Information and Privacy
Commissioner/Ontario

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

ORDER P-1526

Appeal P-9700294

Ontario Insurance Commission

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NATURE OF THE APPEAL:

The appellant submitted a two-part request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ontario Insurance Commission (the OIC) asking for the following:

1. Copies of documents filed by 13 insurance companies with the OIC pursuant to sections 7 and 8 of section 411/412 most current rates filings made under the Insurance Act.

2. Whether submissions made by the 13 insurance companies pursuant to sections 7 and 8 of section 411/412 current rates filings contain any indication that these companies are claiming protection of section 17 of the [Act] with respect to such submissions.

The OIC identified responsive records and denied access to them based on the exemptions contained in sections 17(1)(a), (b) and (c) of the Act.

The appellant appealed the OIC's decision to deny access. The appellant also indicated in the letter of appeal that the OIC did not respond to the second part of the request in its decision letter.

This office provided a Notice of Inquiry to the appellant, the OIC and 13 companies (the affected parties) who appear to have an interest in some of the records at issue in the appeal. Representations were received from all parties.

RECORDS:

There are 13 records at issue, comprising 45 pages. These records consist of the most current rates filings made under section 411/412 of the Insurance Act with respect to the 13 affected parties.

PRELIMINARY MATTERS:

SCOPE OF THE REQUEST

The appellant indicates that part two of the request specifically asked whether the filings provided by the 13 affected parties contained any indication that the companies were claiming the protection of section 17 of the Act with respect to those filings. The appellant indicates that the OIC failed to respond to this part of the request.

The appellant acknowledges that this request was for information about a document rather than for disclosure of the document itself. However, the appellant submits that the information sought is or should be contained on the records themselves and should therefore be accessible under the Act. The appellant indicates that it requires this information to enable it to fully respond to the issue of "confidentiality" found in the three-part test in section 17(1) of the Act.

The OIC indicates that it did not respond to this part of the request because it considered this issue to be irrelevant since access to the records was being denied. In this regard, the OIC explains that regardless of whether or not an insurer explicitly or implicitly claims confidentiality for any material submitted, it is the head's decision as to whether section 17 of the Act applies.

The OIC submits further that since access to the records responsive to the first part of the request was being denied, responding to the second part of the request would have been tantamount to providing access to part of the record.

I have considered the representations of both parties on this issue. In my view, the appellant's request should have been interpreted as asking for a copy of a written indication by any of the 13 affected parties that they were claiming protection under section 17(1) of the Act. The OIC states in its representations that in some cases a covering letter indicates that confidentiality is being claimed and in other cases certain pages are marked as "confidential". The OIC indicates further that in some cases this claim is not explicitly made.

I do not agree with the OIC that this part of the request was irrelevant as access to the information requested in the first part of the request was being denied. Nor do I agree that responding to, or even disclosure of, records or parts of records responsive to this request would be tantamount to providing access to part of the record (for which section 17 has been claimed).

Section 10(2) makes it very clear that if an institution received a request for access to a record that contains information which falls within one of the exemptions under the Act, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. This was a separate request for a different category of information as that requested in the first part of the request. A negative response to the first part of the request has no bearing on whether the second part should be responded to by the OIC.

It is clear that such a caution either exists or does not exist for each affected party. In my view, where it appears on individual pages, such a caution could be severable from the information responsive to the first part of the request. Further, the OIC has admitted that it might be contained on an entirely separate record.

In my view, the OIC should have responded separately to this part of the request. Accordingly, I find that the OIC has not fully responded to the appellant's request.

The appellant indicates that it needs to know the information it requested in the second part of the request in order to fully respond to the section 17(1) claim made for the records responsive to the first part. I do not agree that this information is necessary at this time. I note that the appellant has made extensive representations on the issue of confidentiality, despite not knowing which or if any of the affected parties made a claim, and its position is very clear on this point.

The records at issue in this appeal are very specific to the first part of the request and may or may not be the only records which contain the information requested in the second part of the request. It is not clear whether the appellant wishes this information solely for the purpose stated or whether there is another reason for asking for it. I have no evidence before me, however, to indicate that the appellant does not wish to pursue this issue to its conclusion. Therefore, I will

order the OIC to issue a proper decision with respect to the second part of the request in accordance with the provisions of section 26 of the Act.

EXCHANGE OF REPRESENTATIONS

The appellant has indicated in its representations that without being advised of the particulars of the OIC's or affected parties' submissions on the issues in this appeal, it is not in a position to properly respond to them. Accordingly, the appellant requests that it be advised on the particulars of the other parties' representations and then provided with an opportunity to respond to them.

Section 52 of the Act sets out the powers of the Commissioner with respect to conducting inquiries to review decisions of institutions that are appealed to the Commissioner. The statutory authority of the Commissioner includes, *inter alia* the right to conduct an inquiry in private. Specifically, section 52(13) of the Act reads as follows:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

The appellant has been provided with a copy of the Notice of Inquiry which describes the records, explains the exemption which has been relied on, and the onus requirements under the Act. In my view, the appellant has been provided with sufficient information to enable it to address the issues in this appeal, and has, in fact, made extensive representations on all issues in this appeal. Accordingly, I find that this is not a case in which the exchange of representations should be ordered.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 17(1)(a), (b) or (c), the OIC and/or the affected parties 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 (a), (b) or (c) of section 17(1) will occur.

[Order 36]

All three parts of the test must be satisfied in order for the exemption to apply. I have chosen to refer primarily to the OIC's and appellant's representations in this order. I note, however, that all 13 affected parties have submitted representations, the content of which is similar to, if not a mirror of, those presented by the OIC. It is sufficient to say that the representations of the affected parties support those of the OIC.

Type of Information

The OIC and the affected parties all or variously claim that the records contain trade secrets and/or commercial, financial, scientific or technical information. The appellant concedes that the rating algorithms are or contain information which satisfies the definition of trade secret, technical, commercial or financial information. Despite the agreement of the parties on this issue, I have decided to review the information at issue independently to determine whether it falls into one or more of the categories claimed by the OIC and affected parties.

The OIC states that an algorithm is a process or set of rules for calculation. The OIC advises that Attachment A to its Filing Guidelines (Section 411/412) defines a "rating algorithm" as "the manner in which base rates, rate differentials, and other surcharges/discounts are combined to arrive at the premium charged to an individual risk". The OIC continues that a rating algorithm is "a mathematical formula relating to the base rate and variations to it to an individual's risk measured by the classification variables". Essentially, a rating algorithm produces the price the insurer will ultimately charge for its product.

The OIC indicates further that rating algorithms are unique to the insurer and are produced by the insurer at considerable time and expense. A number of the affected parties have indicated that because the rating algorithms are produced at considerable expense and are critical to their success in the marketplace, they are treated with utmost confidence.

In Order M-29, former Commissioner Tom Wright adopted the following definition for the term "trade secret" for the purposes of section 10(1) of the municipal Act, which is the equivalent provision to section 17(1) of the Act:

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

I adopt this test for the purposes of this appeal. I am satisfied that the information at issue qualifies as a "trade secret" within the meaning of section 17(1). I also find that the information

qualifies as "commercial" as it relates to the buying and selling of merchandise and services, that is, it relates to the price of the insurance product offered by the affected parties.

Supplied in Confidence

In order to meet the second component, the OIC and/or the affected parties must establish that the information in the record was supplied to the OIC in confidence explicitly or implicitly.

Previous orders of the Commissioner have found that in order to determine 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 (Order M-169).

The appellant does not dispute that the records at issue were supplied to the OIC by the affected parties and I am satisfied that they were.

With respect to whether they were supplied in confidence, the appellant takes the position that they were not, for a number of reasons.

First, the appellant advises that in the United States and in a few Canadian provinces, insurers file their rates, including their rating algorithms for public accessibility. In some cases this is done voluntarily, and in some as a requirement of the jurisdiction. The appellant indicates that in at least one case, one of the 13 affected parties has made a voluntary filing of its rates in the United States.

This particular affected party denies that the information at issue in this appeal is available to the public. This affected party states that the information at issue in this appeal is not otherwise publicly available.

The appellant also refers to the Filing Guidelines which contain the following note:

> The Commission may receive access requests under the [Act] for any record in its custody or control. Section 17 of the [Act] recognizes that certain types of information supplied in confidence by third parties should be exempt from disclosure in the event of an access request.
>
> If you think that disclosure of the information included in your rate application would result in the harms described in Section 17 of the [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 assisting the OIC in responding to an access request.

The appellant submits that given the warnings in the Filing Guidelines, the only question that I need to address is whether the information was supplied "explicitly" in confidence. In this regard, the appellant argues that any insurer which has failed to signify that the rating algorithm was supplied with an "explicit" expectation of confidentiality has failed to meet the onus of establishing this part of the test.

The OIC attached to its submissions an affidavit sworn by the Director of the Rates, Classifications and Actuarial Services Branch. In his affidavit, the Director indicates that since the establishment of a regulatory process for rate approval, insurers and the insurance regulator alike have considered rating algorithms to be sensitive, proprietary information that insurers were submitting to the regulator for the purposes of having their rates approved. He continues that the understanding among insurers and the regulator and the historical practice of the OIC (and its predecessors) has always been that rating algorithms are never made public.

The Director advises that because the expectation among all concerned parties is that rating algorithms are never released by the regulator, the practice among insurers in claiming section 17 confidentiality for their rating algorithms varies.

In this regard, the OIC indicates that some insurers submit their entire filing with a covering letter that addresses the confidentiality of the material. Others mark certain pages as "confidential" and a handful do not address the confidentiality of this information at all.

With respect to the appellant's practice, the OIC indicates that it marks every single page and every piece of correspondence as "confidential". The OIC submits that this practice does not in and of itself automatically confer confidentiality to each of those pages and documents.

The OIC submits further that the fact of whether or not the information was marked "confidential" is not determinative of whether or not it has in fact been supplied in confidence. In this regard, the OIC indicates that the substance of the material and the way in which it is treated by the parties must also be considered.

The OIC provides some evidence of the appellant's expectation of confidentiality with respect to the information at issue. In correspondence to the OIC, in the context of a public hearing on its rate filing, the appellant clearly expresses that its underlying rating/underwriting technology and algorithms not be disclosed to the public (and hence competition).

I have considered all of the representations on this issue. I agree with the OIC. Although the Filing Guidelines request that insurers identify those portions of their filings that they consider to be proprietary and for which section 17 should apply, this is only one piece of evidence to be considered in the section 17 analysis. In my view, the totality of the evidence must be considered in the context of the particular information at issue.

In this case, the OIC has established that its practice is to receive this type of information in confidence and the OIC and affected parties have established that an expectation of confidentiality was thus created by the OIC. Further, the OIC and affected parties have established that the affected parties submitted their filing information to the OIC with this expectation in mind. I am satisfied that the affected parties have consistently treated this information in a confidential manner. Moreover, I am satisfied that the affected parties' expectation of confidentiality in the filing process was reasonably held.

I am not persuaded by the appellant's arguments that the information at issue is not confidential. In fact, the appellant's arguments and its own actions are contradictory in this regard. Further, in my view, the evidence submitted by the appellant regarding other jurisdictions does not

sufficiently describe the information made public in those cases as the very information which is at issue in this case.
For all of the above reasons, I am satisfied that in some cases the affected parties provided the information at issue "explicitly" in confidence, and in other cases this expectation of confidentiality was "implicit". Accordingly, the second part of the test has been established.

Harms

The OIC submits that disclosing information that is so insurer-specific would prejudice significantly the competitive position of the insurer. In this regard, the OIC states that competitors would learn the many tactical and strategic pricing and marketplace positioning decisions inherent in the insurer's filings. The OIC submits that once competitors have this information, they could target an insurer's market by repricing their own product. The submissions of the affected parties support these arguments.

The appellant outlines its reasons for requesting this information and the use it intends to make of the rating algorithms, and has asked that I not reveal the content of its representations in this regard.

The appellant submits that it is implicit in making this request that the appellant anticipates that other insurers will be allowed to gain access to its rating algorithms and suggests that this is evidence that the competitive position of other insurers will not be significantly prejudiced.

The appellant provides extensive representations on the issue of harms and while I have considered them, I will not refer to them in this order. I am satisfied, based on the representations submitted by the OIC and the affected parties, as well as those provided by the appellant in confidence, that disclosure of the information at issue could reasonably be expected to result in significant prejudice to the affected parties' competitive position. Accordingly, I find that the third part of the test has been met.

As all three parts of the test have been met, I find that the records at issue qualify for exemption under section 17(1).

ORDER:

1. I order the OIC to issue a decision to the appellant regarding the second part of its request in accordance with the provisions of section 26 of the Act.

2. I further order the OIC to provide me with a copy of the letter referred to in Provision 1 by forwarding a copy to my attention c/o the Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

3. I uphold the OIC's decision with respect to the application of section 17(1) to the records at issue.

Original signed by: February 3, 1998
Laurel Cropley
Inquiry Officer