



Competition Bureau
Canada

Bureau de la concurrence
Canada

INFORMATION BULLETIN
ON
THE COMMUNICATION AND TREATMENT
OF INFORMATION UNDER THE
COMPETITION ACT
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1. INTRODUCTION

This Bulletin sets out the approach of the Commissioner of Competition (the “Commissioner”) and the Competition Bureau (the “Bureau”)¹ to the treatment and communication of information obtained in the course of the administration or enforcement of the *Competition Act* (the “Act”). The Commissioner is an independent law enforcement official appointed by the Governor in Council and is responsible for the administration and enforcement of the Act.²

The Act has specific provisions for the commencement and conduct of formal inquiries, including formal powers to gather evidence, and for governing the communication of information obtained by the Bureau in the course of discharging these duties.

Parties providing information to the Bureau require assurance that it will not be disclosed, except in accordance with the law. The Act enshrines the principle of confidentiality in section 29 and the Bureau has procedures in place to ensure that confidentiality will be upheld.

¹ For the purposes of this document, the terms “Commissioner” and “Bureau” are used interchangeably as appropriate to the topic discussed, but have effectively the same meaning for purposes of the interpretation of and practice under section 29 of the *Competition Act*.

² The Commissioner is also responsible for the following labelling statutes: *Consumer Packaging and Labelling Act* (the “CPLA”), except as it relates to food as that term is defined in section 2 of the *Food and Drugs Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

2. GENERAL APPROACH

In the course of the administration or enforcement of the Act, the Bureau often comes into the possession or control of information, either through the use of formal powers under the Act or through the provision of information and records on a voluntary basis. This information comes from a variety of sources, including complainants, industry participants (such as competitors, suppliers or customers), industry experts, and Canadian or foreign law enforcement agencies. Without access to such information and an ability to communicate it in specific circumstances, the Bureau cannot effectively administer or enforce the Act.

As discussed in more detail below, section 29 of the Act prohibits the communication of information obtained by the Bureau through the use of formal powers or provided voluntarily, except in two specific circumstances: to another Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act. It is important to note that the prohibition on communication of section 29 information does not apply where such information has already been made public or is authorized by the person who provided it.

Where proceedings are taking place before the Competition Tribunal or the courts, information that is confidential in nature may become public. However, the Bureau is prepared to consider various protections for the information, for example, sealing orders, in camera proceedings and other procedures.

Confidentiality is fundamental to the Bureau's ability to administer and enforce the Act and to obtain information from a number of different sources including complainants, industry participants, suppliers and customers. The Bureau recognizes that the proper control of information, regardless of type, medium or location, is essential to its integrity as an efficient and respected law enforcement agency. The Bureau ensures the proper handling of information through stringent security policies and procedures.

3. APPLICABLE LEGISLATION

Section 29 is the key provision protecting information³:

“29. (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

(a) the identity of any person from whom information was obtained pursuant to this Act;

(b) any information obtained pursuant to section 11, 15, 16 or 114;

(c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;

(d) any information obtained from a person requesting a certificate under section 102; or

(e) any information provided voluntarily pursuant to this Act.

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.”

For practical purposes, section 29 protects all information provided to or obtained by the Bureau, as well as the identity of those who provided it. When the Bureau commences an inquiry pursuant to section 10 of the Act, it may obtain information through court-authorized orders under section 11 (orders for oral examination, production of records or making written returns of information). The Bureau may also obtain evidence using court-authorized search warrants under sections 15 and 16 (search and seizure). The Bureau also receives information under the pre-merger notification process required by Part IX of the Act. In addition, in the course of both inquiries and preliminary examinations, persons will often provide information voluntarily

³In addition, section 10 states that all inquiries must be conducted in private.

through complaints or responses to questionnaires, interviews and other investigative procedures.

Normally, the Bureau will only comment on an inquiry or examination if it has become public through another source or to comment on misinformation that may relate to public markets or the Bureau's enforcement practices.

Subsections 29.1 and 29.2 deal with responses to requests for information from the Minister of Transport and the Minister of Finance. These provisions, presented below in detail, allow for the communication of information, as well as "any information collected, received or generated by or on behalf of the Commissioner, including compilations and analyses" when requested by the relevant Minister.

In addition to the above, the Bureau and/or the Attorney General of Canada may be in possession of information obtained pursuant to techniques authorized by the Criminal Code; the communication of this information may be subject to restrictions established pursuant to the Criminal Code. The policies of the Bureau herein are subject to any such restrictions.

4. POLICY AND PRACTICE

4.1 To Canadian Law Enforcement Agencies

The Bureau's view is that a "Canadian law enforcement agency" includes all agencies or persons mandated to enforce laws in Canada, such as police forces and securities commissions.

Communication of information to Canadian law enforcement agencies can occur in numerous circumstances, including:

- when information received by the Bureau falls within another agency's mandate and where the information reveals a potential violation of a statute enforced by that agency;
- when the communication of information will enable another agency to assist the Bureau. For example, when the Bureau seeks the assistance of a police agency to ensure the timely and effective execution of a search warrant;
- when the Bureau undertakes coordinated enforcement actions with other agencies to advance a particular matter and/or for the purpose of sharing intelligence; or
- when a Canadian law enforcement agency has expressly requested the information for the purposes of carrying out its duties.

4.2 For the Purposes of the Administration or Enforcement of the Act

The Bureau may communicate information for the purposes of the administration or enforcement of the Act when (a) advancing a specific examination or inquiry under the Act or (b) making representations before regulatory boards or commissions pursuant to sections 125 and 126 of the Act or before parliamentary committees.

Advancing a specific examination or inquiry requires an ability to both obtain and use relevant evidence and information, and to communicate information. More specifically, it may include:

- eliciting additional information, for example from customers, suppliers or competitors, to determine whether the Bureau's assessment of a matter in question is accurate;
- obtaining an opinion or analysis by an industry, legal, economic or other expert on some or all aspects of the matter in question (contracts retaining these experts under section 25 of the Act contain specific language making section 29 binding on them);
- obtaining enforcement assistance in a matter from foreign law enforcement authorities, or co-ordinating enforcement activity with other agencies enforcing similar legislation;
- assessing the accuracy or the evidentiary value of information;
- making applications to courts for the use of formal investigative powers pursuant to sections 11, 15 and 16 of the Act and for the use of wiretapping provisions contained in the Criminal Code;
- initiating proceedings pursuant to the Act before the courts or the Competition Tribunal;
- making informal representations to a regulator as a result of an examination of a complaint.

A representation before a regulatory body under sections 125 and 126 of the Act or parliamentary committee is considered to be part of the administration or enforcement of the Act. Since the Commissioner makes representations in such matters in the context of general regulatory hearings, the issue of dealing with information protected by section 29 does not normally arise. However if it arises, the Bureau will only communicate information when it is satisfied with the assurances provided by the regulatory bodies that the information will remain confidential.

Finally, it is the Bureau's view that communicating the results of its examinations and inquiries to the public is an important part of the administration or enforcement of the Act and an essential

component to ensure compliance. It may be necessary to disclose information such as the name of the applicant or complainant and general market information in public statements in order to remain transparent. Disclosure in these circumstances may include consultation with affected parties and consideration of any submissions they may have on the issue.

4.2.1 To Foreign Authorities

Cooperation with foreign counterparts has become a crucial part of the enforcement activities of many competition authorities. For example, the Bureau may communicate information to foreign counterparts where the intent is to advance a specific examination or inquiry for the effective administration or enforcement of the Act.

Information sharing is a key component of many bilateral and multilateral instruments, including cooperation agreements between Canada and other jurisdictions; inter-agency arrangements between the Commissioner and foreign counterparts; and Recommendations of the Organization for Economic Cooperation and Development (OECD) relating to cooperation. Any information communicated to a foreign authority under the provisions of a bilateral or multilateral cooperation instrument will be subject to specific confidentiality safeguards contained in that instrument.

As a matter of practice, if no cooperation instruments exist, the Bureau will consider the communication of information only after it is fully satisfied of the assurances provided by the foreign authority with respect to the confidentiality and use of the communicated information.

4.2.1(a) On the Bureau's Initiative

The Bureau can, for example, communicate information to a foreign authority when it believes that it can assist in advancing a specific examination or inquiry under the Act. In some cases certain product or geographic markets may be the subject of parallel investigations by the Bureau and by authorities in other jurisdictions. In other cases, authorities may have investigations in separate but related product or geographic markets. Any communication of information will only occur if it is compatible with Canadian law and the Bureau's obligations, such as confidentiality provisions of international cooperation agreements or arrangements.

4.2.1(b) On the Initiative of a Foreign Authority

When the Bureau receives a request from a foreign authority for information, the Bureau may communicate the information for the purposes of the administration or enforcement of the Act and if the communication is compatible with Canadian law and the Bureau's obligations.

Foreign authorities may request information in the Bureau's possession under bilateral and multilateral cooperation instruments, but these instruments do not compel the Parties to share information nor do they provide any authorization to communicate information over and above that provided under section 29 of the Act. This type of communication is distinguished from evidence gathering, which is linked to treaties developed through the provisions of the *Mutual Legal Assistance in Criminal Matters Act* (the "MLACMA") for criminal matters or Part III of the Act for civil matters (Mutual Legal Assistance). The evidence provided to a foreign jurisdiction under a Mutual Legal Assistance Treaty (MLAT) is not necessarily in the Bureau's possession and may not involve an enforcement matter that the Bureau is examining. The information obtained by the Bureau as a result of a MLAT request is not communicated pursuant to section 29, but pursuant to the obligations resulting from the MLAT. MLATs are

administered by Canada's Department of Justice and typically allow the Parties to the Treaties to request assistance in obtaining evidence located in the other country through such means as depositions, interviews, searches and requests for documents. These treaties include specific confidentiality provisions. The same will also be true in civil competition matters in respect of future treaties now provided for under Part III of the Act, which came into force in June 2002. It is beyond the scope of this document to discuss in detail matters under these provisions. For more information on the MLAT, please refer to the Department of Justice Web site. (Insert link to

http://laws.justice.gc.ca/en/srch.cgi?part=full&method=and&lang=en&corpus=c_stats&titre=Mutual+Legal+Assistance+in+Criminal+Matters+Act&query=&x=0&y=0)

4.2.2 From Foreign Authorities

Foreign authorities typically communicate information to the Bureau on the understanding that the information will be treated confidentially and used for the purposes of the administration or enforcement of the Act. If the Bureau intends to use the information for any other purpose, it will inform the foreign authority and determine that there is no objection. If legal action is initiated for access to information in the Bureau's possession, the Bureau will make all appropriate legal arguments regarding confidentiality and privilege to prevent disclosure. The final disposition of such matters rests with the courts.

4.3 Other Government Departments

The purpose of subsections 29.1 and 29.2 of the Act is to allow for the communication of information in cases where the Bureau and the Ministers of Transport and/or Finance are dealing with mergers or acquisitions involving parties in the air transportation industry or finance sector.

4.3.1 To the Minister of Transport

If requested by the Minister of Transport, the Commissioner may communicate information if the request states that the Minister of Transport requires the information for the purposes of sections 56.1 or 56.2 of the *Canada Transportation Act* (for the review of mergers and acquisitions). Such information supplied by the Bureau can only be used for, or communicated to, persons performing duties under the specified provisions of the *Canada Transportation Act*.

4.3.2 To the Minister of Finance

If requested by the Minister of Finance, the Commissioner may communicate information if the request states that the Minister of Finance requires the information for the purposes of considering a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act*, or the *Trust and Loan Companies Act*, or to determine whether a certificate under paragraph 94(b) of the Act should be provided dealing with such a merger or proposed merger.

4.4 Other Matters

The Bureau's Immunity Program

As outlined in the Bureau's publication, *Information Bulletin - Immunity Program under the Competition Act*, the Bureau treats as confidential the identity of a party requesting immunity and any information obtained from that party. The only exceptions to this policy would be the following:

- when there has been public disclosure by the party;

- when the party has agreed and when disclosure is for the purpose of the administration or enforcement of the Act;
- when disclosure is required by law; and
- when disclosure is necessary to prevent the commission of a serious criminal offence.

Whistleblowing provisions

Under the whistleblowing provisions of the Act, sections 66.1 and 66.2, anyone who has reasonable grounds to believe that an offence has been or may be committed under the Act may notify the Bureau of the particulars and may request that his or her identity be kept confidential. The Commissioner shall keep confidential the identity of a person who has made such disclosure and to whom an assurance of confidentiality has been provided.

Binding Written Opinions

Promoting compliance with the Act is a fundamental objective of the Bureau. Under section 124.1 of the Act, the Commissioner may provide binding written opinions on whether a proposed conduct or practice would raise an issue under the Act.

The Bureau's policy on the communication of information does not limit the scope of this activity because opinions are based on information provided by the party requesting the opinion. The Bureau will not undertake third party contacts in the preparation of written opinions except with respect to requests for written opinions under section 74.01(1)(b) of the Act concerning representations relating to performance, efficacy or length of life of a product. In these cases, the

Bureau may seek independent review of any such claim or tests relating to an applicant's product. Any individuals involved in such a review are hired under section 25 of the Act and are subject to the confidentiality policy set out in this document.

Right of Access to Records

Subsection 18(2) of the Act, dealing with access to records or things obtained pursuant to sections 11, 15 and 16, makes it clear that only persons from whom records were obtained have a right to inspect such records while they are in the Bureau's possession. Subsection 18(2) does not provide the Bureau with the discretion to authorize other persons to review records.

Requests Under the Access to Information Act

The principles enunciated in the *Access to Information Act* ("ATIA") and *Privacy Act* do not limit the Commissioner's ability to disclose information for the purpose of carrying out the responsibilities under the Act. The Commissioner recognizes that persons providing information to the Bureau and persons from whom records were obtained through the use of formal powers may be concerned that the information they give will be disclosed in response to a request under ATIA. In response to these concerns, this section contains a brief discussion of the Commissioner's treatment of ATIA requests aimed at information in the Commissioner's possession.

The purpose of the ATIA is to provide members of the Canadian public access to government

information and records. Records in the possession or control of the Bureau may be subject to requests made under the ATIA. However, the ATIA contains provisions for discretionary and mandatory exemptions from disclosure for specified types and classes of records.

A number of these exemptions are directly applicable to records in the possession or control of the Bureau. The most important is the mandatory exemption from disclosure under section 24 of the ATIA for information covered by section 29. This exemption covers all third party information contained in Bureau records. In addition, section 20 of the ATIA provides a mandatory exemption for records containing trade secrets of a third party, financial, commercial, scientific or technical information supplied to a government institution, and/or information that could reasonably be expected to result in material financial loss or gain, prejudice a competitive position, or interfere with contractual or other negotiations of a third party if disclosed.

Paragraph 16(1)(a) provides for a discretionary exemption which is applicable to information obtained in the course of examinations and inquiries conducted under the Act. Finally, pursuant to section 15 of the ATIA, the Bureau recommends non-disclosure of any records that contains information that could reasonably be expected to be injurious to the conduct of international affairs if disclosed.

It is important to note that the Commissioner does not have the final authority as to the treatment of documents under ATIA, nor can the Commissioner provide undertakings or establish policies that would prevent the release of information under this statute.

Private Actions for Damages

Private parties wishing to seek damages and compensation for anti-competitive conduct may initiate a private action for damages under section 36 of the Act. There is no general right of access to records in the Bureau's possession or control. To preserve the independence necessary

to carry out the Bureau's mandate effectively and to protect the integrity of the investigative process of the Act, the Bureau will not voluntarily provide information to persons contemplating or initiating a private action.

The civil discovery process and subpoena mechanisms are available to any private litigant following the initiation of an action under section 36. The Bureau will generally oppose subpoenas for production of documents if compliance with them would potentially impede an examination or inquiry, or otherwise undermine the administration or enforcement of the Act. If the Bureau's opposition is unsuccessful, it will seek protective orders to maintain the confidentiality of the information in question. If a subpoena is served upon the Bureau after the completion of any examination or inquiry, the Bureau may comply with it once the private action has been initiated and the information provider has been apprised of the request. Whether or not the Bureau would seek to invoke available privileges will be considered on a case-by-case basis.

Private Access to the Competition Tribunal

Section 103.1 allows private parties to apply for leave to make an application to the Competition Tribunal for remedial orders under sections 75 (refusal to deal) and 77 (tied selling, exclusive dealing and market restriction) of the Act. If the Commissioner intervenes in private access proceedings, the Bureau's policy with respect to information will be the same as with other applications before the Tribunal or regulatory bodies. If a party to an application initiated by a private party requests information or records in the possession of the Bureau, the request will be treated in the same manner as a request made by a party to an action initiated under section 36.