

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2014-0543

THE MANITOBA SECURITIES COMMISSION

REPORT ISSUED ON APRIL 1, 2016

CASE SUMMARY

At a September 23, 2013 hearing held by the Manitoba Securities Commission (the commission) to consider the complainant's application for registration as a dealing representative, the commission referred to a record that the complainant did not know would be discussed at the hearing. This record was not included in the materials the commission had provided the complainant to review prior to the hearing. As such, the complainant states that he did not have an opportunity to formulate a response to the record prior to the hearing.

In our view, all records the director of the commission considers in such a decision-making process should be included in the disclosure package provided to an applicant prior to the hearing. If this does not occur and a document is being considered that was not included in the disclosure package, the commission should inform the applicant of the opportunity to formulate and present a response to the document before any decision is made by the director. In this case, however, we have no evidence that the commission advised the complainant of this option.

During the course of our investigation we were advised by the commission that a new process is in place with respect to the disclosure of records to applicants. We are of the view that this new practice meets the requirements of procedural fairness. However, the new process is not reflected in any written policies or procedures.

As a result, the ombudsman suggests that the commission set out the specific aspects of its disclosure process in written policies and procedures, including when and how the commission informs an applicant of the opportunity to provide further information following the hearing. Had the commission informed the complainant of this option, it may have prevented the need for a Manitoba Ombudsman investigation into this matter.

OMBUDSMAN – ROLE AND RESPONSIBILITIES

Under the Ombudsman Act, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation. On other occasions it is written policy or established procedures implemented to give effect to legislative purpose.

The goal of administrative investigations is to determine the validity of complaints and to identify areas requiring improvement.

KEY ISSUE

In response to this complaint, our office decided to investigate the following administrative issue:

- **Was the complainant provided a meaningful opportunity to formulate and present his position on the information that was considered by the director of the commission regarding his application for registration?**

BACKGROUND INFORMATION

The commission is an independent agency of the Manitoba government. The commission's responsibilities include registering individuals and firms who wish to trade in capital markets.

In June 2013, the complainant applied under the Securities Act for registration as a dealing representative with a firm that was sponsoring his registration. A dealing representative is a person that sells investments, such as shares and mutual funds. What they can sell in Manitoba depends on the firm they work for and their registration with the commission.

In some instances, the commission will provide an applicant with an opportunity to meet with the director of the commission regarding his or her application (described by the commission as an opportunity to be heard). The complainant emailed the commission on June 18, 2013, requesting that the director provide him this opportunity.

On August 22, 2013, the commission informed the complainant that the director was prepared to meet with him to review his application and registration history on September 23, 2013.

By a letter dated September 12, 2013, the director provided the complainant the following information about the commission's decision-making process:

In situations where an application may raise a public interest concern that could impact on the decision of the Director whether to grant the registration requested, the applicant for registration is entitled to have an opportunity to be heard before the Director. [...]

The opportunity to be heard is not a formal hearing but is intended to be a forum where issues can be discussed and further information can be received by the Director from the applicant.

Following the opportunity to be heard the Director will review all the materials involved as well as all information received during the meeting in order to make a determination with respect to the application for registration.

Although not required, you are entitled to have legal counsel represent you at this meeting.

Although an opportunity to be heard is not a public hearing process if it is necessary for the Director to make a written Decision on the application, that Decision will be part of the public record.

You will be receiving a package of materials shortly from staff which consist of the materials being reviewed by the Director as part of the review of the pending application. If you feel there are other materials that should be considered by the Director feel free to forward those to my attention, with a copy to [...], at your earliest convenience.

[Emphasis original]

On September 17, 2013, the commission sent the complainant a binder of materials being reviewed by the director with respect to the complainant's application. The binder contained eight appendices and hundreds of pages of documentation.

The opportunity to be heard, which we refer to as "the hearing," was held on September 23, 2013. During the hearing, the commission referred to a document that it had not included in the binder of materials it had disclosed to the complainant prior to the hearing. The document was a two-page email the complainant had sent the commission on August 22, 2013. In this email, the complainant stated that former clients had contacted him regarding concerns with their investment accounts. The complainant stated in the email that he had explained to these individuals that he was not registered with the commission and could provide limited advice.

On November 4, 2013, the director refused the complainant's application for registration. His decision relied in part on the finding that the complainant had "conducted himself in a manner since the loss of his registration that arguably does involve unregistered advising in the trading of securities." The director supported this finding by referring to the email the complainant had sent the commission on August 22, 2013 and to the complainant's statements at the hearing regarding his contact with former clients. The director's written reasons state that:

In an email to [a Senior Investigator of the Commission] dated August 22, 2013 under the subject heading “Unsatisfied clients of [a bank]” [the applicant] refers to speaking with people about their investments. The email refers to changes made to these client accounts after he left [the bank] and questions whether those changes were appropriate under the circumstances. [The applicant] states that “I have been able to gather a significant amount of information concerning this matter...” [...]

[The applicant] confirmed he has continued to have contact with former clients. While [the applicant] states he told the former clients he was no longer registered to trade in securities, he also stated he reviewed those clients’ investments and has pointed out to those clients where in his view the changes made to their investment portfolios following his departure from [the bank] were not appropriate. [...]

Following the director issuing his decision, the complainant notified the commission that he wished to appeal the decision. However, the firm sponsoring his application decided to withdraw its sponsorship. Because a dealing representative applicant needs a sponsoring firm to be able to register with the commission, a re-hearing or appeal regarding the complainant’s application is not possible at this time.

On August 7, 2014, the complainant filed a complaint with our office regarding the director’s decision.

SUMMARY OF THE COMPLAINANT’S POSITION

Content of the disclosure package

The complainant states that the purpose of his August 22, 2013 email was to share information with the commission regarding the investment advising practices of a particular bank. The complainant states in the email that he obtained this information by speaking with individuals who had investment accounts at the bank and that he had explained to the individuals that he was not registered with the commission. The complainant indicates that he sent this email before the commission advised him that the director was prepared to meet with him to review his application. He questions why, once the commission had scheduled the hearing, it did not advise him that the email would be a topic of discussion. He believes the commission intentionally did not include a copy of the August 22, 2013 email in the disclosure package it sent him one week prior to the hearing.

Complainant’s opportunity to formulate and present a position

As there was no indication in the disclosure package that his activities while not registered would be part of the discussion at the hearing, the complainant states that he did not have an opportunity to prepare information and evidence regarding the activities described in the email. The complainant indicates that he felt “ambushed” by the director and senior investigator at the hearing because they were well-prepared to discuss his activities while not registered.

The complainant notes that in April 2013 an investigator at the commission informed him that a referral agreement the complainant had entered into while not registered “appeared to meet the requirements under the exemption.” As such, the complainant states he had no reason to believe that his activities while not registered would be a major topic of discussion at the hearing.

The complainant indicates that he did not request an opportunity after the hearing to present his position concerning his activities while not registered because he was not aware that he had an opportunity to do so. The complainant is of the view that given the impact the director’s decision would have on his profession and livelihood, such an opportunity should have been communicated to him in writing.

The complainant also believed at the time that the commission would have included the August 22, 2013 email in the disclosure package he had received or otherwise advised of the relevance of the email prior to the hearing if the director would be relying on that email in coming to his decision.

Once the complainant received the decision in November 2013, and realized that the director had based his decision in part on concerns about the complainant’s actions while he was not registered, he asked the director for an opportunity to present additional comments and documentation. However, the director informed the complainant that as there was no registration application pending, he was not prepared to meet with him to receive additional information. The complainant is of the view that because he did not know that his activities while not registered would be discussed at the hearing, nor that he had an opportunity to provide comments on the matter after the hearing, the director should have considered the comments and documentation the complainant provided on the matter after the decision was issued.

The complainant advises our office that the director’s decision has hurt his reputation and severely impacted his ability to earn a living.

SUMMARY OF THE COMMISSION’S POSITION

Content of the disclosure package

The commission states that the complainant is a long-time member of the industry and should have been aware that any information he was providing the commission (such as the August 22, 2013 email he sent to the commission) could be considered relevant to his application. The commission’s understanding is that the email was not included in the disclosure package primarily because the complainant was the creator of the email and would be knowledgeable about the contents. The commission also states that given the content of the email, it did not appear that there would be any reason to believe that the complainant would not be able to effectively respond to it at the hearing.

The commission advised our office that the director and deputy director involved in this particular hearing are no longer with the commission. As such, the commission is not able to provide specific information as to the decisions that were made concerning disclosure.

Complainant's opportunity to formulate and present a position

The commission states that the complainant had a chance to respond to the director's direct questions about the email at the hearing and that he spoke to the contents of the email in some detail. The commission states the director reflected the complainant's responses in his decision. The commission also indicates that the complainant had an opportunity to provide further information concerning the activities while not registered in the weeks following the hearing, up until the time the director issued the decision on November 4, 2013, but that the complainant chose not to do so. The commission did not provide our office evidence that before the decision was issued it had advised the complainant of this opportunity.

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- Discussions with the complainant;
- Discussions with the current director of the commission;
- Review of information provided by the complainant and the director; and
- Review of the Securities Act.

ANALYSIS

The commission indicates that it provides the following documentation and information to applicants prior to the applicant's opportunity to be heard:

- A letter describing the hearing process;
- A copy of the application; and
- A copy of other materials commission staff may have gathered or obtained that were relevant to staff recommending to the director to either impose terms or conditions or to not approve the applicant's registration.

The commission describes the pre-hearing disclosure process as follows:

The opportunity to be heard is a fact finding exercise relative to an application for registration. So as to expedite the exercise, staff does disclose to the applicant information that has been provided to the Director to assist in their decision making process. The purpose is to prevent the applicant from being surprised by the introduction of information they may not have seen previously at the meeting for an opportunity to be heard. In the event that such a document was introduced that the applicant had not seen but was being considered by the Director, the applicant would be given an opportunity to provide a more formal response which would include time to formulate the response to the document.

In this case, the director's decision states that at the complainant's opportunity to be heard, the complainant was invited to comment on the August 22 email. The commission maintains it did not deny the complainant an opportunity to present further information after the hearing was over (and before the decision was made six weeks later).

We note that the complainant sent the August 22 email to the commission several weeks before the commission sent him the disclosure package. This suggests that the email should have been included in the disclosure package if it was being considered by the director as part of his decision making,

In our view, all records the director considers in such a decision-making process should be included in the disclosure package provided to an applicant prior to the hearing. If this does not occur, the commission should advise the complainant before the hearing that the document is being considered by the director in his review of the complainant's application and provide the complainant an opportunity to formulate his position on the document prior to the hearing. If the director considers documentation at the hearing that was not provided to the applicant in adequate time before the hearing, the commission should inform an applicant of the opportunity to formulate and present a response prior to any decision being made by the director. In this case, however, we have no evidence that the commission advised the complainant of this option.

During the course of our investigation, the current director stated in a letter to our office dated March 5, 2015 that the commission's disclosure process has since changed and he outlined the following new process:

As a general starting point, I would not give consideration to materials not previously seen by the applicant, or which the applicant did not have an opportunity to review and comment on.

If the document came to my attention prior to the opportunity to heard being convened, but after the disclosure package was sent, I would direct staff to provide a copy to the applicant and indicate it may be considered relative to the application for registration.

If the document came to my attention during the opportunity to be heard, I would give the applicant time to review the document at the meeting. If there was inadequate time to review the document, I would consider adjourning and reconvening the meeting at a later date to give the applicant the time necessary to review and respond to the document.

If the document came to my attention after the opportunity to be heard I would direct the document be sent to the applicant. I would then seek a response to any concerns raised by the document. Depending on the document and the concerns raised, I might invite the applicant to respond in writing, or alternatively reconvene the meeting to allow the applicant to address the concerns in person.

The director indicates that even if a document written by the applicant was relevant to the staff's recommendation regarding the application for registration, that document would be included in the disclosure package. He also advises that his practice at the end of the hearing would be to

invite the applicant to share any further information the applicant believes would be relevant to the director's determination on whether the applicant should be registered. The director states he would indicate that before the decision was issued, the applicant could provide new evidence in writing, or if needed, at a re-convened hearing.

We note that the commission, like any public body, owes a duty of procedural fairness when it makes an administrative decision affecting individual rights or privileges. Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. In the context of an administrative hearing, it generally requires that an individual affected by the decision knows the case he or she has to meet and is given a meaningful opportunity to present their case, including having a meaningful opportunity to respond to any information that might be contrary to their position.

In our view, the commission's current process (as described above) follows the requirements of procedural fairness. The current process ensures that an applicant is given adequate time to review and respond to any material that comes to the director's attention before, during or after an opportunity to be heard. While the commission indicates it has standard forms of communication that it uses regarding an applicant's opportunity to be heard, these documents do not set out the details of the current disclosure process. There are no written policies and procedures that deal with this new process.

Written policies and procedures can contribute to a more transparent and consistent decision-making process. They can set out aspects of the process that are not described in the commission's standard written correspondence with applicants and can help ensure the commission's staff are aware of the operational practice. A written process also helps to ensure applicants' procedural fairness rights are consistently respected in the commission's decision-making, which can have a significant impact on an applicant's livelihood and reputation.

As a result, the ombudsman suggests that the commission set out the specific aspects of disclosure process described by the director in written policies and procedures, including when and how the commission informs an applicant of the opportunity to provide further information following the hearing.

The current director states that the commission will consider this suggestion.

CONCLUSION

As indicated above, we are of the view that the commission's new process with respect to the disclosure of records to applicants meets the requirements of procedural fairness. The ombudsman suggests that the commission set out the specific aspects of its disclosure process in written policies and procedures, including when and how the commission informs an applicant of the opportunity to provide further information following the hearing.

This report concludes our investigation of this complaint.

MANITOBA OMBUDSMAN