



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-1982

Appeal PA-010210-1

Ontario Securities Commission



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ontario Securities Commission (the OSC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a document entitled "Investment Dealers Association of Canada - Review of Enforcement".

The OSC denied access to the responsive record under section 14(1)(c) of the *Act*. Subsequently, the Ministry issued a supplementary decision advising that in addition to this exemption, access is denied to the record under section 65(2) of the *Act*. The OSC later clarified that it is relying on section 67(1) and not section 65(2). The OSC explained that section 67(1) applies because section 153 of the *Securities Act* provides that the OSC may exempt from disclosure certain information if the OSC determines that such information should be maintained in confidence.

The requester (now the appellant) appealed the OSC's decision.

The appeal could not be resolved in mediation, so it proceeded to the adjudication stage. After the Report of Mediator was issued the OSC provided this office with a Determination, dated May 4, 2001, which deals with the appellant's request and the specific record at issue in this appeal. The Determination states that the requested record was provided by the Investment Dealers Association (the IDA) to the OSC and identifies that the IDA is a self-regulatory body within the meaning of section 153 of the *Securities Act*. The determination goes on to state:

NOW THEREFORE, IT IS RESOLVED that:

The request for disclosure of the Review is denied in full and all such information shall continue to be held by the Commission in confidence.

A copy of the May 4, 2001 Determination was provided to the appellant together with a Notice of Inquiry. In the Notice of Inquiry, the appellant was asked to provide representations as to why he believes that section 67(1) of the *Act*, in combination with the confidentiality provision in section 153 of the *Securities Act*, is not applicable in this case, particularly in light of the findings made in Order PO-1930 (which also relates to the appellant and the OSC and is discussed below). The appellant was also asked to provide any documents and/or other relevant evidence that support the positions taken. After reviewing the representations received from the appellant, I determined that it was not necessary to seek representations from the OSC.

RECORDS:

The only record at issue in this appeal is a document entitled "Investment Dealers Association of Canada - Review of Enforcement".

DISCUSSION:

SECTION 153 OF THE SECURITIES ACT

The OSC claims that section 67(1) of the *Act*, in combination with section 153 of the *Securities Act*, gives authority to the OSC to exclude the records from the access provisions of the *Act*. Section 67(1) of the *Act* states:

This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.

Section 153 of the *Securities Act* reads as follows:

Despite the *Freedom of Information and Protection of Privacy Act*, the [Ontario Securities] Commission may provide information to and receive information from other securities or financial regulatory authorities, stock exchanges, self-regulatory bodies or organizations, law enforcement agencies and other governmental or regulatory authorities, both in Canada and elsewhere, and any information so received by the Commission shall be exempt from disclosure under that Act if the Commission determines that the information should be maintained in confidence.

In Order PO-1930, Assistant Commissioner Tom Mitchinson considered the relationship between section 153 of the *Securities Act* and section 67(1) of the *Act* and made the following findings:

Section 67(1) makes it clear that the *Act* prevails “over a confidentiality provision in any other Act unless ... the other Act specifically provides otherwise”. The OSC submits that section 153 is one confidentiality provision that “specifically provides otherwise”.

I concur. There is no ambiguity in the wording of section 153 in this regard. If the requirements of this section apply to the records at issue in this appeal, it is clear from the plain wording of section 153 that the OSC may withhold the records “despite the *Freedom of Information and Protection of Privacy Act*.”

...

In the circumstances, in order to fall within the scope of section 153, the OSC must establish that:

1. the IDA is a self-regulatory body or organization;
2. the information in the records at issue in this appeal was received by the OSC from the IDA; and
3. the OSC has determined that the information in the records should be maintained in confidence.

I agree with the Assistant Commissioner’s interpretation and adopt it for the purposes of this appeal.

Is the IDA a self-regulating body or organization?

In considering whether the IDA is a self-regulating body or organization, the Assistant Commissioner stated the following in Order PO-1930:

Sections 1(1) and 21.1 of the *Securities Act* provide:

1(1) “Self regulatory organization” means a person or company that represents registrants and is organized for the purpose of regulating the operations and the standards of practice and business conduct of its members and their representatives with a view to promoting the protection of investors and the public interest;

21.1 (1) The Commission may, on application of a self-regulatory organization, recognize the self-regulatory organization if the Commission is satisfied that to do so would be in the public interest.

(2) A recognition under this section shall be made in writing and shall be subject to such terms and conditions as the Commission may impose.

(3) A recognized self-regulatory organization shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices.

(4) The Commission may, if it is satisfied that to do so would be in the public interest, make any decision with respect to any by-law, rule, regulation, policy, procedure, interpretation or practice of a self regulatory organization.

The OSC’s representations attach a copy of the IDA Recognition Order dated October 27, 1995, which formally recognizes the IDA as a self-regulatory organization pursuant to section 21.1 of the *Securities Act*.

The appellant appears to accept that the IDA is a self-regulatory organization, but goes on in his representations to identify what he sees as deficiencies or breaches in the terms of the IDA’s Recognition Order and which, in his view, should “void their recognition as a self-regulatory organization”. Whether or not the IDA is in breach of the terms of its Recognition Order, or what impact any such breach would have on the status of the IDA under the *Securities Act*, are matters for the OSC, and not this Office, to decide. In the absence of any evidence to indicate that the OSC has revoked the IDA’s Recognition Order, or otherwise decided that it is no longer valid, I accept that it remains in effect.

Therefore, I find that the IDA is a self-regulatory organization, and that the first requirement of section 153 has been established.

Similar to his representations in Appeal PA-010039-1, which resulted in Order PO-1930, the appellant identifies what he views as contraventions of the “public interest terms and conditions” contained in the IDA’s Recognition Order and requests that I make a finding that the IDA is in breach of the Recognition Order. The appellant also refers to the Assistant Commissioner’s finding in Order PO-1930 that the IDA is a self-regulatory organization and asks for clarification as to what criteria have been met within the Recognition Order that would enable the Assistant Commissioner to make such a finding. In his representations, the appellant is also taking the position that both the OSC and the IDA misrepresented certain facts to this Office in Appeal PA-010039-1.

As stated by the Assistant Commissioner in Order PO-1930, whether or not the IDA is in breach of the terms of its Recognition Order, or what impact any such breach would have on the status of the IDA under the *Securities Act*, are matters for the OSC, and not this Office, to decide. In other words, it is beyond the jurisdiction of this Office to evaluate whether or not the criteria within the Recognition Order have been met by the IDA and/or whether or not the IDA is in breach of any of its terms or conditions. The Recognition Order sets out many items that the IDA must report on to the OSC and it is clearly up to the OSC, and not this Office, to determine compliance with the terms and conditions of the Recognition Order.

As far as the appellant’s concern that the OSC and the IDA misrepresented the facts to this office in Appeal PA-010039-1, the matters referred to by the appellant in this regard once again speak to the issue of failure of the IDA to comply with certain terms and conditions of the Recognition Order. Given that the Assistant Commissioner determined that these were matters for the OSC and not this Office to decide, the submissions from the parties on this issue were not necessary to his finding that the IDA is a self-regulatory organization pursuant to section 21.1 of the *Securities Act*.

As indicated above, in Order PO-1930 the Assistant Commissioner determined that in the absence of any evidence to indicate that the OSC has revoked the Recognition Order, or otherwise decided that it is no longer valid, it remains in effect. Based on the appellant’s representations, I am not persuaded that I should reach a different conclusion from the one reached by the Assistant Commissioner in this regard and find that the IDA is a self-regulatory organization pursuant to section 21.1 of the *Securities Act*. Accordingly, the first requirement of section 153 has been established.

Were the records at issue in this appeal received by the OSC from the IDA?

The appellant does not address this issue directly in his representations.

Based on the material before me, including the OSC’s May 4, 2001 Determination, I accept that the record at issue was received by the OSC from the IDA, thereby satisfying the second requirement of section 153.

Has the OSC determined that the information contained in the record should be maintained in confidence?

As outlined above, the OSC provided this office with a Determination, dated May 4, 2001, stating that “[t]he request for disclosure of the Review is denied in full and all such information shall continue to be held by the Commission in confidence”. Accordingly, I am satisfied that the OSC made a determination that the information contained in the records should be maintained in confidence. Therefore, the third requirement of section 153 has been satisfied.

Similar to Appeal PA-010039-1, the appellant’s representations in the current appeal raise a number of concerns with respect to the supervisory and oversight functions performed by the OSC as they relate to the IDA. The appellant also provided numerous newspaper articles and other documentation with respect to this matter. Consistent with the comments made by the Assistant Commissioner in Order PO-1930, matters of this nature are clearly not within my purview, as my responsibilities in this case are restricted to determining whether the record at issue is accessible to the appellant, in light of section 67(1) of the *Act*.

Because I have determined that all three criteria in section 153 of the *Securities Act* have been satisfied, I find that the record at issue is not accessible under the *Act*.

ORDER:

I uphold the decision of the OSC.

Original signed by: _____
Irena Pascoe
Adjudicator

December 21, 2001
