Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4796

Appeal PA23-00389

Ontario Securities Commission

March 13, 2026

Summary: The Ontario Securities Commission (the OSC) received a request under the *Freedom of Information and Protection of Privacy Act* for access to information about "failed trades," relating to a study it received from the organization regulating securities dealers. The OSC located the responsive records and issued a decision granting partial access. It withheld information it claimed qualified as exempt advice or recommendations under section 13(1), law enforcement information under section 14(1), relations with other governments information under sections 15(a) and (b), third party information under section 17(1) and solicitor-client privileged information under section 19. The appellant challenged the decision and submitted some information should be disclosed under the public interest override in section 23 of the *Act*.

In this order, the adjudicator largely upholds the OSC's decision. He finds that most of the withheld information is exempt and that the OSC exercised its discretion appropriately. He finds there is not a compelling public interest in disclosure of the information withheld under sections 13(1), 15(b) and 17(1). However, he finds that some of the information withheld in five records under section 13(1) should be disclosed, as it is factual material that would not reveal advice or recommendations or provide an accurate inference of deliberations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 , as amended, sections 13(1), 14(1)(c), 15 (b), 17(1), 19 and 23.

Orders and Investigation Reports Considered: Orders PO-1663, PO-1709, PO-2681, PO3315 and PO-3496.

OVERVIEW:

[1] The Ontario Securities Commission (the OSC) received a request for access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to a failed trade study it received in 2022, and related information about failed trades held by the OSC.

[2] The appellant is a lawyer who explains she made her request on behalf of the founder of an advocacy group representing certain securities issuers.

[3] Following notification of organizations that may be affected by disclosure of the records (third parties), the OSC identified 37 responsive records. It granted partial access to some records but withheld others under sections 13(1) (advice or recommendations), 14(1) (law enforcement), 15(a) and (b) (relations with other governments), 17(1) (third party information) and 19 (solicitor-client privilege) of the *Act*. The OSC also withheld some information that it claimed was not responsive.

[4] The appellant was dissatisfied with the OSC's decision and appealed it to the Information and Privacy Commissioner of Ontario (IPC). The IPC appointed a mediator to try to resolve the appeal. During mediation, the OSC decided to disclose an additional record to the appellant and more details about the responsive records. The appellant confirmed she was still seeking access to all records and she raised the possible application of the public interest override in section 23 of the *Act*.

[5] The appeal moved to adjudication, where an adjudicator may conduct an inquiry. An IPC adjudicator conducted an inquiry and received representations from the parties. The appeal was then assigned to me to continue the inquiry. After reviewing the parties' representations, which were shared with one another, I determined that I did not need to hear from the parties further before making my decision.

[6] In the following discussion, I uphold most of the OSC's decision to withhold records. I also find there is no compelling public interest in disclosure of the records I find exempt under sections 13(1), 15(b) and 17(1). However, I do not uphold the OSC's decision to withhold all of records 2, 14, 15, 18 and 35 under section 13(1).

RECORDS:

[7] All of records 1, 2, 12, 14, 15, 17, 18, 20 to 26 and 34 to 37 listed in the OSC's Second Revised Index of Records are at issue. The withheld portions of records 7, 10 and 29 are also at issue. These records all deal with the OSC's work on the Activist Short Selling Project of the Canadian Securities Administrators (the CSA). The records include confidential information from the 2022 failed trade study (records 7 and 10), briefing notes (records 36 and 37), draft documents (records 2, 15 and 18) and emails (records 1, 12, 14, 15, 17, 20 to 26, 29, 34 and 35) exchanged within the OSC, with other provincial securities regulators and with the Canadian Investment Regulatory Organization (the

CIRO).

ISSUES:

A. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to records 1, 2, 14, 15, 17, 18, 22 to 26, and 34 to 37?

B. Does the discretionary exemption at section 15(b) apply to the information received from other governments in records 12 and 20?

C. Does the mandatory exemption at section 17(1) for third party information apply to the withheld portions of records 7 and 10?

D. Does the discretionary law enforcement exemption at section 14(1)(c) apply to record 21?

E. Does the discretionary solicitor-client privilege exemption at section 19 apply to the withheld portion of record 29?

F. Did the institution exercise its discretion under sections 13(1), 14(1)(c), 15(b) and 19(a)? If so, should the IPC uphold the exercise of discretion?

G. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1), 15(b) and 17(1) exemptions?

DISCUSSION:

Background:

[8] The CSA is an umbrella organization of Canada's provincial and territorial securities regulators whose objective is to improve, coordinate and harmonize regulation of the Canadian capital markets. The OSC is a member of the CSA.

[9] In December 2022, the Investment Industry Regulatory Organization of Canada (the IIROC) published a failed trade study (the 2022 failed trade study), which publicly reported about this activity in a general manner. At the same time, the IIROC provided the OSC (as a member of the CSA) with a different version of the study that specifically named the dealers and securities that were involved in failed trades. The IIROC drew its data from its internal records and records from its third party service provider, CDS Clearing and Depository Services (the CDS).

[10] The IIROC was a self-regulatory organization that oversaw all investment dealers and trading activity on Canada's debt and equity marketplaces. In 2023, it merged with

the Mutual Fund Dealers Association of Canada to form the CIRO. The CIRO continues to carry out regulatory responsibilities originally delegated to the IIROC by the OSC and each of Canada's other provincial and territorial securities regulators under "recognition orders" issued by these agencies. The access request in this appeal postdates the merger in 2023, but requests access to records before and after that merger. In this order, I refer to both the predecessor and current organization as the CIRO.

[11] A "failed trade" occurs when a dealer fails to deliver securities (or the buyer fails to pay the funds when delivery/payment is due). Failed trades have regulatory significance because reports of failed trades may be used to flag potential issues with manipulative short selling. As the OSC's representations explain, while the appellant requested information about failed trades, some of the responsive records relate to joint CSA and CIRO initiatives involving short selling, given the connection between failed trades and short selling.

[12] The CSA created a committee of its members to examine the impact of activist short selling; it was called the Activist Short Selling Project. In 2020, as part of this project, the CSA issued a consultation paper and invited stakeholders to comment on it in a first phase of consultations. Two years later, in conjunction with the release of the 2022 failed trade study, the CSA and the CIRO issued a joint public notice (the CSA-CIRO notice) to launch a second phase of consultations.[1]

Issue A: Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to records 1, 2, 14, 15, 17, 18, 22 to 26, and 34 to 37?

[13] Section 13(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions can freely and frankly advise and make recommendations within the deliberative process of government decision making and policy making.[2]

[14] Section 13(1) states:

> 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.

What is "advice" and what are "recommendations"?

[15] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the

[1] CSA-IIROC Staff Notice 23-329 Short Selling in Canada, December 8, 2022.
[2] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43.

person being advised. Recommendations can be express or inferred.

[16] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[3]

[17] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[18] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[4] The relevant time for assessing the application of section 13(1) is the point when the public servant or consultant prepared the advice or recommendations.

Relevant exceptions: Sections 13(2)(a) and (f)

[19] For purposes of this appeal, the relevant exceptions to consider are the factual material exception in section 13(2)(a) and the performance or efficiency report exception in section 13(2)(f).[5]

[20] Under section 13(2)(a), factual material must be disclosed. This exception deals with objective information and specific types of records that could contain advice or recommendations.[6] Factual material refers to a coherent body of facts separate and distinct from the advice or recommendations contained in the record.[7] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[8]

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[3] See above at paras. 26 and 47.

[4] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario* (*Ministry of Northern Development and Mines*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario* (*Ministry of Transportation*) *v. Ontario* (*Information and Privacy Commissioner*), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[5] Section 13(2) provides as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
> (a) factual material;
> …
> (f) 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[.]

[6] *John Doe v. Ontario* (*Finance*), cited above, at para. 30.

[7] Order P-24.

[8] Order PO-2097.

[21] Under section 13(2)(f), reports about an institution's performance or efficiency must be disclosed. This exception is not restricted to reports or studies about institutions as a whole but may also apply to reports or studies about one or more discrete program areas within an institution.[9]

The parties' representations

[22] As an institution governed by the *Act*, the OSC submits that under section 13(1) it does not need to disclose the advice or recommendations of its staff. The purpose of this exemption is to ensure that people working for the OSC can freely and frankly advise and make recommendations within the deliberative process of OSC policy making. The OSC submits this includes its work in connection with the CSA's Activist Short Selling Project.

[23] The OSC submits that records 1, 2, 14, 15, 17, 18, 22 to 26, and 34 to 37 are generally exempt from disclosure because they are:

- internal OSC staff advice or recommendations in the form of emails and briefing notes to OSC management on suggested courses of action with respect to the CSA Activist Short Selling Project;
- emails attaching earlier drafts of the CSA-CIRO notice with staff's suggested edits and changes; or
- emails with general advice or recommendations on process issues related to the CSA Activist Short Selling Project.

[24] The OSC submits these records are not factual in nature, but all reflect some aspect of the deliberative process of OSC staff in policy making around short selling, which culminated in the CSA publication of the material. It submits any facts contained in these records are so intertwined that it is impossible to sever these records.

[25] The OSC specifically notes that the longer records (some of which are email attachments) are essentially all advice or recommendations. These are:

- record 2 (a draft memo),
- records 15 and 18 (blackline versions of an early draft of the CSACIRO notice), and
- records 36 and 37 (internal briefing notes).

[26] The appellant queries the OSC's representations that records 2, 15, 18, 36 and 37 are wholly exempt given that such documents typically include factual portions that can be disclosed without disclosing advice or recommendations. She further submits that

[9] Orders M-941 and P-658.

these records, once reviewed, should possibly be categorized as reports falling within the definition of section 13(2)(f).

Analysis and findings

[27] The IPC's longstanding interpretation of the "factual material" exception in section 13(2)(a) is that "factual material" contemplates a coherent body of facts separate and distinct from the advice or recommendations contained in a record. This would include, for example, an appendix or schedule of factual information supporting a policy document.[10]

[28] The label applied to information is not determinative of whether it is advice or recommendations. It must be considered whether the information sought to be withheld actually advises the decision-maker on a suggested course of action or permits the drawing of accurate inferences about the advice or recommendations.[11]

[29] The OSC's representations correctly note that the purpose of this exemption is to ensure that people employed by institutions can freely and frankly advise and make recommendations within the deliberative process of government decision making and policy making.

[30] For the purposes of section 13(2)(f), the IPC has defined "report" as a formal statement or account of the results of the gathering and consideration of information. Generally, this would not include mere observations or recordings of fact.[12]

[31] The email in record 1 and the draft memo attached to it in record 2 contain advice or recommendations concerning the regulation of short selling. The facts in the email are intertwined in the body of the advice and I find that they are not reasonably severable under the section 13(2)(a) exception.[13] If severed, they would be disconnected snippets of information and would be either meaningless or misleading. Record 1 is therefore exempt under section 13(1).

[32] Record 2 is a draft memo. It is not a report for purposes of section 13(2)(f). However, there is a large portion of record 2 that simply describes the first phase of the CSA public consultations two years earlier. This description contains objective facts and can be severed from record 2 in an intelligible fashion under the exception in section 13(2)(a). The last two pages, for example, are an appendix of the list of questions from the first phase of the CSA public consultations. Nothing about the deliberative process can be accurately inferred from that information. I find that this information is not exempt

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[10] Order PO-3496.
[11] Order PO-3315.
[12] Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario* (*Minister of Health and Long-Term Care*) *v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[13] Order PO-1663.

under section 13(1).

[33] Record 14 is composed of two emails. The first email, from an OSC staff member, has two distinct parts. The first part conveys logistical information about the release of the 2022 failed trade study received in an email from a CIRO employee. The information in the first part of the OSC email, and the email from someone at the CIRO is not advice or recommendations and nothing can be accurately inferred from it; they fit within the exception at section 13(2)(a) and are not exempt under section 13(1). In contrast, the second portion of the OSC email contains advice or recommendations about the substance of the proposed public consultation process and does not contain factual material excepted under section 13(2)(a). I find that the second portion of this OSC email is exempt under section 13(1).

[34] Record 15 is an early draft of the CSA-CIRO notice (it is an attachment to the first email in record 14). It is not a report for purposes of section 13(2)(f). It includes an overview about short selling, provides an update on related initiatives, and requests public feedback on regulatory matters. In "Part 2: Discussion," it contains advice or recommendations about the substance of the proposed consultation process; specifically, draft comments about what regulatory considerations should be included in the consultation process. I find that only this portion of record 15 is exempt under section 13(1). The remaining parts of record 15 are not exempt under section 13(1). The exception in section 13(2)(a) applies to the portions titled "Background and Introduction," "Part 1. Background on short selling, failed trades, and the regulatory framework," "Part 3. Comments," and "Part 4. Questions" do not contain advice or recommendations about the regulatory framework and can reasonably be severed.

[35] Record 17 is an email from an OSC staff member that contains advice or recommendations about the substance of the proposed public consultation process. Therefore, I find that it is exempt under section 13(1) and it does not contain factual material excepted under section 13(2)(a).

[36] Record 18, which is an attachment to record 17, is a later version of record 15 and is in the same format. Like record 15, it is not a report for purposes of section 13(2)(f) but contains one section, "Part 2: Discussion," that qualifies as advice or recommendations within the meaning of section 13(1). As with record 15, the remainder of the document is not exempt under section 13(1) because it is factual material excepted under section 13(2)(a).

[37] Records 22 to 26, and 34 are emails between OSC members that solely contain advice or recommendations for use in the deliberations about the approval of a public consultation process. They are exempt under section 13(1) and the exception in section 13(2)(a) does not apply to them.

[38] Record 35 is an email that simply forwards an attached briefing note (record 36) and a meeting link. It is not exempt under section 13(1) as the exception in section

13(2)(a) applies to it because the email is a separate record that does not contain advice or recommendations.

[39] Record 36, a briefing note, is exempt under section 13(1) even though it contains some factual material. Although the briefing note is divided into sections titled "Background," "Recent Developments" and "Recommendation," every section contains detailed advice or recommendations on substantive matters. The factual information is mostly mixed with the advice or recommendations. Even where that information is not mixed, it would, if disclosed, permit the drawing of accurate inferences about the nature of the actual advice or recommendations provided to OSC decision makers. On this basis, the exception in section 13(2)(a) does not apply to it. It is also not a report excepted under section 13(2)(f).

[40] Record 37 is also a briefing note and is not a report excepted under section 13(2)(f). Its format is identical to record 36 and, for identical reasons, it is exempt under section 13(1) and section 13(2)(a) does not apply to it.

[41] In conclusion, record 35 and portions of records 2, 14, 15 and 18 noted above do not qualify for exemption under section 13(1) and should be disclosed under the mandatory factual material exception. The remaining records qualify for exemption under section 13(1), subject to my review of the OSC's exercise of discretion in Issue F.

Issue B. Does the discretionary exemption at section 15(b) apply to the information received from other governments in records 12 and 20?

[42] Section 15 acknowledges that the Ontario government and its agencies create and receive records in the course of their relations with other jurisdictions. Its purpose is to protect these working relationships,[14] and to allow the Ontario government and its agencies to receive information in confidence, building the trust required to conduct affairs of mutual concern between jurisdictions.[15] In Order PO-1883, the adjudicator found that when the OSC (an agency of the Ontario government) receives information from other provincial securities regulators, they qualify as agencies of other provincial governments for purposes of section 15.

[43] While the OSC claimed both sections 15(a) and (b), for the purposes of this order, I focus on section 15(b) only. Section 15(b) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,

[14] Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.
[15] Order 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.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.

> reveal information received in confidence from another government or its agencies by an institution[.]

What harms could reasonably be expected to result?

[44] The exemptions found in section 15 apply where disclosure of the record "could reasonably be expected to" lead to one of the harms specified in paragraphs (a) or (b).

[45] Parties resisting disclosure of a record cannot simply assert that the harms under section 15 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves or the surrounding circumstances, parties should not assume that the harms under section 15 are self-evident and can be proven simply by repeating the description of harms in the *Act.*[16]

[46] Parties resisting disclosure under section 15 must also show that the risk of harm is real and not just a possibility.[17] However, parties do not need to prove that disclosure will in fact result in 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.[18]

The parties' representations

[47] The OSC submits that records 12 and 20 contain confidential information and discussions involving other CSA members. It submits records 12 and 20 are protected from disclosure because they contain information that was shared in confidence (the section 15(b) exemption). Letters of support from the Alberta and B.C. securities regulators (attached to the OSC's representations) support this submission. The letters explain that information is shared among members of the CSA under its policy on Confidentiality and Disclosure of Documentary Communication, which requires information that is shared "be kept in the strictest confidence."

[48] The OSC further submits that the disclosure of records 12 and 20 would result in a real risk of harm to provincial regulators' ability to communicate and cooperate with each other to harmonize their regulatory activities. Disclosure, according to the OSC, could deter the other provincial regulators from communicating with the OSC.

[49] The appellant submits that it is likely that other provincial regulators would be compelled to release this information under their provinces' access to information laws and that it is unlikely that other provincial regulators would refrain from communicating

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[16] Orders MO-2363 and PO-2435.
[17] *Merck Frosst Canada Ltd. v. Canada* (*Health)*, [2012] 1 S.C.R. 23.
[18] *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.

with the OSC given the size of Ontario's financial markets.

Analysis and findings

[50] For the reasons noted below, I find records 12 and 20 meet the test for exemption from disclosure under section 15(b).

[51] Records 12 and 20 are detailed email exchanges between OSC staff and their provincial and territorial counterparts about the CSA's Activist Short Selling Project. For the reasons noted below, I find these records meet the test for exemption from disclosure under section 15(b).

[52] These emails contain the views of regulatory agencies in other jurisdictions on substantive matters. The OSC's evidence shows that this information was exchanged in confidence. From my review of the records, it is clear disclosure would reveal the substance of the confidential deliberations of these securities regulators.

[53] I also do not place weight on the appellant's assertion that these agencies would be compelled to release this same information in their own jurisdiction as her position is not supported by any precedent or statutory authority. On this point, the OSC's letters of support from the Alberta and B.C. securities regulators specifically note that all CSA members have similar provisions in their jurisdictions' access to information legislation as are found in section 15 of the *Act* in Ontario, and they rely on these provisions to refuse similar requests for information in their jurisdictions.

Issue C. Does the mandatory exemption at section 17(1) for third party information apply to the withheld portions of records 7 and 10?

[54] Record 7 is a confidential version of the 2022 failed trade study, provided by the CIRO to the OSC, that names specific dealers and securities issuers. Record 10 is a slide deck that provides a later update to the confidential data in the study.

[55] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[19] where specific harms can reasonably be expected to result from its disclosure.[20]

[56] Section 17(1) states, in part:

> 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,

[19] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[20] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[57] For section 17(1) to apply, the party arguing against disclosure 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,

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 one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1: Type of information

[58] The information protected under section 17(1) includes "commercial information," which is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[21] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[22]

Part 2: Supplied in confidence

[59] The requirement that the information have been "supplied" to the OSC reflects the purpose in section 17(1) of protecting the informational assets of third parties.[23]

[60] Information may qualify as "supplied" if it was directly supplied to the OSC by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[24]

[61] The party arguing against disclosure, in this case the OSC, must show that both

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[21] Order PO-2010.
[22] Order P-1621.
[23] Order MO-1706.
[24] Orders PO-2020 and PO-2043.

the organization supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[25]

[62] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the OSC on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.[26]

Part 3: Harms – section 17(1)(a), (b) and (c)

[63] Parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. The OSC must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.[27]

[64] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[28] However, they do not have to prove that disclosure will in fact result in 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.[29]

[65] Sections 17(1)(a) and (c) seek to protect information that could be exploited in the marketplace.[30]

[66] To establish the section 17(1)(b) harm, the OSC must provide evidence that

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[25] Order PO-2020.
[26] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).
[27] Orders MO-2363 and PO-2435.
[28] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.
[29] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (I*nformation and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.
[30] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

disclosure of a record could reasonably be expected to result in similar information no longer being supplied to it. The OSC must provide evidence it is in the public interest that similar information continue to be supplied to it and that harm would result if similar information were no longer supplied to it.

The parties' representations

The OSC's representations

[67] The OSC submits that, when the CSA asked the CIRO to provide it with a confidential version of the 2022 failed trade study that named specific dealers and securities issuers (record 7), this was exclusively for the internal use of the CSA. Record 10 is a slide deck that provides a later update to the confidential data in the study.

[68] The OSC claims the withheld information in records 7 and 10 is exempt under section 17(1) because it contains confidential commercial and financial information about trading, settlement and other data received from marketplaces about specific dealers and securities issuers.

[69] The affidavit of a senior official of the CIRO, provided by the OSC, explains that the CIRO understood the withheld information in records 7 and 10 would be kept confidential. He also noted that the CIRO is required to keep this information confidential:

- under the recognition orders issued to it,
- the regulatory service agreements in place across Canada,
- the CIRO's own Universal Market Integrity Rules, and
- the CIRO's memorandum of understanding with the CDS.

[70] In essence, the senior official affirms all information the CIRO has about who is engaged in trading, and what securities they are trading, is supposed to be confidential.

[71] Relying on this affidavit, the OSC also submits that disclosure of the withheld portions of records 7 and 10 will result in harm. It will prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the named dealers and securities issuers who are identified as "outliers." Being an outlier means they had a disproportionate number of failed trades relative to the amount of their trading.

[72] Regarding the harms test, the OSC submits that disclosure of the withheld information is very likely to create a negative impression of the operations of the outlier dealers and securities issuers. Investors could have regulatory concerns about these outliers. It would create a negative public perception of them. As the failed trade data is preliminary and does not make regulatory findings, such effects would be unfair and

harmful.

[73] Relying on this affidavit evidence, the OSC's position is that the release of this information may in the future result in dealers being resistant to supplying such information to the CIRO. The OSC submits this will impede the CIRO's ability to deliver on its regulatory mandate and to conduct policy research.

[74] The OSC submits that records 7 and 10 were supplied by the CIRO to the OSC (as a member of the CSA) and the OSC did nothing to change or modify them. It submits that the portions of records 7 and 10 that it released to the appellant reflect the CIRO's observations and conclusions without divulging the underlying confidential information supplied by the CIRO. The OSC adds that while it can compel market participants to disclose their information to it, power to compel is not a relevant consideration in this appeal as the 2022 failed trade study, which included data naming specific dealers and securities, was provided to it on a confidential basis.

The appellant's representations

[75] The appellant submits that the information she is seeking is commercial in nature (not financial), and the OSC has not met the balance of the test under section 17(1).

[76] The appellant asserts that the study's two data sources do not exempt the disclosure of the severed information as the data was not supplied in confidence.

[77] She submits records 7 and 10 do not contain data from the CDS; rather, the information is the product of the CIRO's analysis of that data from the CDS. She argues that, for the purposes of the *Act*, the information was not "supplied" by the CDS. It was obtained by observation rather than being "supplied."

[78] The appellant asserts that the second source of data, the CIRO's internally collected information, was obtained from dealers who are required to report on their activities and is, therefore, not confidential. The appellant also submits that, as the OSC is a regulator and is entitled to this information from dealers and securities issuers, the withheld information cannot be treated as being supplied in confidence to the OSC.

[79] The appellant submits that the CIRO took raw trading data and concluded who the outliers were, which was new information. When dealers provide the CIRO with information, she contends they cannot expect it to be treated as confidential from the OSC.

[80] On the question of harm resulting from disclosure, the appellant submits that as no dealers or securities issuers have provided evidence on this point, the OSC's affidavit evidence is speculative and insufficient to meet the test for exemption.

[81] Finally, she asserts that neither the OSC nor the CIRO face a risk of loss of information as dealers and securities issuers are subject to regulatory reporting

requirements.

Analysis and findings

Records 7 and 10 contain commercial information

[82] Selling securities is a commercial transaction. Both the appellant and the OSC agree that the information in records 7 and 10 is commercial information. I also agree as the records contain information about dealers and the securities they sell; this is commercial information. Thus, the first part of the three part test for the mandatory exemption under section 17(1) is met.

Records 7 and 10 were supplied in confidence to the OSC

[83] I find that the withheld information in records 7 and 10 was supplied to the OSC in confidence.

[84] The CIRO's publicly released 2022 failed trade study did not specifically identify the dealers and securities who were involved in failed trades; the report discussed the activity in a general manner. At the same time, however, the CIRO provided the OSC (as a member of the CSA) with a confidential version of the study that did name the dealers and securities involved in failed trades.

[85] The CIRO had an implicit expectation that the names of dealers and securities involved in failed trades would be kept confidential. This information is not available from public sources. All information the CIRO collects about who is engaged in trading, and what securities they are trading, is confidential. It provided a confidential version of its study to the CSA, whose members are required to adhere to a policy that shared information is to be kept confidential. It is clear from these circumstances that this information was supposed to remain confidential because, were it not, mistaken assumptions could be made about the regulatory compliance of these dealers and securities issuers.

[86] The appellant argues that the information was not supplied in confidence given that the OSC could ask for this information itself. However, I do not place weight on this argument because it is not relevant to the issue of whether the information in the records was supplied by the CIRO to the OSC in confidence.

The harms if the withheld information in records 7 and 10 is disclosed

[87] The OSC, which has the burden of proof, submits that the release of the withheld information in records 7 and 10 risks each of the harms in section 17(1)(a), (b) and (c).

[88] The senior official of the CIRO, who provided an affidavit, oversees "market functions including trade surveillance, market policy, trading conduct compliance and trading review and analysis." He states that the disclosure of the withheld information in

records 7 and 10 could result in the harms addressed by section 17(1)(a). His evidence is that disclosure of this information would likely create a negative impression of the operations of the outlier dealers and securities issuers. It could cause concerns among investors and the public. This would be detrimental and unfair because the study does not make regulatory findings.

[89] While the appellant asserts this evidence is insufficient to meet the test under section 17(1)(a), I do not agree. Actual harm does not need to be proven; it is sufficient to show a real risk of harm – that disclosure could reasonably be expected to result in the harm. By its nature, securities trading is competitive and what is described is a real risk of harm to the businesses of the named dealers and securities issuers in comparison to their competitors in the market. There is a cogent explanation that the disclosure of the names in records 7 and 10 will lead others to make incorrect assumptions about them. This will prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the dealers and securities issuers who are identified. This evidence meets the required test.

[90] Thus, I find that the third party information exemption in section 17(1)(a) applies to the information withheld in records 7 and 10. As I have found that the harm in section 17(1)(a) has been established, it is not necessary for me to consider the other harms in sections 17(1)(b) or (c).

[91] Having found that the withheld portions of records 7 and 10 are exempt from disclosure under section 17(1), I do not need to consider the alternative representations made by the OSC that this information is exempt from disclosure under section 14(1)(b).

Issue D. Does the discretionary law enforcement exemption at section 14(1)(c) apply to record 21?

[92] Record 21 is a series of emails between the OSC and the CIRO staff about how the CIRO monitors social media to perform its regulatory functions. The OSC submits it is exempt from disclosure under section 14(1)(c).

[93] Section 14(1)(c) exempts the disclosure of records that could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in "law enforcement." The IPC has considered the term "law enforcement" to include securities industry investigations conducted by regulatory bodies under the delegated authority of the OSC. In Order P-30, the adjudicator decided that an investigation conducted by the Investment Dealers Association (whose regulatory function was later assumed by the IIROC (now the CIRO)) under the delegated authority of the OSC is "law enforcement" under section 14(2).

The parties' representations

[94] The OSC submits record 21 would reveal investigative techniques or procedures currently used by the CIRO in law enforcement matters and which are not generally

known to the public. These techniques are "investigative" and directly related to "law enforcement" as they involve processes for monitoring and analyzing data to assess whether further review and enforcement action is warranted. It notes that, to the extent these processes reveal any non-compliance with the CIRO's rules, dealers may be subject to further information requests or may be referred for disciplinary procedures, including a formal enforcement proceeding.

[95] The appellant submits that the OSC's representations provide insufficient detail to support its position. She also submits that since dealers have superior resources compared to regulators, they likely have a technical advantage so the investigative techniques of regulators would already be known to dealers.

[96] The OSC adds that record 21 is a non-responsive record, which the appellant refutes.

Analysis and findings

[97] I do not agree with the OSC that record 21 is a non-responsive record. As its own representations explain, while the appellant's access request did not focus on short selling, some of the records contain information about short selling, given the connection between failed trades and short selling. Because activist short selling can be aided by someone making adverse comments to negatively affect the price of a security, social media use is relevant and this record is responsive. Accordingly, it needs to be considered under section 14(1)(c).

[98] I find that record 21 qualifies for exemption under section 14(1)(c) because it contains a detailed description of the tools and strategies that the CIRO uses to monitor how security market participants use social media. While the surveillance techniques described in the record may be known to sophisticated and well-resourced entities, they are not generally known to the public. I accept that disclosure could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used by the CIRO.

[99] For this reason, I find that record 21 qualifies for exemption under section 14(1)(c), subject to my review of the OSC's exercise of discretion in Issue F, below.

Issue E. Does the discretionary solicitor-client privilege exemption at section 19 apply to the withheld portion of record 29?

[100] The OSC withholds a portion of record 29 under the solicitor-client privilege exemption in section 19.

[101] This exemption states, in part:

> A head may refuse to disclose a record,

> (a) that is subject to solicitor-client privilege,
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation[.]

[102] There are two branches in section 19. The first branch, found in section 19(a) ("subject to solicitor-client privilege"), is based on common law. The second branch, found in section 19(b) ("prepared by or for Crown counsel") contains statutory privileges created by the *Act*. The OSC must establish that at least one branch applies. The OSC claims that the first branch applies to the withheld information.

[103] Solicitor-client communication privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[31] The privilege covers the request for legal advice, the legal advice, and communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[32] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[33]

[104] The severed information is in an email from an OSC staff member to a lawyer in the general counsel's office. The appellant left it to the adjudicator to decide this issue submitting she could not make representations on this exemption without reviewing the record. As the OSC describes, the withheld information relays confidential legal advice about legislative amendments the general counsel provided in an earlier meeting with that staff member. The email is a confidential communication between the client OSC staff member and the lawyer made for the purpose of obtaining legal advice. Accordingly, I find that the withheld portion of record 29 qualifies for exemption under section 19(a) of the *Act*, subject to my review of the OSC's exercise of discretion in Issue F, below.

Issue F. Did the institution exercise its discretion under sections 13(1), 14(1)(c), 15(b) and 19(a)? If so, should the IPC uphold the exercise of discretion?

[105] The section 13(1), 14(1)(c), 15(b) and 19(a) exemptions are 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.

[106] In addition, the IPC may find that the institution erred in exercising its discretion

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[31] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[32] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada* (*Ministry of Public Safety and Emergency Preparedness*) *v. Canada* (*Information Commissioner*), 2013 FCA 104.
[33] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

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.

[107] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[34] The IPC cannot, however, substitute its own discretion for that of the institution.[35]

The parties' representations

[108] The OSC submits that in exercising its discretion under sections 13(1), 14(1)(c), 15(b) and 19(a) it considered the following factors in weighing its decision whether to disclose information:

- it considered the wording of the exemptions claimed and the interests those exemptions seek to protect, having regard to the underlying principles of the *Act*,
- many of the records involve a third party, with which the OSC consulted. The OSC carefully considered the views of the third party in determining what exemptions to apply to the records,
- the OSC reviewed the records at issue in good faith, minimized the amount of information it withheld and focussed the issues in the appeal,
- there is no sympathetic or compelling need to release the records, and
- the appellant is not seeking access to her own personal information or the personal information of any other party.

[109] In response, the appellant submits the *Act* sets out various factors that may be relevant to the exercise of discretion, including:

- that information should be available to the public,
- that exemptions from the right of access should be limited and specific, and
- whether disclosure of the information will increase public confidence in the operation of the institution.

[110] The appellant submits that public confidence in the operation of the OSC is related

[34] Order MO-1573.
[35] Section 43(2).

to whether it is seen to be making decisions that are consistent with the objects of the *Ontario Securities Act* for regulating trading. She contends that the information withheld in records 7 and 10, the names of dealers and securities issuers, ought to be disclosed to hold them to account and to serve as a "report card" of the regulatory regime.

Analysis and findings

[111] Based on my review of the information at issue, the parties' representations and the circumstances of the appeal, I find that the OSC did not err in exercising its discretion to withhold information under sections 13(1), 14(1)(c), 15(b) and 19(a) of the *Act*.

[112] After reviewing the factors the OSC considered when making its decision, I find that the OSC did not exercise its discretion in bad faith or for an improper purpose. I also find that it considered relevant factors and did not consider irrelevant factors in the exercise of its discretion. The OSC considered the purposes of the *Act* and gave due regard to the nature and sensitivity of the information in the specific circumstances of this appeal.

[113] Given its role as a regulator in the public interest, it is evident that the OSC balanced how much information it could grant access to without disclosing the advice or recommendations of staff, law enforcement investigative techniques, intergovernmental information, third party information, and solicitor-client privileged information. The OSC considered the relevant factors and balanced them appropriately.

[114] Accordingly, I uphold the OSC's exercise of discretion.

Issue G. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1), 15(b) and 17(1) exemptions?

[115] I have found above that certain information is exempt under sections 13(1), 15(b) and 17(1). However, section 23 provides for the disclosure of exempt information in some circumstances where there is a compelling public interest and this interest clearly outweighs the purpose of the exemption. It states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[116] The *Act* does not state who bears the onus of establishing that section 23 applies.

Compelling public interest

[117] In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s

central purpose of shedding light on the operations of government.[36] The IPC has stated that to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the public about the activities of the government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[37] The IPC has defined "compelling" as "rousing strong interest or attention."[38]

[118] Any public interest in non-disclosure that may exist also must be considered.[39] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[40]

[119] A "public interest" does not exist where the interests advanced are essentially private in nature.[41]

[120] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation,[42]
- the integrity of the criminal justice system has been called into question,[43]
- public safety issues relating to the operation of nuclear facilities have been raised,[44] and/or
- disclosure would shed light on the safe operation of petrochemical facilities[45] or the province's ability to prepare for a nuclear emergency.[46]

[121] A compelling public interest has been found not to exist where, for example:

- another public process or forum has been established to address public interest considerations,[47]

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[36] Orders P-984 and PO-2607.
[37] Orders P-984 and PO-2556.
[38] Order P-984.
[39] *Ontario Hydro v. Ontario* (*Information and Privacy Commissioner*), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.).
[40] Orders PO-2072-F and PO-2098-R.
[41] Orders P-12, P-347 and P-1439.
[42] Order P-1398, upheld on judicial review in *Ontario* (*Ministry of Finance*) *v. Ontario* (*Information and Privacy Commissioner*), [1999] O.J. No. 488 (C.A.).
[43] Order PO-1779.
[44] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario* (*Information and Privacy Commissioner*), Order PO-1805.
[45] Order P-1175.
[46] Order P-901.
[47] Orders P-123/124, P-391 and M-539.

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations,[48]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding,[49] and/or

- the records do not respond to the applicable public interest raised by the requester.[50]

Outweighs the purpose of the exemption

[122] The existence of a compelling public interest is not enough to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the exemption in the specific circumstances.

[123] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.

The parties' representations

[124] The appellant submits that the compelling public interest in disclosure outweighs the purpose of the section 13(1), 15(b) and 17(1) exemptions because:

- it will inform participants in the securities market about the work of the OSC and the CSA's public consultation process on short selling,

- as a comparison, the federal securities regulator in the United States releases some similar data,

- the information at issue in this appeal concerns the health of the economy and the functioning of public capital markets,

- issuers who believe they have been targeted by short sellers should be given this information because dealers know when they are short selling,

- the access request was made at the request of the founder of an advocacy group representing certain securities issuers, who is an advocate for regulatory reform, and the withheld information in records 7 and 10 may be relevant to a cause of action he believes he has against others, and

[48] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[49] Orders M-249 and M-317.
[50] Order P-613.

- the CIRO wants to keep this information confidential to shield its members from public scrutiny.

[125] The OSC submits:

- this appeal is an attempt to cut short the work of the CSA and the CIRO on studying short selling and the CIRO's public consultation on proposed rules and guidance on this activity,
- the withheld information cannot reliably be used to identify short sellers, or manipulative activity, without further analysis,
- this appeal is an attempt to obtain information from the CIRO that was first sought in a civil action,
- the OSC has this confidential information because it is a securities regulator and its disclosure could be prejudicial and harmful to investors, market participants and capital markets, and
- it is in the public interest to keep this information confidential so that the CIRO's ability to regulate capital markets is not impeded.

Analysis and findings

[126] I find that the appellant has not established that there is a compelling public interest in disclosure of the exempt information in records 1, 2, 7, 10, 12, 14, 15, 17, 18, 20, 22 to 26, and 34 to 37.

[127] As the OSC submits, the release of the 2022 failed trade study coincided with a second phase of the CSA's public consultations about short selling. It adds that the CIRO has also invited comment on proposed rules and guidance related to short selling and failed trades. Thus, the CSA and the CIRO are providing the public and industry stakeholders with information, and a forum, to express their concerns about failed trades and the regulation of short selling. Under the section 23 test, these circumstances weigh against finding there is a compelling public interest in disclosing the appropriately withheld information.

[128] The appellant's request for access to information specifically focussed on confidential information in records 7 and 10. The OSC has disclosed aggregated information from those records but withheld information naming dealers or securities issuers. However, as both the OSC and the appellant advise, the appellant seeks this withheld information for litigation purposes. It was unsuccessfully sought in the preliminary steps of a civil action and continues to be sought for that purpose. This does not demonstrate a compelling public interest for purposes of section 23, as explained above.

[129] The suggestion that some similar information may be published by the federal securities regulator in the United States is also not determinative of this issue.

[130] Finally, the appellant's representations describe a concern that is essentially private. Her concern is that some dealers are intentionally engaging in manipulative short selling and it is having a disproportionate impact on some securities issuers.

[131] In contrast, the OSC's representations caution that the failed trade analysis is too general to be used to conclude malfeasance on the part of specific dealers. For this reason, the records do not respond to the applicable public interest raised by the requester.

[132] Considering all this evidence, the information I have found exempt does not meet the "compelling public interest" threshold. As the first part of the two part test under section 23 is not met, I do not need to consider the second part of the test.

ORDER:

1. I do not uphold the OSC's decision to withhold all of records 2, 14, 15, 18 and 35 under the discretionary exemption at section 13(1) and I order it to disclose to the appellant record 35 in full, and the marked portions of copies of records 2, 14, 15 and 18 that I have highlighted in green and provided to the OSC together with this order.

2. I order the OSC to disclose the information indicated in order provision 1 to the appellant by **April 20, 2026,** but not before **April 13, 2026.**

3. To verify compliance with the order, I reserve the right to require the OSC to provide me with a copy of the records disclosed to the appellant upon request.

4. I uphold the balance of the OSC's access decision.

Original Signed by: March 13, 2026

Jonathan Batty
Adjudicator