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

ORDER P-898

Appeal P-9400812

Ontario Insurance Commission

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ontario Insurance Commission (OIC) received a request for specific pages of the annual returns submitted by 77 life insurance companies for the year 1993. The appellant is one of the life insurance companies whose information was requested.

The request refers to forms prescribed by the federal Office of the Superintendent of Financial Institutions (OSFI). These same forms were also provided to the OIC in fulfilment of the reporting requirements of the Ontario Insurance Act.

The Minister of Finance is the "head" of the OIC for the purposes of the Act. Requests and appeals under the Act are dealt with on behalf of the OIC by the Ministry of Finance (the Ministry). For ease of reference, this order will refer to actions taken by the Ministry on the OIC's behalf as actions of the OIC.

The OIC notified the appellant of the request pursuant to the affected party notification provisions found in section 28 of the Act. The appellant responded to this notice, indicating its objection to the release of any of the requested pages of its annual return. The appellant's objection to disclosure was based on the exemption provided by section 17 of the Act (third party information).

The OIC subsequently decided to disclose the requested information pertaining to the appellant, in its entirety, and it notified the appellant of this decision. As a result, the appellant filed this appeal.

The sole issue in this appeal is whether the exemption in section 17 of the Act applies to the requested information from the appellant's annual return.

A Notice of Inquiry was sent to the appellant, the Ministry (representing the OIC) and the requester. Representations were received from the appellant and the requester. Because it was not opposing disclosure, the OIC did not provide representations per se, but did provide factual background concerning the records.

DISCUSSION:

THIRD PARTY INFORMATION

The appellant's reasons for opposing the disclosure of the records relate to section 17(1)(a), which states as follows:

> 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, where the disclosure could reasonably be expected to,
>
> prejudice significantly the competitive position or interfere significantly with

the contractual or other negotiations of a person, group of persons, or organization.

For a record to qualify for exemption under section 17(1)(a) the appellant 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 one of the harms specified in section 17(1)(a) will occur.

I have reviewed the records and representations submitted to me. I will now consider whether the three parts of the test have been met.

Part 1

The entire record describes the appellant's assets, liabilities, income and other financial aspects of the appellants' operations. On this basis, I find that it constitutes financial information, and part 1 of the test has been satisfied.

Part 2

Based upon the evidence provided, I am satisfied that the record was supplied to the OIC. However, in order to meet part 2, the information must have been supplied **in confidence**, explicitly or implicitly.

In Order M-169, Inquiry Officer Holly Big Canoe indicated that, in order to find that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed, and that it had a reasonable basis. I agree.

I will first consider whether the record was supplied explicitly in confidence. The record itself is not marked confidential, nor are there any other indications on its face to support a finding that it was supplied to the OIC explicitly in confidence.

In the circumstances of this case, my analysis of whether the record was supplied explicitly in confidence will require a determination as to whether the record was supplied to the OIC directly by the appellant, or by OSFI. This is so because of the different provisions regarding confidentiality in the federal Insurance Companies Act and the Ontario Insurance Act. The former carries an express provision regarding the confidentiality of this type of information in the hands of the OSFI, and also contains stipulations about the sharing of this information with other regulators such as the OIC (sections 672(1) and 673 of the Insurance Companies Act, S.C. 1991, c. 41, as amended). By contrast, section 116 of the Insurance Act stipulates that the information is privileged (i.e. it is not compellable in court proceedings), but in my view that is very

different from a general requirement of confidentiality.

The appellant's representations indicate that the information was filed with the OSFI in Ottawa, and that OSFI shared it with "... the Ontario regulators to permit them to carry out their regulatory functions". Presumably this is a reference to the OIC. However, despite a request to the appellant's counsel for clarification in this regard, and documentation to support the appellant's position, neither clarification nor supporting documentation were received.

The OIC indicates that the record was supplied to it directly by the appellant. I have considered and weighed the evidence on this point. I prefer the evidence of the OIC and accordingly, I find that the record was provided directly by the appellant to the OIC. This being so, the confidentiality provisions of the federal Insurance Companies Act do not apply, because they are aimed at the OSFI and others to whom the OSFI provides information. In my view, the provisions of section 116 of the Insurance Act do not support a finding that the record was supplied explicitly (or, for that matter, implicitly) in confidence.

Accordingly, I am unable to conclude that the record was supplied to the OIC explicitly in confidence.

I will now turn to the question of whether the there was an implicit expectation of confidentiality. The appellant's own representations indicate that, in 1993, it was notified of a similar request pertaining to its 1992 return. At that time, the Ministry (acting on behalf of the OIC) indicated its **intention to disclose** that information. An appeal from that decision was filed by the appellant (resulting in appeal file P-9300607), which was ultimately settled when the appellant agreed to disclosure of the information.

The settlement of appeal P-9300607 does not restrict the appellant's right to object to disclosure of the 1993 return. However, in my view, the appellant ought to have known, based upon the OIC's decision to disclose the 1992 information, that the OIC does not view this type of information as confidential.

Accordingly, I am unable to conclude that any implicit expectation of confidentiality existed. Alternatively, if the appellant had such an expectation, I am not persuaded that it had any reasonable basis.

Therefore the appellant has failed to meet part 2 of the test.

Part 3

Prejudice to Competitive Position

The representations submitted on behalf of the appellant state:

> Disclosure of the information in question will significantly prejudice our client's competitive position. This information is to be used ... to permit third parties to compare our client's operations with those of other Canadian insurers but our client's Canadian operation, being carried on as a branch operation of a multi-national insurer, differs in many significant respects from other insurers with which it is to be compared. Disclosure of this information

> may very well mislead and confuse the general public and discourage potential users of our client's service from doing so.

This submission relates to the "prejudice to competitive position" aspect of section 17(1)(a). However, I am not convinced that the difference between Canadian insurers and multinationals, as described in the representations, gives rise to a reasonable expectation of this harm.

The appellant's submissions in this regard also refer to a past decision of the Commissioner's office which, according to the appellant, stands for the proposition that "... the fact that a record may be negatively interpreted does not satisfy the harms test under section 17 of the ... Act". The appellant disagrees with this interpretation and urges me not to follow it. This submission appears to be a reference to a passage in Order P-373, where former Assistant Commissioner Tom Mitchinson states:

> I find the evidence regarding harm that could result from a negative interpretation of the information contained in the records is not sufficient to establish the third part of the section 17(1) exemption test. In my view, the evidence consists of generalized assertions of fact in support of what amounts to, at most, speculations of possible harm.

In my view, this finding in Order P-373 is based upon the former Assistant Commissioner's assessment of the evidence, and should not be seen as a general statement that a potential negative interpretation of a record could **never** satisfy the harms tests in section 17(1). In the current appeal, my view that the representations quoted above do not substantiate the harm in section 17(1)(a) is not based upon the appellant's reference to a potential negative interpretation of the records. Rather, my assessment of the evidence is similar to that in Order P-373; the information provided to me is simply not sufficient to convince me that a reasonable expectation of the harm in section 17(1)(a) has been established.

Interference with Negotiations

The appellant's representations go on to state as follows:

> Section 17 of the ... Act also contemplates harm that may arise where disclosure interferes significantly with the contractual or other negotiations of a person, group of persons or organization. As I have mentioned there have been ongoing negotiations between our client and [the requester] as to the nature and extent of disclosure that will be made to [the requester]. By permitting the ... Act to be used as a way to make an "end run" around these negotiations, the Ministry of Finance is seriously interfering with these negotiations. Our client wants to ensure that information is disclosed by [the requester] in a way that is neither misleading to the public nor incomplete. The only leverage our client has to insist upon this fair representation of its financial results is to deny access to the information until [the requester] agrees to provide appropriate disclosure.

This submission relates to the later part of section 17(1)(a), since it argues that disclosure could reasonably

be expected to "... interfere significantly with the contractual or other negotiations of a person, group of persons or organization".

It is clear that the negotiations relate to the same subject which is at issue in this appeal, namely, how much of the information in these records should be disclosed to the requester. I am unable to agree that the harms contemplated in section 17(1)(a) are substantiated by evidence of negotiations pertaining to the very issue to be decided in the appeal. Such a view would be inconsistent with the existence of the appeals process under the Act, whose purpose is to determine such issues.

If I accept the appellant's argument on this point, the result would be that private negotiations between individuals or corporations, pertaining to the disclosure of the types of information referred to in section 17(1), could be used to block access to that information under the Act. In my view, this could be extremely prejudicial to the access scheme in the Act, and I do not think it would be consistent with the legislature's intention. In my opinion, there is a distinction to be drawn between negotiations concerning disclosure of the information at issue and negotiations of some other kind which could be affected by disclosure. I believe this section is aimed at the latter class of negotiations.

Moreover, I do not accept the characterization of the access process as an "end run" around the negotiations as the appellant alleges. In the absence of provisions to exclude this class of records from the operation of the Act, the question is simply whether the exemption applies or not. In my view, the possible disclosure of the records as a result of private negotiations is not a factor to consider in deciding this case.

For all these reasons, I am not satisfied that disclosure of the record could reasonably be expected to "interfere significantly with the contractual or other negotiations of a person, group of persons or organization" within the meaning of section 17(1)(a).

As previously noted, failure to meet **any one part** of the section 17 test means that the exemption does not apply. In this case, only part 1 has been established. Accordingly, I find that the records are not exempt under section 17(1).

As no other exemptions have been claimed, and no mandatory exemptions apply, the record should be disclosed.

ORDER:

1. I uphold the decision of the OIC.

2. I order the OIC to disclose the record at issue, in its entirety, to the requester within thirty-five (35) days after the date of this order, but not earlier than the thirtieth (30th) day after the date of this order.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the OIC to provide me with a copy of the record which is disclosed to the requester pursuant to Provision 2.

Original signed by: April 5, 1995
John Higgins
Inquiry Officer