



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2454**

**Appeal PA-050065-2**

**Ontario Securities Commission**



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## **NATURE OF THE APPEAL:**

The Ontario Securities Commission (OSC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), seeking access to information about penalty recommendations made by staff of the Investment Dealers' Association (IDA).

The request referred 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 17 cases "... 12 recommendations [by IDA staff] were changed". The requester sought access to 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 requester, now the appellant, appealed the OSC's decision.

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. However, the OSC did not provide a copy of the responsive record to this office, and submitted that section 153 of the *Securities Act* prevailed over the entire *Act*, thus excluding the record from the operation of the *Act*, including the Commissioner's appeals process.

I dealt with this issue in Order PO-2411, where I found that my jurisdiction to conduct this inquiry is not ousted by the operation of section 153 of the *Securities Act*, among other provisions. I ordered the production of the responsive record for the purpose of adjudicating this appeal and the OSC complied by providing a copy to me.

I commenced the adjudication stage of the appeal by issuing a Notice of Inquiry to the OSC, initially, seeking representations on specific issues, including the application of section 153 of the *Securities Act* to the responsive record in this appeal. The OSC responded with representations. I then sent a Notice of Inquiry to the appellant, along with the non-confidential portions of the OSC's representations, and invited his representations on the issue of section 153 of the *Securities Act*. The appellant then provided representations.

## **RECORD:**

The responsive four-page record is entitled, "Prosecution Stats".

## **DISCUSSION:**

### **EXCHANGE OF REPRESENTATIONS**

In the appellant's representations, he questions the fact that parts of the OSC's representations were not provided to him. As explained in the covering letter sent to the appellant with the Notice of Inquiry, the "non-confidential" portions were provided to him. I was satisfied that the portions withheld could reveal part of the contents of the record and other confidential information, and that the parts of the OSC's representations that were disclosed were sufficient to permit the appellant to address the possible application of section 153 in a substantive way, which he did in his representations.

### **SECTION 153 OF THE SECURITIES ACT**

The OSC claims that section 153 of the *Securities Act* applies, and on that basis, it is not required to disclose the record under the *Act*.

Section 153 of the *Securities Act* states:

Despite the *Freedom of Information and Protection of Privacy Act*, the [OSC] may provide information to and receive information from the following entities, both in Canada and elsewhere, and the information received by the [OSC] is exempt from disclosure under that Act if the [OSC] 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 [OSC], who provides services to the [OSC].

In Order PO-1930, former Assistant Commissioner Tom Mitchinson set out the following requirements for the applicability of section 153. The OSC must establish that:

1. the IDA [Investment Dealers Association] is a self-regulatory body or organization;
2. the information in the record[s] at issue was received by the OSC from the IDA; and
3. the OSC had determined that the information in the records should be maintained in confidence.

I agree with the former Assistant Commissioner's interpretation and adopt it for the purposes of this appeal. In order to rely on section 153 of the *Securities Act*, the OSC must satisfy all three of the requirements set out in Order PO-1930.

**1. *Is the IDA a self-regulatory body or organization?***

In Order PO-1930, former Assistant Commissioner Mitchinson accepted that the IDA is a self-regulatory body or organization based on the OSC's IDA Recognition Order of October 27, 1995.

The OSC's representations state that its October 27, 1995 order recognizing the IDA as a self-regulatory body was made pursuant to section 21.1(1) of the *Securities Act* and that it remains in effect. The OSC provided a copy of this recognition order with its representations in this appeal.

The representations of the appellant do not address this issue.

Based on the information provided to me by the OSC, I find that the IDA is a self-regulatory body or organization within the meaning of section 153 of the *Securities Act* and the OSC has satisfied the first requirement under that section.

**2. *Was the record at issue in this appeal received by the OSC from the IDA?***

The OSC has provided confidential representations on the creation of the record and its receipt by the OSC from the IDA. I am satisfied that the IDA prepared the record and provided it to the OSC, and it was therefore "received" by the OSC from the IDA.

Accordingly, I find that the OSC has satisfied the second requirement under section 153 of the *Securities Act*.

**3. *Did the OSC "determine" that the information in the records should be maintained in confidence?***

With its representations, the OSC provided a copy of a Resolution of the members of the OSC dated March 23, 2005 to the effect that "the request made to the Ministry of Finance for disclosure of documents relating to 12 specific enforcement matters administered by the IDA is denied in full and all such information shall continue to be held by the [OSC] in confidence." The OSC's representations indicate that the determination reflected in the March 23, 2005 Resolution has not been amended or revoked and remains in full force and effect.

With respect to this issue, the appellant makes several related arguments. He states:

A board Resolution is a private law mechanism utilized for the ongoing management of a corporation's affairs. The OSC Annual Report to the Minister of Finance explains on page 9, paragraph 2 that:

The members of the Commission also serve as the corporation's Board of Directors and are responsible for overseeing the management of the financial and other affairs of the Commission.

I submit that a Resolution is not a public law mechanism to be utilized behind closed doors as a means of exercising a statutory power pursuant to s. 153 of the *Securities Act*.

...

Can the OSC corporate resolution be sufficient to decide such an important issue such as information sharing between the IDA and the OSC and the public?

The appellant also cites, among other provisions, section 3.6 of the OSC's By-Law # 1, which provides that "the powers of the Board may be exercised by resolution passed at a meeting at which a quorum is present or by resolution in writing signed by all directors entitled to vote on that resolution at a meeting of the Board." In this case, it is evident that the resolution was passed at a meeting of the members, who also function as directors.

Finally, the appellant's representations suggest that a hearing is required before the OSC can make a valid "determination" pursuant to section 153 of the *Securities Act*. The appellant states:

The Ontario Securities Act s. 7(2) states the following:

- The Secretary,
- (b) when authorized by the Commission, may sign a decision made by the Commission as a result of a hearing;
- (c) may certify under his or her hand a decision made by the Commission or a document, record or thing used in connection with a hearing by the Commission if certification is required for a purpose other than that stated in subsection 5(3);

The OSC resolution (para. 5) states that the Resolution was "passed by all of the Members of the Commission at a meeting of the Members held on March 22, 2005..."

Does a meeting of the OSC members constitute a Hearing?

Was the Hearing open to the public?

Was there any announcement of such a Hearing?

Is there any public record of the Hearing?

In this regard, the appellant also refers to the OSC's explanatory note for the addition of section 153 to the *Securities Act*, which "... enhances the ability of the OSC to duly administer Ontario securities law and regulate the capital markets in Ontario". He also raises questions about whether the resolution is enforceable.

I have considered the parties' representations. I am satisfied that the resolution of March 22, 2005 is a perfectly valid way for the OSC to "determine" that the record should remain confidential. In my view, a determination of this kind is clearly within the Board's described powers of "overseeing the management of the financial and other affairs" of the OSC, and the by-law authorizes such matters to be dealt with by resolution. I also note that this by-law is authorized under section 3.2 of the *Securities Act*, which empowers the OSC to make by-laws "governing the administration, management and conduct of the affairs of the Commission".

By contrast, there is nothing in the *Securities Act* nor any other persuasive authority presented to me that would support the view that, outside the context of an actual hearing, a determination by the OSC that a document should remain confidential under section 153 could not be made by resolution of the Board. In my view, the question of enforceability of the resolution, raised by the appellant, is not determinative of this issue. I will therefore not pursue it further.

Based on my review of the representations, I am satisfied that the OSC has "determined" that the information contained in the records should be maintained in confidence. Therefore, the third requirement of section 153 has been met.

To summarize, I find that all three requirements in section 153 of the *Securities Act* have been satisfied, and accordingly, I find that the exemption from disclosure under the *Act* provided by that section applies in this case. It is therefore not necessary for me to consider whether the record is exempt under other provisions of the *Act*.

**ORDER:**

I uphold the decision of the OSC.

Original Signed by: \_\_\_\_\_  
John Higgins  
Senior Adjudicator

February 28, 2006 \_\_\_\_\_