



Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT 18-04

August 10, 2018

Department of Finance and Treasury Board

Summary: The Department of Finance and Treasury Board claimed that records responsive to two related access to information requests fell outside the scope of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* by virtue of an exemption related to the *Pension Benefits Act*. The Commissioner determines that the interpretation of the exemption advanced by the Department violates the statutory interpretation norms of reasonableness and plausibility. She concludes that the responsive records do not fall under the proposed exemption and recommends that the Department process the two related access to information requests as required under *FOIPOP*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 2, 4, 45; *Interpretation Act*, [RSNS 1989, c 235](#), s. 9; *Interpretation Act*, R.S.O. 1980, c. 219; *Pension Benefits Act*, [SNS 2011, c 41](#), ss. 15, 31, 41, 42, 43.

Authorities Considered: British Columbia: Order F17-16, [2017 BCIPC 17 \(CanLII\)](#).

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [\[2011\] 2 SCR 306, 2011 SCC 25 \(CanLII\)](#); *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [\[2004\] 3 SCR 152, 2004 SCC 54 \(CanLII\)](#); *O'Connor v. Nova Scotia (Minister of Priorities and Planning Secretariat)*, [2001 NSCA 47 \(CanLII\)](#); *Rizzo & Rizzo Shoes Ltd. (Re)*, [\[1998\] 1 SCR 27, 1998 CanLII 837 \(SCC\)](#).

Other Sources: Ruth Sullivan, *Statutory Interpretation*, 2nd edition (Toronto, Ont: Irwin Law, 2007).

INTRODUCTION:

[1] The Minister of Finance and Treasury Board is responsible for administering the *Pension Benefits Act*.¹ This responsibility is carried out by the Superintendent of Pensions (Superintendent). In that capacity, the Superintendent receives annual information returns from administrators of pension plans that are subject to Nova Scotia's pension law.

¹ *Pension Benefits Act*, SNS 2011, c. 41.

[2] The applicant filed two very similar access to information requests with the Department of Finance and Treasury Board (Department) in January 2016. Both requests sought information contained in the annual information returns for the year preceding the access to information requests. The Department refused access to the information stating that the records were outside of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* by virtue of an exemption in s. 4A(2) of *FOIPOP*.

[3] This review centres around the appropriate statutory interpretation of the *FOIPOP* exemption and the associated *Pension Benefits Act* provision.

ISSUE:

[4] Does s. 4A(2)(n) of *FOIPOP* apply to the requested records so as to exclude the records from the application of *FOIPOP*?

DISCUSSION:

Background

[5] In January 2016, the applicant filed two access to information requests with the Department of Finance and Treasury Board. In a cover letter accompanying the requests, the applicant noted that the information he sought is all drawn from the annual information returns that must be filed pursuant to s. 31 of the *Pension Benefits Act*.

[6] In summary, the requests were for:

1. A list of all registered pension plans and for each plan:
 - a. the name of the plan; and
 - b. whether it is a defined benefit plan or a defined contribution plan.
2. A list of all registered pension plans and for each plan:
 - a. the name of the plan;
 - b. whether it is a defined benefit or defined contribution plan;
 - c. the name and contact information for the plan administrator;
 - d. the number of active members; and
 - e. the market value of the plan at year's end.

[7] In response, the Department refused access to both sets of requested records citing s. 15(3) of the *Pension Benefits Act* and s. 4A(2)(n) of *FOIPOP*.

Burden of Proof

[8] At a review into a decision to refuse an applicant access to a record, the burden is on the head of the public body to prove that the applicant has no right of access to the record.²

² *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s. 45(1).

Does s. 4A(2)(n) of FOIPOP apply to the requested records so as to exclude the records from the application of FOIPOP?

[9] Sections 4A(1) and 4A(2)(n) of the *Freedom of Information and Protection of Privacy Act* provide:

4A(1) Where there is a conflict between a provision of this Act and a provision of any other enactment and the provision of the other enactment restricts or prohibits access by any person to a record, the provision of this Act prevails over the provision of the other enactment unless subsection (2) or the other enactment states that the provision of the other enactment prevails over the provision of this Act.

4A(2) The following enactments that restrict or prohibit access by any person to a record prevail over this Act:

(n) subsection (3) of Section 15 of the *Pension Benefits Act*.

[10] Section 15 of the *Pension Benefits Act* provides:

Surveys, research and information

- 15 (1) The Superintendent may conduct surveys and research programs and compile statistical information related to pensions and pension plans.
- (2) The Superintendent may request an employer, an administrator or a member of a pension plan to provide information necessary to compile the statistical information and such person shall comply with the request within a reasonable period of time.
- (3) The Superintendent shall use the information only for the purpose of compiling the statistical information and shall not otherwise reveal the information without the consent of the person who supplies the information.

[11] The starting point for any analysis of the application of FOIPOP is its purpose. FOIPOP provides that public bodies must be *fully accountable* to the public subject only to *limited and specific exemptions*.³

[12] The courts have emphasized the uniqueness of Nova Scotia's access legislation in a number of cases beginning with *O'Connor v. Nova Scotia*.⁴ Based on the approach set out in *O'Connor* and in FOIPOP's purpose provision, any application of the exemptions set out in s. 4A of FOIPOP should be limited and specific. If an enumerated statute applies, s. 4A(2) operates so that the statute listed in s. 4A(2) prevails over FOIPOP *to the extent of the conflict*.

The Pension Benefits Act

[13] Both parties in this matter agree that the information requested is found in the annual information returns that pension plan administrators are required to file with the Superintendent pursuant to s. 31 of the *Pension Benefits Act*.

³ FOIPOP s. 2.

⁴ *O'Connor v. Nova Scotia (Minister of Priorities and Planning Secretariat)*, 2001 NSCA 47 (CanLII).

[14] The parties disagree on whether or not the annual information returns are also collected under subsections 15(1) and 15(2) of the *Pension Benefits Act (PBA)*. If the information is collected under the authority of s. 15(1) and 15(2), then s. 15(3) applies, and if that is the case, *FOIPOP* does not apply because of s. 4A(2)(n).

Analysis

[15] This is an exercise in statutory interpretation. As the Department pointed out, the leading case is *Re Rizzo & Rizzo Shoes Ltd.* Iacobucci J. (speaking for the Court) states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.⁵

[16] Iacobucci J. also noted the importance of considering the principles set out in the *Interpretation Act* that every Act shall be deemed to be remedial and that every Act shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.⁶

[17] The Department takes the position that a purposive approach results in the conclusion that *FOIPOP* does not apply to the requested information. In doing so it advances the arguments that:

- Disclosure of the confidential details of private pension plans in a public forum do not serve the objective of the *PBA* which is not to protect the public at large or even a subset of the public but to protect the beneficiaries of employment-based pension plans that are registered under it.
- *FOIPOP* does not indicate that it prevails over the *PBA* and so the approach taken under the *PBA* with respect to the disclosure of pension information changes how one is to interpret and apply *FOIPOP*'s access provisions to any requested information that is subject to the *PBA*.
- Given that the requested information pertains entirely to third parties that are not part of government, disclosing the information would not support any of the stated objectives in s. 2 of *FOIPOP*.

[18] What are the purposes of the *Pension Benefits Act*? The preamble to the *PBA* provides:

WHEREAS the Government of Nova Scotia wishes to promote the development of an environment in which pension promises will be fulfilled;
AND WHEREAS greater transparency of information about pension plans will assist members, former members and retired members in making informed decisions about their pension plans; and
AND WHEREAS the Government of Nova Scotia intends to promote and facilitate the implementation and continuation of pension plans:

⁵ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at 87.

⁶ Referring to Ontario's *Interpretation Act*, RSO 1980, c. 219. Nova Scotia has an *Interpretation Act* with a similar provision at RSNS 1989, c 235, s. 9(5).

[19] One of the purposes listed is “greater transparency of information” particularly with respect to members, former members and retired members. This is an identified group, a subset of the public at the very least.

[20] The Department cites the Supreme Court of Canada decision in *Monsanto v. Superintendent of Financial Services*⁷ as providing the correct view of the overarching purpose of the *PBA* – emphasizing the following quote (underlining provided by the Department):

[38] The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (see *GenCorp, supra; Firestone Canada Inc. v. Ontario Pension Commission*) (1990), 1990 CanLII 6833 (ON CA), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v. Air Products Canada Ltd.*, 1994 CanLII 104 (SCC), [1994] 2 S.C.R. 611, at p. 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.

[21] The last sentence of the quoted paragraph makes clear that the Court sees a public interest in established pension standards (“...beneficial...for the greater public interest”). Later the Court goes on to further explain the vital importance of pension benefit regulation including the facilitation and encouragement of pension plan participation to advance the interests of employees, employers and the public.⁸

[22] So, it seems that the Supreme Court of Canada identified that pension benefit regulation does serve a public interest. No doubt at least in part because if pensions are not properly managed, members will be left without sufficient retirement funds and this, in turn, can place a burden on the public purse. But also because employment related pension plans are increasingly common and essential to the financial stability of our aging population.

[23] With respect to the Department’s assertion that *FOIPOP* does not prevail over the *PBA*, this is wrong in law. *FOIPOP*’s conflict clause clearly states that *FOIPOP* prevails over all other legislation unless another enactment listed in subsection 4A(2) restricts or prohibits access or an enactment states that it prevails over *FOIPOP*. The *PBA* has no general provision stating

⁷ *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 SCR 152, 2004 SCC 54 (CanLII) (*Monsanto*).

⁸ *Monsanto* at para 50.

that it specifically prevails over *FOIPOP*. Therefore, the *PBA* only prevails over *FOIPOP* to the very limited extent that s. 15(3) of the *PBA* applies to responsive records.

[24] This is a very significant point because right to information legislation is an essential element of our democracy. Courts view the public's right to government information as set out in access to information laws as being of a quasi-constitutional nature.⁹

[25] With respect to the suggestion that the disclosure of the requested information would also not serve the purposes of *FOIPOP*, as noted above, the Supreme Court of Canada has highlighted the public interest served by the regulation of pension plans. Further, it is accepted in other jurisdictions that this type of information can and should be accessible under right to information legislation.¹⁰ In Ontario, information taken from annual information returns is published on the regulator's website.¹¹

[26] Therefore, using a purposive approach, I find that subjecting annual information return information to the access rules under *FOIPOP* is consistent with the purposes of both the *PBA* and *FOIPOP*.

[27] But, what does the law actually say?

[28] There are a wide range of rules, principles and maxims of statutory interpretation that aid in resolving an interpretation problem. And while there is no standard way of ranking these rules, there is one constant – the text.¹²

[29] I will begin there. Section 15 of the *PBA* has the subheading, "Surveys, research and information" and falls in a division of the *PBA* entitled, "Administration of the Act". Section 15(1) gives the Superintendent of Pensions the authority to do three things: conduct surveys, conduct research and compile statistical information related to pensions and pension plans. Subsection 2 deals specifically with the Superintendent's power to request information "necessary to compile the statistical information". Subsection 3 then provides that the Superintendent "shall use the information only for the purpose of compiling the statistical information" and shall not otherwise reveal the information (emphasis added).

[30] In summary then, s. 15 grants the Superintendent the authority to compile statistical information, collect information for the purpose of compiling statistical information, and then restricts the Superintendent's authority to disclose "the information".

[31] The logic and flow of the section is clearly about the Superintendent's authority. The most common sense interpretation of s. 15(3) and the use of the phrase "the information" is that it is a reference to the information described in s. 15(2). I agree with the applicant that to be internally

⁹ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 SCR 306, 2011 SCC 25 (CanLII) at para 40.

¹⁰ See for example BC Order F17-16, *2017 BCIPC 17* (CanLII).

¹¹ <http://planinfoaccess.fsco.gov.on.ca/>.

¹² Ruth Sullivan, *Statutory Interpretation* (2nd edition) Toronto, Ont: Irwin Law, 2007 p. 42.

consistent, the term “the information” used in 15(3) refers to information gathered under the authority set out in s. 15(2).

[32] The information in question here is gathered as part of the annual returns requirement placed on administrators of pension plans as set out in s. 31 of the *PBA*. Section 31 falls into a division of the *PBA* entitled, “Registration and Administration of Pension Plans.” Section 31 creates a mandatory requirement on pension plan administrators to file an annual information return in respect of the pension plan in the form approved by the Superintendent.

[33] The phrase “annual information returns” is a defined term and appears only in s. 31 and in the following four provisions found in the Regulations:

- Define the term “annual information return” as that required under s. 31 of the Act (s. 2)
- Prescribe timing and fees for filing annual information returns (s. 65)
- Prescribe rights of members to obtain access to the annual information returns (s. 82(1))
- Prescribe annual information return filing requirements on windup (s. 181(a))

[34] The law entitles the following individuals to inspect and obtain copies of annual information returns: members, former members, retired members and their spouses or agents, a representative of a trade union that represents members, an employer, a person required to make contributions under the pension plan on behalf of an employer, or any other prescribed person.¹³ The inspection can happen either at a location arranged by the administrator or at the office of the Superintendent during regular business hours.¹⁴

[35] There is no confidentiality restriction placed on any individual who is entitled to view and obtain copies of the annual information returns. The forms themselves are prescribed and contain no confidentiality statement or indication on the face of the form that the Superintendent considers the information confidential.

[36] I have already determined that the reference to “the information” in s. 15(3) must logically refer to information collected under the authority set out in s. 15(2). Under s. 15(2) the Superintendent “may request ...an administrator ...to provide information necessary to compile the statistical information....”

[37] The question is: can an annual information return that must be filed with the Superintendent under s. 31 be considered to qualify as “the information” under s. 15(3) of the *PBA*?

[38] Clearly not. The Superintendent does not use the power granted under s. 15(2) to obtain the annual information returns. That is, the Superintendent is not “requesting” the information because the administrator must already supply the information pursuant to s. 31. No “request” is required or made.

¹³ *PBA* ss. 42 and 43(3).

¹⁴ *PBA* s. 43(2).

[39] Further, if, for the sake of argument, the annual information return did qualify as information gathered under s. 15(2) and so is subject to the requirement to “not otherwise reveal” the information as set out in s. 15(3), then the Superintendent would be in violation of s. 15(3) every time the Superintendent fulfilled her obligation under s. 43(2) by allowing listed interested parties to view the annual information return. Put another way, the interpretation of s. 15(3) advanced by the Department would defeat the purpose of s. 43(2) of the *PBA*.

[40] Does this interpretation interfere with the Superintendent’s ability to use information gleaned from annual information returns in compiling statistical information? No, it does not. That power is set out in s. 15(1) and there is nothing in the provisions relating specifically to annual information returns gathered under s. 31 that would prohibit the use of the information for the purposes of compiling statistical information.

[41] The statutory scheme with respect to annual information returns also results in a very practical reason why the prohibition in s. 15(3) does not apply to these returns. A large variety of individuals are entitled not only to view but to obtain copies of the annual information returns. There is nothing in the *PBA* that prohibits further use or disclosure. In this digital age, an unhappy member or spouse could easily scan and post the annual information return on the internet. Practically, the disclosure scheme of the *PBA* means that it is not possible to maintain the confidentiality of the annual information returns.

[42] In statutory interpretation parlance, this is a consequential analysis and I have determined that the results of the interpretation advanced by the Department violate the norms of reasonableness and plausibility. It is considered absurd for the legislature to contradict itself, to create an incoherent scheme, or to act in a futile or self-defeating way.¹⁵

FINDINGS & RECOMMENDATIONS:

[43] I find that s. 4A(2)(n) of *FOIPOP* does not apply to the requested records so as to exclude the records from the application of *FOIPOP*. I recommend that the Department proceed with processing the applicant’s two access to information requests under the provisions of *FOIPOP*.

August 10, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

OIPC Files 16-00026 and 16-00027

¹⁵ Ruth Sullivan, *Statutory Interpretation*, p. 210.