



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER PO-2411-I**

**Appeal PA-050065-2**

**Ontario Securities Commission**



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## **BACKGROUND:**

The Ontario Securities Commission (OSC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about penalty recommendations made by staff of the Investment Dealers' Association (IDA). The requester drew the OSC's attention to a comment in a document titled *OSC Examination of the Corporate Governance and Organization of the Investment Dealers Association of Canada and Review of the 1999 Member Regulation Self-Assessment July 2000*, indicating that "out of the 17 cases forwarded to the [Senior Vice President], 12 recommendations [by Enforcement Counsel] were changed". The requester sought access to:

... the records identifying the 12 aforementioned cases, the original penalty enforcement recommendations and the final recommendations.

The OSC identified one record responsive to the request and denied access to it under section 153 of the *Securities Act*, which provides an exemption from the right of access established by section 10(1) of the *Act*. The record is described in correspondence from the OSC as having been "provided to a member of the OSC's Enforcement Branch by a member of the IDA's Enforcement Branch in the course of a review conducted by the OSC of the IDA's operations, including its enforcement capacity". The review is summarized in the report referred to in the request.

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

Upon receipt of the appeal, this office forwarded a Confirmation of Appeal to the OSC, which included a request for a copy of the responsive record. The responsive record has not been provided. As explained in more detail below, counsel for the OSC has written to this office arguing that it is not required to produce the record because, in conjunction with section 67(1) of the *Act*, section 153 of the *Securities Act* "prevails over" the *Act*.

The matter is now at the inquiry stage of the appeal process. No Notice of Inquiry has yet been sent to the OSC. Instead, I am making a ruling on the production of the responsive record under section 52(4) of the *Act*.

Briefly stated, I have decided that section 153 of the *Securities Act*, read in conjunction with section 67(1) of the *Act*, does not oust my jurisdiction to conduct an inquiry under the *Act*. Nor does it limit the powers conferred on this office by the *Act* in relation to conducting an inquiry, including the power to require production of records under section 52(4) of the *Act*. Because I have concluded that a copy of the record is required for the purpose of adjudicating the appeal, I am ordering the OSC to provide a copy to this office.

## DISCUSSION:

### Jurisdiction

OSC litigation counsel sent correspondence to the IPC on June 2, 2005. On behalf of the OSC, counsel asserted that Orders PO-1930 and PO-1982 support the position that “pursuant to section 67(1) of the [Act] section 153 of the *Securities Act* is a ‘confidentiality provision’ that *prevails over all of the provisions* of [the Act]” [my emphasis]. I note that in the appeals leading to the two orders referred to by OSC litigation counsel (Orders PO-1930 and PO-1982), the responsive records were in fact produced to this office.

Section 67(1) of the *Act* reads:

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:

Despite the Freedom of Information and Protection of Privacy Act, the Commission may provide information to and receive information from the following entities, both in Canada and elsewhere, and the information received by the Commission is exempt from disclosure under that Act if the Commission determines that the information should be maintained in confidence:

1. Other securities or financial regulatory authorities.
2. Stock exchanges.
3. Self-regulatory bodies or organizations.
4. Law enforcement agencies.
5. Governmental or regulatory authorities not mentioned in paragraphs 1 to 4.
6. Any person or entity, other than an employee of the Commission, who provides services to the Commission.

Section 52(4) of the *Act* states:

In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

In Order PO-2029, former Assistant Commissioner Tom Mitchinson considered the issue of the jurisdiction of this office to hear appeals of OSC matters for which the exemption from the right

of access found at section 153 of the *Securities Act* is invoked. In that matter, the OSC submitted, as in the present case, 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.

Former Assistant Commissioner Mitchinson rejected that submission and found that:

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.* [My emphases.]

I agree with the former Assistant Commissioner's interpretation and adopt it for the purposes of this appeal. In my view, the opening words “[d]espite the Freedom of Information and Protection of Privacy Act” in section 153 of the *Securities Act* cannot be construed as meaning that the Act has no application.

This view is reinforced by the ruling of the Divisional Court in *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773, which found that similar wording in a public disclosure provision of the *Municipal Elections Act (MEA)* did not oust the right of access to records under the counterpart of the Act that applies to municipal institutions, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. Section 88(5) of the MEA states that “[d]espite anything in [MFIPPA], documents and materials filed with or prepared by the clerk ... under [the MEA] are public records and, until their destruction, may be inspected by any person at the clerk's office....” The Court found that this provision works in conjunction with an exception to the personal information exemption at section 14(1) of MFIPPA because it makes the MEA “an Act of Ontario... that expressly authorizes disclosure” of

the requested records within the meaning of *MFIPPA* section 14(1)(d). The records were therefore available in response to a request *under MFIPPA*.

Similarly, section 153 of the *Securities Act* operates together with the right of access and the exemptions in the *Act* to add a further exemption that forms part of the access scheme established under the *Act*. The effect is that the OSC is given authority to withhold records from disclosure to a requester where an access request has been made under the *Act*. In other words, section 153 of the *Securities Act* is an exemption from the right of access under the *Act* in the same manner as the exemptions that actually appear in the *Act*, found at sections 12 through 22.

Therefore, like any other exemption in the *Act*, section 153 prevails over the right of access if it is found to apply, but in so doing, it does not displace the operation of the entire *Act*. It does not remove the oversight function of this office, nor any of its appeal powers, including those relating to the production of records under section 52(4) of the *Act*.

Accordingly, I find that I have jurisdiction to conduct an inquiry into whether section 153 of the *Securities Act* applies, and to order production of the record at issue in this appeal for that purpose.

### **Requiring Production of the Record**

With regard to the question of whether production should be ordered in this instance, I note that in Order 9, former Commissioner Sidney Linden commented on the role of this office in situations involving a confidentiality provision in another statute:

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.

Furthermore, I do not accept that a "confidentiality provision" applies to preclude the application of the Act without also ensuring that the provision in question relates to the specific records sought by the requester. In many cases I will not be able to formulate such a conclusion without first viewing the record and

determining whether it contains the kind of information covered by the "confidentiality provision". *Mere reliance on the assertions of the institution, without the right to inspect the record, cannot possibly inspire confidence on the part of the public that the principles enshrined in the Act have been protected.* [Emphasis added.]

Former Commissioner Linden found that section 52(4) of the *Act* gives the Commissioner the authority to examine a record that an institution claims to be protected by a confidentiality provision in another statute in order to determine *on a case by case basis* whether the record contains the kind of information covered by that provision.

The Court of Appeal has also held that section 52(4) of the *Act* empowers the Commissioner to order the production of any document, recognizing this as a procedural mechanism necessary to decide matters of substance, including situations in which it is argued that the records fall outside the scope of the *Act* [see *Ontario (Minister of Health) v. Holly Big Canoe* [1995] O.J. No. 2477, affirming (29 June 1994), Toronto 11/94 (Ont. Div. Ct.)].

In Order PO-2029, former Assistant Commissioner Mitchinson found that:

the principle articulated in [*Big Canoe*], 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 [record] at issue in this appeal.

In this case, the OSC refers to a resolution of its members, which has been provided to this office, indicating that "the IDA is a regulatory body within the meaning of section 153 of the [*Securities Act*], and any documents held by [the OSC] relating to the request were provided to it by the IDA". The resolution goes on to state that "the request for disclosure is denied in full and all such information shall continue to be held by the [OSC] in confidence". The OSC appears to assert that this is a *per se* fulfillment of the requirements of section 153. That is, in fact, the substantive issue to be determined in this appeal.

For the purpose of determining this issue, the OSC asserts that "... a review of the Record would not assist [this office] in confirming that section 153 of the *Securities Act* exempts it from disclosure under [the *Act*]." This assertion is apparently made because, as stated later in the OSC's letter, "[a] review of the Record ... does not reveal its origins and thus would not be of assistance in determining whether it is properly exempt from disclosure".

I reject this argument. Under the *Act*, this office is charged with the responsibility of determining appeals from access decisions by institutions, and as previously noted, section 52(4) of the *Act* empowers the Commissioner to "... require to be produced to the Commissioner ... any record that is in the custody or under the control of an institution". The normal practice of

this office is to require production of all records at issue in access appeals in order to determine whether the exemptions claimed for them are actually applicable. The Commissioner does not make this determination on the basis of bald assertions such as those advanced in this case. In many cases, the records themselves provide crucial evidence in this regard. Such evidence is not limited to revealing the origins of the record. The interaction of the contents of a record and an exemption claimed to apply to it may be considerably more complex and subtle than an analysis of its origin.

Although not determinative here, I also note that in Order PO-2039, former Assistant Commissioner Mitchinson found that, contrary to the arguments and assertions of the OSC, the requirements of section 153 of the *Securities Act* had *not* been established for the record at issue in that appeal.

In my view, therefore, the circumstances of this appeal strongly support the issuance of an order that the OSC produce a copy of the record to this office for the purpose of adjudicating this appeal.

### **Choice of Forum**

Before concluding my analysis, it is necessary to refer to one further argument advanced by the OSC, to the effect that the appropriate route of appeal from the Ministry of Finance's response to the appellant's request is through the Divisional Court as set out in section 9(1) of the *Securities Act*. This section reads:

A person or company directly affected by a final decision of the Commission, other than a decision under section 74, may appeal to the Divisional Court within thirty days after the later of the making of the final decision or the issuing of the reasons for the final decision.

In the analysis above, I found that I have jurisdiction to conduct an inquiry in this matter. Moreover, as noted by former Commissioner Linden in Order 9, and former Assistant Commissioner Mitchinson in PO-2029, I also 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 record at issue in this appeal. As noted by former Assistant Commissioner Mitchinson in PO-2029, 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*".

In my view, the words "exempt from disclosure under that Act" in section 153 signify that the appeal processes for determining whether the exemption applies should be those set out in the *Act*. In addition, because the *Act* provides a specialized appeal process designed to deal with appeals from denials of access under the *Act*, an appeal under the *Act* is a more appropriate forum to deal with the issue than an appeal under section 9(1) of the *Securities Act*.

Accordingly, I will order the OSC to produce the record to me.

**ORDER:**

I order the OSC to provide me with all records in its custody or under its control which are responsive to the request on or before **August 5, 2005**.

Original signed by:

\_\_\_\_\_  
John Higgins  
Senior Adjudicator

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**July 28, 2005**