

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-4394

Appeal PA21-00280

Financial Services Regulatory Authority of Ontario

May 19, 2023

**Summary:** The Financial Services Regulatory Authority of Ontario (FSRA) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records including the checklist to be followed by employees when carrying out inspections, audits or examinations of licensed mortgage brokerage firms. FSRA granted partial access to responsive records withholding information under the discretionary law enforcement exemption in section 14(1)(c) (reveal investigative techniques and procedures) of the *Act*. In this order, the adjudicator upholds FSRA's decision and dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(1)(c).

### OVERVIEW:

[1] The Financial Services Regulatory Authority (FSRA or the authority) notes that in June 2019, its Chief Executive Officer (CEO) assumed the regulatory responsibilities previously held by Financial Services Commission of Ontario (FSCO). At issue in this appeal are records related to procedures and policies followed by FSCO employees when carrying out inspections, audits and, examinations of licenced mortgage brokerage firms. FSRA notes that prior to June 2019, the Superintendent of FSCO was the provincial regulator of financial services, including the mortgage brokering sector under the *Mortgage Brokerages, Lenders and Administrators Act, 2006*<sup>1</sup> (the *MBLAA*). Under

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<sup>1</sup> S.O. 2006, c. 29.

the *MBLAA* the CEO can impose sanctions including licence revocation and administrative monetary penalties for contraventions.<sup>2</sup>

[2] FSRA received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to two categories of records: job descriptions for the positions of Director and Executive Director of Licensing and Market Conduct Division of FSCO between 2013 to 2017; and the checklist for inspections, audits and examinations to be followed by FSCO employees when carrying out an inspections, audits and examinations of licensed mortgage brokerage firms.

[3] FSRA advised the requester that the Ministry of Finance (the ministry) would have the two FSCO job descriptions and that he should make a separate request for access to the ministry for those records. FSRA stated that it would only address the request for the FSCO checklist information.<sup>3</sup> FSRA issued a decision granting partial access to 11 records that it identified as responsive to the request for FSCO checklist for inspections, audits and examinations of licensed mortgage brokerage firms. FSRA disclosed two records in full and relied on the discretionary law enforcement exemption in section 14(1)(c) of the *Act* to withhold parts of the remaining responsive records.

[4] The requester, now the appellant, was not satisfied with the FSRA's decision and appealed to the Information and Privacy Commissioner of Ontario (the IPC).

[5] Mediation was not successful and the appeal was transferred to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry. The original adjudicator assigned to this appeal invited representations from FSRA and the appellant, which were shared in accordance with the IPC's *Code of Procedure*. The original adjudicator also sought reply representations from the authority.

[6] At this point, I was assigned to the appeal and I invited sur-reply representations from the appellant.

[7] In this order, I uphold FSRA's reliance on section 14(1)(c) and dismiss the appeal.

## **RECORDS:**

[8] There are 145 pages that comprise the nine records at issue, which are the following:

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<sup>2</sup> FSRA notes that the CEO's regulatory sanctions are subject to review by an administrative tribunal: the Financial Services Tribunal ("FST"). It also notes that prior to 2019, the Superintendent of FSCO could impose similar sanctions to its CEO.

<sup>3</sup> According to the mediator's report, the appellant agreed to follow-up with the Ministry of Finance and therefore the first part of the request is not at issue in this appeal.

<b>Withheld</b>	<b>Record Description</b>	<b># of pages</b>
In part	Examination process map	5
In part	Planning process overview	4
In part	Planning memorandum guide	10
In part	Planning memorandum	9
In part	Policies and procedures program	22
In part	Mortgage broker program	41
Fully	Exam planning memo template	6
In part	MB exam program (standard)	23
In part	MB exam program (sweep program)	26

## **ISSUES:**

- A. Does the discretionary exemption at section 14(1)(c) related to law enforcement activities apply to the records at issue?
- B. Did the institution exercise its discretion under section 14(1)(c)? If so, should the IPC uphold the exercise of discretion?

## **DISCUSSION:**

### **Issue A: Does the discretionary exemption at section 14(1)(c) related to law enforcement activities apply to the records at issue?**

[9] FSRA relies on section 14(1)(c) to withhold the information at issue. Based on my reason below, I find the withheld information to be exemption. Section 14(1)(c) reads:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

[10] The exemption normally will not apply where the technique or procedure is generally known to the public.<sup>4</sup>

[11] The technique or procedure must be "investigative"; that is, it must be related to investigations. The exemption will not apply to techniques or procedures related to "enforcing" the law.<sup>5</sup>

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<sup>4</sup> Orders P-170, P-1487, MO-2347-I and PO-2751.

<sup>5</sup> Orders PO-2034 and P-1340.

## **Representations**

### *FSRA's representations*

[12] FSRA submits that the records at issue in this appeal contain procedures for its employees to follow when conducting inspections and examinations in order to enforce the *MBLAA* and its regulations and therefore, would fall under law enforcement. FSRA submits that disclosure of the withheld information would hinder its ability to effectively regulate licensed mortgage brokerage firms and would reveal investigative techniques and procedures currently in use or likely to be used by it.

[13] FSRA submits that in Order PO-2591, the adjudicator found that an examination by FSCO of a pension plan under section 98 of the *Pension Benefits Act*, constitutes an inspection and qualified as "law enforcement." In that order, the adjudicator noted that the IPC has found that "examinations that may turn up statutory violations which are then subject to regulatory prosecutions meet the definition of law enforcement."

[14] FSRA submits that under the *MBLAA*, the CEO may make inquiries and conduct examinations of the business and activities of each licensee to ensure that the licensee is

[15] complying with the requirements established under the *MBLAA*.<sup>6</sup> It notes that under section 30 of the *MBLAA* (Inquiries and examinations of licensees) an examination of a licensee would constitute a compliance review with an investigative report that may support a penalty or regulatory sanction imposition and could lead to a review before the Financial Services Tribunal (the FST). As a result, FSRA submits that this would qualify as law enforcement.

[16] FSRA submits that the documents at issue in this appeal are internal documents used to prepare and conduct examinations, reviews and audits of FSRA licensees. It notes that the findings of these inspections support and allow for an enforcement disposition where applicable. FSRA submits that it uses the questions, processes, procedures, and review points contained in the records at issue to investigate potential contraventions to the *MBLAA* and its attached regulations that could lead to enforcement actions. FSRA submits that the records contain components it still relies on to conduct its examinations. It submits that disclosure of this information would allow licensees to prepare for examinations in a manner that would not allow FSRA to assess their day-to-day compliance.

[17] FSRA submits that the specific questions, processes, procedures, and review points in the records are not made publicly available by it and are not posted on its website nor are these materials given to licensees in advance of an examination or audit. It submits that these are strictly internal materials to promote quality, comprehensiveness, and consistency in FSRA's examinations and audits.

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<sup>6</sup> An examination of a licensee under section 30 of the *MBLAA* would constitute a compliance review.

[18] FSRA submits that if it were to share its detailed questions, processes, procedures, and review points with a licensee, that licensee would be then able to prepare to respond to FSRA at the time of examination. It submits that this ability would prevent FSRA from assessing whether the licensee is being consistently compliant with its obligations under the legislation as opposed to simply preparing for the examination. It submits that FSRA has a mandate to assess the licensee's consistent compliance with the legislation, not its ability to prepare for the examination.

*The appellant's representations*

[19] The appellant submits that in order to determine whether section 14(1)(c) applies, I should look at whether the withheld information is confidential to FSRA and whether its disclosure would hinder FSRA's ability to effectively regulate licensed mortgage brokerage firms. Further, the appellant notes that I should also consider whether disclosure of the withheld information would reveal investigative techniques and procedures currently in use or likely to be used by FSRA.

[20] The appellant notes that in his request he sought information relating to FSCO's checklist and clarifies that he has no interest in FSRA's checklists. The appellant acknowledges that FSRA assumed FSCO's regulatory obligations and submits that this was after a great deal of criticism had been levelled against the regulatory oversight of the mortgage brokerage industry by FSCO.<sup>7</sup> The appellant submits that in light of this background, it is surprising that FSRA has not changed any of FSCO's methodology for carrying out inspections, audits and examinations of brokerages, brokers and agents.

[21] The appellant submits that FSRA overstates the confidentiality of its procedures and that its inspections are standard and routine and have been for years. The appellant suggests that FSCO's methodology is well-known within the mortgage brokerage industry. The appellant submits that as early as 2009, FSCO published a compliance checklist for brokerages, brokers and agents and set out a detailed list of the obligations of these regulated parties under the provisions of the *MBLAA*.<sup>8</sup> The appellant submits that there can be no assertion of confidentiality with respect to these obligations and the checklist brokerages, brokers and agents should follow in meeting their statutory/regulatory obligations.

[22] The appellant notes that the numbers of inspections, audits and examinations carried out by FSCO were published annually.<sup>9</sup> He submits that it is no secret as to how these inspections, audits and examinations are carried out as they are mandated by the *MBLAA* and its regulations. He also refers to a decision of the Financial Services Tribunal, *First Commonwealth Mortgage Corporation (FCMC)* and submits that it shows

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<sup>7</sup> The appellant submits that after a report by the Auditor General of Ontario, the government appointed a blue-chip panel to look into FSCO's practices which resulted in FSRA's assumption of these duties.

<sup>8</sup> The appellant attached a copy of the checklist published by FSCO for my review.

<sup>9</sup> The appellant attached a copy of the 2014-2015 annual report and refers to page 21 where it shows there were 105 inspections, audits and examinations in the previous year and 166 in the current year.

the exact methodology followed in one examination of a brokerage firm. The submits that *FCMC* illustrates that there is no confidentiality regarding the type of material that the brokerage firm was asked to produce, no confidentiality in the failures of the brokerage firm to meet its obligations under the *MBLAA* and no confidentiality to the penalty imposed by FSCO.

[23] The appellant submits that one can reasonably infer with more than a hundred inspections, audits and examinations of brokerages, brokers and agents were carried out by FSCO each year, that the FSCO methodology would become well-known within the mortgage industry.

#### *Reply representations*

[24] In its reply representations,<sup>10</sup> FSRA submits that the *Act* does not use qualifying criteria to describe how harm should factor into the section 14(1)(c) analysis. FSRA submits that it is sufficient to demonstrate that it can reasonably expect that disclosure of the withheld information would reveal investigative techniques or procedures that it presently has in use, and further discussion of (potential) harm to FSRA's efficacy of its investigation are either irrelevant or narrowly applicable.

[25] FSRA submits that similar to itself, FSCO regulated over 80,000 registrants across Ontario's financial sectors, including mortgages, life and auto insurance, and pensions. It submits that this scope has led both FSCO and FSRA to put a premium on its investigations being conducted with speed, accuracy, and efficacy. It submits that both organizations adopted risk-based methodologies to use specific, tailored, assessment criteria to help identify high-risk actors, monitor low-risk actors, and inform future decisions about escalation to enforcement – including matters that may eventually appear before the Financial Services Tribunal ("FST").

[26] FSRA submits that it is largely these risk assessment criteria that remains withheld and that it would be inaccurate to conflate the assessment criteria contained in the withheld information with the itemized list in the 2009 compliance checklist for mortgage brokerages, brokers & agents, referenced by the appellant, or the 2009 compliance checklist for mortgage administrators. It submits that these checklists do not refer to or reveal criteria that compliance/enforcement staff will use in inspections or examinations, and FSRA has not asserted confidentiality in these 2009 checklists which remain publicly available on FSCO's website.

[27] FSRA submits that there is no basis to the appellant's allegation that merely because inspections occurred this shows widespread awareness that this methodology of FSCO/FSRA became "well-known within the industry." It submits that this does not reflect the relatively limited number of inspections and examinations, about 166 in 2014 (across all sectors) compared to the 83,000 registrants that FSCO was regulating.

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<sup>10</sup> FSRA's reply submissions were supported by an affidavit sworn by the Senior Manager, Mortgage Broker Conduct, Special Situations in the Market Conduct Division of FSRA.

[28] FSRA also submits that the referenced FST decision *FCCM* discusses the eventual findings of FSCO, but does not divulge specific assessment criteria used.

[29] FSRA acknowledges the appellant submission that his only interest is “in FSCO’s checklists,” and submits that the reality is that there is no practical way to further distinguish or sever the past practices at FSCO from the present practices at FSRA in the withheld information. FSRA submits that as the regulatory handoff between FSCO to FSRA was an intentional transition, and it benefited from much of FSCO’s institutional knowledge. It submits that FSCO had regulated the *MBLAA* for 11 years, so it is not surprising that FSRA integrated some of its investigative techniques and procedures into its continued administration of *MBLAA* and the regulations.

[30] FSRA submits that disclosure of the withheld information would be disclosure of its present investigative and enforcement methods. It confirms that what was disclosed to the appellant represented FSRA’s attempt to sever any irrelevant or outdated material in the interests of FSRA’s obligation under the *Act* and commitment to transparency.

[31] In sur-reply, the appellant suggests that FSRA repeatedly states that disclosure of the requested information will harm its ability to carry out its regulatory duties, but it does not explain why this disclosure will lead to this result. The appellant submits that the harm that FSRA states will be suffered, in allowing licensees access to information to prepare for their inspections and examinations and distort FSRA’s ability to assess if that reflects their day-to-day experience, does not withstand scrutiny. He submits that a FSRA examination of a licensee asks the licensee to produce files related to its business activities, to determine if the licensee has met its statutory/regulatory obligations. He submits that the requested documents are historical documents, and if provided during the examination will or will not disclose compliance. The appellant questions how disclosure of FSRA’s methodology would allow the licensee to “prepare” for the examination and “distort” the ability to ascertain “day-to-day compliance.”

### ***Analysis and finding***

[32] Section 14(1)(c) applies if disclosure of the withheld information could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. The IPC has consistently held that the exemption normally will not apply where the technique or procedure is generally known to the public because it could not reasonably be expected to interfere with its effective use.<sup>11</sup> Based on my review of the parties’ representations and the withheld information, I find that section 14(1)(c) applies.

[33] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>12</sup> However, they do not have to prove that disclosure will in fact result in

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<sup>11</sup> Orders P-170, P-1487, MO-2347-I and PO-2751.

<sup>12</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.<sup>13</sup>

[34] I accept FSRA's submission that there are no material changes between the FSCO examination documents and the current policies and procedures currently used by FSRA in the withheld information. As confirmed by FSRA, when it assumed regulatory duties from FSCO in 2019, it relied on much of FSCO's institutional knowledge and integrated the investigative techniques and procedures into its continued administration of the *MBLAA* and its regulations.

[35] The appellant suggests that FSCO published a detailed list of the obligations of the regulated parties under the provisions of the *MBLAA* as early as 2009 and therefore one cannot assert confidentiality with respect to these obligations. However, a review of the withheld information and FSRA's representations shows that the withheld information consists largely of risk assessment criteria that is specific and tailored in order to help FSRA identify high-risk actors and monitor low-risk actors. The compliance checklists referenced by the parties are noted to assist mortgage brokerages, brokers, agents and administrators in complying with new regulations under the *MBLAA* and do not disclose specific testing steps, risk criteria, thresholds or how to interpret this information when assessing a regulated entity. After reviewing the withheld information, I accept that it consists of assessment criteria including methodologies and procedures currently in use by FSRA to conduct its examinations that are not set out in the 2009 checklists referenced by the parties.

[36] The appellant suggests that given the number of inspections, more than 100 per year, FSCO's methodology is well-known within the mortgage industry.<sup>14</sup> However, as noted by FSRA, FSCO regulated over 83,000 entities and individuals across the province's financial sectors, including 1,185 mortgage brokerages. In my view, the fact that hundreds of registrants are inspected every year does not imply that FSRA's methodology for assessments is well-known throughout the industry.

[37] The appellant also points to a decision of the Financial Services Tribunal, in *First Commonwealth Mortgage Corporation*, as evidence that the methodology used by FSCO is publicly available. However, after reviewing that decision, it is clear that the FST decision contains a chronology of the interactions between FSCO's examiner and the mortgage brokerage and discusses the eventual findings of FSCO, but it does not divulge specific assessment criteria FSCO used. In my view, *FCMC* does not illustrate that the withheld information concerning inspections, audits and examinations is information that is publicly available.

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<sup>13</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

<sup>14</sup> FSRA included a *Report on FSCO's Compliance Review of Mortgage Brokerages 2014*, which shows that FSCO completed 163 onsite compliance exams in 2014.



[38] For all of the above reasons, I find that disclosure of the withheld information would reveal investigative techniques and procedures currently in use by FSRA and therefore qualifies for exemption under section 14(1)(c). Next, I will review FSRA's exercise of discretion.

**Issue B: Did the institution exercise its discretion under section 14(1)(c)? If so, should the IPC uphold the exercise of discretion?**

[39] The section 14(1) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[40] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[41] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>15</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>16</sup>

[42] FSRA submits that in exercising its discretion under section 14(1) it considered the following factors in weighing its decision whether to disclose:

- The appellant is not seeking their own personal information
- The appellant did not specify any dates or incidents that this relates to, so FSRA is not able to assess if there is a compelling need for the records, or the extent to which the nature of the information is significant or sensitive to the requestor or affected persons
- The purpose of the exemption at section 14(1)(c) which is to prevent revealing investigative techniques and procedures currently used in law enforcement
- That the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context
- The public interest in ensuring the integrity of the law enforcement regime under the *MBLAA* and its regulations

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<sup>15</sup> Order MO-1573.

<sup>16</sup> Section 54(2).

- Releasing the records would adversely affect FSRA's reviews and oversight activities.
- The purpose of the *Act*, which is to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public, and necessary exemptions from the right of access should be limited and specific
- The fact that, in general, the public is entitled to scrutinize the activities of law enforcement agencies.

[43] FSRA notes that in the situations where FSCO could sever past from present function, FSRA believes that it has exercised its discretion in its commitment to transparency. Of the initial 150 pages that had been collected, FSRA partially disclosed 144 pages to the Appellant in the initial Records, sent alongside the FSRA Decision.

[44] The appellant does not specifically address FSRA's exercise of discretion in his representations, but he submits that the protestations of confidentiality have no validity as the information is already widely publicly available. He suggests that it is only bureaucratic overreach that prevents FSRA from allowing the appellant to see the withheld information. The appellant submits that confirming FSCO's methodology is important in current litigation that is underway.

### ***Finding***

[45] Based on my review of the information at issue, the parties' representations and the circumstances of the appeal, I find that FSRA did not err in exercising its discretion to withhold information under section 14(1)(c) of the *Act*.

[46] After reviewing the factors FSRA considered when making its decision, I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. I am satisfied that it considered relevant factors and did not consider irrelevant factors in the exercise of its discretion. FSRA considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal.

[47] It is also evident that FSRA disclosed as much responsive information as it could without disclosing the investigative techniques and procedures it currently uses. FSRA considered the right factors and balanced them; it is not for me to substitute my discretion for FSRA's.

[48] Accordingly, I uphold FSRA's exercise of discretion.

**ORDER:**

The appeal is dismissed.

Original Signed By: \_\_\_\_\_

Alec Fadel  
Adjudicator

\_\_\_\_\_ May 19, 2023