

Practice Guideline – April 24, 2012

Use and Disclosure of Personal Information in Ontario Securities Commission’s Adjudicative Proceedings

(Cross-references: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 and *Ontario Securities Commission Rules of Procedure* (2010), 33 O.S.C.B. 8017)

Preamble

The Ontario Securities Commission (the “Commission” or the “OSC”) is issuing the following practice guideline on the use and disclosure of personal information in adjudicative proceedings (the “Practice Guideline”). The Practice Guideline sets out some limits on the use and disclosure of personal information of investors, witnesses and other third parties referred to in the course of hearings, or collected as part of the hearing record, in adjudicative matters before the Commission. This Practice Guideline does not apply to personal information about any respondent to an adjudicative matter.

The Practice Guideline was developed in accordance with the *Ontario Securities Commission Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the “OSC Rules”), the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the “SPPA”) and the Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the “FIPPA”).

In developing the Practice Guideline, the Commission considered the *FIPPA*’s purpose to “protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information”. Most Ontario administrative tribunals, including the Commission, which perform an adjudicative function, are institutions for the purpose of the *FIPPA* listed in the schedule in Regulation 460 to that statute.

The *SPPA* applies to a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal, including the Commission, is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision.

The Practice Guideline applies to all proceedings before the Commission where the Commission is required under the *Securities Act*, R.S.O. 1990, c. S.5, as amended and the *Commodity Futures Act*, R.S.O. 1990, c. C.20, or otherwise by law, to hold a hearing or to afford to the parties to the proceeding an opportunity for a hearing before making a decision. The Practice Guideline is issued pursuant to Rule 1.3 of the *OSC Rules*.

For the purpose of the Practice Guideline, personal information includes recorded information about an “identifiable individual” pursuant to section 2 of the *FIPPA*. For the purpose of the Practice Guideline, the name, title and contact information that identifies

the individual in a business, professional or official capacity does not constitute personal information pursuant to subsection 2(3) of the *FIPPA*.

The Commission therefore issues the following Practice Guideline which will apply immediately to all proceedings before the Commission, including proceedings commenced by a Notice of Hearing issued prior to the issuance of the Practice Guideline:

1. General Principles and Application

- 1.1. The purpose of the Practice Guideline is to provide, to the extent possible, an appropriate balance between the right of access by the public to information and the desirability to protect the privacy of individuals with respect to personal information about themselves in the context of the OSC's adjudicative process.
- 1.2. The Practice Guideline is consistent with the Commission's current practice adopted to prevent the unnecessary dissemination of personal information and draws upon best practices and recommendations from other federal and provincial tribunals and agencies.
- 1.3. The Practice Guideline sets out the right of access by the public to personal information of investors, witnesses and other third parties contained in records and adjudicative decisions and governs the use and treatment of personal information by parties and intervenors to a proceeding before the Commission, Members and Adjudicative Personnel.
- 1.4. Any restrictions on access to records and decisions apply to the general public and not to parties and intervenors to the proceeding to which the record or decision relate, unless otherwise ordered by a Hearing Panel. The restrictions do not apply to Members and Adjudicative Personnel.

2. Personal Information Covered by this Practice Guideline

- 2.1 "Personal information" refers to information that, when combined together or with the name of an individual, enables the direct identification of this individual. In the OSC's adjudicative context, this information includes, but is not limited to, the following:¹
 - social insurance numbers, Driver's Licence numbers, Passport numbers, Licence Plate numbers, and OHIP number (or other similar health number) of investors, witnesses and/or third parties;
 - The date of birth of investors, witnesses and/or third parties;
 - The municipal addresses of investors, witnesses and/or third parties, including street name, number and postal code (not city or province);

¹ See the definition of "personal information" set out at section 2 of *FIPPA*.

- All telephone numbers of investors, witnesses and/or third parties;
- Bank account numbers and trading account numbers of investors, witnesses and/or third parties (including joint accounts); and
- The names of spouses and children of investors, witnesses and/or third parties.

2.2 “Personal information” does not include a person’s name, title or contact information or the designation of an individual that identifies the individual in a business, professional or official capacity.²

3. The Hearing Record

3.1 The hearing record includes any information or document that is collected, received, stored, maintained or archived by the Commission in connection with its adjudicative proceedings. The *SPPA* provides that: “A tribunal shall compile a record of any proceeding in which a hearing has been held which shall include,

- (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
- (b) the notice of any hearing;
- (c) any interlocutory orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
- (e) the transcript, if any, of the oral evidence given at the hearing; and
- (f) the decision of the tribunal and the reasons therefore where reasons have been given.”³

3.2 The following are excluded from the definition of hearing record:

- (a) hearing notes, personal notes, legal opinions, memoranda, drafts of reasons and similar documents of information prepared and used by Members of the Commission or OSC Adjudicative Personnel; and
- (b) records maintained by the Commission that are not connected with adjudicative proceedings.

² See section 2(3) of the *FIPPA*.

³ *SPPA*, s. 20.

- 3.3 “Decision” refers to any decision rendered by the Commission, including orders, as well as any disposition or reasons given in connection with such a decision.
- 3.4 Rule 5.1 of the Commission’s *Rules of Procedure* (2010), 33 O.S.C.B. 8017 provides that documents required to be filed or received in evidence in proceedings shall be available to the public. However, rule 5.2 permits the Commission to order that any document or transcript of a proceeding be kept confidential pursuant to section 9 of the *SPPA*. Public access to documents relating to a Commission proceeding may also be limited to redacted copies of those documents which do not contain personal information, as prescribed by the Practice Guideline.
- 3.5 The hearing record of a proceeding before the Commission shall consist of an original version of each document in the hearing record and, where appropriate, a redacted version with all personal information expunged. The publicly accessible hearing record shall consist of the redacted version of the record, unless ordered otherwise by a Hearing Panel.
- 3.6 The publicly accessible hearing record in an enforcement hearing will only be made public at the close of the evidence in that hearing.

4. Limitation on the Disclosure of Personal Information

- 4.1 When any party or participant files a document intended to be part of the hearing record, that party or participant is expected to use all reasonable efforts to limit the disclosure of personal information of investors, witnesses and other third parties to what is necessary for the disposition of the matter in accordance with the Practice Guideline.
- 4.2 In addition to the five unredacted copies of documents to be filed in accordance with subrule 1.5.4(3) of the Commission’s *Rules of Procedure* (2010), 33 O.S.C.B. 8017, a sixth redacted version of all documents that form part of the hearing record should be filed with the Commission, where appropriate, with the personal information of investors, witnesses and other third parties redacted in accordance with the Practice Guideline. Parties and participants are expected to use all reasonable efforts to ensure that all personal information of investors, witnesses and other third parties has been removed from the redacted version of the documents that form part of the hearing record.
- 4.3 It is not expected that personal information of a respondent that is relevant to the disposition of the matter be redacted. It remains open to a party or participant to bring a motion before the Hearing Panel to request that any personal information about a respondent be redacted from any documents in the hearing record.

4.4 Ultimate discretion with respect to whether any document in the hearing record should be redacted remains with the Hearing Panel.

5. Public Access to Records

5.1 When a redacted version of a document or record is filed, the Hearing Panel may order that the public only have access to the redacted version of the document or record.

5.2 When such an order has been made, the Registrar shall provide a redacted copy of the record or document to the public.

6. Application of the Practice Guideline to Adjudicative Decisions

6.1 When making a decision, a Hearing Panel will, to the extent possible, not refer to any personal information of non-parties as set out in the Practice Guideline.

6.2 Where appropriate, and at the discretion of the Hearing Panel, initials or similar anonymous identifiers should be substituted for the names of non-parties referred to in the decision so as to keep their identities private.

7. Practice Guideline Dissemination

7.1 The Commission will continue to inform the public and participants involved in the adjudicative process of the extent to which information in the hearing record is made publicly available, and of the measures that are taken pursuant to the Practice Guideline to protect personal information.

8. Practice Guideline Review

8.1 The Commission will review the Practice Guideline as appropriate to ensure that its application is current and further developed as required.

9. Power of the Hearing Panel

9.1 The Practice Guideline does not impede in any way the power of the Hearing Panel to make rulings as it deems appropriate in the circumstances, and does not fetter the discretion of the Hearing Panel in making decisions regarding the use and disclosure of personal information of any party or participant in any adjudicative matter.