Court File Nos.: 796/01 and 797/01
Date: July 4, 2003

SUPERIOR COURT OF JUSTICE - ONTARIO
(Divisional Court)

RE: SALVATORE (SAM) FUDA

- and -

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

- and -

TORONTO POLICE SERVICE

AND: SALVATORE (SAM) FUDA

- and -

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

- and -

MINISTER OF FINANCE

BEFORE: Justice Lang

COUNSEL: *John Swaigen*, for the Information and Privacy Commissioner, Moving Party

Kim Mullin, for Salvatore (Sam) Fuda, Applicant/Responding Party

Darrel A. Smith, for the Toronto Police Service, Respondent

Sara Blake, for the Attorney General for Ontario, Intervenor

Alexandra Clark, for the Ministry of Finance, Respondent

HEARD: June 24, 2003 (at Toronto)

E N D O R S E M E N T

Issue

[1] The Information and Privacy Commissioner of Ontario (Commissioner) moves under section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 for an order sealing part of the Commissioner's record in these applications for judicial review. The sealing order is not opposed. The contested issue is whether Mr. Fuda's counsel should be permitted access to the sealed part of the record (the private record) upon providing an undertaking not to disclose its contents to anyone, including Mr. Fuda. Mr. Fuda's counsel seeks access so that he can properly prepare for the judicial review of the Commissioner's decisions.

Background

[2] Mr. Fuda is a businessperson who, although no charges have ever been laid, has been subject to allegations that he is involved in organized crime. Apart from the obvious damage to his reputation, he says that the allegations have resulted in the Toronto Stock Exchange's refusal to list a company with which he was associated and in problems crossing the border to the United States. To determine the source of the allegations against him and to correct the information, Mr. Fuda requested access to personal information about him in the possession of the Ministry of Finance (Ontario Securities Commission) (OSC) and the Toronto Police Service (Police). He brought his request for information held by the OSC under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (*FIPPA*). Section 47 of that Act gives every individual a right of access to personal information about him or herself and the right to request correction "where the individual believes there was an error or omission." His request for access to information held by the Police proceeded under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (*MFIPPA*). That Act, in section 46, also provides for access to information and the right of correction.

[3] When both the OSC and the Police refused to disclose certain information, Mr. Fuda complained to the Commissioner under the provisions of *FIPPA* and *MFIPPA*. The Commissioner ordered limited disclosure of OSC records. He refused to order disclosure of the Police records, but ordered the Police to disclose whether such records exist. Mr. Fuda wishes to challenge these decisions in separate applications for judicial review under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1. Section 10 of that Act requires the Commissioner to file a record of its proceedings. The parties have agreed that the applications should be heard together.

Usual Practice

[4] As has become the usual practice, prior to filing its record, the Commissioner brought this motion to seal those parts of the record that are private to ensure that the judicial review is not rendered moot by disclosure of the very records that are at issue. The public record contains the balance of the Commissioner's records including relevant correspondence, the file's formal documents, the non-confidential portions of submissions, and the Commissioner's order.

[5] Where parties are represented by counsel, the proposed sealing order usually provides for counsel's access to the private record for the purpose of preparing for and presenting argument. Access to the record is subject to counsel signing a form of undertaking to keep the contents of the

private record confidential even from their own client, and, upon disposition of the judicial review, to return the material to the Commissioner. Such a sealing order, with access to counsel, usually issues on consent.

[6] There are exceptions to such access. Counsel have been denied access to the private record where counsel is also retained by the party in a related civil action and the information is relevant to the other proceeding. Access has also been denied to an in-person litigant because disclosure would be dispositive of the issue.

[7] Where a party opposes access to the private record by another party, as is the case here, the Commissioner, without taking any position on the issue, seeks direction from the court. The Commissioner participates only to provide a factual and legal context for its usual practice of disclosure subject to a confidentiality undertaking.

Access to Court Records

[8] The fundamental principles of our judicial system require public proceedings and public access to court documents. Public access to court proceedings fosters public confidence in the administration of justice. Accordingly, the burden of establishing that access to court records should be curtailed rests with the person seeking to deny such access. See *Attorney-General of Nova Scotia et al. v. MacIntyre*, [1982] 1 S.C.R. 175 at 185-189; *887574 Ontario Inc. v. Pizza Pizza Ltd.*, [1994] O.J. No. 3112 at para. 11 (Gen. Div.), leave to appeal refused [1995] O.J. No. 1645 (C.A.).

[9] Even where material has been treated confidentially in earlier proceedings, such as at a private arbitration, once the proceeding is brought to the courts, the presumption of openness applies, subject to sound reason to the contrary. In deciding whether such a sound reason applies, the court will look at the particular circumstances of the case and the specific information at issue: *Pizza Pizza, supra*, at paras. 13-15; *S.(P) v. C.(D.)*, (1987), 22 C.P.C. (2d) 225, (O.H.C.J.).

[10] Sealing orders, therefore, are the exception and not the rule; they are to be granted only in limited circumstances. In freedom of information cases, they are granted to prevent premature release of the information that is the very subject matter of the litigation. Such orders will only be granted "in the clearest of cases ... where ... the interest of justice would be subverted and/or the totally innocent would unduly suffer without any significant compensating public interest being served": *S.(P) v. C.(D.)*, (1987), 22 C.P.C. (2d) 225, (O.H.C.J.) at 229.

[11] During the Commissioner's initial consideration of a request, access to the information at issue is generally not provided. The *Statutory Powers Procedure Act*, by virtue of section 52(1) of *FIPPA*, does not apply to a request for information from the Commissioner. The Commissioner's inquiry may be conducted in private: *FIPPA*, s. 52(3) and (13). As a result, the Commissioner is not required to disclose a party's representations to another party and a party has no right to be present during the representations of others: *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [1998] O.J. No. 5015 (Div. Ct.). Accordingly, when the Commissioner is considering a request for information he is performing an inquisitorial role.

[12] Submissions of parties made to the Commissioner - even though they have not been exchanged between the parties before the Commissioner - are generally contained in the record that is filed on a judicial review: See *FIPPA*, s. 55(1) and *Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner)*, (1993), 13 O.R. (3d) 531 at 532 (Div. Ct.); *Ontario (Attorney General) v. Hale* (1995), 85 O.A.C. 229 at 230-231 (Div. Ct.); *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1995), 23 O.R. (3d) 31 at 39-41 (Div. Ct.); reversed on other grounds at (1998), 41 O.R. (3d) 464 (C.A.); *Solicitor General and Minister of Correctional Services et al. v. Information and Privacy Commissioner et al.* (June 3, Sept. 10, 1999) Toronto Doc. 103/98, 330/98, 331/98, 681/98, 698/98.

[13] The court will, however, seal that part of the Commissioner's record that would, if disclosed, render the review nugatory. This becomes the private record: *N.E.I. Canada Ltd. v. Ontario (Information and Privacy Commissioner)* (1990), 40 O.A.C. 77 at 78-79 (Div. Ct.); *Rubin v. Ontario (Information and Privacy Commissioner)*, [1991] O.J. No. 3562; *Gravenhurst, supra*, at 532; *Tectonic Infrastructure Inc. v. Ontario (Information and Privacy Commissioner)* (March 20, 1998), Toronto Doc. 259/97 (Div. Ct.).

[14] The federal access to information legislation sets out somewhat different parameters. Under that legislation, the Federal Commissioner does not make a decision but only provides recommendations. A party who challenges a recommendation brings an application for a determination at first instance by the Federal Court, Trial Division. Representations filed by the parties that do not reveal the information at issue are part of the public record. Where public disclosure would pre-empt the disclosure decision, the records at issue will be sealed with access to counsel on filing a confidentiality undertaking. This is in keeping with minimalizing the private record in deference to the principle of open access to court records. See *Re Maislin Industries Ltd. v. Minister for Industry, Trade and Commerce, Regional Economic Expansion* (1984), 10 D.LR. (4th) 417 at 419 - 420 (F.C.T.D); *Bland v. Canada (National Capital Commission)* (1988), 20 F.T.R. 236 (T.D.) at para. 11; *Canada (Information Commission) v. Canada (Minister of Industry)* (1999), 166 F.T.R. 299, at para. 11 (T.D.).

The Police Position

[15] The Police take the position that the records at issue in this case are of such a sensitive nature as to constitute an exception to the usual procedure for restricted counsel access to the private record.

[16] The Police records were not compiled through the investigation of a specific offence but rather over years of intelligence gathering by means of surveillance of suspected persons and contact with informants. In such intelligence gathering, the Police say, they are not looking for specific information to support laying immediate charges. Rather, they look for links between individuals that may assist with future investigations. The information from such an investigation that may appear insignificant or meaningless on its own, may form a body of information critical to the ongoing probe. During such a probe, the police rely on the opinions of the officers involved. Accordingly, the material at issue might contain opinions or "hunches" that would not be seen in more targeted police reports.

[17] With respect to the intelligence records at issue, the Police state that Mr. Fuda was not the target or subject of the intelligence gathering. The reports refer to and contain personal information about a number of individuals and corporations. Such reports, say the Police, must be maintained in the strictest confidence so that those involved in crime will not learn about, and hence be able to, avoid police surveillance. Further, they argue that any release of this information might result in inadvertent disclosure that could put informants at risk or that could cause personal distress to third party individuals included in the investigation. Finally, they argue, disclosure would have a "chilling effect" on the willingness of police officers to express opinions in their reports.

[18] Even if Mr. Fuda's counsel signed an undertaking, the Police take the position that the sensitive nature of the information precludes access by counsel. In addition to the risks of inadvertent disclosure, the Police point to the difficulties for a lawyer in "compartmentalizing" the private information in his/her possession from the publicly available information, and the "untenable position" in which the lawyer is placed by having access to information that is not available to his or her client.

[19] Although counsel would not receive the private record if that counsel was acting for the client in contemporaneous litigation, the Police raise a further concern that the lawyer may use information acquired from the private record as a foundation for future related civil litigation. There is, according to the Police, a risk that the information obtained through the private record would be used indirectly for other purposes.

[20] In support of their argument against disclosure, the Police rely heavily on the decision of the Supreme Court of Canada in *Ruby v. Canada (Solicitor General)* (2002), 219 D.L.R. (4th) 385 (S.C.C.) at 402-403:

> As a **general rule**, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position. ... However, the general rule does tolerate certain exceptions. As indicated earlier, some situations require a measure of secrecy, such as wiretap and search warrant applications. In such circumstances, fairness is met through other procedural safeguards such as subsequent disclosure, judicial review and rights of appeal. In other cases, for instance where a privilege is successfully asserted, the content of the disputed information may never be revealed. (Emphasis: the Police; citations omitted)

[21] *Ruby* considered a freedom of information application made under the federal legislation. The court, at 404, went on to say that the provisions of that legislation met the requirements of procedural fairness:

> ...Parliament has seen fit to assert the special sensitive nature of the information involved and has provided added protection and assurance against inadvertent disclosure. Even though the adversarial challenge to the claim of exemptions in such cases is limited, recourse to the Privacy Commissioner and to two levels of court who will have access to the information sought and to the evidence supporting the claimed

> exemption is sufficient, in my view, to meet the constitutional requirements of procedural fairness in this context.

[22] It is important to consider *Ruby* in its context. It was based on the federal *Privacy Act*, R.S.C. 1985, c. P.21, which specifically mandates, in section 51, an in camera hearing for matters relating to international affairs and defence and provides for ex parte representations upon the government's request. The provincial legislature has chosen not to include similar provisions in either *FIPPA* or *MFIPPA* with respect to sensitive information.

[23] Under the same federal privacy legislation, Mr. Fuda applied for access to R.C.M.P. information. When the R.C.M.P. refused, he applied to the Federal Court. Mr. Fuda argued that because neither he nor his lawyer was given access to the information in order to prepare for the review, the R.C.M.P. must satisfy a higher onus to establish a case for non-disclosure. The court rejected this argument: *Fuda v. Canada (Royal Canadian Mounted Police)*, 2003 F.C.T. 234, [2003] F.C.J. No. 314, at paras. 20-23. In doing so, the court noted, citing *Ruby* in support, that while Mr. Fuda may not have seen the information, adequate protections were provided by the court's ability to scrutinize the records and by the onus placed on the R.C.M.P. to justify its decision.

The OSC Position

[24] The OSC, the regulatory body that oversees Ontario's security industry, made similar submissions on disclosure of the sealed or private records to the requester's counsel. The OSC's objectives are "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets": *Securities Act*, R.S.O. 1990, c. S.5, s. 1.1. The OSC's enforcement branch investigates and prosecutes violations of Ontario securities laws. Enforcement records may contain both information from confidential informants and information provided confidentially through law enforcement intelligence gathering. Clearly, the OSC is concerned about the protection of confidential information, and like the Police, draws the court's attention to cases involving solicitor-client privilege, public immunity privilege, and confidential informant privilege. It also relies upon the Commissioner's practice of non-disclosure during its review of a request and queries why the procedure should change upon the launching of an application for judicial review.

[25] The OSC points to those cases that decide the answer to the disclosure question upon the nature of the records at issue. The matter was discussed in *Bland, supra*, at para. 12, by Cullen J.:

> ... some consideration must be given to the nature of the information to be released to counsel... I believe the Court must consider the nature of the information and concur with the Associate Chief Justice that, "the determination will vary with the circumstances of each case". Here we are talking about rents, not national security, not a psychiatrist's or doctor's report, nor personal information of a kind that one applying to immigrate might reveal but would not want made public. Considering the nature of the information is a precurser to the decision ultimately made.

See also *Re Maislin Industries, supra*, at 420.

Analysis

[26] The Police and OSC note that neither of the respective municipal and provincial statutes gives Mr. Fuda the right to see the records at issue when the matter is before the Commissioner. Accordingly, they say, in the absence of anything to indicate a contrary intention at this stage of the proceedings, Mr. Fuda's right to the information is no higher than it had been before the Commissioner. As in *Ruby* and *Fuda*, they argue that the Commissioner's, and then the court's, ability to scrutinize the information provide sufficient protection.

[27] This analysis, however, ignores the fundamentally different roles of the Commissioner and of a reviewing court, and it ignores the significant differences between the federal freedom of information legislation upon which Ruby and Fuda were based and the municipal and provincial legislation applicable in this case.

[28] I do not voice an opinion on access by a requester to information when the matter is before the Commissioner; it is not an issue before me. I do, however, note that in performing his or her legislative function, a municipal or provincial Commissioner is performing an inquisitorial function that, by legislation, does not mandate a public hearing. Once a Commissioner's decision is brought to this court, however, the review process changes from inquisitorial in nature to adversarial. The review itself is held in open court in the presence of parties (usually) represented by counsel with the benefit of complete argument and response. Absent specific provisions to the contrary, denial of information in a court setting is the exception and not the norm.

[29] On the other hand, the courts, in various contexts, have expressed concern about the release, inadvertent or otherwise, of confidential information. The Police and the OSC point to other instances in civil proceedings where parties are routinely denied access to information. Specifically, Rules 30.06 and 30.10(3) of the *Rules of Civil Procedure* allow a procedure where a court first reviews documents for which privilege is claimed before ordering or refusing disclosure of those documents to a party. Similarly in criminal proceedings, where Crown privilege is at issue, a court reviews the material - which is not disclosed to defence counsel - before ruling on the issue: *Canada Evidence Act*, R.S.C. 1985, c. C-5, section 37.

[30] A concern about private information is also evident in cases raising solicitor's conflict of interests: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; in cases about Crown privilege: *Alberta (Provincial Treasurer) v. Pocklington Foods Inc.*, [1993] 5 W.W.R. 710, (Alta. C.A.); and about informants: *R. v. Leipert*, [1997] 1 S.C.R. 281.

[31] Courts have clearly recognized the difficulties inherent in disclosing information to a lawyer, even one bound by an undertaking not to disclose that information to his or her client. In such a situation, where a lawyer continues to act for the client, it may be difficult for the lawyer to compartmentalize information, to be always vigilant in separating information gleaned from the confidential source from information obtained by other means. This issue was the subject of comment, where counsel was acting in related litigation, in *Gravenhurst, supra*, at 532-533:

> The solicitors say they would honour their undertaking and I have no doubt that they would make their very best efforts to do so. The difficulty is that circumstances might

> render compliance impossible. The solicitors could not disabuse their minds of any significant information during the subsequent proceedings. They could not compartmentalize their minds so as to screen out what has been disclosed by the access and what has been acquired elsewhere. ... Furthermore, there would remain the perception of a possibility of non-compliance with the undertaking.
>
> ... I, reluctantly, conclude that if the solicitors want access they must retain independent counsel who must provide the undertaking in the form proposed. Such counsel, or another independent counsel, must thereafter represent the solicitors on this judicial review application. [Citations omitted]

[32] To a large extent, the concerns raised in *Gravenhurst* are addressed by the form of undertaking proposed by the Commissioner in this and other cases, and by refusing access to counsel who are representing the party in related litigation.

[33] Unlike situations arising in other civil or criminal contexts, counsel in this case does not even possess general knowledge about the information at issue. Even so, it is very important that information, particularly highly sensitive information, not be disclosed to the requester either prematurely or inadvertently. The risks of disclosure become increasingly important in proportion to the sensitivity of the information at issue. This was commented upon in *Hunter v. Canada (Consumer and Corporate Affairs)*, [1991] 3 F.C. 186 (C.A.) at 195, quoting, and overturning the conclusions of, Reed J. in *Hunter v. Consumer and Corporate Affairs* (1990), 35 F.T.R. 75:

> There are a number of factors which the court takes into account in deciding whether counsel should be given access, for purpose of argument only, to the documents which are the subject of an access refusal review. Some of these are: the extent to which counsel will be impeded in making argument if the documents are not disclosed to him; the nature or sensitivity of information contained in the documents; the extent to which the proceedings before the court will operate more smoothly and fairly if access is granted; the type of assurances which counsel can give that the documents will not be disclosed inadvertently...

In other words, the decision on whether to grant access to the private record is fact specific. See also *Re Maislin Industries, supra*, at 420. A balancing is needed; a balancing between, on the one hand, ensuring that a court operating in an adversarial context has the benefit of full and informed submissions, and, on the other hand, ensuring that highly sensitive information is not improperly accessed, particularly where such access would cause harm to uninvolved third parties. The question becomes whether the benefit the court would receive from the ability of the requester's counsel to provide meaningful argument outweighs the risk of disclosure of confidential information collected during information gathering. In this case, the requester's counsel, who has little information about the nature of the records at issue, requests access to these records in order to make submissions as to whether the exemptions to disclosure were properly claimed and applied. This request is made in the context of legislation that gives every individual a right to access their own personal information and the right to request that inaccurate or false information be corrected.

[34] The Commissioner's office, with the approval of the court, has proffered the solution of its usual practice of counsel access upon execution of a confidentiality undertaking: a solution that respects both these competing interests. With access to the record at issue, counsel is able to prepare properly to make submissions on the applicability of the claimed exemptions. As a result of the confidentiality undertaking, counsel is not to disclose any of the information at issue to the client. It is not a perfect answer, nor can it be. It is not an appropriate solution in all cases and it may, over time, benefit from refinement. For example, in certain cases, it may be appropriate to provide counsel with edited material, particularly where the information contained in the records would not be helpful to counsel and could be potentially quite damaging to third parties. Editing of records was not, however, an issue raised before me and it may, after the benefit of full argument on the issue, be inappropriate in any event.

[35] In this case, though, I have had the opportunity to review the records at issue that were given to me. Most of those records are significantly dated. Almost all records are more than ten years old; none were created after 1998. I have considered the nature of those documents and their contents. I have also considered that Mr. Fuda's counsel has little information as to the types of documents involved and hence, without access to them, his argument on the judicial review application would be severely hampered. While in other circumstances there may well be valid concern about disclosure of surveillance techniques and information about the source of sensitive information, those concerns - on the basis of the material provided to me - are not sufficient to preclude the limited disclosure requested in this case. Nor am I of the view, given the nature of these proceedings, that limited disclosure of these particular records would have a "chilling effect" on other investigations. I am satisfied that the proposed solution of restricted disclosure with an undertaking is appropriate in the circumstances of this case. Before the limited disclosure is provided, the form of undertaking must be expanded so that the relevant counsel agree not to act for their client in any other outstanding or subsequent proceeding arising out of the information. In this way an appropriate balance will be achieved between the important principle of public scrutiny of the issues at stake and the need to ensure the confidentiality of the records at issue.

Result

[36] On consent, an order will go as asked in paragraphs one and two of the Notice of Motion sealing the requested portion of the Commissioner's Record of Proceedings identified as "PRIVATE". An order will also go on consent that the two applications for judicial review will be heard together. Finally, an order will go that, upon filing a signed undertaking as set out in Schedule C to the Notice of Motion, as supplemented by these reasons, the Commissioner shall provide the requester's counsel with a copy of the private record.

[37] Unless counsel wish to make written submissions to the contrary, costs of this motion are reserved to the panel hearing the judicial reviews.

LANG, J.

Released: July 4, 2003