Access to your information

As governments at all levels, federal, provincial and municipal play a larger role in commerce, the likelihood that businesses will be required to file confidential information with a federal, provincial or municipal agency increases. Conversely, with the privatization of government functions, there is both the likelihood of private sector information coming under the control of such an agency, and a corresponding view that information about such "public functions" should be publicly available.[1]

Access to commercial information

The purpose of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*") is to provide a right of access to information in records that are under the control of a government institution. The principle behind this purpose is that government information should be available to the public, with limited exceptions, and decisions on disclosure should be reviewed independently of government.

Pursuant to the *Act's* purpose, Canadian citizens and permanent residents, including resident corporations and partnerships, have a right to be given access to information under the control of a government institution – a right that extends beyond information that has been generated by or for the government. It applies to all information, including that belonging to a Third Party.

Under Section 20 of the *Access Act,* the Head of an institution must refuse to disclose Third Party information that contains: a) trade secrets; b) financial, commercial, scientific or technical information, that is consistently treated as confidential by the Third Party; c) information, the disclosure of which could result in material financial loss or gain, or may prejudice the Third Party; or d) information that may interfere with the Third Party's contractual negotiation (Third Party Commercial Information).

Third Party Commercial Information may only be disclosed in two circumstances. One is with the consent of the Third Party. The other is subject to one of the exceptions to the exemptions listed in the *Access Act*. The first of these exceptions concerns information that is the result of product or environmental testing, other than preliminary testing conducted for the purpose of developing methodology, carried out by or on behalf of the government.

The Head of an institution may also disclose information referred to above in (b), (c) and (d) if it would be in the public interest to do so, such as public health, safety or protection of the environment. That interest must outweigh in importance the prejudice to the Third Party. There is no public interest disclosure for trade secrets.

If the Head of an institution believes that records might contain Third Party Commercial Information, but is not sure, and is considering release, the Head must give written notice to the Third Party within 30 days of receiving the initial request for the records. The Third Party may make representations, in writing, as to why the records should not be disclosed and must submit them within 20 days of receiving the notice.

Within 30 days of notifying the Third Party, the Head of the institution must make a decision as to whether to disclose the record(s) or not, and give written notice of this decision to the Third Party. If the decision is made to disclose, then the Third Party may, within 20 days of receiving the notice, apply to the Federal Court for a review of the matter.

If the Head decides not to disclose the information, then the party that requested access to the records may complain, in writing, to the Information Commissioner about the non-disclosure. The Information Commissioner will then notify the Head of the institution of the complaint. The Head of the institution must then reply to the Information Commissioner concerning the Third Party. The Third Party will be entitled to make representations to the Information Commissioner if the Commissioner believes that the records sought may contain Third Party Commercial Information and he/she proposes to recommend that the Third Party Commercial Information should be released.

The Information Commissioner will provide his findings and recommendations to the Head of the institution. These findings will also be reported to the complainant and to the Third Party. The Information Commissioner may only make recommendations. The decision to disclose or not still rests with the Head of the institution.

Where access to the information is still not given after the complaint to the Information Commissioner, the requestor may apply to the Federal Court – Trial Division for a review. Where access to the Third Party Commercial Information is at issue, the Third Party must be notified of the court proceeding by the Head of the institution and the Third Party may participate in the court review. On the other hand, if the Head intends to grant access in accordance with the recommendation of the Information Commissioner, the Head must first advise the Third Party. Access will then be granted within 20 days of the notice being given. Where the Third Party wishes to dispute the decision to release the information, it may also apply to the Federal Court – Trial Division, within 20 days of being notified, for a review of the matter.

The Federal Court is authorized by the *Access Act* to then order that the information sought be either disclosed or not. The Federal Court decides the matter *de novo* based on the evidence filed before it.

Safeguarding commercial information

Third Parties may take certain measures in order to help protect information that they wish to remain confidential. There

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are two general strategies involved in this pursuit – both proactive and defensive measures.

By instituting an information management strategy to demonstrate a practice of treating certain information as confidential, Third Parties can lessen the chance of a particular record being found to not be confidential.

One of the items within this strategy will be marking documents with some sort of confidentiality claim. However, over-use of such documentation may prove to discredit the claim. Standard clause confidentiality statements are not sufficient in and of themselves to establish that a record was supplied in confidence. Even in the case of the document being an agreement where both parties are bound by a confidentiality clause, this is by no means determinative of a document being found to be confidential. The article in the agreement cannot prevent a court from granting access to the document if the disclosure does not contravene a disclosure exemption.

In addition to the confidentiality statement, it is wise to include a statement indicating that the Third Party would like to be able to make representations to the contrary, should access be requested. Due to tight timelines for releasing information under the various statutes, a simple reminder on the face of the document may protect it from release, or at least offer the Third Party opportunity to make representations.

One suggested notation for a record containing sensitive information, encompassing all of the above is:

> *The information contained herein is confidential commercial information and is supplied on that basis. We believe that the information also contains trade secrets and that its disclosure could reasonably be expected to cause material financial loss to us. In the event that you intend to disclose all or any part of the information, we should be advised at [address] to the attention of [name an individual], so that we can make appropriate detailed representations to you about the nature of the information.*[2]

The above statement notes the harmful effects of disclosing the information. This is particularly important under the provincial Acts, as this is a requirement to fitting into the exemption provisions. Additionally, by characterizing the information as a "trade secret" further armour is added to the level of confidentiality with which the information should be treated. As noted above, there are several benefits to information being classed as a trade secret. Under the *Access Acts* trade secrets are exempt as a class without proof being provided by a Third Party or proof of harm. Also, they are not subject to public interest disclosure.

It is important that the Third Party consistently treat the information as confidential. To that end, when the information must occasionally be disclosed, undertakings of confidentiality ought to be extracted from those receiving the information. If the need arises, this demonstrates the consistent treating of the record as confidential. Furthermore, it discourages the person to whom the record was disclosed from revealing the information, thus helping to keep the record confidential.

Government cannot disclose information it does not have. Therefore, a final precautionary measure may be the careful review of information that is given to government institutions. By eliminating information not required to be disclosed, access issues are lessened.

If commercial information has been disclosed pursuant to an access request, then the Third Party will no longer be in a position to object to a subsequent release because it can no longer be said that the information has been treated as confidential. Therefore, a Third Party ought to oppose the first access request with vigour in order to be able to continue to claim the exemption.[3]

As we have seen above, if the Head of an institution decides to disclose Third Party information that may contain information referred to in the Third Party exemption provision, the Third Party must be notified. At this point, the Third Party has an opportunity to make representations as to why the information should not be disclosed. Obviously, this stage of the process is no longer prevention. Nevertheless this is clearly a crucial point in maintaining the confidentiality of Third Party records.

The representations made may include any reason why the information should remain confidential. The Third Party may argue that sections aside from the Third Party exemptions, apply. For example, it may be possible to argue that the government institution does not have "control" of the information or that other statues provide the protection. Additionally, the Third Party should, in some cases, argue that the public interest override should not be invoked.

Conclusion

It is crucial that businesses have a two-tiered approach to maintaining the confidentiality of information that they provide to the government, whether at the federal, provincial or municipal level. Internal confidentiality is key. That confidentiality must be maintained in the course of transferring the information to the government institution. Maintenance of such confidentiality is ever elusive, but ever important, in a regime where access is the rule, and confidentiality is the exception.

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FOOTNOTES

1 M.Q. Connelly, "Freedom of Information and Commercial Confidentiality, in John D. McCamus, *Freedom of Information: Canadian Perspectives*" (Toronto: Butterworths, 1981). T.M. Rankin & K. Chapman, *Report to Access to Information Review Task Force*, Government of Canada: www.atirtf.geai.gc.ca/paper-thirdparty1-e.html (last modified: July 20, 2001).

2 McNairn & Woodbury, *Government Information: Access and Privacy* (Scarborough: Carswell, 2002) at 4-16 - 4-17.

3 If the information was accidentally disclosed then it will not be treated as in the public domain for the purposes of subsequent access requests. See *Ocean Marine Technologies Ltd. v. Canada (National Research Council)*, [1998] F.C.J. No. 1502 at para. 29.