Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2029

Appeal PA-010410-1

Ontario Securities Commission

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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 "copies of any report or correspondence by the Ontario Securities Commission since June 1998 regarding the operations of the Investment Dealers' Association (the IDA) and its members." The requester later narrowed the request to "a recent report or audit conducted by the OSC of the IDA … and any correspondence relating directly to [the report] between the OSC and the IDA."

The OSC responded to the requester as follows:

> Access is denied to the [records] under section 67(1) of the *Act* concerning conflicts with other legislation.
>
> This provision applies because section 153 of the *Securities Act* may exempt from disclosure under the [*Act*], information received from self-regulatory bodies if the OSC determines that such information should be maintained in confidence.

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.

And section 153 of the *Securities Act* reads:

> 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.

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

During the course of mediation, the appellant withdrew the portion of her request relating to correspondence, thereby restricting the scope of this appeal to the audit report. Also during mediation, the OSC provided this office with a copy of an OSC "Determination" dated October 6, 2001. In it, the OSC "determines" that the OCS should hold the audit report in confidence.

The sole issue to be determined in this appeal is whether, in the circumstances, the OSC's decision that section 153 of the *Securities Act* applies and prevails over the *Act* should be upheld.

After the appeal was transferred to the adjudication stage, I sent a Notice of Inquiry to the OSC, outlining the facts and issues and seeking written representations. The OSC submitted representations and, after reviewing them, I determined that it was not necessary to hear from the appellant prior to making my decision on the issues raised in this appeal.

RECORD:

The record remaining at issue in this appeal is an undated 25-page Audit Report prepared by the OSC on the operation of the IDA.

DISCUSSION:

PRELIMINARY ISSUE:

As a preliminary issue, the OSC questions whether I have jurisdiction to hear this appeal. It states:

> It is respectfully submitted that section 153 of the *Securities Act*, and section 67(1) of the [*Act*] operate to deprive the Information and Privacy Commissioner of jurisdiction to hear this appeal. Section 67(1) of the *Act* limits the jurisdiction of the [*Act*] in those circumstances where another Act contains a confidentiality provision that specifically references the [*Act*]…
>
> …
>
> The Notice of Inquiry dated May 21, 2002 indicated that the IPC [Information and Privacy Commissioner] was satisfied that section 153 of the *Securities Act* was a confidentiality provision which takes precedence over the [*Act*].
>
> The IPC specifically recognized this interrelationship in its Order PO-1930. There the IPC said that: "[t]here 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 [*Act*]."
>
> It is respectfully submitted that there is no provision in section 67 or elsewhere in the [*Act*], that suggests that only certain sections of the [*Act*] are overridden by the provisions of the *Securities Act* when the conditions of section 67 of the [*Act*] are met. In other words, the *Securities Act* takes precedence over the [*Act*] in its entirety, including the [*Act*]'s appeal provisions found in sections 50 through 54 of that *Act*.
>
> Section 153 states that the [OSC] can share information with certain enumerated entities despite [the *Act*]. It also states that, if the [OSC] determines that information so received should be maintained in confidence, then this information is exempt from disclosure under [the *Act*]. It is the [OSC]'s determination, under section 153 of the *Securities Act* that exempts the relevant information from disclosure, not the operation of [the *Act*].
>
> In this case, the [OSC] operating under the jurisdiction of the *Securities Act*, used its discretion to determine that certain information that it has in its possession

> should remain confidential. It is respectfully submitted that if the appellant wishes to appeal the [OSC]'s Determination, the appropriate recourse is to the appeal provisions of the *Securities Act* regarding appeals of [OSC] decisions.

After referring to section 9(1) of the *Securities Act*, which provides that entities directly affected by a final decision of the OSC may, in certain circumstances, appeal to the Divisional Court, the OSC states:

> It is respectfully submitted that the issues at the heart of this appeal, as highlighted by the questions raised in the Notice of Inquiry by the IPC, amount to a review of the OSC's interpretation of its own statute and the appropriate use of it's discretionary authority under the *Securities Act*. It is respectfully submitted that the Divisional Court, and not the IPC, is the appropriate forum for a review of this nature.

I do not accept the OSC's position on this jurisdictional issue.

Section 67(1) of the *Act* specifies that the *Act* prevails over a confidentiality provision found in any other statute unless section 67(2) of the *Act* or the other legislation specifically provides otherwise. Section 67(2) lists confidentiality provisions that prevail over the *Act* and does not apply here.

Section 153 of the *Securities Act* states that "information so received by the Commission *shall be exempt* from disclosure under [the *Act*]" (emphasis added). This wording parallels the language of the *Act* by referring to information being exempt from disclosure. Therefore, in my view, section 153 does not purport to exclude records from the operation of the *Act*, including its appeal provisions, but rather to exempt them from disclosure.

Even if section 153 is interpreted more broadly as indicating that the *Act* does not apply to records found to fall under it, I have concluded that this office has jurisdiction to consider whether the applicability of this section has been established.

In Order 9, former Commissioner Sidney B. Linden considered the manner in which the predecessor provision to section 67(1) should be interpreted. He explained his approach as follows:

> ... Where, as in this case, an institution purports to remove itself from the ambit of the *Act* through the use of a "confidentiality provision" in another act, it is my responsibility to scrutinize the provision of that other act to ensure that both the subject matter and the person who would be releasing the requested information under that act (i.e. the head of the institution) are covered by the "confidentiality provision" relied on.
> ...
>
> While the head of an institution must determine at first instance whether a particular statutory provision is a "confidentiality provision" precluding access to the requester, I, too, must be assured of the relevance and application of the

> provision upon receipt of an appeal. I regard this duty as fundamental to the effective operation of the *Freedom of Information and Protection of Privacy Act, 1987* and the principles of providing a right of access to information and protecting the privacy of individuals.
>
> [See also Order P-931]

Other orders have also addressed whether this office has jurisdiction to review decisions of this nature, often in the context of determining whether an adjudicator can require an institution to produce the records in order to review the institution's decision on jurisdiction. For example, in Order P-623, which was upheld in *Ontario (Minister of Health) v. Big Canoe* [1995] O.J. No. 1277 (C.A), affirming (June 29, 1994), Toronto Doc. 111/94 (Div. Ct.), Adjudicator Holly Big Canoe made the following determination regarding jurisdiction in an appeal involving mental health records. She found that:

> The first issue which arises, then, is whether the words "This *Act* does not apply" in section 65(2) of the *Act* mean that the whole *Act* does not apply to these records, including the appeal process and section 52(4) of the *Act*.
>
> Section 1(a)(iii) of the *Act* provides that one of the purposes of the *Act* is to provide a right of access to information in accordance with the principle that "decisions on the disclosure of government information should be reviewed independently of government". In keeping with this principle, the Legislature created an independent, expert review authority (the Commissioner) to determine issues relating to access to information.
>
> The appeal provisions of the *Act* provide that any decision of the head of an institution relating to access to records can be appealed by the requester to the Commissioner. The Commissioner (or his delegate) has the statutory duty to dispose of the issues raised in an appeal, and makes decisions in respect of an appeal by issuing an order pursuant to section 54(1) of the *Act*, which states:
>
> > After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.
>
> In my view, section 65(2) can apply only to the records which fall within the scope of that section. While the Legislature clearly intended that these records should fall outside the purview of the *Act*, I do not believe that the Legislature intended to have the threshold issue of whether or not records fall within the scope of this provision determined by a non-independent body, such as the Ministry, whose decision would not be reviewable.
>
> While the Ministry must determine at first instance whether section 65(2) applies precluding access to the requester, the Commissioner, too, must be satisfied of the relevance and application of the provision to the records upon receipt of an appeal. This duty of the Commissioner is fundamental to the effective operation

> of the *Act*, the principle of providing a right of access to information under section 1(a), and the principle that decisions on the disclosure of government information should be reviewed independently of government under section 1(a)(iii).
>
> In my view, notwithstanding a claim by the Ministry that the records in question fall within the scope of section 65(2), the Commissioner (or his delegate) does have the power to compel the production of records claimed to be covered by section 65(2).
>
> This power to compel initially would be exercised for the limited purpose of determining whether or not the records fall within the scope of section 65(2) of the *Act*. If, having reviewed the records, I determine that the Ministry's claim is correctly made, pursuant to section 65(2) the records would be returned to the Ministry and the appeal would be closed, since I would not have the jurisdiction to conduct a further inquiry.
>
> However, if I determine that the Ministry's claim is not validly made with respect to some or all of the records (i.e., that section 65(2) does not apply to some or all of the records), then I will be required to proceed with the inquiry and determine the application of the *Act* to the records.

(See also Interim Order P-1636 (Reconsideration Order R-990001), which involved the OSC))

The analysis in Order P-623 deals with a different jurisdictional issue (i.e. section 65(2) rather than section 67(1)). However, in my view the principle articulated in that order, that decisions about the accessibility of a record under the *Act* should be reviewed independently of government and the related view that the appeal provisions of the *Act* are available to review them, are equally applicable to my consideration of the relationship between sections 67(1) of the *Act* and section 153 of the *Securities Act*, as they apply to the audit report at issue in this appeal.

Several decisions of the courts, in other contexts, have confirmed that a tribunal has a duty to decide whether or not its home statute applies [see, for example, *Morgan v. Windsor Roman Catholic Separate School Board* (1979), 29 O.R. (2d) 100 (Div. Ct.) and *Blue Mountains (Town) v. Canadian Development Management Corp.*, [2002] O.J. No. 2497 (Sup. Ct.)].

Adopting the approach originally articulated by former Commissioner Linden in Order 9, and applied in subsequent orders of this office, I find I have a statutory responsibility under the *Act* to scrutinize section 153 of the *Securities Act* and the surrounding circumstances of this appeal, and to assure myself that it has been properly applied by the OSC in the context of the audit report at issue in this appeal. I have this responsibility, regardless of whether or not an appeal to the Divisional Court may be available under the *Securities Act*, because the appellant has made an otherwise valid request under the *Act*.

SECTION 153 OF THE *SECURITIES ACT*

In Order PO-1930, I examined section 153 of the *Securities Act* and its impact on section 67(1) of the *Act*. I stated:

> 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*."

I then interpreted the requirements of section 153 of the *Securities Act* as follows:

> 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 will apply this same test to determine whether or not the audit report at issue in this appeal fits within the criteria set out in section 153 of the *Securities Act*.

Is the IDA a self-regulating body or organization?

The OSC refers to Order PO-1930 in support of the position that this office has determined that the IDA is a self-regulating organization for the purpose of this section. Based on the analysis in Order PO-1930, I find that the IDA is a self-regulatory organization for the purpose of section 153 of the *Securities Act*, and that 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 OSC submits that the audit report "contains mostly information that was received by the [OSC] from the IDA as well as analysis that was provided by [OSC] staff to the IDA."

In the Notice of Inquiry, I asked the OSC to respond to the following specific questions concerning this second requirement of the section:

> Was the information and/or the record "received by the Commission" for the purpose of section 153 of the *Securities Act*? In particular, why does section 153 refer to circumstances where the Commission may "**provide information to and receive information from** other securities or financial regulatory authorities" in one portion of that section, and specify that "any information so **received**" shall be exempt under the *Act* in another portion of that section?

The OSC responded by stating:

> … there is no requirement in section 153 that the relevant information must be received for a particular purpose. Section 153 states: "any information **so received**". The words "so received" refer to the preceding clause of that sentence, that being, any information which the [OSC] provides to or receives from other securities or regulatory authorities and so forth. The words, "so received" can be properly interpreted to mean any information in the hands of the OSC.
>
> This is a sensible interpretation because it is only information in the hands of the [OSC] that is subject to the [*Act*]. If information was provided by the [OSC] to another agency, of which the [OSC] did not have a copy, the [OSC] would not be required to provide this information in response to a [Freedom of Information] request because that information is not in the control of the institution. Similarly, the [OSC] cannot dictate to other agencies, what information they can release once the information is provided. It would, therefore, be inappropriate for the clause in question to state any information "so received or **so provided**" shall be exempt. It is respectfully submitted that the wording is appropriate given that it is only information that is in the control of the institution that is subject to [the *Act*]. [OSC's emphasis].

I do not accept the position taken by the OSC.

The wording of section 153 is clear. The first portion of the section permits the exchange of information between the OSC and a number of other bodies, despite the provisions of the *Act*. In my view, the policy rationale for this first portion is to allow the OSC and these other related bodies to exchange information notwithstanding the mandatory requirements in the *Act* prohibiting disclosure of certain personal information or third party business information.

The second portion of section 153 is also clear, and deals with a different but related circumstance; specifically, what type of information and in what circumstances the OSC may decide to exempt from disclosure in response to a request under the *Act*. In this regard, as long as the other requirements of section 153 have been satisfied, the OSC may exempt from disclosure information **received** by the OSC from the various types of organizations listed in that section.

I do not accept the OSC's argument that the phrase "any information so received" includes all information that the OSC has provided to other agencies. This would require me to read in the phrase "or so provided" to the wording of section 153, which would, in my view, expand the

application of the section in a manner not supported by the actual wording of the provision. The first part of the section uses the phrase "provide information to and receive information from", and the latter portion uses only the words "any information so received". The two portions are drafted differently and, in my view, must be interpreted differently. Furthermore, if I were to accept the OSC's position, it would suggest that the OSC could utilize section 153 to remove any information in its custody or control from coverage under the *Act* simply by providing copies of the information to one of the types of organizations listed in that section and making a determination that this information should be maintained in confidence. In my view, section 153 was not intended to have this type of broad application. Rather, it was designed to provide a limited zone of confidentiality to enable the OSC and certain other identified classes of organizations to effectively discharge their regulatory responsibilities, while at the same time holding the OSC, as a scheduled agency under the *Act*, accountable for the general access and privacy responsibilities outlined in the statute.

That being said, I do accept that the second portion of section 153 could have application in circumstances where records containing information were not directly received from one of the organizations listed in the section, but nonetheless include information that would reveal the "information so received". A number of previous orders have established that information contained in a record would reveal information "supplied" by a third party, if its disclosure would permit someone to draw accurate inferences with respect to information which had actually been supplied by the third party (e.g. Orders P-218, P-839, P-1000 and P-1231). In my view, the same principles would appropriately apply to the second portion of section 153. To the extent that the disclosure of the record would reveal information "received from" one of the identified organizations, this information would be exempt from disclosure by virtue of section 153 of the *Securities Act* in the same manner as if the information were supplied directly by one of the types of organizations listed in the section.

As far as the audit report in this appeal is concerned, the OSC submits that it "contains mostly information that was received by the [OSC] from the IDA as well as analysis that was provided by [OSC] staff to the IDA." The OSC thereby acknowledges that some portions of the report contain information that was not "received from" the IDA. As far as the rest of the report is concerned, the OSC does not identify what portions contain information received from the IDA.

The record is an audit report, which was clearly prepared by staff of the OSC. As such, I find that the record itself was not "received by the OCS" for the purpose of section 153 of the *Securities Act*.

I have reviewed the report in detail. It consists in large measure of an analysis and review of the IDA conducted by the OSC. It includes subject matters common to reports of this nature, including the objectives of the audit, assessments based on interviews and analysis, and a series of observations and recommendations. Based on my review and the representations provided by the OSC, I am not persuaded that any of the audit report's content would reveal information received from the IDA.

Accordingly, I find that the OSC has failed to establish the second requirement of section 153 of the *Securities Act*.

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

The OSC provided me with a copy of an OSC Determination dated October 26, 2001, which deals with the appellant's request for access to the audit report under the *Act*. The Determination refers to section 153 of the *Securities Act*, and identifies that the IDA is a self-regulatory body. The resolution goes on to state:

> NOW THEREFORE, IT IS DETERMINED that:
>
> The request for disclosure of the Audit Report, the Related Correspondence and the Consultant's Report is denied in full and all of such information shall continue to be held by [the OSC] in confidence.

Had the second requirement of section 153 been established with respect to the audit report, in my view, the Determination made by the OSC would have been sufficient to satisfy the third requirement of section 153. However, in light of my findings that the audit report was not received by the OSC from the IDA, I find that the Determination is not sufficient to bring the record within the scope of section 153 of the *Securities Act*.

In summary, I find that the three requirements of section 153 of the *Securities Act* have not been established with respect to the audit report. Accordingly, section 67(1) of the *Act* does not apply, and I will order the OSC to make an access decision under the *Act* concerning the audit report. If the appellant does not agree with the access decision, once issued, she will be entitled to appeal that decision to this office, in accordance with section 50(1) of the *Act*.

ORDER:

1. I order the OSC to issue an access decision with respect to the audit report to the appellant under the *Act*, treating the date of this order as the date of the request, in accordance with the provisions of sections 26, 28 and 29 of the *Act*.

2. I further order the OSC to provide me with a copy of the access decision referred to in Provision 1.

Original signed by: July 24, 2002
Tom Mitchinson
Assistant Commissioner