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COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Canada**

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More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

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Canada

1. Introduction

1. Canada's Competition Bureau ("Bureau") is pleased to provide this submission to the OECD Working Party No. 3 roundtable on Access to the Case File and Protection of Confidential Information.
2. The Bureau, headed by the Commissioner of Competition ("Commissioner"), is an independent law enforcement agency of the Federal Government of Canada responsible for the administration and enforcement of the *Competition Act* ("Act")¹ and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.
3. In the course of performing its duties under the Act, the Bureau often comes into possession or control of confidential information through the use of formal powers or the provision of information on a voluntary basis. This information comes from a variety of sources, including complainants, informants, immunity and leniency applicants, suppliers, customers, industry experts, and Canadian or foreign law enforcement agencies. Without access to such information, the Bureau cannot effectively administer and enforce the Act.
4. This submission discusses how the Bureau protects information obtained through its investigations and outlines how the Bureau approaches access to the case file in both civil and criminal matters.

2. Overview of the Confidentiality Provisions of the Act

5. Given the importance of treating confidential information responsibly and in accordance with Canadian law, the Bureau produced an *Information Bulletin on the Communication of Confidential Information Under the Competition Act*². The Bulletin notes that the statutory framework that guides the Bureau's communications with parties and other stakeholders is governed by subsection 10(3) and section 29 of the Act.
6. Section 10 of the Act provides for the commencement of inquiries by the Commissioner and subsection 10(3) requires that all inquiries be conducted in private. In practice, the Bureau extends this protection to all preliminary examinations being pursued to determine whether or not grounds exist for the commencement of an inquiry by the Commissioner.
7. Section 29 imposes confidentiality obligations on persons performing duties in the administration or enforcement of the Act and protects information obtained by or provided to the Bureau, including the identities of the persons who provided the information, and any information that could reveal their identities.

1 Competition Act, R.S.C. 1985, c. C-34

2 Commissioner of Competition, *Information Bulletin on the Communication of Confidential Information Under the Competition Act*, (2013) online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03597.html>>

2.1. Exceptions to Section 29

8. Section 29 provides the Bureau with the discretion to communicate information in four limited circumstances:

- communication of information to a Canadian law enforcement agency;
- communication of information that has been made public;
- communication of information when it has been authorized by the person who provided the information; or
- communication of information for the purposes of administration or enforcement of the Act.

9. Section 29 does not require the Bureau to provide notice to any person who has provided confidential information to the Bureau before exercising the discretion to communicate the information under these exceptions. As a general principle, the Bureau does not provide such notice as this would unreasonably hinder the investigative process.

2.2. Information Sharing with other Jurisdictions

10. Communication of information for the purposes of the administration or enforcement of the Act allows for communication to international partners. In all cases where confidential information is communicated to a foreign authority, the Bureau seeks to maintain the confidentiality of the information through either formal international instruments or assurances from the foreign authority.

11. The Bureau also requires that use of the confidential information by the foreign authority be limited to the specific purposes for which it is provided. 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 well as those in the Act and in other domestic legislation. Generally, where there is no bilateral or multilateral cooperation instrument in force, the Bureau does not communicate information protected by section 29 unless it is fully satisfied with the assurances provided by the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put.

12. The Bureau will not disclose the identity of an immunity or leniency applicant or the information provided by that applicant to any foreign law enforcement agency without the consent of the applicant or unless required by law (e.g., in response to an order of a Canadian court of competent jurisdiction).

3. Civil Enforcement Matters

13. In Canada, civil enforcement matters are heard by a provincial court or the Competition Tribunal, which is a specialized court with jurisdiction for civil applications made under the Act. General discovery processes mirror those of Canada's Federal Court. The Bureau has a duty to search for and disclose all documents in its possession or under its control that are relevant to proceedings.

3.1. Guidance from the Competition Tribunal

14. In March 2018, the Competition Tribunal updated its *Practice Direction Regarding the Filing of Confidential and Public Documents with the Tribunal*³. The Practice Direction's particular focus is on how the highlighting and redaction of confidential information is to be done. Proceedings before the Tribunal typically contain three categories of documents:

1. "Public" documents containing information that is public and that can be disclosed to any person;
2. "Confidential Level A" documents containing information that a party claims is confidential and that may only be disclosed to (a) external counsel for the parties and their staff and (b) experts retained by a party who have executed a confidentiality undertaking; and,
3. "Confidential Level B" documents containing information that a party claims is confidential and that may be disclosed to (a) the individuals having access to Confidential Level A documents and (b) a limited number of designated representatives of a party who have executed a confidentiality undertaking.

15. The definitions of what constitutes confidential information, what confidential information is considered "Level A" or "Level B" and who qualifies as a designated representative, as well as the requirements of any confidentiality undertaking, will vary from case to case and will typically be contained in a confidentiality order issued by the Competition Tribunal.

16. All parties appearing before the Competition Tribunal are required to adhere to the instructions provided in the Practice Direction when filing any documents that contain confidential information, introducing them into evidence or otherwise placing them on the record. The instructions apply to both electronic and paper documents filed with the Competition Tribunal.

4. Criminal Enforcement Matters

17. Conspiracies among competitors to fix prices, allocate markets or restrict output, bid-rigging and some forms of misleading advertising (representations made knowingly and recklessly to the public which are materially false or misleading) are criminal offences under the Act.

18. In competition matters, disclosure of information involves a tripartite relationship between the Bureau, the Crown (as represented by the Public Prosecution Service of Canada, or "PPSC") and the accused. The relationship between the Bureau and the PPSC

3 Competition Tribunal, Practice Direction Regarding the Filing of Confidential and Public Documents with the Tribunal, (2018) online: <<https://www.ct-tc.gc.ca/Procedures/FilingDocuments-eng.asp>>

is encapsulated in a Memorandum of Understanding (“MoU”), signed on May 13, 2010.⁴ Section 4 of the MoU deals explicitly with disclosure.

19. As described in the PPSC Deskbook⁵, the leading case on the Crown’s disclosure obligations, *R. v. Stinchcombe*⁶, explains that:

“... there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it.”

20. The process of disclosure includes two distinct elements: disclosure and production. In disclosure, the Bureau must disclose the existence of all records considered “fruits of the investigation” to the Crown for disclosure to the accused. As such, the Bureau will assemble a disclosure package, which includes a categorization of all records into one of three categories: not clearly irrelevant (or “relevant”), privileged or irrelevant. The second element of disclosure is a process known as “production” and involves the actual production of copies of relevant records to the accused by the Crown. Currently, production is effected, in most cases, by providing the accused with electronic copies of relevant records. The records categorized as privileged or irrelevant will not be produced to the accused; however, the accused must be informed of the existence of these records.

21. As additional relevant material comes into the Crown’s possession, it too must be provided to defence counsel.

5. Measures to Protect Confidential Information

22. Even in the case of formal proceedings before the Competition Tribunal or the courts, when it is necessary to use confidential information, efforts to protect the information from disclosure will be taken if such action does not hinder the administration or enforcement of the Act. Available measures include sealing orders, confidentiality orders, confidential schedules to public documents, and in camera proceedings. These measures are ultimately under the purview of the Competition Tribunal or the courts.

5.1. Immunity and Leniency Programs

23. As a result of a case-specific decision in the Ontario Superior Court relating to the status of witnesses, in March 2019, the PPSC and the Bureau issued updated *Immunity and Leniency Programs*⁷ to provide clarity on the status of cooperating witnesses. The update includes revisions to clarify that, notwithstanding any representations made by the Bureau or others about confidentiality of identity and information, nothing in the programs confers confidential informer status to a cooperating party. While the PPSC and the Bureau will

4 Memorandum of Understanding between the Commissioner of Competition and the Director of Public Prosecutions, Commissioner of Competition and the Director of Public Prosecutions, 13 May 2010.

5 Public Prosecution Service of Canada, Public Prosecution Service of Canada Deskbook, (2014) online: <<https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/index.html>>

6 *R. v. Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45

7 Competition Bureau, Practice Direction Immunity and Leniency Programs under the Competition Act, (2019) online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html>>

keep the identity of a cooperating party confidential in certain circumstances, the identity of a cooperating party and any information that might tend to identify them are not subject to informer privilege.

5.2. Whistleblowing

24. Under section 66.1 of the Act (commonly referred to as the whistleblowing provision), anyone who has reasonable grounds to believe that a person has committed or intends to commit a criminal offence under the Act may notify the Bureau of the particulars of the matter and may request that his or her identity be kept confidential. The Bureau will keep confidential the identity of a person who has made such disclosure and to whom an assurance of confidentiality has been provided.

6. Privilege Claims

25. In the context of civil litigation, where appropriate, the Commissioner may rely upon legal privilege in order to exempt applicable records from discovery. There are a number of class privileges that have been recognized in Canada, including legal professional privilege, litigation privilege, informer privilege and settlement privilege.⁸

26. In addition to the aforementioned privileges, the Commissioner has historically sought to rely on a class-based public interest privilege to shield disclosure of certain information provided by third parties. However, in January 2018, in relation to the Commissioner's application against the Vancouver Airport Authority, the Federal Court of Appeal ruled⁹ that the Commissioner could no longer rely on a class-based public interest privilege to preclude disclosure of third-party information. Rather, the Commissioner must justify a claimed public interest privilege on a case-by-case or document-by-document basis.

7. Access by Private Parties

27. Under section 36 of the Act, private parties can commence legal action to recover damages incurred as a result of conduct contrary to Part VI of the Act or the failure of any person to comply with an order of the Competition Tribunal or a court under the Act. To clarify its approach to requests for access to information by private parties, the Bureau published a guidance document entitled *Requests for Information from Private Parties in Proceedings under Section 36 of the Competition Act*¹⁰.

28. Persons contemplating actions under section 36 may believe that the Bureau possesses information, such as information obtained as a result of the use of formal investigative powers, which could be relevant to their claims. However, it is important to

8 Vancouver Airport Authority v. Commissioner of Competition, [2018] 3 FCR 633, 2018 FCA 24 (CanLII)

9 Ibid

10 Competition Bureau, Requests for information from private parties in proceedings under section 36 of the Competition Act, (2018) online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04314.html>>

note that section 36 does not provide a general right of access to records in the Bureau's possession or control.

29. To preserve the independence necessary to carry out the Bureau's mandate effectively and to protect the integrity of the Bureau's investigative process and the confidentiality of information in its possession, the Bureau will not voluntarily provide information to persons contemplating or initiating a section 36 action.

30. If served with a subpoena, the Bureau will inform the information provider and oppose subpoenas for production of information if compliance with them would potentially interfere with an ongoing examination or inquiry, or otherwise adversely affect the administration or enforcement of the Act. If the Bureau's opposition is unsuccessful, it will seek protective court orders to maintain the confidentiality of the information in question.

8. Conclusion

31. The Bureau has a statutory duty to conduct its inquiries in private and to maintain the confidentiality of information it receives pursuant to the Act. The Bureau is committed to treating confidential information responsibly and in accordance with the law because maintaining confidentiality is fundamental to the Bureau's ability to pursue its responsibilities under the Act and to maintain its integrity as a law enforcement agency.