

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3724

Appeal PA15-192

Ministry of Finance

April 27, 2017

Summary: The appellant made a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain records relating to a consulting firm's reports on the impact of Ontario's reforms to automobile insurance in 2010. The record at issue in this appeal is a chart containing the names of insurance companies who were approached to participate in a survey, the results of which were used to prepare the reports. The ministry withheld the chart in reliance on the exemption for third party information at section 17(1) of the *Act*, and the appellant appealed. The appellant subsequently clarified that he seeks only the names of the insurance companies listed in the chart, and not any other information in the chart. In this order, the adjudicator finds that the section 17(1) exemption does not apply to the names of the insurance companies appearing in the chart and orders the ministry to disclose this information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 17(1).

BACKGROUND:

[1] The issue in this appeal is whether a list of the names of insurance companies who were contacted to participate in a survey on insurance reform is exempt from disclosure pursuant to section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] In 2010, Ontario introduced major reforms to its automobile insurance system to

address an increase in claims costs. Subsequent to those reforms, the Ministry of Finance (the ministry) hired a consulting firm to prepare an interim report on the impact of the reforms, and to prepare annual reports for 2014 and 2015.

[3] The appellant is an individual who submitted a request to the ministry pursuant to the *Act* for records relating to the consulting firm's reports. Specifically, the appellant requested the following information:

1. Provide communications, exchanges and meetings [an identified consulting firm] has had from January 1, 2012 to date with [the ministry] and FSCO on its assigned consultant work on auto insurance data and strategies.
2. Include suggested changes made to date by [the ministry] and FSCO to [identified consulting firm] draft reports and work.
3. Include [identified consulting firm] presentations made to date to [the ministry] and FSCO on its assigned work.
4. Provide the backup survey notes of telephone or face to face interviews [identified consulting firm] prepared whose summary results are found in the April, 2014 [identified consulting firm] Interim Report. Do sever the names of individuals/firms contacted from the survey/interview [identified consulting firm] notes. Provide separately a list of all those persons, entities in the auto insurance industry that [identified consulting firm] contacted for its survey/interview work and a list of those not replying.
5. Provide Finance/FSCO reactions/review of [identified consulting firm]'s April, 2014 Interim Report.
6. Provide Finance/FSCO instructions for [identified consulting firm] to produce both a 2014 and 2015 annual report, and the timetable and outcomes sought from these further [identified consulting firm] reports.
7. Provide drafts to date for the [identified consulting firm] 2014 annual report; a list of stakeholders contacted for this report; and the notes/correspondence made of such contacts (note, please sever individual identifying data from the survey/interview work collected).

[4] The ministry conducted a search and located 63 records responsive to the request, including emails and draft reports. Prior to making its decision on access, and pursuant to the notice provisions found at section 28 of the *Act*, the ministry notified the consulting firm as a party whose interests could be affected by disclosure of the records. After reviewing the consulting firm's response, the ministry issued a decision to disclose 51 records in full and 12 records in part. The ministry cited sections 17(1) (third party information), 18 (economic interests of Ontario) and 21 (personal privacy) to deny access to the withheld information. The consulting firm did not appeal the

ministry's decision and the records (with the exception of the withheld portions) were released to the appellant along with an index of records.

[5] The appellant appealed the ministry's access decision to this office, taking issue with the application of section 17(1) of the *Act* (third party information) to records 28 and 32, and the chart that forms part of record 4. It is this chart that is at issue in this appeal.

[6] During mediation, the ministry notified 25 additional affected parties, seeking their views regarding the disclosure of information pertaining to them. Nine affected parties responded that they did not object to the release of the information, three of them objected, and 13 did not provide representations.

[7] The ministry then issued a revised access decision to the appellant and the affected parties, including the original affected party (the consulting firm), in which it granted the appellant partial access to the chart in record 4, citing section 17(1) of the *Act* to deny access to information relating to the three affected parties who had objected to the disclosure of their information. The ministry also advised that some of the information in the chart is not responsive to the appellant's request. In addition, the ministry granted access to record 28 in its entirety and record 32 in part (some information in record 32 was severed as not responsive to the request).

[8] No affected party appealed the decision, and the ministry then disclosed records 28 and 32 (minus non-responsive information) to the appellant. However, the ministry issued a further revised decision with respect to the chart in record 4 in which it stated the following:

Information denied in the chart included three specific rows, with several rows that would have been released. After further review, the ministry's original position denying access to the full chart stands. The chart must be denied in its entirety under section 17 because disclosure of any portion of the chart would likely reveal the third party information that must be protected.

[9] The appellant advised the mediator that he is not pursuing access to the information in record 32 that the ministry found to be non-responsive. The appellant confirmed, however, that he takes issue with the application of section 17(1) to the chart in record 4 (the chart), and also objects to the ministry's decision that some of the information in record 4 is not responsive to his request.

[10] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by inviting representations from the ministry and seventeen affected parties. The affected parties given notice were the consulting firm and the sixteen affected parties who had not provided consent in response to the ministry's notification

of them under section 28 (including the three who had expressly objected).

[11] Representations were received from the ministry and four affected parties, all of whom objected to disclosure of the information at issue. In addition, two affected parties responded to advise that they had no objection to disclosure of the information. The remaining affected parties did not provide representations. The consulting firm did not provide representations.

[12] I provided copies of the representations of the ministry and the four affected parties to the appellant¹ and invited representations from the appellant. In his representations, the appellant clarified the nature of the information he still seeks in the following terms:

[W]hat is only being sought and appealed is the names of insurance companies who were surveyed to participate in Ministry of Finance's commissioned 2014 ... studies on auto insurance costs... [O]ther data that may be in Record 4 was not the subject of this appeal, only the company names surveyed were sought.

[13] As a result of this clarification, the only information at issue in the chart is the names of the insurance companies listed therein.

[14] I provided a copy of the appellant's representations to the ministry and the four affected parties who had objected to disclosure and invited them to file reply representations. Two affected parties provided representations advising that they do not object to being identified as survey participants. The other two affected parties and the ministry did not file reply representations.

[15] In this order, I find that the information remaining at issue, the list of names of insurance companies in the chart, is not exempt from disclosure under section 17(1) of the *Act*, and I order the ministry to disclose this information to the appellant.

RECORD:

[16] The chart forms part of the record appearing as record 4 in the ministry's index of records. The only information in the chart remaining at issue is the first column (minus the heading), which is a list of insurance companies.

[17] The chart is attached to an email that was disclosed to the appellant. The email is from the consulting firm to the ministry and states that the attached list of companies are those that the consulting firm would like to approach regarding the survey. From

¹ Pursuant to the sharing criteria found in *Practice Direction 7: Sharing of Representations*, some information in the representations was redacted from the copies provided to the appellant.

my review of the records disclosed to the appellant as well as the publicly available interim report prepared by the consulting firm, it is evident that not all insurance companies who were approached participated in the survey.²

ISSUE:

[18] The only issue in this appeal is whether the mandatory exemption at section 17(1) applies to the names of the insurance companies as they appear in the chart.

DISCUSSION:

[19] Section 17(1) states in part:

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

[20] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.³ 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.⁴

[21] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

² The publicly-available Interim Report dated April 14, 2014 states that "more than 78% of the Ontario PPA insurance industry, measured by 2012 direct premium written, participated in the survey."

³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
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), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[22] The types of information listed in section 17(1) have been discussed in prior orders:

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.⁵ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁶

[23] The information at issue reveals the identities of insurance companies carrying on business in Ontario. This is information that relates to the selling of services and constitutes commercial information as defined in previous orders of this office. I find, therefore, that it is commercial information.

Part 2: supplied in confidence

[24] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁷ 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.⁸

[25] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁹

⁵ Order PO-2010.

⁶ Order P-1621.

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

[26] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.¹⁰

Representations

[27] The ministry submits that the insurance companies supplied the information in the chart to the Financial Services Commission of Ontario (FSCO), which is an agency of the ministry, and that this information was subsequently provided to the consultant for the purposes of conducting the survey. With respect to confidentiality, the ministry submits that disclosure of the information in the chart would contravene the affected parties' expectation of confidentiality as evidenced by the letter they received from the consultant, which contains confidentiality assurances. It also submits that some communications give rise to an implicit expectation of confidentiality and that the preparation of the chart was done with the expectation that it would also remain confidential.

[28] Affected party #1 submits¹¹ that it provided the information at issue to the consulting firm for the purposes of the firm's preparation of the report for the ministry, and that this information was provided in confidence. Affected party #1 refers to the consulting firm's assurance of confidentiality as well as an express written communication it made to the consulting firm when it submitted its survey responses, outlining its expectation that the information it provided was to be kept confidential.

[29] Affected party #2 submits that the information in the chart was provided to FSCO with a reasonable expectation of confidentiality.¹²

[30] Affected party #3 submits¹³ that the information in the chart describes its

¹⁰ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

¹¹ In reply, affected party #1 advised that it did not oppose the disclosure of its identity as a participant in the survey to the appellant.

¹² In reply, affected party #2 advised that it does not object to being identified as a participant in the survey.

¹³ Affected party #3 did not file reply representations.

relative position in the private passenger automobile insurance marketplace in Ontario. Affected party #3 submits that it submitted its information in confidence, and refers to the contents of the consulting firm's letter to it requesting its participation in the survey. That letter states that the report will document aggregated results of the survey, and that companies will not be identified individually either in the report or to the government.

[31] Affected party #4 also filed representations objecting to disclosure. However, this affected party's description of the information at issue made it evident that it was under a misapprehension as to the nature of the information at issue in this appeal. I invited the affected party to file additional representations based on the description of the information at issue contained in the Notice of Inquiry. Affected party #4 did not file further representations and did not file reply representations when invited to do so.

Analysis and findings

[32] The chart is an attachment to an email that the consulting firm sent to the ministry which states, "attached is the list of companies that we would like to approach regarding the survey". From the content of this email and its date, it is clear that the consulting firm provided the chart to the ministry before the consulting firm approached the companies seeking their participation in the survey. It is important to note this, because some of the representations made to me during the course of the inquiry appear to focus instead on responses that the insurance companies provided to the consulting firm as part of their participation in the survey. No such information appears in record 4.

[33] Some of the representations initially made to me are also of limited relevance because of the fact that the appellant subsequently clarified that he does not seek any information in the chart except for the names of the insurance companies.

[34] I have been provided with little evidence about where the information in the chart came from, although the nature of the information suggests that it originated with the insurance companies and/or the Financial Services Commission of Ontario (FSCO). As noted above, the ministry submits that the insurance companies supplied the information in the chart to FSCO, which is an agency of the ministry, and that this information was subsequently provided to the consultant for the purposes of conducting the survey.

[35] The affected parties and the ministry provided some information in their representations with respect to the confidentiality of the survey participants' responses to the consulting firm's survey questions, referring, in particular, to the assurance of confidentiality set out in the consulting firm's letter to the companies asking them to participate in the survey. However, I have been provided with very little in the way of

any indicia of confidentiality surrounding their provision of the information contained in the chart to FSCO.

[36] Only the identities of the insurance companies listed in the chart are at issue in this appeal. Even if I assume that the insurance companies supplied much of the information in the chart to FSCO in confidence, it is arguable that their names alone were not supplied in confidence, given that the names of automobile insurance providers are readily available to the public.

[37] The context surrounding this record is important, however. The consultant's letter to the companies approached to participate in the survey states that "companies will not be identified individually, either in the Report or to the Government..." I note that the consulting firm, when updating the ministry about response rates of the companies approached, did not identify which individual companies participated. It is arguable, therefore, that the identities of the insurance companies who participated in the survey could be considered to be confidential in this context.

[38] However, according to the publicly available Interim Report prepared by the consulting firm, "more than 78% of the Ontario PPA¹⁴ insurance industry, measured by 2012 direct premium written, participated in the survey." Given that there was not a 100% response rate, disclosure of the list of insurance companies in the chart arguably would not reveal the participants in the survey. While it is possible that those familiar with the insurance industry might be able to infer the participants, I have received no representations on that issue.

[39] In my view, however, I do not need to make a determination about whether disclosure of the information at issue would reveal information supplied in confidence, because I find below that the third part of the three-part test under section 17(1) has not been satisfied.

Part 3: harms

[40] The party resisting disclosure must demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm. An institution must, however, provide evidence "well beyond" or "considerably above" a mere possibility of harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁵ Parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the

¹⁴ Defined in the report as private passenger automobile or personal lines automobile.

¹⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

*Act.*¹⁶

Representations

[41] The ministry (who did not file reply representations in response to the appellant's narrowing of the information he continues to seek) submits that disclosure of the chart would harm the affected parties. It submits that disclosure could reasonably be expected to prejudice significantly the competitive position of the affected parties (section 17(1)(a)) and 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 (section 17(1)(b)). The ministry adopts the arguments that the three affected parties who initially objected to disclosure had made to the ministry when notified of the request. Those submissions are similar to the representations filed by the affected parties in the course of my inquiry (see below).

[42] Affected party #1 initially submitted that disclosure of the chart would identify the survey participants and would also provide third parties with an understanding of the market share of the survey participants. Affected party #1 submitted that this could disrupt its competitive position. It submitted, further, that it chose to participate in the survey on the basis that that its participation and responses would remain anonymous. It submitted that disclosure of the chart would cause it, and potentially other insurance companies, to reconsider participating in future voluntary surveys, or to be more selective of the information they choose to divulge. As a result, the government's public policy objective of reducing automobile insurance premiums may not be achieved.

[43] After reviewing the appellant's representations in which he advised that he seeks only the names of the insurance companies surveyed, affected party #1 advised in its reply representations that it does not object to being identified as a survey participant.

[44] Affected party #2 initially submitted that maintaining the confidentiality of all sensitive commercial information provided for the purposes of the consulting firm's report is paramount in encouraging transparency and fostering a strong regulatory relationship with the regulated insurance companies. It stated that there is a public benefit to encouraging a competitive environment of openness, transparency and accountability. It argued that the objective of regulators such as FSCO will be rendered more difficult to achieve if companies do not openly and voluntarily contribute to reports like the ones prepared by the consulting firm in this case, or if companies are reluctant to provide requested sensitive commercial information out of fear it will be disclosed to third parties.

[45] After reviewing the appellant's representations in which he advised that he seeks only the names of the insurance companies surveyed, affected party #2 advised in its reply representations that it does not object to being identified as a survey participant.

¹⁶ Order PO-2435.

[46] Affected party #3 submits that the disclosure of the chart could reasonably be expected to cause harm insofar as it would result in it no longer supplying similar information in future. It submits that when it participates in voluntary surveys, it does so on the basis that information it provides will be treated as confidential. Otherwise, information that it provides could be used against it to its detriment. It submits that if it cannot be assured that information it provides will be treated confidentially, it could result in it not participating in voluntary surveys, or limiting the information it supplies. Affected party #3 also submits that disclosure of the information in the chart would allow a party to link that information to the information contained in the consulting firm's report, namely, the views and experiences of the insurance industry on the reforms in question.

[47] Following my receipt of the appellant's representations in which he advised that he seeks only the names of the survey participants listed in the chart, I invited this affected party to file reply representations, but it did not do so.

[48] The representations filed by affected party #4 do not address the information at issue. This affected party also did not file reply representations.

[49] The appellant submits that the release of the names of the surveyed companies would cause no harm, and that he has received similar information under the *Act* previously.

Analysis and findings

[50] From my review of the parties' representations, I find that they have raised explicitly or implicitly the potential application of sections 17(1)(a), (b) and (c), which 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)(a): prejudice to competitive position

Section 17(1)(c): undue loss or gain

[51] The information remaining at issue consists only of the names of insurance companies that were approached to participate in the survey. Although some affected parties argued that the disclosure of the responses to the survey would result in harm, their responses are not found in record 4.

[52] The affected parties also raised the issue of disclosure of their market share. I note that the cover email from the consulting firm to the ministry, which was disclosed to the appellant, identifies the companies listed in the chart as the "top" insurance companies operating in Ontario. However, in my view, this vague statement does not come close to providing any meaningful information about the market share of any individual company on the list. Further, even if it were possible to ascertain a company's market share from disclosure of the list of the companies, I have not been provided with evidence that this could reasonably be expected to "prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations" of an affected party or result in undue loss or gain. While affected party #1 submitted that disclosure of its market share "could disrupt its competitive position", this is not enough to establish the harms stipulated under sections 17(1)(a) or 17(1)(c).

[53] I conclude that neither section 17(1)(a) or (c) applies to the information at issue.

Section 17(1)(b): similar information no longer supplied where it is in the public interest that it be supplied

[54] As noted above, three affected parties made representations to the effect that if they cannot be assured that information they provide will be treated confidentially, this could result in either their not participating in voluntary surveys, or limiting the information they supply in response to such surveys.

[55] From my review of the affected parties' representations, it appears that much of their concern surrounds the disclosure of information that is not at issue. Two of the affected parties indicated in reply that they had no objection to the release of their names alone.

[56] In any event, I am not satisfied that disclosure of the list in the chart could reasonably be expected to result in insurance companies not participating in future similar surveys. Even assuming that the insurance companies who participated in the study can be inferred from the list of companies in the chart, I have not been provided with enough information to enable me to conclude that the release of this information could reasonably be expected to result in insurance companies declining to participate in future surveys.

[57] As noted in the letter from the consultant to the survey participants, the report

was to document the aggregated results of the survey, and companies were not to be identified individually. None of the affected parties explained why they might no longer participate in a similar study should they be identified as having participated in the survey in this case, where none of their individual responses are being disclosed. Affected party #3 submitted that disclosure of the information in the chart would allow a party to link that information to the information contained in the consulting firm's reports, namely, the views and experiences of the insurance industry on the reforms in question. However, I was not provided with argument or evidence to support this assertion. From my review of the reports and the list of insurance companies, I am not satisfied that any individual company's responses to the survey could be surmised as a result of the disclosure of the list of insurance companies. As a result, the parties' very general assertions that they might be reluctant to participate in future are not enough to satisfy me that section 17(1)(b) applies in this case.

Conclusion

[58] I conclude that section 17(1) does not apply to the information at issue. As I have concluded that section 17(1) does not apply, I do not need to consider the possible application of section 17(3), which provides that a head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

[59] Since section 17(1) does not apply and no other exemption has been claimed by the ministry, I will order that the names of the companies as they appear in the chart be disclosed to the appellant.

ORDER:

1. I order the ministry to disclose the names of the insurance companies listed in the chart forming part of record 4 to the appellant. This disclosure is to take place by **June 2, 2017** but not before **May 29, 2017**.
2. In order to verify compliance with this Order, I reserve the right to require the ministry to provide me with a copy of the information provided to the appellant.

Original Signed by: _____

Gillian Shaw
Adjudicator

April 27, 2017