



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-1992**

**Appeal PA-010242-1**

**Ontario Securities Commission**



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## **NATURE OF THE APPEAL:**

The requester made a complaint to the Investment Dealers Association (IDA) regarding an individual financial advisor, and the advisor's employer. The IDA ultimately disposed of the matter by approving a settlement agreement. Under section 21.7 of the *Securities Act*, the requester then applied to the Ontario Securities Commission (OSC) for a hearing and review of the IDA's decision and the settlement agreement.

The requester then made a request to the OSC under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all information relating to the matter of his complaint to the IDA.

Later, the OSC declined the appellant's application for a review of the IDA's decision, on the basis that he does not have standing under section 21.7 of the *Securities Act* to make such an application.

Subsequently, in response to the request under the *Act*, the OSC identified 67 records responsive to the request and granted the requester access to 44 of them. The OSC denied access to the remaining 23 records on the basis of the exemptions at sections 13 (advice or recommendations), 14 (law enforcement), 21 (personal privacy) and 49(a) and (b) (discretion to deny access to requester's own personal information) of the *Act*.

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

During the mediation stage of the appeal, the appellant agreed not to pursue certain records. In addition, the OSC reconsidered its decision in part, and decided to grant access to certain additional records or portions of records. Also, the appellant confirmed that he was not seeking access to personal information of other individuals and, therefore, the records or portions thereof withheld under section 49(b) in conjunction with section 21 are no longer at issue. As a result, the remaining, undisclosed portion of Record 12 is no longer at issue. In addition, the application of section 21 to the withheld portions of Record 29 is no longer at issue. However, the OSC maintains that the withheld portions of Record 29 are still exempt under sections 13 and 14.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the OSC, which provided representations in response. I then sent the Notice of Inquiry, together with the OSC's representations, to the appellant, who provided representations in response.

The appellant's representations do not address the specific issues under the *Act* raised by this appeal. Rather, they focus on the reasons for his dissatisfaction with the handling of his complaint to the IDA and his subsequent application to the OSC, as well as his views on the need for transparency in these processes. For this reason, I will not refer to the appellant's representations below.

## **RECORDS:**

The records at issue and the exemptions claimed are described in the following table. The OSC withheld all records in full except where indicated.

<b>Record Number</b>	<b>Description</b>	<b>Exemption claim</b>
26	E-mail from the Manager of Litigation to the Secretary to the Commission, copied to the Director of Enforcement dated February 3, 2001	sections 49(a)/13
27	E-mail from the Manager of Litigation to the Director of Enforcement dated February 5, 2001	sections 49(a)/13
28	E-mail from the Director of Enforcement to the Manager of Litigation, copied to the Secretary to the Commission dated February 5, 2001	sections 49(a)/13
29	E-mail from the Director of Enforcement to the Manager of Litigation dated February 6, 2001	sections 49(a)/13/14 (withheld in part)
32	E-mail from the Manager of Litigation to the Secretary to the Commission dated March 13, 2001 and a copy of an e-mail from the Secretary to the Commission to the Manager of Litigation dated March 14, 2001	sections 49(a)/13
37	E-mail from the Manager of Litigation to the Director of Enforcement dated April 30, 2001	sections 49(a)/13
43	E-mail from the Director of Enforcement to the Manager of Litigation dated May 28, 2001	sections 49(a)/13
45	E-mail from Senior Litigation Counsel to the Manager of Litigation dated May 20, 2001 and a copy of an e-mail from the Manager of Litigation to Senior Litigation Counsel dated May 27, 2001	section 13

## **DISCUSSION:**

### **PERSONAL INFORMATION**

The OSC claims that Records 26, 27, 28, 29, 32, 37 and 43 are exempt under section 49(a) of the *Act*, in conjunction with section 13 and/or 14. In order for section 49(a) to apply, the records must contain the appellant's "personal information". Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The OSC submits:

. . . [T]he Records contain "personal information" of the Appellant. Records 26, 27, 28, 29, 32 and 37 refer to the Appellant directly by name. Record 43 refers to the Appellant indirectly.

On my review of these records, I am satisfied that they contain personal information of appellant, in relation to his complaint to the IDA and subsequent application to the OSC for a review of the matter.

The OSC submits that Record 45 does not refer to the appellant at all but states that “it is clear that the e-mail concerns an issue that arose from the appellant’s application to the OSC” regarding the IDA matter. In my view, although this record has some connection to the appellant’s application, it cannot be said to contain or reveal personal information of the appellant. Accordingly, I will consider whether Record 45 is exempt solely on the basis of section 13, whereas the remaining records will be considered under section 49(a), in conjunction with section 13 and/or 14.

### **RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/ADVICE TO GOVERNMENT**

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a), an institution may refuse to disclose an individual’s own personal information where section 13 (among others) would apply. Section 13(1) of the *Act* reads:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it “. . . purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making”. Put another way, the purpose of the exemption is to ensure that:

. . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head’s ability to take

actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

The OSC submits:

. . . . .  
It is important that Staff be permitted to communicate candidly with each other when advising on a course of action. As noted by Tom Mitchinson, Assistant Commissioner,

[i]t is a fact of life that staff would not feel free and open to express their minds in writing on specific issues if they were aware that their advice or recommendations were subject to possible public scrutiny. Such “chilling effect” is precisely the rationale behind the exemption. In our opinion, the Commissioners must have the benefit of staff advice which is candid, direct and to the point [Order P-363].

. . . [T]he Records in issue disclose advice or recommendations of Staff of the Institution pursuant to section 13(1) of the *Act*. The Records are all inter-office e-mails between the Manager of Litigation and another party. The Director of Enforcement is a party to all e-mail except Records 32 and 45. All e-mail discuss and provide advice and suggest or recommend a course of action to the decision-makers within the OSC regarding the Appellant’s application to the OSC for a review of the IDA’s settlement agreement and decision regarding [the complaint]. The advice provided was ultimately accepted and acted upon when the decision was made by the OSC to reject the Appellant’s application on the basis that he had no standing . . . Record 29 suggests or recommends a course of action regarding an unrelated matter.

. . . . .  
. . . [T]he disclosure of these Records would reveal the advice of a public servant as contemplated by section 13(1) of the *Act* and therefore the discretionary exemption provided by section 13(1) of the *Act* applies to all parts of the Records.

[I note that the purported quote from the Assistant Commissioner in Order P-363 is, in fact, an excerpt from the representations of the institution in that case.]

In my view, all of Records 27, 28, 37 and 43, and portions of Records 26, 32, either contain or reveal the advice or recommendations of OSC staff on how the OSC should determine the appellant’s application for a review under section 21.7 of the *Securities Act*. Therefore, this information qualifies for exemption under section 49(a) in conjunction with section 13(1). In addition, I find that the portions of Record 29 remaining at issue are unrelated to the appellant’s application and therefore are not responsive to the request. The remaining portions of Records 26 and 32 consist mainly of background, factual information, and neither contain nor reveal the advice or recommendations of OSC staff within the meaning of section 13(1) of the *Act*.

In addition, I find that portions of Record 45 contain or reveal advice of OSC staff within the meaning of section 13(1).

Given my finding that the portions of Record 29 remaining at issue are not responsive to the request, it is not necessary for me to determine whether this record qualifies for exemption under section 49(a) in conjunction with the section 14 law enforcement exemption.

**ORDER:**

1. I uphold the OSC's decision to deny access to the records, with the exception of portions of Records 26, 32 and 45.
2. I order the OSC to disclose the portions of Records 26, 32 and 45 I found not to be exempt, in accordance with the highlighted copies of those records I have enclosed with the OSC's copy of this order, no later than **March 5, 2002**.
3. I reserve the right to require the OSC to provide me with copies of the material sent to the appellant pursuant to provision 2 above.

Original Signed By: \_\_\_\_\_  
David Goodis  
Senior Adjudicator

February 14, 2002 \_\_\_\_\_