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

ORDER PO-2734

Appeal PA-050139-1

Financial Services Commission of Ontario

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NATURE OF THE APPEAL:

The Financial Services Commission of Ontario (FSCO), for which the Minister of Finance is the Head, received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

1. Quarterly or periodic auto-insurance data submitted by [five] named insurance companies (automobile category only) and internal/consultant reviews assessing these results, including how their reports stack up against publicly given insurance company profits/losses;

2. Responses of those replying to a November, 2004 survey sent to insurance companies re: hidden commission fees, record of those companies not replying, survey results compiled and internal FSCO assessments of survey responses; and

3. Other records released on these above subjects under [the *Act*]…

Upon receipt of the request and in accordance with section 28 of the *Act*, the Ministry of Finance (the Ministry), which processed this appeal, notified the five named insurance companies who may have an interest in the records (the affected parties) of the request, and sought their views on the disclosure of the records. After receiving submissions from the affected parties, the Ministry issued a decision letter in which it denied access to records responsive to parts 1 and 2 of the request on the basis that the records were exempt under section 17(1) (third party information) of the *Act*. With respect to part 3 of the request, the Ministry provided the appellant with two responsive reports.

The requester, now the appellant, appealed the Ministry's decision related to parts 1 and 2 of the request. In his appeal letter, the appellant also referred to his view that the public interest override found at section 23 of the *Act* applied to the records.

During the mediation stage of this appeal, the Ministry wrote to the appellant to advise that it was raising section 15(a) (relations with other governments) as a discretionary exemption which applied to records responsive to part 2 of the request. The appellant objected to the Ministry's raising of this section, and the late raising of a discretionary exemption is an issue in this appeal.

Also during mediation, the Ministry contacted the affected parties and advised them that the Ministry was now of the view that only certain sections of the records responsive to part 1 of the appellant's request (automobile insurance rate filings) qualified under the third party information exemption in section 17(1). The Ministry subsequently sent the appellant a revised decision letter granting partial access to the responsive records. In particular, access was granted to section 1 (Table of Contents), section 3 (Certificates of the Actuary and of the Officer), section 9 (Manual Pages Containing Revised Rates and Risk Classification System), and section 10 (Rate Examples) of the automobile insurance rate filings. The Ministry released these parts of the records to the appellant, and they are no longer at issue in this appeal.

The Ministry's letter to the appellant also indicated that in an effort to further address some of the appellant's concerns, it had contacted the affected parties with a view to obtaining their written consent regarding the release of the records responsive to part 2 of the request (insurance survey records). The Ministry did not indicate the results of this consultation during mediation.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. A Notice of Inquiry was sent to the Ministry and the five affected parties, setting out the facts and issues on appeal. Representations were received from the Ministry and the five affected parties. In its representations, the Ministry identified that, on consent of the five affected parties, certain portions of the records responsive to part 2 of the request had now been disclosed to the appellant, and were no longer at issue.

Following the resolution of issues relating to the sharing of representations, a modified Notice of Inquiry was sent to the appellant, seeking representations on the issues raised and enclosing the severed representations of the Ministry and the five affected parties. After this file was placed on hold for a period of time at the appellant's request, the appellant provided representations in response to the Notice.

A Reply Notice of Inquiry was then sent to the Ministry and the five affected parties, enclosing the relevant and non-confidential portions of the appellant's representations and several of the attachments. The Ministry was invited to address all of the issues, including the appellant's contention, raised in his representations, that the Ministry had not provided a complete response to the request. The five affected parties were invited to respond to the appellant's representations regarding the application of sections 17(1) and 23 of the *Act*. The Ministry and three of the affected parties provided reply representations.

The file was subsequently transferred to me to complete the adjudication process.

RECORDS:

The records remaining at issue in this appeal can be separated into two distinct groups, responsive to the two parts of the request.

The records responsive to part 1 of the request consist of a total of fifty automobile rate filings filed by the five named insurance companies. The portions of these records remaining at issue comprise Sections 2, 4, 5, 6, 7 and 8 of each responsive record. Access to these records was denied on the basis of the exemption in section 17(1) of the *Act*.

The records responsive to part 2 of the request are insurance survey records relating to the five insurance companies (Records 1 – 5). The Ministry has indicated in its representations that, on consent of the affected parties, Record 4 has been disclosed in its entirety, and portions of the other four records have also been disclosed to the appellant. Access to the remaining portions of these records was denied on the basis of the exemptions in sections 15(a) and 17(1) of the *Act*.

Due to the distinct nature of the records responsive to Parts 1 and 2 of the request, and the fact that some of the parties have provided separate representations on the records responsive to the two parts, I will address the application of the exemptions to the records responsive to each part separately.

DISCUSSION

Preliminary issue: What is the scope of the request? What records are responsive to the request?

As identified above, in his representations the appellant takes the position that the Ministry had not provided a complete response to the request. He refers to his original request and identifies that the portion of Part 1 of his request which was for "internal/consultant reviews assessing these results, including how their reports stack up against publicly given insurance company profits/losses" was not responded to by the Ministry. In his representations, the appellant takes the position that responsive records must exist, and provides evidence in support of his position.

In response to the appellant's contention, the Ministry's reply representations state that there were a number of conversations between the Ministry and the appellant after the Ministry received the initial request, and that these resulted in clarifications and revisions to Item 1 of the access request. The Ministry then refers to its understanding of the scope of the request as set out in its initial representations, which read: "the parties agreed that the responsive records under Item 1 of the request consist of the automobile insurance rate filings of the five named insurance companies for [a defined period of time]."

The Ministry also provides an affidavit sworn by the individual who was responsible for responding to the access request. In this affidavit, the affiant reviews in considerable detail the steps taken to clarify the request (and earlier versions of the request, which were subsequently clarified to become the request at issue). The affiant confirms that a number of clarifications were discussed with the appellant, particularly with regard to the identities of the insurance companies whose information was requested. The affiant also reviews the steps taken to locate the responsive records and the volume of records responsive to the request that were located.

The Ministry then identifies that it was its understanding throughout the processing of the appeal, based on the communications that the Ministry had with the appellant, that the responsive records were as identified. The Ministry also states:

> … the appellant had a number of opportunities to advise [the Ministry] that the parties were not *ad idem* as to the agreed scope of this revised request, but failed to so advise.

The Ministry then notes that it was only at the reply representations stage, and upon receiving the appellant's representations, that the Ministry became aware of the appellant's concerns about the scope of the request.

Findings

On my review of the wording of the request, as set out above, it appears to clearly be for the data submitted by the five named insurance companies, as well as the reviews assessing these results. However, it also is clear to me, based primarily on the affidavit of the individual who processed the appeal, that in the course of this appeal and as a result of the substantial amount of information at issue, the understanding of the Ministry was that the only records responsive to Item 1 sought by the appellant were the automobile insurance rate filings.

This understanding is confirmed by the description of the records at issue in this appeal set out in the Mediator's Report sent to the Ministry and the appellant at the conclusion of the mediation process. In that report, the records responsive to Item 1 are described as "Sections 2, 4, 5, 6, 7 and 8 of part 1 of the request (automobile rate filings)."

The cover letter to the Mediator's Report which was sent to the parties, invited the parties to identify any errors or omissions contained in the report. It identified that the Mediator's Report set out the issues that have been resolved and the issues that remain in dispute, and then stated:

> The purpose of the Report is to provide the parties to an appeal with a record of the result of mediation and to provide the Adjudicator with information regarding records and issues that remain to be adjudicated.
>
> Please review the Report and if there are any errors or omissions, please contact [the mediator] no later than [an identified date]….
>
> After [the identified date], the appeal will be transferred to an Adjudicator, who will conduct an inquiry and dispose of the outstanding issues in the appeal. …

The appellant did not respond to the Mediator's Report, and the appeal was transferred to an Adjudicator to conduct an inquiry. It was only following the issuance of the Notices of Inquiry that the appellant identified his concern that the Ministry had not provided him with a complete response to his request.

Based on the information provided above, it appears to me that there may have been some miscommunication between the parties about the scope of the request during the processing of the appellant's request. However, the appellant did not identify this as an issue until after the Notice of Inquiry was sent out to the Ministry. The Ministry was therefore not aware of this issue at the time it prepared its representations in response to the Notice. In my view, given the circumstances of this appeal and particularly in light of the information contained in the Mediator's Report, to which the appellant was invited to respond, the appellant should have identified this issue in response to the Mediator's Report. As a result, this order will not address the issue of whether the Ministry improperly narrowed the scope of the appellant's request.

That being said, the Ministry identified in its reply representations that, as a result of this issue being raised by the appellant, it has identified records responsive to this part of the request. The appellant is invited to pursue access to these records if he so chooses.

AUTOMOBILE RATE FILINGS

The records responsive to part 1 of the request are the sections of the automobile rate filings to which access has been denied. These consist of the following sections of the automobile rate filings:

Section 2 (Summary of Information)
Section 4 (Actuarial Support)
Section 5 (Discount/Surcharge Changes)
Section 6 (Rating Rule Changes)
Section 7 (Final Rates)
Section 8 (Dependent Categories)

Nature of the records

In its representations, the Ministry provided background information regarding the creation and provision of the records. It identifies that FSCO, created on July 1, 1998, is an arm's-length agency of the Ministry. It then states:

> FSCO is a regulatory agency. It provides Ontario's regulatory oversight for pensions, insurance, loan corporations, trust companies, credit unions, caisses populaires, co-operatives and mortgage brokers. FSCO's mandate is to enhance consumer confidence and public trust in the regulated sectors; and also to make recommendations to the Minister on matters affecting the regulated sectors.
>
> In respect to insurance activities in Ontario, FSCO has powers of regulation, enforcement, investigation, mediation and adjudication and data collection over insurers that carry on business in Ontario.
>
> Automobile insurance in Ontario is a highly regulated product, both in terms of the nature of the coverage provided and the rates that insurers charge for coverage.
>
> FSCO's responsibilities for the regulation of automobile insurance include reviewing and approving both the insurance rates charged and the risk classification systems used to determine those rates.
>
> "Rate" and "Risk Classification System" as they relate to automobile insurance are defined in the *Insurance Act* as follows:
>
> > Rate means "all amounts payable under contracts of automobile insurance for an identified risk whether expressed in dollar terms or in some other manner and includes commissions, surcharges, fees, discounts, rebates, and dividends."

> Risk Classification System means "the elements used for the purpose of classing risks in the determination of rates for a coverage or category of automobile insurance, including the variables, criteria, rules and procedures used for that purpose."

A rate filing is an application submitted to FSCO, by an insurer, licensed to write automobile insurance in Ontario, seeking approval to set or change its rates and/or risk classification system respecting automobile insurance. There are a number of different types of filings depending on whether the insurer is entering the Ontario automobile insurance market for the first time, asking for an increase or decrease in rates, or for a rate change that parallels the Ontario market average.

During the time period covered by the request, two pieces of legislation are applicable: the *Insurance Act* and the *Automobile Insurance Stabilization Act* ("*Bill 5*"). The *Insurance Act* definitions of rate and risk classification system apply to *Bill 5* filings.

Regulation of Automobile Insurance Rates and Risk Classification Systems

The *Insurance Act* requires all insurers selling insurance for private passenger automobiles to apply to FSCO for approval before setting or changing rates, or risk classification criteria. To ensure consistency, these applications for approval of rates and risk classification systems must be in a form approved by the Superintendent and must be filed for approval along with such other information, material and evidence as required by the Superintendent in support of the application.

No insurer may use a rate that has not been approved by the Superintendent, where the categories and coverages are subject to the rate approval process.

A major rate filing has 10 sections. These are:

Section 1- Table of Contents;
Section 2 - Summary of Information;
Section 3 - Certificates of the Actuary and of the Officer;
Section 4 - Actuarial Support;
Section 5 - Discount/Surcharge Changes;
Section 6 - Rating Rules Changes;
Section 7 - Final Rates;
Section 8 - Dependent Categories;
Section 9 - Manual Pages;
Section 10 - Rating Examples.

The Ministry then identifies that it produces guidelines for a major rate filing, and provides a copy of those guidelines with its representations. It identifies that not all the sections are mandatory when submitting a major rate filing, and provides as an example the fact that sections

5, 6, and 8 are not mandatory, and that if the rate proposal does not impact these sections, no material needs to be filed as part of that particular filing. The Ministry then states:

> Rate filings describe and support an insurer's request for approval to modify the insurer's rates and/or risk classification system. They also contain the complete rationale, actuarial support, and economic justification for any changes in rates and/or risk classification system that are requested by the insurer.

Later in its representations, the Ministry sets out the specific information that is included in the various sections of the rate filings which are at issue in this appeal. The Ministry describes the information as follows:

> *Section 2: Summary of Information*
>
> This section provides a high level summary of the proposed rates, risk classification changes and supporting information. Items that apply to the filing are identified in a checklist (ie: base rate change; change in classification, limit of liability, deductibles or other rate differentials; rating rules; discounts or surcharges; algorithm; and other). The proposed effective dates for the changes for new policies and renewal policies are indicated. The insurer's distribution of business by length of policy term (generally 3, 6, or 12 months) is provided.
>
> In the Summary, the insurer must list the changes that it is asking FSCO to approve. The Summary refers to the insurer's financial information [including information such as the percentage of its business attributable to each type of coverage, the impact of the proposed changes on the insurer's business, a two year history of the insurer's written and earned premiums, losses, and earned vehicles (including additional financial information), as well as various loss trends, overhead information and proposed return targets.]
>
> *Section 4: Summary and Actuarial Support*
>
> This section includes the detailed statistical information used to make the business case for the changes proposed in the rate filing. There are a number of possible methods for determining changes. A description of the specific methodology applied and all the calculations used to arrive at the proposed rate level change are given as well as background support. Detailed justification for estimates and assumptions used to support the methodology and proposed rate level change is included.
>
> Individual insurers apply different methodologies in their filings. Insurers may use external actuarial consultants as well as in-house actuaries to formulate their estimates and assumptions. Insurers may use industry wide data, company specific data or a combination of both when making a rate filing. It is the professional judgement of the insurer's actuarial team that determines the type of data to be used and how that data is to be applied in the rate filing. The data that

is used along with the method by which the data is applied are unique to each insurer and will convey its direction in the marketplace.

Section 5: Discount/Surcharge Changes

This section provides details of proposed changes to the amount or value of a discount or surcharge or the introduction of a new discount or surcharge. Discounts may be expressed as either a dollar amount or a percentage of coverage and applied if a customer qualifies. …. Similarly, a surcharge may be expressed as either a dollar amount or a percentage of a coverage and increase the premium… This section is only required if a change or addition is requested.

Section 6: Rating Rule Changes

This section is used to provide details when an insurer wishes to make a change to any of the rules or definitions it uses to place individual risks in specific categories for the purpose of determining a rate… The proposed wording of the rule that will appear in the rate manual, if approved, must be included. Once approved, the rating rule is set out in the rate manual that is publicly available.

The required information will include: a description of the proposed changes; the rationale for the proposed changes; the effect on rates; and calculations that show how the effect on rates of the proposed change was arrived at, based on the expected impact on existing business. This section is only required if a change or addition is requested.

Section 7: Final Rates

This section contains the rating algorithms, base rates, differentials, discounts and surcharges. The proposed rate level change set out in Section 2 must be reconciled here.

The rating algorithms are given at a coverage level. A rating algorithm is a formula which allows the insurer to calculate a price for a particular risk for a particular insurance coverage. Usually a base rate for a territory and coverage (eg. collision) is multiplied by the various components of the algorithm (eg. class, driving record, limits, etc.) to arrive at the end premium. For each insurance coverage, the formula is identified. The components of the formula may vary from insurer to insurer.

The insurer must provide further detail showing the current base rates compared to the proposed base rates and the impact of the overall rate change on a per coverage basis. Further detail is also required if the rating differentials and discounts or surcharges impact the overall rate level change.

> The calculation of the final rates and any actions proposed to reduce consumer dislocation must be disclosed.
>
> *Section 8: Section 413 Dependent Categories*
>
> This section identifies any other category of automobile insurance that is indirectly affected by the rate filing…
>
> This section must show the effect on rates of the proposed changes, calculations that validate the rate level, a copy of the rating rule that shows the connection to the other category, and the rating examples must be attached. This section is only required if a change or addition is requested.

The Ministry then reviews how information about the approved rates is communicated to the public, and it identifies the information that the public has access to through its website and other methods. The Ministry indicates further that the following sections of the rate filings are available to the public, upon request, once the filing receives FSCO approval:

> Section 1 - Table of Contents;
> Section 3 - Certificates of Officers and Actuaries;
> Section 9 - Manual Pages; and
> Section 10 - Rating Examples

However, the Ministry notes that any portion of a submitted rate filing that is not approved by FSCO is considered confidential and never released. It also states:

> Those sections that contain trade secrets, financial and commercial information provided by the insurance company to support its rate filing, as well as the rating algorithm itself, are considered confidential and never released. These sections are highly technical and are structured to provide sufficiently detailed documentation to allow FSCO staff reviewing the proposal to trace the calculated rates from the raw supporting data.

The Ministry also outlines FSCO's policy regarding disclosure of rate filings:

> The FSCO website contains quarterly bulletins listing all approved private passenger rate filings by insurer. Information such as each insurer's market share (source: Automobile Statistical Plan), effective dates of changes and overall average approved rate change as a percentage are included. Guidelines associated with each type of rate filing as well as other FSCO Bulletins are also available on the website.
>
> The policy of FSCO and its predecessor, the Ontario Insurance Commission ("OIC"), since inception, has been that, with the exception of personal information or information identified as confidential or proprietary, all material it receives is generally accessible by the public at large. It has followed this policy

with regard to insurers' approved rate manuals which contain the current rates and rating rules (available from FSCO on payment of $100 per category per insurer).

Persons asking FSCO directly for information related to approved rates are given it orally or in writing and are not asked to make a formal access request under the *Act*. Often, they are encouraged to attend at the FSCO offices to view the material they have requested and, just as often, FSCO staff will explain it to them if an explanation is needed. Should they request copies of the material, those are, within reason, provided.

Third Party Information

The Ministry and the affected parties take the position that the exemptions at sections 17(1)(a), (b) and (c) apply to the portions of the Rate Filings at issue in this appeal. Those sections state:

> 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,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party 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 paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1: type of information

The Ministry and the affected parties submit that the records at issue contain information that is scientific, technical, commercial, financial and/or trade secret information. These terms have been defined in prior orders as follows:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].
>
> *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 [Order PO-2010].

I adopt these definitions for the purposes of this appeal.

Representations

In its representations the Ministry reviews previous orders that have addressed the issue of what is "commercial information", and focuses on the view that the notion of "commercial" is not restricted to traditional activities associated with merchandising, but is broad enough to apply to the provision of professional services in non-traditional settings. The Ministry then states:

> … in the context of the insurance industry, the rate filings are informational assets with commercial value. They describe the commercial approach used in costing the insurance and include a narrative of the process and factors each insurer uses in establishing its rates and risk classification system.
>
> It was held in Order P-1526 that rating algorithms and supporting material in rate filings qualify as "commercial information". It is submitted that the same rationale must be applied to the Rate Filings in this case.

The Ministry makes similar arguments in support of its view that the records also contain "financial information" as that term has been defined in previous orders. With respect to the Ministry's position that the records also contain "trade secrets", the Ministry states:

> … the Rate Filings constitute trade secrets within the meaning of section 17, in the context of the insurance industry. It is submitted that they meet the four part test for trade secrets under the *Act* set out by Commissioner Wright, in Order M-29.
>
> It is submitted that the ratemaking methodology and the data used in a Rate Filing will vary between insurers. Generally, there are two different sources for accident data used to develop trends; the insurer's own data, and industry wide data as compiled under the Automobile Statistical Plan. An insurer may use either source or a combination of the two. Each insurer, on the advice of its actuarial experts, chooses the most appropriate data and methodology to develop the projected trends it uses to establish its rates.
>
> These Rate Filings and supporting materials are valuable assets to the insurers and are not disclosed publicly. They include: the rating algorithm; the formula or basis by which the various rates are calculated; the overall company market strategy; and all other matters relating to the services provided by the intermediaries with respect to rate changes; detailed strategies; base rates and rating differentials.

> It was held in Order P-1526 that insurance rating algorithms, the formula by which an insurance company arrives at the price that it charges for its products, and is unique to each insurer, are trade secrets.

The affected parties also support the view that the records contain commercial, financial and/or trade secret information.

In his representations, the appellant takes the position that the Ministry and the affected parties have not provided sufficient evidence to support a finding that the information in the records is the type of information set out in section 17(1). The appellant identifies that there is no "line-by-line" evidence that the information in the records is that sort of information. The appellant states:

> How much of the data, line by line, for instance, in the Auto Rate Section 2 Summary of Information … is purely factual and has nothing to do with being commercial data?

Finding

On my review of the information contained in the records, as well as the nature of the records themselves, I am satisfied that the records contain commercial information for the purpose of section 17(1) of the *Act*. The rate filings are applications submitted to FSCO by insurers licensed to write automobile insurance in Ontario, seeking approval to set or change its rates and/or risk classification system respecting automobile insurance. As a result, I find that the information contained in these records qualifies as "commercial" as it relates to the buying and selling of merchandise and services, that is, it relates to the insurance products offered for sale by the affected parties.

Part 2: supplied in confidence

General

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

Representations

The Ministry and the affected parties submit that the information at issue was supplied in confidence to the Ministry. The Ministry provides some background information to the records, including the manner in which they are dealt with by the parties, and the understanding of the parties regarding the impact the *Act* has on disclosure. It states:

> One of the first Information Bulletins sent to automobile insurers by the OIC dealt with the *Act* and rate filings and provided a general background on the freedom of information legislation to an industry that was still not fully aware of its impact.
>
> That Bulletin, A-3/91, dated April 23, 1991 … and Bulletin, G-11/93, dated June 3, 1993 (directed to commercial liability insurers) … outlined the section 17 requirements of the *Act* which deal with disclosure of third party information and alerted insurers that not all information supplied by insurers will be exempt from disclosure in the event an access request is made.
>
> Bulletin A-3/91 also recognized that certain parts of a rate filing might be considered confidential and suggested to insurers that they label specific records as being confidential if they contained confidential information.
>
> In 1998 the Information and Privacy Commissioner ("IPC") ruled that the section 17 exemption applied to automobile insurance rate filings, particularly the rating algorithm. (Order P-1526)
>
> As a result of the IPC decision, the OIC issued Bulletin A-04/98 dated March 9, 1998 … directed to all insurers licensed to sell automobile insurance in Ontario.
>
> This Bulletin was issued to: provide automobile insurers with another review of the impact of the *Act* on rate filings; summarize the Institution's position on the

> confidentiality of materials filed with it; and consider the impact of a rate hearing on a rate filing.
>
> The Bulletin reinforces the regulator's position that rate filings are confidential pending approval or non-approval. However, it sets out that, once approved, those portions of the filing which the Institution considers to not contain confidential information are:
>
> Section 1 - Table of Contents;
> Section 3 - Certificates of Officers and Actuaries;
> Section 8 - Proposed Manual Pages (with Revised Rates/Classification System)
> Section 9 - Affiliated Insurers; and
> Section 10 - Rating Examples.
>
> Since this Bulletin was issued, the format of rate filings has changed. The previous Section 9 (Affiliated Insurers) is no longer required. Section 8 (Manual Pages) has been renumbered to Section 9.
>
> The Bulletin also brought to the attention of all insurers the decision of the IPC in Order P-1526 upholding the Institution's decision to refuse a request for access to the algorithms of 13 insurers on the basis that it was third party information and exempt from disclosure under section 17.

The Ministry then states:

> It is submitted that the same reasons in that case apply to the records in dispute in this case. While that case considered algorithms only, the reasoning applied equally to the withheld sections of a rate filing.

The Ministry reiterates this position in its representations, by confirming that all of the outstanding records in relation to the auto insurance rate filings that have not been disclosed as part of the severances were submitted to it in confidence. It refers to Bulletin A-04/98, referenced above, and confirms that the OIC's position regarding the confidentiality of material filed is still the position held by FSCO, and that only section 1, 3, 9 and 10 of the rate filings are disclosed following approval. It also confirms that FSCO and its predecessor's long-standing position regarding rating algorithms (that they are never released and not accessible to the public) has been upheld by the IPC in Order P-1526, refers to Bulletin A-04/98, and states:

> As a result, insurers submit all rate filings and the attached materials to FSCO with the expectation that only those portions of each rate filing specifically identified in Bulletin A-04/98, as set out above, will be accessible to the public once the filing is approved. This is consistent with the positions taken by the five insurers in their response to their third party notices ….

> As discussed above, the understanding by FSCO, its predecessor and the insurers, based on this Bulletin, is that these specific sections of the rate filings are confidential, subject to the application of the *Act*.
>
> As held in Order PO-1688, an explicit promise of confidentiality by the head of an institution in respect of particular third party information may be reasonably relied upon even though it is qualified by a statement to the effect that the institution is bound by the provisions of the *Act*.
>
> While many of the rate filings specifically address the confidentiality issue in their rate filings, in the covering letter, others rely on the Head's promise of confidentiality when making their rate filing.
>
> FSCO kept the Rate Filings secure at all times and only those staff involved in their review had access to them.

The affected parties also support the position that the information at issue was supplied to the institution in confidence, and refer to their expectation that the information provided by them was supplied in confidence.

The appellant take the position that the information in the Auto Rate filings was not supplied in confidence. The appellant states:

> On an objective basis no insurer selling automobile insurance in Ontario can reasonably expect information supplied to obtain approval of regulated rates remain confidential. It is a compulsory system which forces consumers to buy auto insurance. Correspondingly, if insurers want the privilege of selling a compulsory product over which they exercise collectively a monopoly, they cannot reasonably argue that they are entitled to confidentiality of their rate approval applications. … [I]f the [institution] has issued Bulletins giving rise to the Third Parties Insurers having that expectation, then the [institution] has overstepped its authority. …

Findings

On my review of the portions of the rate filings records remaining at issue, and based primarily on the representations of the Ministry and the affected parties, I am satisfied that the information was communicated to FSCO on the basis that it was to be kept confidential. I accept that the FSCO clearly communicated to the affected parties that it intended to keep the information contained in the records at issue confidential, and that the affected parties supplied the information to FSCO on that basis. Furthermore, as some of the information at issue is similar to the information at issue in Order P-1526, and that information was found to be covered by the exemption in section 17(1), I am satisfied that the information at issue was supplied in confidence.

The appellant's representations focus on the reasons why the appellant believes the information ought not to be confidential, as well as on the appellant's view that the public are entitled to access the information. These arguments are addressed below. Whether or not the information ought to be disclosed or not depends on whether all three parts of the section 17(1) test are or are not met, or whether a compelling public interest supports disclosure. In my view these arguments do not negate the finding that the information was supplied to the Ministry in confidence by the affected parties, particularly when previous orders have found that at least some of the information at issue was held to be confidential, and was not disclosed.

Part Three: Harms

Introduction

To meet this part of the test, the institution and/or the third parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus. [Order PO-2020]

The Ministry's Representations

The Ministry provided the following representations with respect to the harms issue, in support of its position that the records qualify for exemption under all of sections 17(1)(a), (b) and (c). The Ministry's representations state:

> The manner in which the insurance industry calculates its rates and determines its risk classification system is considered confidential and highly sensitive commercial information. The involvement of highly specialized trained actuaries is critical to this process. FSCO agrees and supports this view.
>
> Automobile insurance is mandatory and is essentially the same product for each insurer. Competition occurs through the offering of different prices for the product resulting from each insurer's method of calculating rates. This, in turn, reveals the particular market strategy or niche which the insurer may be pursuing. The rates and corresponding rate classification system are the basis by which the insurer distinguishes itself from its competition and the basis by which the insurer's market strategy is operationalized.
>
> In the rate setting process, insurers are required to share with FSCO details of their financial position, company marketing strategy, experience and assumptions.

It is submitted that disclosing financial and proprietary information in this detail … would prejudice the position of the insurers relative to their competitors.

If this information is accessible, competitors would learn the many tactical and strategic pricing and market place positioning decisions inherent in the insurer's filings. Once they had this information, competitors could target an insurer's market by re-pricing their own product.

While FSCO supports greater disclosure to consumers generally, the disclosure of this specific detailed information would yield important technical, commercial, financial and trade secret information to competitors.

It is submitted that disclosure would provide the competitors of these insurers with precise information that will allow them to match or better the terms and conditions offered by the insurers, thereby prejudicing the competitive position of the insurers in question.

The Rate Filings include valuable information, the disclosure of which would create a competitive disadvantage relative to the other insurers in the industry.

Disclosing this information may leave the targeted insurer with less business, less profitable business or unprofitable business.

…

The Rate Filing constitutes a competitive tool. Providing competitors with this information has the effect of diminishing the insurer's position and increasing the competitor's gain.

It is submitted that the disclosure of the Rate Filings gives rise to a reasonable expectation that the harm specified in all of paragraphs (a), (b) and (c) of section 17 (1) will occur:

- the insurer's competitive position will be prejudiced;

- similar information would no longer be supplied to FSCO where it is in the public interest that it continued to be supplied;

- innovation would be discouraged and competition minimized; and

- there will be undue loss to these insurers, potential gain to another insurer or withdrawal of an insurer from the Ontario market.

Affected parties' representations

All five of the affected parties provided representations in support of their position that the disclosure of the rate filing information would result in the harms in section 17(1)(a), (b) and (c) of the *Act*. The representations of a number of the affected parties were similar in nature.

One of the affected party's representations stated:

> The automobile insurance industry is a competitive financial services industry. [The affected party's] business is generally placed through a network of independent brokers and underwriters who in turn place insurance directly to the public. [The insurance companies] and brokers actively compete with each other for customer business and loyalty. This competition ultimately benefits the consumer, usually in the form of service, products and lower premiums.
>
> Insurance companies compete with each other in a number of ways. Since coverages are largely standardized under legislation, the industry competitors seek to differentiate themselves on the basis of pricing and services. These include the design of their insurance programs (pricing, discount schedules, and risk classification systems), better matching of premium revenues to assume the risk, and through design of their marketing programs. Due to the competitive nature of this industry, information relating to planned price changes, marketing plans, and costs on a product line or geographic basis, are confidential and proprietary. This is proprietary information and much of it has been developed through proprietary data gathering and analysis programs over many years. [The affected party] treats this information as confidential trade secrets.
>
> Disclosure of [the affected party's] detailed rate change proposals and responses, and permitting insurance companies to readily identify [the affected party] and how it arrives at its rates, would be damaging to [the affected party] ….
>
> Disclosure of planned pricing strategies, marketing plans, dates and methods of analysis would enable [the affected party's] competitors to design their own marketing plans to more effectively target [the affected party's] customers, thus creating clear and direct harm to [the affected party], whose information is disclosed. It would enable competitors to identify [the affected party's] product lines or market areas, which are most profitable to [the affected party], and target their efforts on those markets. The pricing strategy and methodology of [the affected party] has been developed through proprietary programs of [the affected party], and often at considerable expense. Disclosure of this proprietary information … would be unfairly damaging to [the affected party] and give an unfair competitive advantage to its competitors.
>
> Since automobile insurance coverages are almost uniform across the industry, there are 2 major ways that a company can differentiate itself in the marketplace - price and service. The property and casualty insurance business is very complex.

> For example, a standard rating structure for the private passenger vehicle risk class consists of more than 1.5 million individual rates not including discounts and surcharges. The data used to substantiate and determine those rates are contained in a filing to FSCO.

The affected party then identifies the ways in which competitors could use the information contained in the affected party's rate filings to their advantage, and how this would result in harm to the affected party. The affected party also takes the position that the release of this rating information would provide "advance information about the pricing intentions of any other insurance company" and could provide a "price umbrella" for competitors, resulting in loss. It then provides specific representations in support of its position that each of the sections of the rate filing remaining at issue would result in harms. Its representations on each section can be summarized as follows:

> *Section 2* - contains historical financial information that paints the picture for why rate changes have been requested. Knowing why the affected party is filing makes the competitive analysis much easier for … competitors.
>
> *Section 4* - contains the most significant estimates to project future losses. It informs on an estimate of what amounts [the affected party] will finally settle its claims and what the expected loss trend is. These are crucial assumptions to determine an appropriate pricing for the associated risk. With this knowledge, one could compare the assumptions of one versus that of [competitors] and determine a pricing/underwriting/marketing strategy that would cause significant financial impact to [the affected party].
>
> *Section 5* - contains information on discounts and surcharges which are the basis to formulate a successful marketing strategy. Knowledge of what the discounts are and, more importantly, how the discounts/surcharges are justified could be detrimental, as copying these changes would, in effect, sabotage any marketing plans of [the affected party]. There would be a significant reduction of any competitive advantage [the affected party] would be expecting to achieve.
>
> *Section 6* - demonstrates that insurance business is all about risk selection. If … competitors knew the type of risks [the affected party] was willing to write, they could formulate their marketing plans to nullify any competitive advantage.
>
> *Section 7* - details a company's rating algorithm. With this information our competitors could program their systems to match rates dollar for dollar. Without this information, it is almost impossible to figure out how [the affected party] determines its final premiums.
>
> *Section 8* - informs on which classes of personal automobile insurance rates are tied to the rates of other personal automobile risk classes.

The affected party also argues that premature disclosure would discourage innovation through introduction of new programs, new marketing approaches, and new ideas. In addition, the affected party submits that disclosure of information would harm significantly the competitive position of the company, as it would reveal information on how a competitor was looking at and analysing the market. It states:

> This information is based on the company's cost structure, including incurred losses, expenses, and profit margins including costs in jurisdictions outside of Ontario. It sets out cost information, future expense assumptions, as well as source information. This information is known to the filing company alone and is considered and treated by all insurance companies as confidential trade secrets. Disclosure to competitors would be harmful to the company, whose data is disclosed, thereby impairing the ability of that company to compete effectively. This, in turn, is contrary to the interests of consumers. While the techniques used by actuaries to assess the adequacy of reserves and premiums are generally standardized in accordance professional standards, the processes used by the companies in the setting of base rates and differentials are not. These are products of the company's business strategies and are confidential. These systems are the products of research; investment, and the experience of each company. They are based on proprietary data with respect to loss experiences. This intellectual property represents a strategic asset of each company, disclosure of which could cause specific harm to the company, and an undue competitive advantage to its competitors…

The other affected parties also provided representations which make similar arguments in support of their position that the rate filing information at issue qualifies under section 17(1).

Appellant's representations

The appellant submits that the Ministry and the affected parties have not provided sufficient evidence to support a finding that the records are exempt under section 17(1), and that they have produced "no objective evidence or 'detailed and convincing evidence' to support the third part of the test under section 17(1)."

The appellant takes the position that the overriding question in this appeal is "how does the 'public' (not insurance companies) benefit from keeping information on rate setting and evidence in support of rates confidential?" He then submits:

> … section 17(1) exemptions must be interpreted in these circumstances in the light of the fact that [FSCO] is mandated in law under the *Insurance Act* to regulate the auto insurance industry and consumers are forced by the *Compulsory Automobile Insurance Act* … to purchase insurance as a condition of being granted a license.
>
> By way of example, no evidence has been advanced by the [the Ministry or the third parties] to show the existence of a competitive automobile insurance

> industry or that market competitiveness exists in the price to consumers of automobile insurance. Although there are a great number of companies selling automobile insurance in the Province, the existence of consumer choices are very limited, since the 5 companies whose records are requested, dominate the industry ...
>
> Further, the distribution system for a purchase of automobile insurance is such that it discourages a competitive market and there is no evidence supplied by [the Ministry or the third parties] that there is real choice for the consumer based upon price.

The appellant's remaining representations focus on the public interest in access to records relating to how and why the public is required to pay higher compulsory automobile insurance premiums, and that disclosure of this information will ensure that the government is held accountable to the public. The appellant also argues that the release of the information is consistent with the fundamental purpose of an access to information regime, and allows for greater government accountability. I will consider these arguments under my review of the appellant's public interest override argument, below.

Findings

On my review of the records at issue - that is - the portions of the rate filings which have not been disclosed, as well as my review of the representations of the parties, I am satisfied that these records qualify for exemption under section 17(1)(a), as disclosure could reasonably be expected to prejudice significantly the competitive position of the affected parties who submit the rate filings.

I make this finding on the basis of the description of the information contained in the portions of the rate filings remaining at issue. I note specifically that the sections remaining at issue include the following:

> *Section 2* includes a summary of not only the proposed rates and changes, but also the supporting information (including various deductibles or other rate differentials, discounts or surcharges and algorithms) as well as the insurer's financial information including the percentage of its business attributable to each type of coverage, the impact of the proposed changes on the insurer's business, a two year history of the insurer's written and earned premiums, various loss trends, overhead information and proposed return targets.
>
> *Section 4* includes detailed statistical information, a description of the specific methodology applied and all the calculations used to arrive at the proposed change, and a detailed justification for estimates and assumptions used to support the methodology.
>
> *Section 5* includes details of proposed changes to the amount or value of a discount or surcharge including how the discounts/surcharges are justified.

> *Section 6* includes a description of the proposed changes; the rationale for the proposed changes; the effect on rates; and calculations that show how the effect on rates of the proposed change was arrived at, based on the expected impact on existing business. [As noted above, the actual rating rule change is subsequently set out in the manual, which is available to the public, if it has been approved].
>
> *Section 7* includes the rating algorithms, base rates, differentials, discounts and surcharges.
>
> *Section 8* includes the effect on rates of the proposed changes, calculations that validate the rate level, a copy of the rating rule that shows the connection to the other category, and the rating examples.

In my view the disclosure of the detailed information contained in these sections, which is required to be filed with FSCO to describe and support an insurer's request for approval to modify the insurer's rates and/or risk classification system, could reasonably be expected to prejudice significantly the competitive position of the insurers. These sections contain the rationale, actuarial support, and economic justification for any changes in rates and/or risk classification systems that are requested by the insurer, and I accept the Ministry's position that disclosing the details of the insurers' financial position, company marketing strategy, experience and assumptions would prejudice the position of the insurers relative to their competitors.

I also accept the affected parties' arguments that price and service are the two major ways in which insurers compete and that, due to the competitive nature of the industry, disclosure of information relating to planned price changes, marketing plans, and costs on a product line or geographic basis would be harmful to the company whose data is disclosed. I also accept that the processes used by the companies in the setting of base rates and differentials are not standardized, are confidential products of the company's business strategies based on proprietary data with respect to loss experiences, represent a strategic asset of each company and that disclosure could cause specific harm to the company.

In addition, I do not accept the appellant's position that, because of the regulated nature of the industry and the fact that a few companies "dominate" the industry, there is effectively no competition in the industry. Although the affected parties acknowledge that coverages are "largely standardized" under legislation, they identify that price and service are the major ways that companies compete in the industry, and I accept that the competitive position of the affected parties can be affected by disclosure of the requested records.

I have also reviewed the appellant's arguments that portions of the records ought to be disclosed, and I accept that some of the withheld portions are treated differently than others. For example, it is clear from the Ministry's representations that the portions of section 6 (Rating Rule Changes) that contain the proposed wording of the rule that will appear in the rate manual, if approved, will eventually be made public once the rule is approved. However, the supporting information contained in this section is not subsequently made public. In the circumstances, I find that there is no purpose served in treating these portions of the records differently, given the nature of the request and the number of different records at issue in this appeal.

Finally, I have reviewed whether the severance provisions of the *Act* apply to the records. While it may be possible to sever small segments or portions of each rate filing which, if disclosed, would not reveal information that would result in the harms contemplated by section 17(1)(a), in my view, given the nature of the records and my finding that they qualify for exemption under section 17(1)(a), the records cannot reasonably be severed of this information, since to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information (see Orders PO-1727 and PO-1878).

In summary, I find that the withheld portions of the rate filings qualify for exemption under section 17(1)(a) and should not be disclosed.

Public Interest Override

As identified above, in this appeal the appellant takes the position that there is a compelling public interest in the disclosure of the withheld portions of the rate filings, and that section 23 of the *Act* applies. That section states:

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

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in non-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

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

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

The appellant's representations

In addition to the appellant's general representations referred to above regarding the public interest in the records, the appellant provides further representations on this issue. The appellant states:

> The issue of public interest must be analyzed here in relation to the public mandate of FSCO, as the public regulator, which is quoted as follows:
>
> > To protect the public interest and enhance public confidence in the regulated sectors, FSCO provides regulatory services that protect financial services, consumers and pension plan beneficiaries, and support a healthy and competitive financial services industry.
>
> In addition to the public mandate of [FSCO], the Superintendent of Insurance is given wide discretion and must not approve a rate application that is not just and reasonable or that is excessive in relation to the financial circumstances of the insurer. The Superintendent may take into account financial statements and other information and other matters that directly or indirectly affect the applicants' proposed rates. These powers are found in Section 412 of the *Insurance Act*.

After setting out the relevant sections of the *Insurance Act*, the appellant then reviews the reasons why he takes the position that the public interest override applies to the withheld records. These reasons include:

- the disclosure of the records will enhance consumer protection;

- the public has the right to know whether FSCO is taking into account various possible bookkeeping practices used by the insurers;

- the public has the right to know whether insurers are passing through to consumers the costs of lobbying, political contributions and costs;

- the public has the right to know whether expenses in excess of the industry average are included in the rate approval process that determines fair and reasonable premiums;

- the public has the right to know how rates were determined by FSCO when changes and new rules were introduced by regulation;

- the public has the right to know whether amendments to the *Insurance Act* are reflected in changes to approved rates;

- the public has a right to know if FSCO is approving a fixed and guaranteed rate of return on equity for all insurers irrespective of their mismanagement of claims.

With respect to the issue of whether the public interest outweighs the purpose of the exemption, the appellant states:

> Although there may be some potential monetary benefits to the insurance industry in keeping rate applications confidential, when the monetary based purposes of the claim for exemption are balanced against the public interest in public accountability for the regulation of compulsory insurance premiums within an auto public safety regime, it is respectfully submitted that there is compelling public interest to disclose the records in the public interest which clearly out weighs the purpose of any exemptions found in the *Act*.

The Ministry's representations

In its initial representations (prior to reviewing the appellant's representations), the Ministry addressed the issue of the possible application of the "public interest override" in this appeal in a general way. The Ministry was of the view that the records in question "have nothing to do with the operations of government, and deal exclusively with the business activities of the insurers and therefore disclosure of them would not shed light on the operations of government." It also submitted that, because of the nature of the information sought, disclosure could only serve to advance the particular private interests of the appellant and would not inform citizens about the activities of their government, and that a public interest does not exist where the interests being advanced are essentially private in nature. In addition, the Ministry submitted that any public interest that may exist would not outweigh the purposes of the exemption in section 17, which is "to protect the confidential information assets of business or other organizations that provide information to government institutions."

In its reply representations and in response to the appellant's representations, the Ministry takes the position that the appellant's public interest submissions relate more to FSCO's analysis of the insurer's rate filings rather than the rate filings themselves, and that the appellant has not provided sufficient evidence to support the view that a compelling public interest exists. The Ministry also takes the position that a significant amount of information, adequate to address any public interest considerations has already been disclosed

Findings

The appellant's representations on the issue of the public interest in the withheld portions of the records raise broad public accountability issues with respect to the activities of FSCO.

In the circumstances, I am not persuaded that the disclosure of the records at issue would provide the appellant with the information he is seeking to permit the public to review the activities of FSCO. As noted above, FSCO was created to provide regulatory oversight of *inter alia* insurance companies providing automobile insurance. The withheld portions of the records do not reflect FSCO policy, but rather contain the financial and other information of the insurance companies regulated by FSCO. Although I accept that there is a public interest in ensuring that insurance companies operate within the regulations and parameters governing them, I am not persuaded that the public interest in disclosure of the financial details, market strategies, methodologies, and other information provided to FSCO in the portions of the rate filings at issue is compelling.

In addition, FSCO provides the public with access to approved rate manuals for each insurer. In my view the public information already available informs the public with respect to FSCO's activities and provides the public with the means of expressing public opinion and/or to make political choices.

Furthermore, I am not persuaded that any public interest that may exist in the disclosure of the information would outweigh the purpose of the section 17 exemption. The information at issue is commercially sensitive information pertaining to ongoing businesses in a competitive field. In my view, there exists a public interest in the non-disclosure of information that could reasonably be expected to negatively impact on the competitiveness of the insurers providing their confidential information to FSCO in this highly regulated field.

Accordingly, in the circumstances, I am not satisfied that the public interest override applies to the withheld portions of the records.

INSURANCE SURVEY RECORDS

Preliminary Matter

Late raising of a new discretionary exemption

As I indicated above, during the mediation stage of this appeal, the Ministry wrote to the appellant to advise that it was raising section 15(a) (relations with other governments) as a discretionary exemption which applied to records responsive to part 2 of the request. The appellant took issue with the Ministry's raising of this section, and the late raising of a discretionary exemption is an issue in this appeal.

On July 13, 2005, this office provided the Ministry with a Confirmation of Appeal, which indicated that an appeal from the Ministry's decision had been received. The Confirmation also indicated that, based on a policy adopted by this office, the Ministry would have 35 days from the date of the confirmation (that is, until Thursday, August 18, 2005) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period; however, the Ministry subsequently sent a revised decision letter to the appellant on Monday, August 22, 2005, raising the new discretionary exemption in section 15(a) of the *Act*.

Previous orders have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

The objective of the policy enacted by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced. In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeal process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption, the result of which is that the processing of the appeal will be further delayed.

The Ministry's representations explain why it did not raise the discretionary exemption in section 15(a) earlier in the processing of the appellant's request and appeal:

> The notification required [FSCO] to provide a decision letter by August 18, 2005 if it intended to claim any discretionary exemptions. It was provided to the Appellant on August 22nd, four days (two business days) later.
>
> It was the intention of FSCO and the other regulators to rely on section 15 in denying access to the questionnaires well before August 18 (as is reflected in the letter from [another provincial] Financial Services Commission which is dated August 9, 2005), and even before the Confirmation of Appeal was issued.
>
> However, this was not communicated by FSCO to, or appreciated by, Ministry staff in time. FSCO staff handling the file were not aware that an administrative deadline for raising discretionary arguments would arise before mediation occurred, and did not notice the time limit, located at the bottom of page two of the Confirmation.
>
> It did not become apparent to FSCO staff until August 20, 2005 when the file was reviewed by counsel that the deadline in the Confirmation had passed to raise discretionary exemptions and that the required decision letter had not been sent. It was immediately brought to the attention of the Ministry, which in turn immediately notified the Mediator and the Appellant by way of a letter dated August 22, 2005…

The Ministry also made submissions on whether I should permit it to raise the discretionary exemption in section 15(a) in the circumstances of this appeal:

The 35 day time limit is administrative rather than statutory. A number of orders have determined that the Commissioner's office has the authority to set a limit on the time during which it will allow an institution to rely upon new discretionary exemptions not originally raised in its decision letter. [Orders PO-2394, PO-2339, P-883, P-658, Section 11.01 of the *Code of Procedure*]

According to the *Code of Procedure* for Appeals, the Adjudicator may decide whether or not to allow a discretionary exemption claim after the 35 day time limit after the institution is notified of the appeals. The rationale for the rule requiring prompt notification regarding discretionary remedies has been described as follows:

> Claiming discretionary exemptions promptly is necessary in order to maintain the integrity of the appeals process. Unless the parties know the scope of the exemptions being claimed at an early stage in the proceedings, effective mediation of the appeal will not be possible. In addition, claiming a discretionary exemption for the first time after a Notice of Inquiry has been issued could necessitate re-notifying the parties to give them an opportunity to make representations on the exemption, and delay the appeal.

It is submitted that in this case there is no prejudice to the appellant, or to the integrity of the appeals process, for a number of reasons:

> - Given the short time involved, there was no delay in the proceeding necessitated by the notice. Nor was there any need to solicit additional representations from interested parties as a result of the delay. Accordingly, the timing and status of the proceeding has not been affected in any substantive way.
>
> - There was no detrimental reliance by the appellant at that stage in the proceeding, or opportunities foregone by the appellant in adequately responding to the argument under section 15.
>
> - [In the circumstances] … there was no lost opportunity to prepare for, or participate in, a mediation that might have settled the matter.

It is submitted that there is no harm to the appellant in these circumstances of allowing the section 15 argument to be made, caused by the delay.

It is submitted that the appeal raises important issues concerning the application of section 15 to risk based market conduct questionnaires that warrant adjudication.

> It is further submitted, in light of the involvement of the other regulators in this project, the submissions made by those regulators in the appeal, and the steps taken by [FSCO] when the issue came to its attention, that it would be prejudicial and unfair to [FSCO] to deny it the opportunity to raise the arguments on account of a lapse of two business days.

Although given an opportunity to submit representations in response to the Ministry's representations and/or outlining his position on this issue, the appellant did not directly address it. However, it appears that the appellant's primary objection to the late raising of the new discretionary exemption arises from the lack of communication and delay overall in the processing of his request. The appellant refers in his representations to some of the difficulties he experienced throughout the processing of this file. He also notes that, it was only after considerable time had passed that the Ministry advised him that some of the information he was seeking was publicly available.

Finding

In this case, as I indicated above, the decision to claim additional exemptions was made during mediation, but after the 35 day deadline, when the Ministry sought to apply section 15(a) to some of the records at issue. The delay in claiming the discretionary exemption in this case was a mere four days (two business days). I note that the Mediator's Report was issued on October 12, approximately seven weeks after the exemption was raised. In the circumstances, there was time for the issue relating to this exemption claim to be canvassed and discussed during the mediation process. Since the Notice of Inquiry had not yet been issued, it was possible to seek representations on these issues without delaying the inquiry, and this was done, as the Notice included section 15(a) as a possible issue.

It is apparent that at the time section 15(a) was raised, the Ministry never intended to disclose the records at issue, it simply amended the basis for withholding them. Moreover, this decision was made very early in the mediation stage, and the appellant was fully apprised of the changes at that time. In effect, there has been no additional delay to the process because of the Ministry's actions. In my view, there was no prejudice to the appellant under the circumstances. Moreover, it is apparent that FSCO took action as soon as practicable to seek the views of the other jurisdictions that might have had an interest in the records. In my view, to deny the FSCO the opportunity to rely on section 15(a) in these circumstances, following a delay of only two business days, would prejudice the FSCO and the other jurisdictions to have this matter fairly adjudicated.

Accordingly, I will consider the possible application of section 15(a) in this order.

Section 15 – Relations with other Governments

General principles

FSCO claims the application of the discretionary exemption in section 15(a) to the severed information in the questionnaires remaining at issue. Section 15(a) reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In order for a record to qualify for exemption under section 15(a), an institution must establish that:

> 1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and
>
> 2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.
>
> [Reconsideration Order R-970003]

The Ministry's representations

The Ministry begins by making general submissions on how section 15(a) can apply to the records at issue in this appeal. It states:

> "Intergovernmental relations" can be understood as the ongoing formal and informal discussions and exchanges of information as a result of joint projects, planning and negotiations between various levels of government, according to Order P-270. As an example, it was held in Order P-1291 that board minutes of

> meetings of the Canadian Blood Agency, an inter-governmental agency that had participation from provincial and national governments and was responsible for the National Blood Supply Program, were exempt from disclosure, although the board decisions were not.
>
> With respect to the work of inter-governmental committees, it was held in Final Order PO-2369 that:
>
> > … in its application to the work of intergovernmental committees, section 15(a) may be seen as protecting against two distinct kinds of prejudice. First, disclosure has the potential to prejudice ongoing work of an existing intergovernmental committee or body. Second, even if the specific work of an identified committee or body is not at issue, disclosure may undermine the conduct of intergovernmental relations in general, in that the governments will be less willing to share information in other contexts ...
>
> It is submitted that in this appeal, it is the latter sense in which section 15(a) applies. It is submitted that disclosure of the outstanding records relating to the questionnaires could reasonably be expected to undermine the ability of regulators to conduct future questionnaires on a co-operative, national basis as occurred in this case.

The Ministry then provides representations in support of its position that FSCO and the other regulators are capable of conducting "intergovernmental relations". It states:

> Although FSCO and the regulators that make up the [Canadian Council of Insurance Regulators (the CCIR)] and [the Canadian Insurance Self-Regulatory Organization (the CISRO)] are not governments, they exercise powers as agents of their respective provincial Crowns. The members of CCIR and CISRO are the regulators of the market practices of insurers operating in Canada.
>
> FSCO exercises its regulatory authority exclusively as an agency of the Ministry, in accordance with the statutory authority under which it operates. FSCO is an "institution" under the *Act*.
>
> It is submitted that the insurance regulators are capable of conducting "intergovernmental relations" for the purposes of section 15. It is further submitted that where a regulator is conducting regulatory activities through a joint committee of other regulators as in this case, it qualifies as conducting "intergovernmental relations".
>
> In Order P-270 the Commission held that Atomic Energy of Canada Ltd. and Ontario Hydro, as agents of the Crown, were capable of conducting intergovernmental relations, for the purposes of section 15. It is submitted that

the same reasoning in that case applies here. In that Order, Commissioner Tom Wright found:

> Atomic Energy Canada Limited ("AECL") is a crown corporation which was incorporated under the *Canada Corporations Act* in 1952 ... Pursuant to section 10(4) of the *Atomic Energy Control Act*, AECL is for all its purposes an agent of Her Majesty in right of Canada ... and may exercise its powers only as an agent of the crown. Ontario Hydro is an agent of the Government of Ontario … Although neither the institution nor AECL are themselves "governments", as agents of the provincial and federal governments they are capable of conducting "intergovernmental relations" on behalf of their respective governments. Intergovernmental relations can be understood as the ongoing formal and informal discussions and exchanges of information as the result of joint projects, planning and negotiations between various levels of government.

FSCO was established under the *Financial Services Commission of Ontario Act, 1997*. The purposes of the Commission, pursuant to section three of that Act include, among other things, providing regulatory services that protect the public interest and enhance public confidence in the regulated sectors, and making recommendations to the Minister on matters affecting the regulated sectors. FSCO is required to annually file a report on its affairs with the Minister, and to provide any information the Minister requires.

The Superintendent of Financial Services, the chief executive officer of FSCO, is responsible for the financial and administrative affairs of FSCO, for supervising generally the regulated sectors, and for administering and enforcing every Act that confers powers or duties on the Superintendent. One of these is the *Insurance Act*, under which he has statutory authority for the licensing, supervision and regulation of insurers that operate in Ontario.

The other regulators have similar functions and duties and act as FSCO's counterpart in other Canadian jurisdictions. The CCIR was established specifically to promote an effective insurance regulatory system across Canada, enhance public protection, and harmonize insurance policy and regulation.

Accordingly, it is submitted the regulators are able to, and did, engage "intergovernmental relations" within the meaning of section 15.

The Ministry then provides representations in support of its position that its receipt of the records arose out of its relations with other governments. It states:

> … the receipt of the records by FSCO arose out of its relations with other provincial and territorial governments in Canada, having been collected on behalf

> of the provincial and territorial insurance regulators in Canada as part of an intergovernmental joint project. The insurers carry on business nationally and the questionnaires contain cross Canada information relating to the insurers' business, not just their Ontario operations. The information relates to the examination by Canadian regulators of the financial relationships between insurers and their intermediaries, a sensitive and complex issue.
>
> … while FSCO played a lead role in the collection and analysis of the questionnaires in order to save time and avoid duplication of effort, the collection was national in scope involving regulators from across Canada, and constituted the "conduct of intergovernmental relations" within the meaning of section 15(a). The information was collected not just by FSCO but by all the regulators collectively.
>
> … the relations between the Institution and the CCIR and CISRO organizations that conducted this initiative are intergovernmental in purpose, composition and function.
>
> Although the records were not created by those regulators, they were created by the insurers at the regulators' behest. For purposes of section 15(a) there is no requirement that the records themselves be created by another government, merely that their disclosure would have the effect of prejudicing intergovernmental relations.
>
> Nor is there any requirement in section 15(a) that the records be directly obtained from another government. In this regard, section 15(a) differs from section 15(b) which requires the records to have been received in confidence "from another government".
>
> It is submitted that the information received from the insurers qualifies as information received in the course of relations with other governments, for the purposes of section 15(a). The other governments are the other provincial and territorial governments on whose behalf the regulators exercise their authority.

Lastly, the Ministry provides representations in support of its position that disclosure of the records could reasonably be expected to prejudice intergovernmental relations between members of the CCIR. It states:

> From the regulators' standpoint, the decision in this matter under section 15 will be an important consideration in their willingness to participate in interjurisdictional information gathering exercises of this type in the future. In the same vein, it will have implications for FSCO's ability to play a lead co-ordination role as occurred in this case.
>
> … harmonization of regulation across jurisdictions is an important policy goal, and intergovernmental co-operation in the gathering and analysis of market

conduct information of this type is in the public interest. The achievement of these goals will be jeopardized by a decision to release the records in question.

CCIR operates under a general understanding of confidentiality, which is essential in order to achieve its aims. This is reflected in its "Principles of Communication" … which provides as follows:

> In order to conduct the work of this intergovernmental forum it is necessary for members to freely exchange ideas and information. Accordingly, and in order to achieve its goals, the exchange of information between members of the CCIR must, of necessity be held in the strictest confidence. Without the protection of the confidentiality of this exchange, members are often unable to share information needed to resolve inter-jurisdictional regulatory issues.
>
> CCIR recognizes that provincial freedom of information legislation in each province and territory is applicable to all records as defined in the applicable legislation. While there are variations in the provincial legislation, all provinces allow the head of an institution to refuse to disclose information if it is received in confidence from another government. In some cases, the refusal to disclose information is discretionary rather than mandatory.
>
> It is also recognized that in all jurisdictions, discretion to release or withhold documents must be exercised on a case-by-case basis, subject to relevant legislation, and after consultation.
>
> In recognition of these principles, CCIR members hereby acknowledge and agree that:
>
> 1) All members shall maintain the confidentiality and security of all records relating to the business of the CCIR at all times.
>
> 2) In the event that a member becomes aware that information passed between members may be subject to a demand to disclose, it will convey the request to the other member and the Chair of CCIR.
>
> 3) Documentation that is expressly prepared to inform industry and members of the public on various issues may be released upon the authorization of the Chair of the CCIR.
>
> 4) Any other information, in whatever form, shall be kept confidential unless the member from whom the request or information originates provides its written consent to the disclosure of that information.

A number of the regulators have communicated to FSCO that they will re-evaluate their participation in these joint exercises, and their willingness to rely on FSCO, if confidentiality with respect to sensitive information cannot be assured by FSCO. Were this to occur, it would be to the detriment of the efforts at national co-ordination and the public generally. It could reasonably result in comprehensive information gathering exercises such as this being done on a piecemeal, jurisdiction by jurisdiction, basis or not at all. It is in the best interests of Ontario and the other regulators to conduct initiatives like these on a co-ordinated, national basis.

It is submitted that if these jurisdictions do not have a reasonable confidence in the CCIR's ability to conduct its activities with an assurance that records disclosed to FSCO will be kept confidential, there will be a reluctance to engage in such joint exercises involving risk-based assessments, and a chilling effect on allowing FSCO to play a lead role.

Prior to the distribution of the questionnaires, a number of the other regulators expressed their concern about participating without a high degree of assurance with respect to confidentiality. Those concerns have been expressed in the submissions written to FSCO from several regulators, found at "Exhibit 1". As expressed in correspondence … from the Superintendent of Financial Institutions of [one of the identified provinces]:

> In addition, and as a matter of great concern to me, is the effect that the release of this information could have on intergovernmental relations between the provinces and territories throughout Canada. The disclosure of confidential information received by one jurisdiction from another could not be anything but harmful to the continued cooperation between jurisdictions.
>
> The release of this information will have the following effects:
>
> - Result in an inability on the part of regulators to communicate important confidential information relating to solvency and market conduct issues as a result of concerns that this information could be inappropriately released;
> - Result in the inability of regulators to engage in interjurisdictional projects such as this one in the future as a result of concerns that confidential information may be released;
> - Provide the insurance industry with financial and other confidential information about how their competitor's business operates throughout Canada; and
> - Provide information to the insurance industry about some insurance companies, to the potential financial detriment of those insurance companies.

> [FSCO] shares these concerns. Similar sentiments have been expressed by the regulators for [four other identified provinces] (see "Exhibit 1").
>
> In light of these submissions, it is submitted that disclosure of the outstanding records could reasonably prejudice the conduct of intergovernmental relations.
>
> It is further submitted that disclosure would have a chilling effect on the future sharing of information and the undertaking of national projects by the members of the CCIR and CISRO.
>
> FSCO therefore takes the position that the undisclosed records are exempt under section 15.

Exhibit 1 to the Ministry's representations includes the submissions made by a number of the identified provinces. The position taken by these provinces is reflected in the portions of the Ministry's representations reproduced above which quote from these submissions.

The appellant's representations

The appellant provides lengthy representations on the types of records at issue in this appeal, and his position regarding their confidentiality. The appellant's general arguments in support of his position that the information in these surveys ought to be disclosed can be summarized as follows:

> - Articles in various newspapers questioned the financial ties that exist between Brokers and Insurance Companies, particularly relating to "hidden commissions" paid by insurance companies to insurance brokers who sell their products. Opponents of undisclosed commissions suggest that they raise conflict of interest issues.
> - Various agencies in the United States commenced investigations into "hidden commissions". The portion of the complaint relevant to this appeal is the allegation that accepting "secret contingent commissions" violated a brokers' duty to act in the best interests of its clients.
> - Certain states have proposed broad regulations that would require brokers and some agents to disclose all compensation they receive from insurance companies. These actions in the United States prompted a public outcry for government action in Canada.

The appellant then refers to the "public outcry", and refers to various groups and associations that requested investigations or asked questions about these issues. The groups referred to by the appellant include the Consumers Association of Canada ("CAC") (which called on the Ontario Government to launch an investigation into the use of contingent commissions and to conduct a public inquiry, and also called on insurance regulators across Canada to protect consumers by taking action on secret commissions), and the Ontario Trial Lawyers Association (which asked the government to take immediate steps to conduct a public inquiry, investigation and audit

concerning "contingent" commissions). The appellant also refers to articles in major newspapers which reported on the issues.

The appellant identifies that the Ontario Government's response to these issues included instructing FSCO to review sales commissions that insurance companies paid to Brokers, and he refers to the response made by the Premier to these issues. The appellant then refers to a Globe and Mail article which reported that the Canadian Insurance Regulators had "launched a wide-ranging probe of all relationships between insurance companies and Brokers." The scope of the investigation went beyond contingent commissions because "industry observers, including many Brokers themselves, say the close financial ties between insurance companies and Brokers, such as ownership, stakes and loans, pose far greater conflicts than the lucrative commission arrangements now under scrutiny." The appellant also states:

> In November 2004, the press reported that [the CCIR] had developed a questionnaire to assess market conduct and financial incentives that might work to the disadvantage of the consumer. Property insurers across Canada answered 30 questions about their contracts, commissions and ownership ties with brokers and agents. Insurers were required to disclose the percentage of their business that comes from the five largest brokers in each province, provide sample broker contracts and disclose any requirements or rewards for placing or transferring a certain volume of business to the insurer.

The appellant reviews the responses of the insurance industry to this issue, and takes the position that the industry "did not share the perception that undeclared … financial ties between brokers and insurance companies are detrimental to consumers." The appellant also argues that, when the insurance industry acted (by disclosing commission compensation), it only did so under government pressure.

The appellant then reviews the three ways in which insurance can be purchased: 1) directly from an insurance company; 2) from an insurance agent, who represents a single insurer and can offer only that company's products; or 3) through an insurance broker, who can offer a choice of coverages and prices from various companies. The appellant proceeds to identify that the brokers work on behalf of their clients, and that their "foremost duty" is to their client.

Based on this duty to the client, the appellant proceeds to provide detailed representations regarding the fiduciary duty that a broker has to his or her client, and describes the agency relationship that exists between them. The appellant describes in detail the laws relating to the agency relationship, and focuses on the trust and confidence a client must have in his or her agent, since the agent has the authority to affect the legal position of the principal (or client). The appellant then states:

> In the context of the "secret commission" cases, the fundamental duties of the agent are those arising from the fiduciary nature of the agency relationship. The relationship of trust focuses on the principal with the result that agents must not let their own personal interests conflict with the obligations owing to their

> principals. A conflict of interest exists when an agent is faced with a choice between the agent's personal interest and the agent's duty to the principal.

The appellant then refers to legal textbooks and court decisions which support the position that, where an agent is in a position in which his own interest may affect the performance of his duty to the principal, the agent is obliged to make a full disclosure of all the material circumstances, so that the principal, with such full knowledge, can choose whether to consent to the agent's acting.

Based on the above, the appellant proceeds to identify how the obligation of "full disclosure" affects the issues in this appeal. The appellant states:

> Both the broker and the insurance company are clearly under a legally enforceable duty to make "full disclosure" of all commission arrangements between the broker and the insurer once the broker recommends the insurance company's product to his client. This enforceable duty to make "full disclosure" of all commission arrangements is owed to all potential customers.
>
> This legally enforceable duty of "full disclosure", which applies to every insurance company means that none of the details of the commission arrangement between a broker and an insurer can ever be considered "confidential".
>
> Any member of the public considering buying insurance is legally entitled to full disclosure of any and all compensation paid to the Broker by an insurance company. …
>
> Given the well recognized obligation of "full disclosure", that rests with all brokers and all insurance companies, it would be inappropriate for an insurer to use a claim of "confidentiality" as a means of placing limits on the ability of the broker to fulfill his legal duty by restricting his right to provide a client with the full details of all commission arrangements with the insurer.
>
> Furthermore it is submitted that an insurer cannot claim that the full details of contingent commission arrangements with brokers are "confidential" given its legally enforceable obligation of "full disclosure" to insurance buyers,

With respect to the possible application of section 15(a) to the records, the appellant's representations are relatively brief. He states:

> … [FSCO] is relying upon its claim of "confidentiality" with respect to the requested information. As set out above, there can be no legitimate expectation of "confidentiality" with respect to the details of the Broker's commission arrangements and other financial ties between brokers and insurance companies due to the legally enforceable obligation of "full disclosure" that rests with the Brokers and the insurance companies.

The appellant's references to the earlier arguments that there can be no claim of confidentiality are made in his representations concerning the possible application of section 17(1) to the records (which requires that the information be "supplied in confidence"). In those representations, the appellant submits that information "cannot be considered confidential if it is subject to disclosure at the request of any member of the public considering purchasing an insurance product offered by one of the insurers that are subjects of the access request." He then states that "The insurers have provided this information to their Brokers in the full knowledge that those Brokers, and indeed they themselves, are under a legally enforceable duty to make full disclosure of the terms and conditions relating to commissions to any and all customers who request it."

The appellant goes on to state:

> The information that has been requested was obtained from insurance companies operating in Ontario. Such information could have been obtained if FSCO had initiated its own Risk Based Market Conduct Questionnaire. The Commissioner should not extend the section 15 discretionary exemption to this information just because FSCO chose to participate in a larger multi-jurisdictional survey.
>
> If FSCO is allowed to exclude Ontario information on the basis it was obtained as part of a larger multi-jurisdictional survey this will only encourage future abuse. Information required by an Ontario regulatory body can be immunized from access by simply obtaining it by means of a multi-jurisdictional process.
>
> At most, section 15 should only be applied to information obtained through the survey that only has application outside of Ontario. This information can be severed.

Ministry's reply representations

The Ministry provided brief representations in reply on the issue of the application of section 15(a). The Ministry's reply representations address the appellant's argument that the information could have been obtained if FSCO had initiated its own questionnaire, rather than choosing to partake in the multi-jurisdictional survey. The Ministry states that whether or not the information could have been obtained in some other manner, it was in fact obtained through the multi-jurisdictional exercise, and that section 15(a) applies.

Analysis

I have carefully examined the records at issue in this appeal, as well as the representations of the parties. In my view, section 15(a) applies to the portions of the survey results remaining at issue in this appeal, for which it has been claimed.

As identified above, in order for a record to qualify for exemption under that section, the parties must establish that:

1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and

2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

Part 1 – relate to intergovernmental relations

In order to meet part one of the test, the records must relate to intergovernmental relations.

Intergovernmental relations are identified as "relations between an institution and another government or its agencies." Based on the representations set out above, I am satisfied that the relationship between FSCO and the regulators from the various governments represented in the CCIR are relations between an institution and another government or its agencies. FSCO is clearly an institution for the purpose of section 15(a). In addition, I am satisfied that the regulators from the other governments are "agencies" of those other governments. As referenced by the Ministry, in Order P-270 former Commissioner Wright found that agents of the crown were capable of conducting intergovernmental relations for the purposes of section 15, and stated:

> … Although neither the institution nor AECL are themselves "governments", as agents of the provincial and federal governments they are capable of conducting "intergovernmental relations" on behalf of their respective governments. Intergovernmental relations can be understood as the ongoing formal and informal discussions and exchanges of information as the result of joint projects, planning and negotiations between various levels of government.

The role of FSCO and the other regulators who form the members of the CCIR, as described in the Ministry's representations, including the responsibility to provide regulatory services and to administer and enforce the *Insurance Act*, satisfy me that these regulators are capable of conducting "intergovernmental relations" on behalf of their respective governments for the purpose of section 15 of the *Act*.

With respect to the issue of whether the records "relate to" intergovernmental relations, the Ministry has identified the manner in which the records were created, and the reasons why the records were requested from the insurers. It specifically identifies that the records were received by FSCO because of FSCO's relations with other provincial and territorial governments in Canada, as these records were collected on behalf of the provincial and territorial insurance regulators in Canada as part of an intergovernmental joint project. It is clear that the regulators decided to conduct the risk based market conduct review of the financial and contractual relationship between insurers and sales intermediaries in Canada, and felt that the review of industry practices required a coordinated, national approach. FSCO, on behalf of the regulators, took the lead role in distributing, collecting and analyzing the questionnaires, and obtained copies of all of the questionnaires from all provinces and tabulated the results on behalf of all the regulators. Although the records are from the affected parties, based on representations of the Ministry, and particularly on the fact that FSCO collected these records as part of an

intergovernmental joint project, I am satisfied that the records "relate to intergovernmental relations."

With respect to the appellant's suggestion that the portions of the records that pertain only to Ontario should not be withheld under this section, I note that in the circumstances, and given the nationwide nature of the information at issue, severances such as those suggested by the appellant are not feasible.

Part 2 – could disclosure of the records reasonably be expected to prejudice the conduct of intergovernmental relations

As identified above, in order for the section 15(a) exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry has provided detailed evidence in support of its position that disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations. It identifies that the questionnaires were collected by FSCO on behalf of the members of the CCIR, and provides information regarding the expectations of the regulators concerning the disclosure of information shared between the members. In addition, FSCO provided the submissions made by five provincial regulators who opposed disclosure. These parties expressed their concerns about disclosure of the records, and specifically identify that disclosure of this confidential information "could not be anything but harmful to the continued cooperation between jurisdictions."

Based on the representations received from the parties, including the specific submissions received from the other regulatory bodies involved in the CCIR, I am satisfied that the disclosure of the portions of the records remaining at issue could reasonably be expected to prejudice the conduct of intergovernmental relations.

I make this finding recognizing that the information at issue was not provided directly to FSCO by the regulators (who are the parties whose relations are in jeopardy), but rather by the third party insurers. However, based on the manner in which this information was collected (by FSCO on behalf of the CCIR regulators), the background to the collection of this information, as well as the objections to disclosure made by the CCIR regulators, I am satisfied that the records qualify for exemption under section 15(a).

The appellant has raised a number of objections to FSCO's ability to argue that the exemption in section 15(a) could apply to the records. Many of the appellant's representations focus on the background to the creation of the records, and the reasons why the questionnaires were requested and the records were created, including the serious concerns expressed by various groups which initiated the decision to conduct the surveys. Although I accept that there were important reasons why the surveys were conducted, the reasons do not affect the ability of FSCO to claim the discretionary exemption in section 15(a). Some of these reasons are addressed in the

discussion under the possible application of the public interest override in section 23 of the *Act*, discussed below.

The appellant also provides lengthy arguments regarding the application of the law of agency to the relationship between a broker and his or her client. The appellant extends that argument to submit that the records at issue in this appeal cannot qualify for exemption, as the law of agency requires the "full disclosure" of the records. The appellant takes the view that this principle not only affects the ability of FSCO to claim a discretionary exemption, but also impacts the ability of the insurer (or the regulators) to argue that there was a legitimate expectation of confidentiality when these surveys were provided to FSCO.

I do not accept the appellant's position that the law of agency affects the issues in the circumstances of this appeal. Although the appellant may be correct that the brokers who deal with clients have a fiduciary duty to those clients, and that this duty may include full disclosure of certain specific information in that relationship, in my view the records at issue in this appeal are not captured by the agency principles referred to by the appellant. The records consist of survey results and do not involve any direct agent/client relationship. In my view the appellant's arguments that agency principles extend to all potential clients and to all of the information contained in the records at issue is simply too broad an argument, and I do not accept that section 15(a) cannot apply to these records for that reason.

The appellant also argues that the wording of the section 15(a) exemption can be broadly interpreted, and submits that allowing the insurers to simply state that they had an expectation of confidentiality would be reading it too broadly. This argument relates more directly to the discussion of whether the Ministry properly exercised its discretion, and I will address this issue below.

Accordingly, subject to my review of the manner in which the Ministry exercised its discretion, I am satisfied that the remaining portions of the records qualify for exemption under section 15(a).

Exercise of Discretion

In support of its position that the Ministry properly exercised its discretion in applying section 15(a) to the records, the Ministry states that it exercised its discretion in determining that the outstanding records should not be disclosed while the severed records should be disclosed. It also states that it:

> … severed and disclosed all of the records that could reasonably be released, while balancing the interests of the regulators to maintain the integrity of the market conduct questionnaire process, and the interests of the affected parties. The Institution obtained consent of the insurers to release the severed information and also canvassed the views of the regulators who did not object to the release of those records that the insurers had consented to disclose.

> It is submitted that [the Ministry] exercised its discretion appropriately, fairly, in good faith and in accordance with the requirements of the *Act*. The section 15 arguments are applicable to the outstanding records only.

The appellant argues that the Ministry's own representations "make it clear that it exercised its discretion for the improper purpose of currying favour with the insurance industry." The appellant refers to the Ministry's representations in support of the possible application of section 17(1)(b), which the appellant believes suggests that "the ability of FSCO to regulate the insurance industry is, in some way, dependent upon 'a degree of co-operation by the regulated entities'." The appellant also argues that the Ministry's representations under that section suggest that if disclosure of information that the insurance companies prefer to keep secret is ordered, the insurers will cease to voluntarily comply with the applicable regulations. On this basis, the appellant argues that the Ministry took into account irrelevant factors in exercising its discretion. The appellant then states:

> The Freedom of Information regime should not restrict access to otherwise properly accessible information based on an implied threat that being forced to comply with Freedom of Information legislation will lead to a regulated industry failing to comply with the applicable Regulations.
>
> A Regulator should not be seeking to restrict access to otherwise accessible information on the basis that it is concerned that compliance with the *Act* will result in a regulated industry breaching the applicable Regulations.

In addition, the appellant takes the position that the wording of the section 15(a) exemption can be broadly interpreted, and submits that allowing the insurers to simply state that they had an expectation of confidentiality would be reading it too broadly.

Lastly, the appellant takes the position that FSCO failed to take into account all relevant factors when exercising its discretion, particularly in light of the legal obligations on both the insurance companies and the brokers to make "full disclosure" of all commission arrangements between the broker and the insurer "once the broker recommends the insurance company's product to his client."

Analysis

A number of the arguments made by the appellant in support of his view that the Ministry did not properly exercise its discretion are similar to the ones he made under the issue of the application of section 15(a), and I address those issue in my discussion of section 15(a) above.

With respect to the appellant's argument that the Ministry applied the exemption too broadly, on my review of the records at issue, I carefully considered the application of the exemption to the records. As identified above, the circumstances of this appeal are somewhat unique, as the records at issue were prepared and submitted to FSCO directly from the insurers, but it is FSCO and the other regulators who are concerned that disclosure would prejudice the conduct of intergovernmental relations. On my review of the Ministry's representations, I shared the

appellant's concerns to some extent. The representations of the Ministry suggest that, based on the "principles" agreed to by the regulators who formed the CCIR, their arrangement with these other regulators effectively stated that all information was to be withheld (subject to consent) and that the insurers were assured that their information would not be disclosed. However, as set out above, during the mediation stage of this appeal the Ministry contacted the affected parties with a view to obtaining their written consent regarding the release of the survey results. On consent of the affected parties, certain portions of the responsive records were disclosed to the appellant, and the exemption claims were made for only select portions of four of the remaining records.

On my review of the representations of the parties, and particularly based on the fact that the Ministry did not simply apply the section 15(a) exemption to all of the information in the surveys, but obtained consent to release portions of the surveys (including confirming the release with the regulators), and then chose to apply the section 15(a) exemption only to those portions of the survey results which were specifically objected to, I am satisfied that the Ministry (on behalf of FSCO) properly exercised its discretion to apply the section 15(a) exemption to the records. I find that it considered relevant considerations and did not take into account irrelevant considerations. Accordingly, I uphold the Ministry's exercise of discretion to apply section 15(a) to the portions of the records remaining at issue.

Public Interest Override

As identified above, in this appeal the appellant takes the position that there is a compelling public interest in the disclosure of the remaining portions of the survey results, and that section 23 of the *Act* applies. As I indicated above, that section states:

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

As set out above under the discussion of the public interest override for the records responsive to part 1 of the request, in order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption. The discussion above reviews what evidence is necessary to meet these requirements.

The appellant's representations

The appellant takes issue with the Ministry's position that the information provided by the insurers relates exclusively to the insurers' business activities and their relationships with their sales force, rather than to the insurers' relationship with government or FSCO. The appellant submits that the Ministry's position:

> … clearly demonstrate[s] that there is a compelling public interest involved in the collection of the information which was obtained by FSCO in the course of the execution of its governmental role as the regulator of the insurance industry…

The appellant submits that there is a compelling public interest in disclosure of the records at issue for the following reasons:

- the information in the questionnaires was collected as part of a joint initiative by the [CCIR] and [CISRO], both of which are "composed of insurance regulators";
- the CCIR's mandate is to facilitate and promote an effective regulatory system in Canada and to serve "the public interest" and to "enhance consumer protection";
- the CCIR has published three papers on the subject of actual or potential conflicts of interest in the insurance industry since this became a "hot" public issue in 2004;
- the CCIR's June 3, 2005 report on the results of its analysis of the questionnaire made findings which varied from findings of other questionnaires conducted by other bodies;
- the CCIR's analysis of the questionnaire suggested various policy options which, according to identified newspaper articles identified by the appellant, do not appear to have been implemented in full.

In light of the above, the appellant states:

> The compelling public interest in the proper execution of FSCO's mandate arises from the fact that its mandate includes "enhancing consumer confidence and public trust in the insurance sector that it regulates and making recommendations to the Minister on matters affecting the regulation of this Sector …"
>
> It is clear that FSCO is exercising a governmental function and the Minister is responsible to answer to Parliament and voters for FSCO's conduct, including conducting this survey, analyzing the responses and reporting the results of its analyses. The survey was conducted as part of a process which ultimately should result in further Government action if it is in the public interest to do so.
>
> It is impossible for the public to hold the Minister accountable for the decision to take no additional measures relating to the market conduct and regulation of insurance companies in Ontario after the results of the Risk Based Market Conduct Questionnaire were available, a clear aspect of governmental (in)action, if it is denied access to the actual responses to the survey.
>
> If the actual survey answers are not disclosed the public is unable to undertake an independent assessment upon which to base decisions as to whether the Government response to the information obtained by the survey was appropriate.
>
> Withholding the actual survey answers forces the public to accept the Government's conclusions regarding appropriate Government (in)action and prevents informed public debate.
>
> Release of the actual survey results will increase public confidence in the open and transparent regulation of the insurance industry in the public interest. When

> the government undertakes such an investigation in response to expressions of concern regarding potential and real conflicts of interest by knowledgeable people both in government and in the industry then public confidence will be eroded if the actual survey results are keep secret but the government decides that no action is necessary …
>
> The public interest in disclosure is clearly demonstrated by the fact that the only reason the survey was undertaken was intense public pressure for disclosure once "secret" contingent commissions and other financial ties between Brokers and insurance companies were reported in the media and the Minister came under public and political pressure to take action…
>
> It was public pressure that enforced the Government to act. The Government acted in part by undertaking the survey. No governmental action was undertaken as a result of the information obtained by the survey and, therefore, the public can only assume that the Government is satisfied that it has fulfilled its obligation to regulate the insurance industry even though it has taken no action based on the survey results.

The appellant then states that FSCO's mandate of enhancing consumer confidence and public trust in the insurance industry cannot be accomplished if the information is withheld from the public, nor can the public decide whether the government's decision that no additional regulatory action was required was reasonable and acceptable if the information that this decision was based on and which was obtained from the regulated industry is withheld from the public. He then states:

> It is not sufficient for Government to give the public a cumulative report with its own conclusion that there is no problem requiring additional regulation. The public is entitled to make its own informed decision and, therefore, it requires access to the actual details of Broker compensation and other financial ties …

The Ministry's representations

In response to the appellant's argument that disclosure would enable the public to hold the Minister accountable, the Ministry states:

> …the purpose of section 23 is not to serve as a mechanism to hold public officials accountable for public policy decisions they may have taken or not taken. It is the Legislature's role to hold public officials accountable. The forum for public policy discussion and debate with respect to the responses by the Government on matters of policy is through other means, including directly through those officials.
>
> Whether or not the survey should result in further Government action, which appears to be the appellant's complaint…is…not an issue that is relevant to this proceeding.

The Ministry also submits that sufficient information has been provided to the public to enable it to decide whether the government's response to the survey results was appropriate. In this regard, the Ministry notes that CCIR published three reports related to its work on this project and has made all of the relevant information available on its website. The Ministry indicates that the website contains: "the findings of the survey, the various consultations with stakeholders, the submissions of stakeholders, and the CCIR response…"

The Ministry takes the position that in light of the disclosure that has already been made, further disclosure of the withheld information will not advance the public debate or the ability of the public to make informed decisions on insurance related matters. The Ministry concludes:

> …matters of Government policy are not, in and of themselves, matters that give rise to a compelling public interest. The Appellant has not provided any evidence or arguments as to why releasing these records clearly outweighs the interests underlying section [15(a)].
>
> The withheld information consists of private commercial contracts and other records of a commercial nature which do not provide any insight into the workings of Government.

Finding

As a preliminary matter, I do not agree with the Ministry's statement that the purpose of section 23 is "not to serve as a mechanism to hold public officials accountable for public policy decisions they may have taken or not taken." In the report entitled, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the *Williams Commission Report*), there was discussion about the rationale for the adoption of a freedom of information scheme in Ontario, which includes public accountability, informed public participation, fairness in decision-making and protection of privacy. With respect to "accountability", the *Williams Commission Report* stated at page 77:

> Increased access to information about the operations of government would increase the ability of members of the public to hold their elected representatives accountable for the manner in which they discharge their responsibilities. In addition, the accountability of the executive branch of government to the legislature would be enhanced if members of the legislature were granted greater access to information about government.

In my view, the ability of the public to scrutinize the bases upon which government policy-making is undertaken is an important aspect of public accountability. With respect to the application of section 23, where the information in the record informs the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984], a compelling public interest may be found to exist.

That being said, in the circumstances of this appeal, I find that section 23 does not apply to override the application of section 15(a) to the records which I have found that section to apply to.

As identified above, previous orders have stated that the first requirement to establish that section 23 applies is that there must be a "compelling public interest in disclosure", and that the word "compelling" means "rousing strong interest or attention" [Order P-984]. Although I accept the appellant's position that there is a public interest in issues relating to the regulation of the insurance industry, and in particular, risk-based assessments that focus on actual or perceived conflict of interest concerns, I am not persuaded that a compelling public interest exists in disclosure of the records remaining at issue in this appeal. The records remaining at issue comprise portions of the named insurers' responses to the questionnaire and the attachments provided by the insurers that detail their commercial contracts and other business activities. I am not persuaded that there exists a "compelling" public interest in the disclosure of these records sufficient to override the section 15(a) exemption in this appeal.

In addition, although the appellant has selectively quoted from one report of the CCIR, I note from my review of the CCIR's website that this report is considerably more detailed and expansive than suggested by the appellant. Moreover, based on my review of the CCIR website generally, I find that the information contained in it provides a reasonable level of transparency and accountability regarding its activities and the results of its assessment of the insurance industry with respect to the issues canvassed in its questionnaire. I am satisfied that the amount of information already made available to the public is sufficient to enable the public to engage in public debate on the issues and to hold the government accountable for policy related decisions based on the results of the survey. Indeed, some of the evidence provided by the appellant himself, including the articles he refers to and the arguments he provides, confirm this finding.

Accordingly, in this appeal, I have not been provided with sufficient evidence to indicate that the public has a compelling interest in the disclosure of the records remaining at issue, and I find that section 23 does not apply.

ORDER:

I uphold the decision of the institution, and dismiss this appeal.

Original Signed by: November 25, 2008
Frank DeVries
Adjudicator