

CAN THEY KEEP A SECRET? COMPETITION BUREAU ISSUES DRAFT BULLETIN ON INFORMATION REQUESTS FROM THIRD PARTIES

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I. Overview

The Competition Bureau (the “Bureau”) recently released for comment its draft bulletin on *Information Requests from Private Parties in Proceedings for Recovery of Loss or Damage*^[1] (the “Bulletin”) which addresses the Bureau’s stance on requests for confidential information in its possession arising from private damages actions under section 36 of the Competition Act (the “Act”). The Bulletin is timely given the increase in applications, particularly by class action plaintiffs, for access to Bureau information.

In the Bulletin, the Bureau recognizes that private damage claims under section 36 of the Act have value as a tool for victims to recover losses suffered from anti-competitive behaviour. However, the Bureau notes that its fundamental obligation is to protect the integrity of its investigative process in order to fulfill its statutory mandate. Accordingly, the Bureau’s position is that it will not voluntarily disclose confidential information to persons contemplating, or who are parties to, a proceeding under section 36 of the Act. With respect to Court ordered production, the Bulletin provides guidance on the Bureau’s position in circumstances where it is served with a subpoena:

The Bureau will inform the information provider and oppose a subpoena for production of information if compliance would potentially interfere with an ongoing examination, inquiry or enforcement proceeding 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.

II. The Legal Analysis

The Bulletin details the legal basis on which the Bureau acts in maintaining the confidentiality of information in its possession. Notably:

1. Section 10(3) of the Act

The Act provides, under section 10(3), that all its inquiries are to be conducted in private. The Bureau applies the provision to its preliminary examinations, as well as formal Inquiries.

Section 29 of the Act

2. Section 29 of the Act

prohibits the communication of information related to the administration and enforcement of the Act, subject to specific exemptions.

3. Public Interest Privilege

Public interest privilege protects against the disclosure of information possessed by the government where such disclosure is not in the public interest. A class-based public interest privilege attaches to all information collected or created by the Bureau during the course of an examination, inquiry or enforcement proceeding.

4. Interaction of Public Interest Privilege and the Act

While section 29(1) of the Act contains exceptions to the Bureau's obligations of confidentiality, the Bureau's position is that these exceptions do not impact the application of public interest privilege to information in the Bureau's possession or control. The Bureau notes that courts have consistently found that neither sections 29 nor 36 of the Act serve as a basis for compelling the Bureau to disclose information in its possession or control.

5. Burden to Demonstrate an Exception

In the context of the Act, public interest privilege results in a prima facie presumption of inadmissibility, and thus a heavy burden lies on a party to show sufficient "compelling circumstances" to justify an exception, especially when the courts have noted it would be "difficult to conceive of a situation" where this would apply.

III. Reasons for the Bureau's Approach

The Bulletin notes several key practical reasons for seeking to maintain the confidentiality of the information it possesses, including:

1. Importance of Confidentiality to the Bureau's Ability to Gather Information

In addition to the Bureau's statutory duty to conduct its inquiries in private and to maintain the

confidentiality of information it receives, the Bureau's ability to effectively operate is largely predicated on voluntary disclosure, which itself is predicated on the assurance that the information will not be publically disclosed.

2. Damage to Competition by Disclosure

Due to the often proprietary and/or commercially sensitive nature of information in the possession of the Bureau, obliging disclosure, particularly where competitors of the person who provided such information can access it, frustrates the Act's purpose to promote competition and protect consumers.

3. Disclosure of Confidential Information Can Interfere with Bureau Procedure

The disclosure of confidential information risks interfering with the Bureau's ongoing examinations, inquiries and enforcement proceedings, and thus adversely affects its ability to administer and enforce the Act.

4. The High Financial and Opportunity Costs of Disclosure

Parties in class proceedings under section 36 of the Act often make voluminous requests for information. The Bureau does not have sufficient resources to process such requests, and attempts to do so would be adverse to public interest because this would reduce the Bureau's ability to perform its mandate.

IV. Conclusion

The Bureau's general stance, strongly supporting maintaining the confidentiality of information in its possession with respect to both ongoing and concluded investigations is, we submit, both appropriate and welcome. As the Bulletin notes, however, courts are increasingly being asked to weigh in on this question. The issue has gone both ways in decisions over the past few years. It is likely to be a few more years before the key questions are settled in some reasonably definitive way.

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[1] <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04204.html>.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

The logo for mcmillan, featuring the word "mcmillan" in a lowercase, sans-serif font. The "m" and "c" are in a dark red color, while the "m", "i", "l", "l", "a", and "n" are in a light blue color. The logo is positioned in the upper left corner of a banner image that shows a low-angle view of a modern glass skyscraper against a clear sky.

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