assistance on this motion.

Dated at Toronto this 2nd day of June, 2020.

"M. Cecilia Williams"
M. Cecilia Williams