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File No. 2018-52

IN THE MATTER OF AN ACCESS TO INFORMATION REQUEST SUBMITTED BY X.X.

REASONS AND DECISION
(Subsections 17(1) and 17(4) of the *Securities Act*, RSO 1990, c S.5)

Hearing:	September 19, 2018	
Decision:	September 24, 2018	
Panel:	Timothy Moseley	Vice-Chair and Chair of the Panel
Appearances:	Kai Olson Christopher Berzins	For Staff of the Commission

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REASONS AND DECISION

I. OVERVIEW

[1] An individual, whose identity is to remain confidential, submitted a request for access to records that are in the possession of the Ontario Securities Commission (the **Commission**). The individual is referred to in this decision as "X.X.". X.X. made his request (the **Access Request**) pursuant to the *Freedom of Information and Protection of Privacy Act* (**FIPPA**).[1] The Access Request relates to documents referring to X.X. that fall within a specified period of time.

[2] Thirty-three of the records responsive to that request are subject to section 16 of the *Securities Act*,[2] which provides that they cannot be disclosed without an order of the Commission. In responding to the Access Request, the Ministry of Finance's (**Ministry**) Manager of Access, Privacy and Information Management, who makes access decisions under FIPPA on behalf of the Commission, decided to withhold the 33 records, as recommended by Staff of the Commission (**Staff**).

[3] X.X. has appealed that decision to the Information and Privacy Commissioner of Ontario (**IPC**). The appeal is entering a mediation process. In response to a request from IPC staff for production of the 33 records, Staff now applies to this Commission for an order permitting disclosure of those records to specified individuals at the Ministry and the IPC, for the purpose of responding to the appeal and participating in the mediation.

[4] On September 19, 2018, Staff appeared before me at a confidential hearing of this application, without notice to any other party. The following day, I issued a confidential order authorizing the requested disclosure in respect of 29 of the 33 records. The remaining four records are all copies (in slightly different formats) of the same transcript of one examination by Staff of an individual, whose identity is also to remain confidential. That individual is referred to in this decision as "Y.Y.". I ordered that only the front page of each copy of the transcript (the **Y.Y. Transcript**), with Y.Y.'s name redacted, be disclosed.

[5] In the order, which is described more fully in paragraph [48] below, I indicated that reasons for my decision would follow. These are those reasons.

II. STATUTORY FRAMEWORK

[6] Two statutory schemes are at play here. The first is under the *Securities Act*. The second is under FIPPA.

A. The *Securities Act*

[7] Sections 11 through 17 of the *Securities Act* govern what are commonly referred to as "formal investigations". Section 11 authorizes the Commission to issue an order appointing one or more persons (typically, members of Staff) to conduct an investigation. A person who is so appointed has certain powers, including the power under section 13 to compel the production of documents or to compel the attendance of an individual to testify.

[1] RSO 1990, c F.31.
[2] RSO 1990, c S.5.

[8] Section 16 of the *Securities Act* protects the confidentiality of information related to, and obtained through, a formal investigation. It provides that unless authorized by a Commission order, no person or company shall disclose the nature or content of the section 11 investigation order, or other specified information regarding the production of documents or testimony given under section 13. That prohibition applies equally to the persons appointed by the section 11 order as it does to anyone else, including individuals who testify or who produce documents.

[9] Despite that confidentiality requirement, the Commission may authorize disclosure of protected information. Subsection 17(1) provides that if the Commission "considers that it would be in the public interest", it may make the necessary order.

[10] Where a party applies for such an order, subsection 17(2) states that persons or companies who provide information or give testimony pursuant to section 13 are entitled, "where practicable", to reasonable notice of the application, and to an opportunity to be heard.

[11] Subsection 17(2.1) allows for an exception to that requirement. Under certain specified circumstances (which exist in this case), and if the Commission "considers that it would be in the public interest", the order under subsection 17(1) may be made without notice to such persons or companies.

B. FIPPA

[12] FIPPA sets out a comprehensive framework regarding requests for access to information held by provincial and municipal government institutions. Two provisions in FIPPA are particularly relevant in this case.

[13] Subsection 52(4) of FIPPA empowers the IPC to require an institution to produce records for examination when the IPC is reviewing a decision regarding an access request.

[14] Paragraph 9 of subsection 67(2) of FIPPA explicitly provides that sections 16 and 17 of the *Securities Act* "prevail over this Act [*i.e.*, FIPPA]". As discussed below, there is a potential issue regarding the extent to which this provision of FIPPA applies in this case.

III. CONFIDENTIALITY OF THIS APPLICATION

[15] In my view, adherence to the confidentiality restrictions imposed by section 16 of the *Securities Act* outweighs the desirability that this proceeding be fully open to the public. Clause 9(1)(b) and subsection 9(1.1) of the *Statutory Powers Procedure Act* (**SPPA**)[3] and Rule 22 of the Commission's *Rules of Procedure and Forms* (**Rules**)[4] provide that in such circumstances, the Commission may hold a hearing in the absence of the public, and documents submitted may be withheld from the public.

[16] I therefore ordered that the hearing of this application be held in the absence of the public, and that the hearing transcript and material filed with the Commission be kept confidential. Pursuant to Rule 34(2) of the Rules, the order I issued on September 20, 2018, to which these reasons relate, shall also remain

[3] RSO 1990, c S.22.
[4] (2017), 40 OSCB 8988.

confidential. However, I am releasing these reasons to the public, without disclosing the identities of the individuals involved. In my view, doing so strikes an appropriate balance between the competing principles identified above.

IV. ANALYSIS

A. Introduction

[17] Staff submits that it would be in the public interest to authorize disclosure of the 33 records to Ministry and IPC staff, mediators and adjudicators involved with the appeal of the Access Request.

[18] I accept Staff's submission that there are at least two compelling reasons that support the requested disclosure. First, the Commission and the Ministry have various obligations under FIPPA, and compliance with those obligations is desirable. Second, the contemplated disclosure is to a limited group of individuals, for the valid purpose of facilitating the conduct of the appeal of the Access Request decision and the related mediation.

[19] I also note that in this case, unlike some other cases, there is no potential prejudice to an ongoing investigation or enforcement proceeding.

[20] My analysis below addresses two subsets of the 33 records. The first subset consists of 29 records. The second subset consists of the four copies of the Y.Y. Transcript, as referred to in paragraph [4] above.

B. The 29 records

[21] Twenty-nine of the subject records (*i.e.*, all of the 33 records except for the four copies of the Y.Y. Transcript) do not raise any real privacy considerations, given the limited disclosure that Staff seeks to make. Had Staff sought an order authorizing disclosure to a broader group of people, including perhaps X.X., the analysis might be different.

[22] Some of the 29 records are transcripts of examinations of X.X., but X.X. is the very person requesting access to the records, so I need not be concerned about any prejudice to his privacy interest.

[23] In relation to the 29 records, I have no difficulty concluding that the public interest considerations referred to in paragraph [18] above favour granting the order requested by Staff.

C. The four copies of the Y.Y. Transcript

1. Introduction

[24] The four copies of the Y.Y. Transcript are more problematic.

[25] The public interest considerations described in paragraph [18] above, which support disclosure, apply equally to those documents as they do to the remaining 29 records. However, the copies of the Y.Y. Transcript present a potentially countervailing privacy interest, because they set out testimony of Y.Y. that was obtained by way of a summons issued pursuant to section 13 of the *Securities Act*.

[26] Y.Y. is therefore presumptively entitled to notice of this application, pursuant to subsection 17(2) of the *Securities Act*.

[27] Staff has not given Y.Y. notice. Staff relies on subsection 17(2.1) of the Act, which, when read together with paragraph 5 of section 153 of the *Securities Act*, provides that if the contemplated disclosure is to a governmental authority (as is the case here), and the Commission considers it to be in the public interest, the Commission may make the disclosure order without notice.

[28] In considering whether to accede to Staff's submission, I am guided by the words of the Supreme Court of Canada in *Deloitte & Touche LLP* v *Ontario (Securities Commission)* (***Deloitte***). *Deloitte* involved an application for an order authorizing disclosure of documents and testimony that had been obtained from individuals at Deloitte:

> [T]he OSC has a duty to parties like Deloitte to protect its privacy interests and confidences. That is to say that [the] OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act.[5]

2. Staff's submission that Y.Y. should not be given notice

[29] Staff cites two factors in support of its submission that notice of the application to Y.Y. would be contrary to the public interest:

a. the contemplated disclosure is to the limited group of individuals and solely for the purpose described above; and

b. making an order without notice to Y.Y. would allow the IPC appeal to proceed in a timely manner.

[30] I accept the first of those two factors. The limitations on the proposed order are appropriate. However, the possibility remains that Y.Y. would still have concerns and would argue that only partial disclosure should be authorized.

[31] With respect to the second factor, there is no evidence before me that giving Y.Y. notice of this application would unduly delay the IPC appeal. Equally, there is no evidence about any anticipated difficulty in contacting Y.Y., about Y.Y.'s likely response if contacted, or about any urgency from X.X.'s or the IPC's perspective.

[32] Having said that, I accept that giving Y.Y. notice might cause the process to take more time than it otherwise would. As Staff pointed out in oral submissions, in order to give Y.Y. meaningful notice, Staff might have to disclose X.X.'s identity to Y.Y.. X.X.'s permission might be required to allow that to happen. Would the additional time required for those steps be problematic? Without more information, I am not in a position to answer that question.

3. Considerations supporting the giving of notice to Y.Y.

[33] In deciding whether it would be in the public interest to waive the notice to which Y.Y. would normally be entitled, I have considered whether Y.Y. might have any reasonable argument as to why the requested disclosure ought not to be made, or as to why it ought to be made but in a more limited fashion. That exercise is admittedly imperfect, because only Y.Y. can truly advocate for his own interests. However, it is still a useful exercise.

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[5] [2003] 2 SCR 713, 2003 SCC 61 (CanLII) at para 29.

[34] At least three arguments may be available to Y.Y.

(a) Has the IPC formally required production?

[35] First, while staff of the IPC has requested production of the records, it is not clear that the IPC has formally required production, as contemplated in subsection 52(4) of FIPPA.

(b) Does section 16 of the Securities Act *prevail over a formal requirement to produce?*

[36] Second, even if the IPC's request constitutes a formal requirement under subsection 52(4) of FIPPA, it may be argued that subsection 67(2) of FIPPA governs, and that as a result, sections 16 and 17 of the *Securities Act* prevail over FIPPA and any steps taken under FIPPA, including a subsection 52(4) requirement for production.

[37] In 1995, in *Ontario (Minister of Health)* v *Holly Big Canoe*,[6] the Court of Appeal for Ontario rejected a similar argument. The Minister of Health argued that certain records were "clinical records" under the *Mental Health Act*[7] and that they were therefore excluded from the FIPPA disclosure regime, pursuant to a provision similar to subsection 67(2). The court held that the IPC could require production of the relevant records nonetheless, so that the IPC could determine whether the records were properly excluded.

[38] Arguably, however, that case features an important distinction from the present application. In the 1995 case, examination of the records themselves may have been necessary to determine whether they fell within the definition of "clinical records". In this case, the Y.Y. Transcript exists only because it records an examination conducted under section 13 of the *Securities Act*. The confidentiality of the copies of the Y.Y. Transcript is protected by section 16 of the *Securities Act* regardless of the transcript's content. If Y.Y. had been present at the hearing of this application, he might have argued that an examination of the records' content could not possibly assist in determining whether they fall within subsection 67(2) of FIPPA. He might therefore have argued that *Ontario (Minister of Health)* v. *Holly Big Canoe* does not apply.

[39] The interaction between section 16 of the *Securities Act* and subsection 67(2) of FIPPA has previously been considered. In a 1999 decision, an IPC adjudicator concluded that without having the opportunity to examine the subject records, she was unable to determine whether the records should be excluded.[8]

[40] Whether that case was correctly decided, and if so whether it applies to transcripts as well as produced documents, are questions that Y.Y. may or may not wish to raise.

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[6] 1995 CanLII 512 (ON CA).

[7] RSO 1990, c M.7.

[8] *Ontario Securities Commission (Re)*, 1999 CanLII 14324 (ON IPC) at p5. The adjudicator later reconsidered but reaffirmed that decision: *Ontario Securities Commission (Re)*, 1999 CanLII 14325 (ON IPC).

(c) Would authorizing disclosure of a portion of the subject records suffice?

[41] Third, if Y.Y. had been present at the hearing of this application, he might have argued that any valid purpose in authorizing disclosure could be fully satisfied by permitting disclosure of only a portion of the subject records. For example, disclosure of the cover page of a transcript would establish that the transcript recorded an examination conducted under section 13 of the *Securities Act*.

[42] Arguably, an order that is limited in that way is consistent with the Supreme Court of Canada's direction in *Deloitte* (*i.e.*, it is "only to the extent necessary"), and may meet the IPC's needs. This latter possibility may be true, even if the IPC is of the view that it could legally require production of the entire records if it chose to do so.

(d) Conclusion as to available arguments

[43] In deciding this application, I need not, and I expressly do not, resolve any of the three arguments described above. In my view, the mere fact that those arguments might reasonably be made is relevant to my determination of whether it is in the public interest to waive notice to Y.Y.

V. CONCLUSION

[44] This application, as it relates to the copies of the Y.Y. Transcript, requires balancing of the numerous considerations set out above. In accordance with the Supreme Court of Canada's direction in *Deloitte*, I should authorize disclosure in a way that both respects the spirit of FIPPA and intrudes as minimally as possible on Y.Y.'s privacy interests.

[45] Without Y.Y.'s participation, I cannot fully consider his privacy interests or arguments he might make, including those outlined above. The record before me is insufficient to overcome that concern, or to justify authorizing disclosure of the four records without affording Y.Y. an opportunity to be heard. I therefore concluded that the public interest is best served by authorizing disclosure of the front page only of the copies of the Y.Y. Transcript, with Y.Y.'s name redacted from those records. This result should cause no prejudice to Y.Y., and may afford the Ministry and the IPC the information they require, as a practical matter, to engage in the mediation and the appeal.

[46] With respect to the remaining 29 records, I concluded that disclosure should be authorized as requested.

[47] Because the Ministry or the IPC may be dissatisfied with the result and may choose to take further steps, and because Staff may choose to give notice to Y.Y., I concluded that this decision should be made without prejudice to the right of any party to bring a further application under subsection 17(1) of the *Securities Act*, with respect to the four records, should circumstances change following the date of the order.

[48] Accordingly, my order of September 20, 2018, provided as follows:

a. pursuant to subsection 9(1) of the SPPA and Rule 22 of the Rules:

   i. the transcript of the hearing of this application shall be kept confidential; and

ii. the material filed with the Commission in connection with this application shall be kept confidential;

b. pursuant to clause 17(1)(b) of the *Securities Act*, Staff is authorized to disclose to:

i. staff, mediators and adjudicators at the IPC; and

ii. staff of the Ministry's Freedom of Information and Privacy Office,

involved in the mediation and appeal of the Access Request, for purposes relating to the mediation and appeal of the Access Request, and for no other purpose, the following:

i. the 29 records referred to in paragraphs [21] to [23] above;

ii. the first page only of each copy of the Y.Y. Transcript, and in all four cases with Y.Y's name redacted;

iii. the nature or content of any demands by Staff for the production of any of the 29 records; and

iv. the fact that any of the 29 records were produced under section 13 of the *Securities Act*;

c. pursuant to Rule 34(2) of the Rules, the order shall be kept confidential; and

d. pursuant to subsection 17(4) of the *Securities Act*, the order is without prejudice to the right of any party to bring a further application pursuant to subsection 17(1) of the *Securities Act*, with respect to the copies of the Y.Y. Transcript, based upon a change in circumstances from the date of the order.

Dated at Toronto this 24th day of September, 2018.

"Timothy Moseley"
Timothy Moseley