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

ORDER PO-2206

Appeal PA-010410-2

Ontario Securities Commission

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BACKGROUND:

Under the *Securities Act*, the Ontario Securities Commission (OSC) is the statutory regulator of the capital markets in Ontario. The OSC is responsible for administering the *Securities Act* and performs the duties assigned to it under that act.

The Investment Dealers' Association of Canada (the IDA) is a national self-regulatory organization that is responsible for regulating the operations, standards of practice and business conduct of its member investment dealers.

Under section 21.1(1) of the *Securities Act*, the OSC may recognize a self-regulatory organization if to do so would be in the public interest. Under section 21.1(3) of the *Securities Act*, a recognized self-regulatory organization shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices.

On October 27, 1995, the OSC recognized the IDA as a self-regulatory organization pursuant to section 21.1(1) of the *Securities Act*. The terms and conditions of the IDA's recognition are contained in a Schedule to the Recognition Order and provide, in part, for a system of oversight of the IDA by the OSC and reporting by the IDA to the OSC.

NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the OSC for access to records regarding the operations of the IDA and its members. The appellant 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 appellant 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.

The appellant appealed the OSC's decision, and this office opened Appeal PA-010410-1.

During the course of mediation, the appellant restricted the scope of this appeal to the 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 report in confidence.

In Order PO-2029, Assistant Commissioner Tom Mitchinson overturned the OSC's decision that section 153 of the *Securities Act* applies and prevails over the *Act*, because it had not been "received by the OSC". As a result, the Assistant Commissioner ordered the OSC to issue an access decision to the appellant.

The OSC then issued a decision to the appellant in which it denied access to the report on the basis of the exemptions at sections 13 (advice or recommendations), 14 (law enforcement) and 17 (third party commercial information) of the *Act*.

The appellant appealed the decision and this office opened Appeal PA-010410-2.

Mediation was not successful in resolving the issues in the appeal so the matter was streamed to the adjudication stage of the process.

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

RECORD:

The record at issue is a 25-page examination report prepared by the OSC regarding the operations of the IDA. In his Order PO-2029, Assistant Commissioner Mitchinson described the record in more detail as

> . . . 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 . . .

DISCUSSION:

ADVICE OR RECOMMENDATIONS

Section 13(1): the main exemption

General principles

Section 13(1) 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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028]

Representations

The OSC submits:

> The record contains no less than 18 specific recommendations regarding the corporate governance and organizational structure of the IDA, the IDA's Enforcement Division, and the IDA's compliance with the terms and conditions of its recognition by the OSC as a self-regulatory organization. These recommendations are summarized at the beginning of the report and developed throughout the body of the report. Each recommendation clearly relates to a suggested course of action.
>
> Staff in the Capital Markets Branch of the OSC formulates the recommendations. The responsible staff members are permanent employees of the OSC.
>
> The record is the result of OSC Staff's oversight examination of the IDA. The purposes of such an examination include:
>
> 1. To determine compliance with the terms and conditions of the IDA's recognition and related undertakings,
>
> 2. To ensure that the IDA continues to have appropriate corporate governance structure, procedures and resources to fulfill its regulatory obligations,

3. To ensure that the IDA's core member regulation functions are being performed appropriately and there is consistent enforcement of securities laws and IDA rules,

4. To analyze and address any deficiencies in the IDA's functioning as a self-regulatory organization, and ensure the effective resolution of these deficiencies.

Where, in the course of an oversight examination, OSC staff identifies possible areas of concern regarding the IDA's fulfillment of its regulatory obligations, it can recommend corrective action. These recommendations are initially provided to the IDA for feedback but are ultimately directed to the OSC for consideration. Some recommendations may require actions by the OSC. In considering them, the OSC decides which recommendations, if any, the IDA or OSC should implement.

Following its oversight examination of the IDA and other self-regulatory organizations, OSC Staff make their recommendations frankly and candidly to assist the OSC and the self-regulatory organization in determining whether or not the self-regulatory organization is meeting its mandate or if changes to any regulatory processes are required. Not every recommendation is necessarily accepted or rejected.

Public scrutiny of Staff's recommendations could reasonably be expected to result in undue pressure on the OSC to make decisions or take actions regarding a particular self-regulatory organization. A direct result of such pressure would be an unwillingness by OSC Staff to be as frank and candid in their assessments and recommendations in the exercise of the OSC's oversight function. This would deprive the OSC of the benefit of a full and measured consideration of the issues raised by Staff's recommendations. As the IPC noted in reiterating representations made by the Ontario Human Rights Commission,

> [i]t is a fact 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 [Human Rights] Commissioners must have the benefit of staff advice which is candid, direct and to the point.

The appellant submits:

> The audit does not constitute "advice and recommendations" in the traditional sense. The OSC is, by its own definition, the regulator of capital markets in

Ontario and administrator of the *Securities Act*. The audit, presumably, represents the findings of the OSC in the discharge of that duty. Therefore, "advice and recommendations" carry the weight of directives for this purpose.

The OSC cannot claim on the one hand that the audit offered "advice and recommendations' and at the same time constituted a law enforcement document. Since I haven't been able to read the audit, I can only assume that the OSC conducted an investigation of IDA operations, found flaws and instructed the IDA to correct the faulty practices? If that assumption is correct, then the audit does not meet the test of either definition.

. . . . .

. . . [T]he argument by both the OSC and IDA that the audit was prepared in confidence and that its release would prevent public servants in future from offering their frank and candid advice. Seemingly, a chill would descend on the offices of both organizations. Why? Public servants make an oath of service that requires them to discharge their responsibilities in the public interest. Occasionally, this involves the identification of problems that might arise in the provision of services, or protection of the public. I am assuming that the audit does not reveal the names of public servants who might have volunteered their thoughts and information during the course of the IDA review. In which case, confidentiality should not be an issue.

Frankly, the public should be seriously concerned about the comment made by the OSC, in its representation, to the effect that: "Public scrutiny of staff's recommendations could reasonably be expected to result in undue pressure on the OSC to make decisions or take actions regarding a particular self-regulatory organization. A direct result of such pressure would be an unwillingness by OSC staff to be as frank and candid in their assessments and recommendations in the exercise of the OSC's oversight function."

If that is true, the OSC is openly confessing an inability to endure public scrutiny. Why would that be?

What is perhaps most troublesome about the representations by the OSC and IDA is almost their total lack of reference to their obligations to the investor. Only passing mention is offered. The representations essentially focus on the perceived problems that could befall the administrators should their inner workings be glimpsed by the public they are charged to protect.

On its web site, the OSC tells the public that its mandate is to

- Protect investors from unfair improper and fraudulent practices
- Foster fair and efficient capital markets
- Maintain public confidence in the integrity of those markets

> Similarly, on its web site, the IDA claims its mission is "to protect investors and enhance the efficiency and competitiveness of the Canadian capital markets."
>
> I submit that the repeated refusal of the OSC and IDA to release the audit flies directly in the face of their professional priorities and, in fact, erodes public confidence in Ontario's investment industry.

Findings

The report clearly contains information that could be characterized as "advice" or "recommendations". However, in this context, OSC staff gives the advice to the IDA, not to OSC and its decision-makers or policy makers. The advice given is clearly couched in terms of what course of action the IDA should take, and nowhere is the advice directed to the OSC. I do not accept the OSC's submission that the advice is "ultimately directed to the OSC for consideration". While the OSC would no doubt consider the contents of the report, this record neither contains nor reveals any suggested course of action for the OSC to take.

In my view, section 13 is designed to protect the process of *government* decision-making and policy making, as opposed to the decision-making and policy making process of non-government entities such as the IDA. In my Order PO-2006, regarding the role of the Children's Lawyer for Ontario and section 13, I stated:

> In my view, this exemption is designed to protect communications only within the context of the government making decisions and formulating policy *as a government*, not in its specialized role as an advocate representing the private interests of an individual in proceedings before a court. Here, as explained above in detail under the solicitor-client privilege discussion, any advice being given, and any decisions being made, are for the benefit of the child, not the OCL as a government agency or the public at large.
>
> . . . . .
>
> Therefore, although some of the records would, in fact, reveal advice or recommendations, section 13 does not apply in these unusual circumstances, since the rationale for the exemption is not present.

On judicial review, the Divisional Court in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 3522 upheld Order PO-2006. In its decision, the court stated:

> The effect of [Order PO-2006] is to read the CLO, in its specialized role, out of section 13 without impairing the exemption's essential thrust of protecting the policy-making and advice giving functions of those who are actually advising the government. The CLO does not advise the government, at least not in the process of acting as solicitor for its clients, and that is the only role in which the

> exemption does not apply. Those who do not advise the government are not deprived of any protection by this decision.

As I will discuss below, the OSC itself submits that the IDA is not an "institution" under the *Act*, lending support to the view that the IDA cannot be considered "government" for the purposes of section 13(1) and, therefore, any advice flowing from the OSC to the IDA cannot be considered a process of advising the government. Therefore, section 13(1) cannot apply.

Section 13(2): exceptions to the exemption

Although it is not strictly necessary for me to do so, I will now consider whether any of the mandatory exemptions contained in section 13(2) of the *Act* apply to the record. In the circumstances of this case, section 13(2)(f) may be applicable. That section reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy

The OSC submits:

> The *Act* defines "institution" to mean,
>
> (a) a ministry of the Government of Ontario, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations;
>
> Section (1) of the regulations to the *Act* provides,
>
> > 1(1) – The agencies, boards, commissions, corporations and other bodies listed in Column 1 of the Schedule are designated as institutions.
>
> The IDA is not listed in Column 1 of the Schedule contained in the regulations to the *Act*. Consequently, the [OSC] submits that the IDA is not an "institution" for the purposes of the *Act* and therefore the exception does not apply in the circumstances of the appeal.

I accept the OSC's submission that the IDA is not in and of itself an "institution" under the *Act*. However, it might be argued that in the context of being a recognized self-regulatory organization under the *Securities Act*, the IDA is performing statutory, regulatory functions that

otherwise would be performed by the OSC. Thus, in this context, the IDA may be considered to be "part of" or "an agent of" the OSC, thereby bringing it within the terms of the definition of "institution" under the *Act* and for the purpose of the section 13(2)(f) exception.

If this is the case, and I am wrong in my finding above that the IDA is not a "government" for the purposes of section 13(1), I would find that the section 13(2)(f) exception applies.

In my view, the report at issue in this case clearly would qualify as a "report or study on the performance or efficiency of" the IDA. As stated above, in the OSC's words, the purpose of the report was

1. To determine compliance with the terms and conditions of the IDA's recognition and related undertakings,

2. To ensure that the IDA continues to have appropriate corporate governance structure, procedures and resources to fulfill its regulatory obligations,

3. To ensure that the IDA's core member regulation functions are being performed appropriately and there is consistent enforcement of securities laws and IDA rules,

4. To analyze and address any deficiencies in the IDA's functioning as a self-regulatory organization, and ensure the effective resolution of these deficiencies.

These purposes clearly fall within the scope of a "performance" or "efficiency" study. In addition, the OSC submits that the record at issue qualifies as a "report". Therefore, in the event that the IDA can be considered a "government" for the purposes of section 13(1), the report would not qualify for exemption by virtue of the exception at section 13(2)(f) of the *Act*.

LAW ENFORCEMENT

Introduction

The OSC claims that the record is exempt under section 14(2)(a), which reads:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law

Is the record a "report"?

The word "report" in section 14(2)(a) has been defined as "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The OSC submits:

> The IPC has held that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. These results generally would not include mere observations or recordings of fact.
>
> The record contains the results of a detailed review by Staff of the corporate governance and organizational structure of the IDA as well as the IDA's compliance with the terms and conditions of recognition by the OSC. The results are organized according to various functions and aspects of the IDA's organization and consist of detailed assessments of these functions by OSC Staff. The results go beyond simple observations of fact to include a detailed analysis of the IDA's activities and corresponding recommendations in the area of examination.

I found above that the record qualifies as a "report" for the purpose of section 13(2)(f). I find that this conclusion applies equally for the purpose of section 14(2)(a), since the record clearly is a formal statement or account of the results of the OSC's collation and consideration of information.

Is the report "prepared in the course of law enforcement, inspections or investigations"?

The term "law enforcement" is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

The OSC submits:

> In Order P-480, the IPC held that reports prepared in the course of examinations of and investigations into the activities of a corporation pursuant to the *Loan and Trust Corporations Act* satisfied the second branch of the test in section 14(2)(a). The IPC found that this legislation authorized the agency responsible for regulating registered loan and trust corporations to conduct examinations, audits and inspections of registered corporations. Since the report was prepared in the course of examinations and investigations pursuant to these provisions, they were held to have been prepared in the course of law enforcement, inspections or investigations.
>
> . . . [T]he report in the present appeal was prepared in the course of an examination by OSC Staff of the IDA's corporate governance and organizational structure and review of the 1999 Member Regulation Self-Assessment. This examination and review was carried out pursuant to the terms and conditions of the OSC's Recognition Order that recognized the IDA as a self-regulatory organization for the purposes of section 21.1(1) of the *Securities Act*.
>
> As part of this examination, OSC Staff interviewed numerous IDA personnel from each member regulation department as well as Human Resources, Information Systems, Corporate Secretary, a sample of IDA members and staff from other provincial securities regulators.

I accept that the report was prepared in the course of an inspection or investigation into the operations of the IDA and that, therefore, this part of the exemption is satisfied.

Was the report prepared "by an agency which has the function of enforcing and regulating compliance with a law"?

In Order P-352, Assistant Commissioner Mitchinson found that, in conducting an internal investigation to ensure the proper administration of a one of its facilities, the Ministry of Correctional Services was not acting as "an agency which has the function of enforcing and regulating compliance with a law" under section 14(2)(a) of the *Act*. The Assistant Commissioner stated:

> . . . [T]he Archives submits that the report was prepared as a result of an investigation conducted by the Inspections and Standards Branch of the Ministry of Correctional Services, pursuant to section 7 of the *Training Schools Act*, which the ministry was responsible for administering in 1976. In the Archives' view, the administrative and enforcement responsibilities under that statute qualify as law enforcement activities, thereby categorizing the ministry as an agency which has the function of enforcing and regulating compliance with a law.

> I do not agree with the Archives position. In my view, the investigation conducted by the ministry was an internal investigation into the operation of a training school. Upon completion of the investigation, the ministry was not in a position to enforce or regulate compliance with the *Training Schools Act* or any other law. Rather, it determined that the allegations warranted further investigation and forwarded the report to the local Crown Attorney's office. In my view, the ministry had investigatory responsibility for ensuring the proper administration of the training school, but it was the police force and Crown Attorney's office which had regulatory responsibilities of law enforcement as envisioned by section 14(2)(a) of the *Act*. Therefore, I find that section 14(2)(a) is not applicable in the circumstances of this appeal.

The Divisional Court upheld Order P-352, in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, although that decision was reversed on other grounds in (1994), 107 D.L.R. (4th) 454 (C.A.). In upholding Order P-352, the Divisional Court stated:

> In this case, the Ministry of Correctional Services in conducting an investigation at the Grandview Training School was not engaged in an "external regulatory activity", but was rather conducting an internal investigation pursuant to s. 7 of the *Training Schools Act* . . . There is no regulatory offence that the ministry was in a position to enforce following its investigation. The [Assistant] Commissioner's order is thus consistent with the established approach to s. 14(2)(a).
>
> . . . . .
>
> Having concluded that all interpretations of the constituent statute made by the [Assistant] Commissioner were interpretations that the sections could reasonably bear, we are not prepared to alter the Assistant Commissioner's decision.

Similarly, in this case, there is no regulatory offence that the OSC was in a position to enforce following its investigation. There is no doubt that in certain situations, the OSC carries out law enforcement activities and thus could be considered "an agency which has the function of enforcing and regulating compliance with a law" (see, for example, its role under the offence provisions in Part XXII of the *Securities Act*). However, the OSC has not directed me to any offence sections in the *Securities Act* that would apply in the context of the OSC's review of a self-regulatory organization, and I find that none apply.

To conclude, I find that section 14(2)(a) does not apply because the OSC has not established that the report was prepared "by an agency which has the function of enforcing and regulating compliance with a law."

In the circumstances, it is not necessary for me to consider whether the report fits within the terms of the section 14(4) exception to the section 14(2)(a) exemption.

THIRD PARTY COMMERCIAL INFORMATION

Introduction

The OSC submits that section 17(1)(b) applies to the records at issue. That section reads:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

Section 17(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. Section 17(1) is designed to protect the "informational assets" of businesses or other organizations that provide information to the government [Order PO-1805].

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of information which, while held by government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

For a record to qualify for exemption under sections 17(1)(b) the OSC and/or the IDA must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in paragraph (b) of section 17(1) will occur [Orders 36, P-373, M-29 and M-37].

I will first consider part 2 of the test.

Part 2: supplied in confidence

In his Order PO-2029, the Assistant Commissioner overturned the OSC's decision that section 153 of the *Securities Act* applies and prevails over the *Act*, because it had not been "received by the OSC". As a result, the Assistant Commissioner ordered the OSC to issue an access decision to the appellant. More specifically, the Assistant Commissioner stated:

> 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 OSC" 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.

The OSC takes issue with the Assistant Commissioner's finding in Order PO-2029, and submits:

> In Order PO-2029, Assistant Commissioner Mitchinson held that the record at appeal was not received by the OSC from the IDA for purposes of section 153 of the *Securities Act*. However, he did acknowledge that the requirement under section 153 that the OSC receive the information from an enumerated entity could be satisfied "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'."
>
> Assistant Commissioner Mitchinson based this finding on the principles established in section 17(1) of the *Act*. Previous IPC orders have held 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 that had actually been supplied by the third party. In the context of the application of section 153, the Assistant Commissioner held:
>
> > [t]o 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.
>
> The [OSC] respectfully disagrees with Assistant Commissioner Mitchinson's finding that disclosing the record would not reveal information supplied by the IDA. In its representations to the IPC in Appeal PA-010410-1 (Order PO-2029), the OSC indicated that most of the report is made up of information received from the IDA in the course of Staff's review. In preparing the report, Staff interviewed numerous IDA personnel to understand each member regulation department's mandate, procedures and processes and how each interacts with the others. Staff reviewed the IDA's corporate governance and organizational structure, including organizational charts, business plans, mandates and minutes of selected committees, budgets, performance measurement processes, and compensation structure. Staff also reviewed the IDA's 1999 Regulation Self-Assessment Report, an annual report prepared by IDA management for the IDA's Board, which assesses the IDA's performance of its self-regulatory responsibilities. Throughout the report, Staff expressly refers to discussions with senior IDA personnel and reviews of the Member Regulation Self-Assessment and other IDA information as the basis for their observations.
>
> The [OSC] submits that disclosing the report would readily permit someone to draw accurate inferences with respect to information that had actually been supplied to the OSC by the IDA. Attached as Appendix "A" to the [OSC's] representations is a detailed description of those portions of the report the disclosure of which would permit someone to draw accurate inferences regarding information supplied by the IDA.

The IDA agrees with the OSC, and submits:

> . . . [I]n order to prepare the report, OSC Staff interviewed numerous IDA personnel to understand each member regulation department's mandate, procedures and processes and how each interacts [with] the others. OSC Staff reviewed the IDA's corporate governance and organizational structure, including organizational charts, business plans, mandates and minutes of selected committees, budgets, performance measurement processes, and compensation structure. OSC Staff also reviewed the IDA's 1999 Member Regulation Self-Assessment Report, and annual report prepared by IDA management for the IDA's Board, which assesses the IDA's performance of its self-regulatory responsibilities. Throughout the report, OSC Staff expressly refers to discussions with senior IDA personnel and reviews of the Member Regulation Self-Assessment and other IDA information as the basis for their observations.

> The IDA supports the [OSC's] submission that disclosing the report would readily permit someone to draw accurate inferences with respect to information that had actually been supplied to the OSC by the IDA.

I am not persuaded that the Assistant Commissioner erred in finding that the information in the report was not "received" by the OSC from the IDA for the purpose of section 153 of the *Securities Act* and, therefore, I conclude that the IDA did not "supply" this information to the OSC. This finding is consistent with previous orders of this office in circumstances where government inspectors review information of a third party and record their observations and opinions [see, for example, Orders P-1614, PO-2142; see also *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246 (Fed. C.A.)].

Although it is not necessary for me to do so, I will consider the third part of the three-part test.

Part 3: harm

To meet part 3 of the section 17(1)(b) exemption, the OSC and the IDA must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The OSC and the IDA take the position that if the record is disclosed, it could reasonably be expected that similar information will no longer be supplied to the OSC. More specifically, the OSC submits:

> . . . [I]t is reasonable to expect that the consequence of disclosing information in the report would be for the IDA to no longer provide similar information to the OSC in the course of its oversight reviews. Information provided by the IDA that goes into the report goes beyond a simple presentation of facts and statistics to candidly address possible problems and concerns. The IDA has previously indicated to OSC Staff in the context of possible disclosure of its self-assessment reports that the IDA would be unlikely to provide useful critical commentary on its own performance should that commentary be publicly available. In that event, the IDA has previously indicated that it would provide the OSC with little more than a statistical review as an annual self-assessment.
>
> . . . [I]t is equally unlikely that the IDA will continue to provide useful critical commentary of its own organization in the context of an oversight examination should that commentary be publicly available. In the event that OSC Staff can expect nothing more from the IDA in an oversight examination than a statistical review, . . . the quality of future disclosure made by the IDA to OSC Staff would be significantly diminished.

> . . . [I]t is reasonable to expect that disclosure of the record would result in similar information no longer being provided to the OSC by other self-regulatory organizations that the OSC oversees, in addition to the IDA. The OSC presently oversees other recognized self-regulatory organizations such as Market Regulation Services Inc. ("RS Inc.") and the Mutual Fund Dealers Association ("MFDA") and recognized stock exchanges such as The Toronto Stock Exchange Inc. ("TSX"). OSC Staff conducts oversight examinations of these other self-regulatory organizations in much the same way they do the IDA. In the course of these examinations, these other self-regulatory organizations also provide the OSC with information similar to that provided by the IDA and contained in the record at appeal. If disclosed, . . . other self-regulatory organizations would be unlikely to provide the OSC with this kind of information in the future as well.

The IDA's representations on this point are very similar.

In essence, the position of the OSC and the IDA is that if the record is disclosed, the IDA will be reluctant to cooperate with the OSC in its reviews. This submission lacks credibility. By the terms of the order in which the OSC recognized the IDA as a self-regulatory organization [see *Re Investment Dealers Association of Canada* (1995), 18 O.S.C.B. 5293] the IDA is bound to cooperate and be fully frank with the OSC in its reviews and, specifically, to provide OSC staff with access to its processes and procedures (see, in particular, Schedule "A" of the recognition order). In addition, with respect to the IDA's annual self-assessments, paragraph 10 of Schedule "A" of the recognition order states:

> Management of the IDA shall at least annually self-assess the IDA's performance of its self-regulatory responsibilities and report thereon to the executive committee, together with any recommendations for improvements. The executive committee shall be responsible for reporting to the Board as to the IDA's performance of its self-regulatory responsibilities, and the executive committee shall include at least one public director. The IDA shall provide the [OSC] with copies or summaries of such reports and advise the [OSC] of any proposed actions arising therefrom.

In my view, this provision conflicts with the position of the OSC and the IDA that, in future, the IDA would be "unlikely to provide useful critical commentary on its own performance" and "would provide the OSC with little more than a statistical review as an annual self-assessment."

Further, in the absence of any evidence to indicate that other self-regulatory organizations are not similarly bound to cooperate with the IDA, I am not persuaded that it is reasonable to expect that disclosure of the record will have any effect on the OSC's reviews of these other organizations.

To conclude, I find that the OSC and the IDA have not provided sufficiently "detailed and convincing" evidence to establish a "reasonable expectation of harm" under section 17(1)(b). Therefore, the record is not exempt under section 17.

ORDER:

1. I order the OSC to disclose the record to the appellant no later than **December 16, 2003**, but not earlier than **December 9, 2003**.

2. In order to verify compliance with provision 1, I reserve the right to require the OSC to provide me with a copy of the material disclosed to the appellant.

Original signed by: November 18, 2003
David Goodis
Senior Adjudicator