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

ORDER P-1295

Appeals P-9600257 and P-9600272

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NATURE OF THE APPEALS:

The requester asked the Ontario Insurance Commission (the OIC) for a copy of the "current private passenger automobile rates and rating rules" of four named insurance companies. The requester, which is itself an insurance company, offers motor vehicle policies and operates an insurance quotation service for consumers.

Following the receipt of this request, the OIC notified the four insurance companies. It advised the companies that, while the information sought was very likely accessible under the Freedom of Information and Protection of Privacy Act (the Act), components of the records might exist whose disclosure could significantly prejudice the position of the companies. Two of the insurance companies consented to the disclosure of their rates and rating schedules. The other two advised the OIC that they objected to the release of these records.

The OIC subsequently advised the latter two companies that it considered the information in question to be publicly accessible and, therefore, that the exemptions in the Act did not apply to the records in question. It then informed the companies that it had disclosed these records to the requester.

The two insurance companies appealed the OIC's decision to the Commissioner's office. They took the position that the rates and rating schedules had been disclosed contrary to the mandatory exemptions found in sections 17(1)(a), (b) and (c) of the Act (third party information). The companies also contended that the OIC had failed to meet its obligations under section 28 of the Act (notification of third parties).

On appeal, the two insurance companies now ask that the Commissioner's office overturn the OIC's decision and direct the OIC to (1) comply with the provisions found in section 28 in the future and (2) obtain the immediate return of the records which have been disclosed to the requester.

The issues arising in these appeals could not be mediated. As a result, the Commissioner's office sent a Notice of Inquiry to the requester, the OIC and the two insurance companies. All parties provided representations.

The records at issue in these appeals consist of the private passenger automobile rates and rating rules provided to the OIC by the two insurance companies.

Given that these two appeals raise similar issues, I have decided to deal with them both in a single order. In the course of this decision, I will refer to the insurance company which objects to the disclosure of its records in Appeal Number P-9600257 as Company (X) and to the company opposing disclosure in Appeal P-9600272 as Company (Y).

DISCUSSION:

JURISDICTION OF THE COMMISSIONER'S OFFICE TO PROCEED WITH THESE APPEALS

Was the Request Made Under the Act?

In its submissions, the OIC takes the position that the Commissioner's office lacks the jurisdiction to proceed with these appeals since the requester never made a formal request under the Act. In the OIC's view, for a request to be properly constituted under the Act, a party must specifically state that it is made "under the Freedom of Information and Protection of Privacy Act". The OIC further contends that this proposition is valid despite the fact that it may have processed requests for similar information under the Act in the past.

The OIC then argues that since a request under the Act was never filed, it follows that the OIC did not have an obligation to issue third party notices to the insurance companies under section 28 of the Act. Furthermore, since the companies were never sent notices under this provision, they lack the right to appeal the OIC's disclosure "decision" under section 50(1) of the Act.

To state the OIC's position somewhat differently, since its decision to disclose the rates and rating rules was made outside the scope of the Act, no appeal rights exist and the Commissioner's office lacks the jurisdiction to become involved in these files.

The requester approaches this issue somewhat differently. It notes that it has already obtained access to the records at issue. This means that there is no longer a decision to appeal. The requester also submits that the OIC's failure to advise Companies (X) and (Y) of their appeal rights under the section 28 does not constitute a reviewable decision.

In the alternative, the requester argues that, even if there is a decision which can be appealed, it has already obtained access to the responsive records. On this basis, the requester submits that no practical purpose would be served by proceeding with these appeals. It then contends, based on the principles set out in the Supreme Court of Canada decision in Borowski v. The Attorney General of Canada (1989), 57 D.L.R. (4th) 231, which I will discuss shortly, that the present appeals are moot and should be dismissed.

Companies (X) and (Y), on the other hand, submit that both the original access request and the OIC's subsequent letter to the companies dated November 27,1995 make reference to the provisions of the Act. On this basis, they submit that both the conduct and intent of the parties illustrate that they wished the request to be treated under the Act. The companies contend, therefore, that the Commissioner's office holds the requisite jurisdiction to decide these appeals.

The two companies then argue that their appeals are not, in fact, moot. In this regard, Company (X) points out that, on two separate occasions since its appeal was filed, the OIC has disclosed its rates and rating rules to other third parties. In these instances, it states that there was no advance notice to the company nor any opportunity to make submissions to the OIC.

Both companies emphasize that, in order to deal with similar requests in the future, it is imperative for the Commissioner's office to decide whether such information should be disclosed. They also ask that this office dispose of the two appeals on their merits.

I will first consider whether I have the jurisdiction to proceed with these appeals. In making this determination, I will review the wording of sections 50(3), 54(1) and 54(3) of the Act, as well as

the court decisions which have discussed the scope of the Commissioner's jurisdiction to decide appeals.

Section 50(1) provides, in part, that a person who is given notice of a request under section 28(1) may appeal any decision of a head under the Act to the Commissioner's office. Sections 54(1) and (3) set out the scope of the Commissioner's order making powers. Section 54(1) specifies that:

> After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

Section 54(3) goes on to provide that, subject to the Act, the Commissioner's order may contain any terms and conditions that the Commissioner considers appropriate.

To proceed with this analysis, I must first determine whether the requester's letter of August 25, 1995, which sought access to the rates and rating rules, constitutes a request for the purposes of section 24(1) of the Act. This is a preliminary jurisdictional question which I must answer prior to deciding the main issues in this inquiry [*Ontario (Minister of Health) v. Big Canoe* (June 29, 1994), Toronto Doc. 111/94 (Ont. Div. Ct.), affirmed [1995] O.J. No. 2477 (C.A.)].

Should I decide that the request was properly constituted under the Act, I may proceed to decide the main issues. If the answer to this question is "no", then I do not have the jurisdiction to continue with this inquiry.

If the requester's August 25 letter can be characterized as a request, then this would provide evidence that the letters which the OIC sent to the two companies on November 27, 1995 could reasonably be construed as notices under section 28(1) of the Act. The receipt of such notices would, in turn, allow the two companies to appeal the OIC's access related decisions under section 50(1) of the Act and, thereby, confer the requisite jurisdiction to the Commissioner's office to adjudicate these files.

For reasons that I will elaborate upon in the next section of the order, I have concluded that the requester's August 25, 1995 letter constitutes a request under section 24(1) of the Act and that the OIC's letters of November 27, 1995 are written notices prescribed under section 28(1) of the Act. On this basis, I find that I have the necessary jurisdiction to proceed with these appeals.

Are these Appeals Moot?

I will now consider the requester's argument that I should discontinue my inquiry because the subject matter of the two appeals is moot.

The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision of Borowski v. The Attorney General of Canada. There, the court commented on the topic of mootness as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not

> have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

In the Borowski case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

I have carefully considered the principles articulated in the Borowski case and believe that they are equally applicable to the adjudication processes of the Commissioner's office.

Although no one disputes that the records at issue in these appeals have already been disclosed to the requester, both Companies (X) and (Y) have requested that I grant them certain relief to mitigate the consequences of this decision. In particular, I am requested to direct the OIC to comply with the provisions found in section 28 in the future and to order the immediate return of the records which have been disclosed to the requester. While these remedies are unusual, I am not prepared to say that they would necessarily fall outside the scope of the Commissioner's jurisdiction under sections 54(1) and (3) of the Act.

In addition, Company (X) points out that, in 1996, the OIC released two further copies of its rates and rating rules to other requesters without first notifying the company or allowing it to make representations under section 28 of the Act. It is also clear, based on my review of these files, that there is sharp disagreement between the OIC and the two companies on the question of whether their rate filings are in the public domain. This dispute has spawned expensive litigation which shows no sign of abating.

Based on the facts before me, I have concluded that the subject matter which underlies these two appeals is neither hypothetical nor abstract. I also find that the continuation of this inquiry may resolve a longstanding controversy which affects the rights of the parties. This is also a situation where a decision from the Commissioner's office can have a practical effect.

For all of these reasons, I have determined that the issues to be adjudicated in these appeals are not moot. I will, therefore, go on to consider the remaining substantive and procedural issues arising in these appeals.

DID THE OIC COMPLY WITH ITS OBLIGATIONS UNDER SECTION 28 OF THE ACT?

To address this issue, it is necessary for me to set out the chronology of events that lead to the OIC's decision to disclose the relevant records to the requester.

On August 25, 1995, the requester wrote to the OIC to request access to "the current private passenger automobile rates and rating rules" prepared by four insurance companies, including Companies (X) and (Y).

In asking for this disclosure, the requester stated that:

> It is my understanding that the Freedom of Information and Protection of Privacy Act requires that the [OIC] provide access to the records in its custody or control, subject to certain exemptions enumerated in [section] 17(1). Since the OIC has published comparative rates and has expressed its intention to continue this behaviour, by implication the OIC has concluded that rates are not subject to exemption under the Act.

On November 27, 1995, the OIC wrote to Companies (X) and (Y) to advise them that this request had been received. In its letters, the OIC advised the parties that:

> This information is not normally considered proprietary by the Insurance Commissioner, and is very likely accessible under the Freedom of Information and Protection of Privacy Act. However, there may be information embedded in these pages, the release of which, you would consider significantly prejudice the competitive position of [the named insurance company].
>
> Accordingly, before the OIC responds to [the requester], we would appreciate receiving your comments on this matter.

What follows is the subsequent exchange of correspondence which occurred between the OIC and Company (X).

On December 5, 1995, an official from Company (X) indicated that, while the company would be prepared to exchange certain information contained in the records, it regarded other elements as proprietary in nature.

On January 4, 1996, the Commissioner of the OIC (the Insurance Commissioner) responded to the December 5, 1995 letter. In this correspondence, he made reference to a bulletin distributed by the OIC which dealt with the treatment of third party information under section 17(1) of the Act. After noting that (1) the records at issue were not marked "confidential" and (2) Company (X) had a manual exchange program with other insurers, the Insurance Commissioner indicated that he would be disclosing the rates and rate schedules to the requester.

On January 10, 1996 an official from Company (X) responded to the November 27, 1995 and January 4, 1996 correspondence from the OIC. In his letter, the Company (X) official stated that:

> I am assuming that, consistent with the Ontario Freedom of Information and Protection of Privacy Act, [Company X] will be afforded 20 days upon receipt of your letter to make representations to the head as to why this information or any

> part thereof should not be disclosed. In the meantime, I trust that none of the information in question will be released.

Company (X) also indicates that, on January 11, 1996, one of its officials spoke with an OIC representative. During this discussion, the OIC confirmed that the company would have 20 days from January 10, 1996 to make submissions to the OIC before a formal decision on disclosure was made.

On January 29, 1996, Company (X) submitted its representations to the OIC which it indicated were made pursuant to sections 28(1) and (5) of the Act.

On February 7, 1996, the Insurance Commissioner wrote to Company (X) to express his view that it was in the public interest to ensure that the information in question was widely available. He also indicated that it was inappropriate to force an individual or organization to file a formal request for the rates and rating rules under the Act.

The Insurance Commissioner concluded his letter by indicating that, should requests for this sort of information be received in the future, the OIC would make this information available to the insurance industry at a cost of $100 for each company filing. He also pointed out that, where possible, electronic access would be provided and that industry brokers and others could attend at the OIC's offices and make copies as they wished.

On February 15, 1996, the Insurance Commissioner acknowledged receipt of Company (X)'s January 29, 1996 representations which he described as having been made to the "Privacy Commissioner". His letter went on to state that:

> Should the Privacy Commissioner disagree with our position that the [requester's] request for rates and rate rulings was not an access request covered by the [Act], he will advise us of this and ask for our submissions at that time.

On February 27, 1996, counsel for Company (X) wrote to the Insurance Commissioner to explore the contents of his letter. Counsel pointed out that his client's January 29, 1996 submissions were made to the OIC under section 28 of the Act and *not* to the Commissioner's office.

On March 19, 1996, counsel for the OIC responded to the February 27, 1996 letter. She indicated that the OIC considered the company's rates and rate filings to be publicly available. On this basis, the OIC had determined that the provisions of the Act did not apply to withhold disclosure of the records. Counsel also reiterated the OIC's view that Company (X)'s submissions had been made to the Commissioner's office, rather than the OIC.

On April 29, 1996, an OIC official advised Company (X) that the company's rates and rules had been sent to the requester.

I will now deal with the communications which passed between the OIC and Company (Y).

On November 30, 1995, an official from Company (Y) wrote to the OIC to indicate that it considered its rating materials to be proprietary and that they should not be disclosed to the appellant.

On December 21, 1995, the Insurance Commissioner responded to the November 30, 1995 letter. In this correspondence, he made reference to a bulletin distributed by the OIC which dealt with the treatment of third party information under section 17(1) of the Act. After noting that (1) the records at issue were not marked "confidential", (2) Company (Y) has a manual exchange program with other insurers and (3) the company supplies rating information to a firm which sells that information to the insurance industry, the Insurance Commissioner indicated that he would be disclosing the rates and rate schedules to the requester. These records were apparently released on January 2, 1996.

On January 11, 1996, an official from Company (Y) responded to the December 21, 1995 letter by expressing surprise that her company's records had been disclosed. The official took the position that the OIC had contravened sections 28(8) and (9) of the Act by issuing a decision prior to the expiry of the 30-day period for filing an appeal with the Commissioner's office.

On the same date, the official from Company (Y) also wrote to the requester to demand the return of the documentation which it had received from the OIC.

On January 15, 1996, the Insurance Commissioner wrote to the official from Company (Y) to indicate that her letter of November 30, 1995 "did not address the germane issues under the Act or provide sufficient evidence to support the "reasonable expectation of harm" portion of the section 17(1) exemption.".

To determine whether or not the OIC complied with its legal obligations under the Act, I will need to set out the relevant statutory provisions which appear in sections 24(1) and 28 of the Act. Section 24(1)(a) of the Act specifies how an access request should be made. It states that:

> A person seeking access to a record shall make a request in writing to the institution that the person believes has custody or control of the record.

Section 28 of the Act describes the obligations of institutions when they receive access requests where the records contain, among other things, commercial or financial information which might affect the interests of third parties. The relevant portions of section 28 for the purposes of these appeals are the following:

> (1) Before a head grants a request for access to a record,
>
> (a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information
>
> ...

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

(2) The notice shall contain,

(a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;

(b) a description of the contents of the record or part thereof that relate to the person; and

(c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed.

...

(5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make representations to the head as to why the record or the part thereof should not be disclosed.

...

(7) The head shall, within thirty days after the notice under subsection (1) is given, but not before the earlier of,

(a) the day the response to the notice from the person to whom the information relates is received; or

(b) twenty-one days after the notice is given,

decide whether or not to disclose the record or the part thereof and give written notice of the decision to the person to whom the information relates and the person who made the request.

(8) Where a head decides to disclose a record or part thereof under subsection (7), the head shall state in the notice that,

(a) the person to whom the information relates may appeal the decision to the Commissioner within thirty days after the notice is given; and

(b) the person who made the request will be given access to the record or to a part

> thereof, unless an appeal of the decision is commenced within thirty days after the notice is given.

(9) Where, under subsection (7), the head decides to disclose the record or a part thereof, the head shall give the person who made the request access to the record or part thereof within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision.

Each of the parties submitted representations on the manner in which the OIC dealt with the requester's August 25, 1995 letter. I will now summarize the key arguments that were advanced.

The OIC's Position

The OIC argues that the Insurance Commissioner's decision to disclose the rating materials was not made in response to a request for information under the Act.

It then submits that, even if the two requests were validly constituted under the Act, the OIC nonetheless complied with the terms of section 28(1) of the Act. That is the case because, at the time the request was received, the OIC *did not* have reason to believe that the responsive records might contain information referred to in section 17(1) that would affect the interests of the two insurance companies.

The OIC concluded that section 17(1) did not apply to these records because (1) it had always considered the rates and rating rules to be public information and (2) in response to OIC requests, neither of the companies has indicated which components of their rate filings they considered confidential.

The OIC, therefore, determined that the two companies did not have an expectation of confidentiality with respect to the records which meant that section 17(1) could not, in its view, apply.

The Requester's Position

The requester takes the position that any request for information directed to an institution is implicitly made pursuant to the Act. It points out that, if any other approach is taken to this question, then all of the confidentiality safeguards afforded under the legislation will be lost.

The requester then generally asserts, however, that the issue of whether or not there has been compliance with section 28 of the Act is not a decision for the purposes of the Act.

The Positions of Companies (X) and (Y)

The two companies state that the process followed by the OIC which led to the disclosure of their records was flawed and contravened sections 28(1), (2), (8) and (9) of the Act. They note, in particular, that the OIC neither (1) made a formal decision under the Act, (2) explained the

basis for its decision nor (3) advised the parties of their right to file appeals with the Commissioner's office.

Both companies also emphasize that, section 28 of the Act aside, all administrative bodies have a common law duty of procedural fairness. This duty includes the right of parties to know why an adverse decision has been made and the right not to be treated arbitrarily. The two companies assert that the OIC failed to meet these basic obligations in this case, and thus, breached its duty of fairness to the companies.

Conclusion

To decide whether the OIC complied with its obligations under section 28 of the Act, I must first decide whether the requester's letter of August 25, 1995 constitutes a request for the purposes of section 24(1) the Act. In reviewing the requester's letter, I note that it makes specific reference to the Act, to the concept of custody or control and to a specific exemption found in the Act, section 17.

The requester's letter also invites the OIC to contact the writer should there be any questions about the nature of the request. Based on my review of the files, there is no evidence that any such contact occurred. Arguably, the OIC could, at this stage, have advised the requester that it did not plan to treat its letter as a request under the Act.

In my view, the reasonable inference to draw from these facts is that the requester intended its August 25, 1995 letter to be a formal request under of the Act. This expectation is also confirmed in the requester's submissions to this office. I find, therefore, that the letter in question is a request under section 24(1) of the Act.

I must now consider whether the OIC's letters of November 27, 1995, which were sent to Companies (X) and (Y), constitute third party notices for the purposes of sections 28(1) and (2) of the Act.

In these letters, the OIC (1) notified the two companies that a request had been made to obtain copies of their records, (2) indicated that the rates and rating rules were very likely accessible under the Act, (3) asked for comments on whether any of the information contained in the records might significantly prejudice the competitive position of the companies and (4) indicated that it wished to review these comments prior to responding to the requester.

In my view, the contents of these letters (with the exception of the requirement that the submissions be received within 21 days) very closely mirror the requirements of sections 28(1) and (2) of the Act.

I would also point out that in a bulletin which the OIC distributed to insurance companies in April 1991, it made the following general statement:

> In the event that the [OIC] receives a [request under the Act], involving records which might come under section 17, you will be notified and given the

> opportunity to make representations on whether the document should be exempted. This notice provision is set out under section 28 of the Act.

While this bulletin is a bit dated, I believe that it creates an expectation that any requests for third party information will attract the notice provisions of the Act.

Based on the evidence before me, I have concluded that the OIC's letters of November 27, 1995 were, in fact, third party notices for the purposes of sections 28(1) and (2) of the Act. This means that, prior to disclosing the records and in accordance with the Act, the OIC ought to have (1) provided Companies (X) and (Y) with written notice of its determinations, (2) indicated that its decisions to disclose the records could be appealed to the Commissioner's office and (3) confirmed that the rating materials would not be released until the 30-day appeal period had elapsed.

In its submissions, the OIC has stated that, even if the two requests were validly constituted under the Act, it nonetheless complied with the terms of section 28(1) of the Act. That is the case because, at the time the request was received, the OIC *did not* have reason to believe that the responsive records might contain information referred to in section 17(1) that would affect the interests of the two insurance companies.

I do not accept this argument. By seeking comments from Companies (X) and (Y) on November 27, 1995 I find that the OIC implicitly concluded that there could be some parts of the records which might attract the section 17(1) exemption. Having made this threshold determination, the OIC could not then reverse its course and thereby deny the companies their notice and appeal rights under the Act.

To conclude, I have determined that the OIC failed to meet its procedural obligations under the Act in processing these two requests.

I will now go on to determine whether the rating materials contain any information which is exempt from disclosure under the Act.

THIRD PARTY INFORMATION

Companies (X) and (Y) submit that their rates and rating rules qualify for exemption under sections 17(1)(a), (b) and (c) of the Act (the third party information exemptions).

To show that the records in these two appeals fall within these provisions, the insurance companies must establish that:

1. the records reveal information that is a trade secret or scientific, technical, commercial or financial information; **and**

2. the information has been supplied to the OIC in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the records gives rise to a reasonable expectation that the harms outlined in sections 17(1)(a), (b) or (c) will occur.

I will now examine these statutory requirements.

TYPES OF INFORMATION

Companies (X) and (Y) submit that the contents of the records constitute commercial and/or financial information. Neither the OIC nor the requester disputes this point. I agree that the records contain these two types of information and, therefore, that the first part of the section 17(1) exemption has been met.

SUPPLIED IN CONFIDENCE

To meet the second part of the test, Companies (X) and (Y) must establish that the information contained in the records was supplied to the OIC in confidence either explicitly or implicitly. There is no doubt that the two companies provided the information in question to the OIC. On this basis, the first component of the "supplied" test has been met. The key issue is whether such information was supplied *in confidence*.

In Order M-169, Inquiry Officer Holly Big Canoe commented on the application of the second part of section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act (whose wording is similar to that found in section 17(1) of the Act). She there stated that:

> In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

I adopt these comments for the purposes of these appeals.

In order P-561, I stated that, in determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

The question, therefore, is whether Companies (X) and (Y) can demonstrate a reasonable expectation that the records at issue would be held in confidence at the time that they provided these documents to the OIC. I will now summarize the submissions on this subject from the parties.

The OIC's Position

The OIC indicates that, under section 412(1)(b) of the Insurance Act, insurance companies are required to apply to the Insurance Commissioner for approval of the rates they intend to use for each type of coverage and category of automobile insurance. It also points out that the resulting approval order is a public document. The OIC then suggests that, by implication, the rates, rating rules and risk classification elements are also in the public domain.

The OIC further notes that, when a member of the public asks for information about a rating issue, it encourages the individual to visit its office to review the relevant source materials. It is also the OIC's policy that, except where third party materials are considered to be confidential or proprietary, they are generally accessible to the public.

The OIC also indicates that, in April 1991, it distributed a bulletin to automobile insurers which dealt with the impact of the Act on rate filings made by these companies. The bulletin warned insurance companies that section 17(1) of the Act should not be viewed as a blanket exemption. In addition, the bulletin specified that, where an insurance company considered that certain parts of its rate filings were proprietary, it should list the records which it believed were confidential and explain the basis for this view.

The OIC states that it has reminded insurance companies of its position on several occasions and that the annual Filing Guidelines, which insurers are required to complete each year, repeat this message. The relevant portions of this document are here set out:

> The [Insurance] Commission may receive access requests under the Freedom of Information and Protection of Privacy Act (FOIPOP Act) for any record in its custody or control. Section 17 of the FOIPOP Act recognizes certain types of information as supplied in confidence by third parties should be exempt from disclosure in the event of an access request.
>
> If you think that the information included in your rate application would result in the harms described in section 17 of the FOIPOP Act, please list all such pages or stamp such pages as confidential and the reasons you consider the information confidential. While this exercise does not guarantee that records will not be disclosed, it will be useful in responding to a FOIPOP request.

The OIC then points out that neither Company (X) nor Company (Y) identified its rating materials as confidential when these filings were made.

The OIC next submits that the rating manuals compiled by insurance companies are provided to their brokers and agents in the normal course of business and are otherwise widely disseminated. It goes on to indicate that there are a number of commercial vendors (e.g. Compu-Quote Inc.) which, for a fee, will provide a rate comparison service to brokers, agents and other third parties. The OIC notes that insurers provide these vendors with copies of their rate manuals as well as periodic updates.

The OIC also states that most of the large automobile insurance companies and many smaller ones participate in rate manual exchange programs where these records are exchanged with their competitors. The OIC indicates that both Companies (X) and (Y) have participated in this program.

The OIC concludes by stating that rating rules, factors and discounts can be considered to be in the public domain since brokers employ information contained in the company manuals to both rate a specific risk and provide comparison rates to consumers.

The Requester's Position

The appellant points out that the rate manuals for all insurers are available for public inspection in the Province of Quebec. It also confirms that a number of insurers release rate information to services which provide brokers and insurers with rate comparisons.

The Positions of Companies (X) and (Y)

The two companies emphasize that the contents of the records were supplied to the OIC for the *sole* purpose of enabling the Insurance Commissioner to carry out his statutory mandate of rate setting and monitoring the insurance industry. On this basis, neither company could reasonably expect that its records would also be disclosed to competitors.

Company (X) points out that, while it has not been its practice to mark documents as confidential, it is the nature and the content of the information in a document (not its label) which determines confidentiality. Company (X) then argues that its information was supplied implicitly in confidence for the following reasons.

First, in a letter dated January 11, 1991, Company (X) advised the OIC that it considered the information contained in its rate filings to be confidential. In a second letter, dated January 23, 1991, Company (X) made a similar statement with respect to a study that it provided to the institution. Company (X) notes that, in response to this later correspondence, the OIC agreed that the information contained in the study was proprietary and, as such, would not be distributed outside the OIC.

The OIC indicates, however, that the January 23, 1991 letter involved the contents of a confidential research paper which only a few people in Company (X) had seen. It indicates that this situation is not at all analogous to the disclosure of the rates and rating rules which are required to be filed by statute. I agree with this position.

Second, Company (X) points out that, although it subscribes to the Compu-Quote and Nova Data services, these providers will only release its information to brokers who are under contract with Company (X). The company also notes that these brokers are required to enter into confidentiality agreements with Company (X). In these agreements, the brokers acknowledge that the written materials which they receive from the company may involve information that is "of a highly sensitive, confidential or proprietary nature", that such data must be held "in strictest confidence " and that such data shall at all times remain the sole property of the company.

Company (Y), for its part, says that it treats its records as confidential and that the contents of these documents are not known, or readily available, to the public. The company points to the following considerations to support this position.

First, the company's manual exchange program with participating insurers is conducted on an exclusive and confidential basis with the understanding that the manuals will not be disseminated to other insurers without the prior written consent of the company.

Second, Company (Y) only participates in the Compu-Quote program for the convenience of its brokers. The company notes that an insurance broker can only obtain access to the rating information if he or she is associated with Company (Y) and if the individual signs a licence agreement with Compu-Quote.

It goes on to indicate that the use of Compu-Quote software is limited to the licensee's premises and only to authorized licensees who are expressly prohibited from granting sub-licences or extending the right to view the information to others.

Third, pursuant to the terms of the licencing agreement between Company (Y) and its brokers, its manuals are stated to be the property of Company (Y) and must be returned to the company on demand.

Finally, both companies argue that the fact that the requester has been required to make a freedom of information application establishes that their rating materials are not in the public domain.

Conclusion

I have carefully considered the detailed submissions provided by the parties. In my view, Companies (X) and (Y) have not demonstrated that they had a reasonable expectation that their records would be held in confidence at the time that they provided these documents to the OIC. I have based this conclusion on the following considerations.

First, other than a letter which Company (X) sent to the OIC in 1991, I have not been provided with any evidence that either of the companies advised the OIC that their rate filings (or any portions thereof) were to be treated as confidential. I find this omission to be significant since the OIC subsequently warned both companies to identify information which they considered to be proprietary.

On this basis, I find that the information contained in the rate filings was not communicated to the OIC on the basis that it was confidential and that it was to be kept confidential.

Second, Companies (X) and (Y) acknowledge that they share their rates and rating rules with insurance brokers and agents who are associated with their companies. While I appreciate that there exist certain rules and conditions which these intermediaries must adhere to when using this information, it is equally clear that many individuals in the insurance field have access to these rating materials.

The accessibility to this information is further enhanced through (1) the distribution links provided by several commercial vendors (e.g. Compu-Quote Inc.) which will provide a rate comparison service to brokers, agents and other third parties and (2) by the rate manual exchange programs in which the two companies participate. Finally, I would note that the OIC allows members of the public to review these rating materials at its offices.

For these reasons, I conclude that the records at issue have been otherwise disclosed and are available from sources to which the public, either directly or indirectly, has access. I also find that Companies (X) and (Y) have not treated these materials consistently in a manner that indicates a concern for their protection prior to being communicated to the OIC.

Finally, I consider it significant that two of the insurance companies which were initially advised of the requester's letter, consented to the disclosure of their rates and rating rules. This supports my view that there does not exist an industry wide aura of confidentiality with respect to these rating materials.

Based on my finding that the "supplied in confidence" component of the section 17(1) test has not been established, it is not necessary for me to go on to consider the application of the third part of the test

The result, therefore, is that the rates and rating rules are not protected from disclosure under section 17(1) of the Act. This means that the records in these appeals may properly be disclosed to the requester.

ORDER:

For the reasons that I have previously outlined, these two appeals are dismissed

Original signed by: November 19, 1996
Irwin Glasberg
Assistant Commissioner

POSTSCRIPT:

While I appreciate the OIC's desire to make rating materials the subject of routine disclosure principles, this issue becomes more complex where the records may contain information that is subject to section 17(1) of the Act.

In these cases, the OIC must balance the public's right to know against the legitimate and statutorily recognized rights of third parties. I would encourage the Insurance Commissioner to continue its dialogue with the insurance industry to ensure that the disclosure of publicly useful information will occur in an informed, predictable and proper fashion.