

**INFORMATION BULLETIN**  
**ON**  
**THE COMMUNICATION OF**  
**CONFIDENTIAL INFORMATION**  
**UNDER THE**  
***COMPETITION ACT***

# TABLE OF CONTENTS

1.	INTRODUCTION .....	1
2.	APPLICABLE LEGISLATION .....	2
3.	GENERAL APPROACH .....	4
4.	POLICY AND PRACTICE .....	7
4.1	To Canadian Law Enforcement Agencies .....	7
4.2	For the Purposes of the Administration or Enforcement of the Act .....	8
4.2.1	General .....	8
4.2.2	Foreign Authorities .....	11
5.	MUTUAL LEGAL ASSISTANCE TREATIES .....	14
6.	TO THE MINISTERS OF TRANSPORT AND FINANCE .....	15
7.	OTHER TOPICS .....	16
7.1	The Bureau's Immunity Program .....	16
7.2	Whistleblowing and Confidentiality .....	17
7.3	Binding Written Opinions .....	18
7.4	The Right of Access to Records .....	19
7.5	Requests Under the <i>Access to Information Act</i> .....	19
7.6	Private Actions for Damages .....	19
7.7	Private Access to the Competition Tribunal .....	20

## 1. INTRODUCTION

- 1.1 This Bulletin<sup>1</sup> sets out the approach of the Commissioner of Competition (the “Commissioner”) and the Competition Bureau (the “Bureau”)<sup>2</sup> with respect to the communication and use of confidential 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.<sup>3</sup> This Bulletin provides a general framework only. In the enforcement and administration of the Act and when exercising discretion under the Act, the Commissioner and the Bureau consider the specific circumstances of each matter.
- 1.2 The Act is a law of general application to business activities in Canada. Its purpose is to maintain and encourage competition in the marketplace so as to provide for, among other objectives, an efficient and adaptive economy, competitive prices and product choice for consumers, and accurate information in the marketplace. There are specific provisions governing the commencement and conduct of formal inquiries by the Commissioner. The Act also includes formal powers to gather information and evidence, as well as specific provisions governing the communication of information obtained by the Bureau in the course of performing duties or functions under the Act,

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<sup>1</sup> This Bulletin replaces and supercedes any other publication on this policy and describes the policy of the Commissioner and Bureau applicable to the communication of confidential information under the *Competition Act* by the Commissioner and other persons performing duties under the Act. This Bulletin updates the previous one issued in 1995 and reflects changes to the confidentiality provisions of the *Competition Act* since that time, principally the inclusion of information voluntarily provided to the Competition Bureau and specific provisions relating to the communication of information to the Ministers of Finance and Transport.

<sup>2</sup> For the purposes of this Bulletin, the terms “Commissioner” and “Bureau” are used interchangeably according to the topic discussed, but have effectively the same meaning for the purposes of interpretation of, and practice under, section 29 of the *Act*. The terms are also used to include any “person who performs or has performed duties or functions in the administration or enforcement of” the *Act*.

<sup>3</sup> The Commissioner is also responsible for the administration and enforcement of the *Consumer Packaging and Labelling Act* (except for food as that term is defined in the *Food and Drugs Act*), the *Textile Labelling Act*, and the *Precious Metals Marking Act*.

both through informal means and through the exercise of formal powers.

1.3 The purpose of this Bulletin is to set out the Bureau's policy on the communication of confidential information and to assure parties providing information to the Bureau voluntarily, in the course of complying with section 114 of the Act, when requesting a certificate under section 102, as a result of the Bureau's exercise of formal powers, or when requesting a binding written opinion under section 124.1, that the Bureau takes seriously its duty to protect this information. While the Act provides the persons performing duties or functions under the Act with discretion to communicate confidential information to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act, maintaining confidentiality is fundamental to the Bureau's ability to pursue its responsibilities under the law. The Bureau also recognizes that maintaining the confidentiality of information and communicating such information only as allowed by law is essential to its integrity as a law enforcement agency.

1.4 The Bureau is committed to treating confidential information responsibly and in accordance with the law. It remains vigilant to avoid communicating confidential information when dealing with matters under the Act unless such communication is permitted under section 29 of the Act or other statutory provisions pertaining to confidentiality and, even when permitted, considers whether disclosure is, in the circumstances, advisable or necessary. In other words, the general policy of the Bureau is one of minimizing the extent to which confidential information is communicated to other parties.

## **2. APPLICABLE LEGISLATION**

2.1 Section 10 of the Act provides for the commencement of inquiries by the Commissioner under the civil and criminal provisions of the Act. In addition to the specific confidentiality provisions of section 29, 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.

2.2 Section 29, the key provision dealing with the communication of confidential information in the possession or control of the Bureau, reads as follows:

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.”

2.3 Section 29 protects information provided to or obtained by the Bureau, including the identity of any persons who have provided it. When the Commissioner commences an inquiry under section 10, information may be obtained through court-authorized orders under section 11 (orders for oral examination, production of records or written returns of information) or through court-authorized search warrants under section 15 of the Act (search and seizure). The Bureau also receives information concerning certain proposed transactions under the pre-merger notification process required by Part IX of the Act, pursuant to requests for advance ruling certificates under section 102 and for binding written opinions under section 124.1 of the Act. In the course of preliminary examinations, inquiries and other matters under the Act, persons will often provide

information to the Bureau voluntarily by filing complaints, submissions, or responses to questionnaires and interviews.

2.4 In addition to the above, the Bureau or the Public Prosecution Service of Canada may be in possession of information obtained pursuant to formal investigative powers under the *Criminal Code*. Accordingly, the communication of such information by the Bureau may be subject to requirements under the *Criminal Code*.

2.5 Notwithstanding subsection 29(1), subsections 29.1 and 29.2 of the Act allow the Commissioner to communicate to the Minister of Transport or the Minister of Finance information otherwise protected by section 29. These provisions are discussed in more detail below.

### **3. GENERAL APPROACH**

3.1 In the course of performing its duties under the Act, the Bureau often comes into possession or control of confidential information, principally 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, industry participants, 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.

3.2 Section 29 effectively draws under its protection nearly all information<sup>4</sup> that is provided to or obtained by the Bureau in the course of executing its mandate under the Act. Essentially, the section provides the Bureau with the discretion to communicate information in four limited circumstances:

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<sup>4</sup> In a small number of cases, the Bureau may obtain information through the use of powers under the *Criminal Code*, particularly through search warrants, production orders, or wiretaps. The communication of information obtained in this manner is governed by the provisions of the *Criminal Code* and related regulations and policies.

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

3.3 As noted above, in addition to the protection provided by section 29, subsection 10(3) of the Act directs that all inquiries be conducted in private. Consistent with that requirement, the Bureau will normally comment publicly on the existence of an inquiry or examination only if it has become public through another source, through the filing of charges, through an application to the Competition Tribunal or the courts, or, in the case of a merger, if the merger has been made public.

3.4 Clearly, when information has been made public or where persons providing information authorize its communication to other parties, section 29 permits the disclosure of such information. Additionally, section 29 provides exceptions for the communication of information to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act. The application of these exceptions is at the discretion of persons performing duties or functions under the Act and is exercised to carry out their responsibilities under the law. The Bureau has practices in place to ensure that confidentiality is protected. The discretion to communicate confidential information is exercised principally when not doing so will prevent or hinder an inquiry or other matter from being addressed or dealt with under the Act.

3.5 Generally, in the case of dealings with Canadian law enforcement agencies, information will be communicated where such action is necessary to transfer a matter not within the Bureau's mandate to the appropriate enforcement agency or when the Bureau and the agency are engaged in cooperative action with respect to an investigative matter. Communication of information to other parties, including communication to non-

Canadian law enforcement agencies, falls under the exception for the purposes of the administration or enforcement of the Act, and is undertaken cautiously with the objective of addressing or dealing with an administrative or enforcement matter under the authority of the Act. These issues are discussed in more detail below.

- 3.6 Even in the case of formal proceedings before the courts or the Competition Tribunal, 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. Measures include the use of sealing orders, confidentiality orders, confidential schedules to public documents, and *in camera* proceedings. These measures are ultimately under the control of the Competition Tribunal or the courts, and necessarily subject to the generally public nature of the proceedings.
- 3.7 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 pursuant to any of the exceptions in the law. As a general principle, the Bureau does not do so as this would unreasonably hinder the investigative process. However, there may be limited exceptions to this general practice. Two examples are set out below.
- 3.7.1 When undertaking preliminary examinations of issues raised under the non-merger civil provisions of Part VIII of the Act (specifically, sections 75, 77, and 79), the Bureau usually relies on information protected by section 29 received from complainants at the initial stage of its examination. In order to determine whether further investigative steps or a formal inquiry is warranted, it is often necessary that the Bureau approach market participants, including the party or parties whose actions in the marketplace have given rise to the complaint. Before doing so, and only at this preliminary stage, the Bureau will seek the consent of the information provider to communicate information protected by section 29 to these other parties. Usually it is only necessary to disclose the identity of the information provider and the general nature of the issue to these third parties. If the information provider does not consent to the communication,

the Bureau will normally indicate that without consent it is not likely that further investigation of the matter will be fruitful. In such situations, the Commissioner's review of such matters will not likely proceed.

- 3.7.2 A second circumstance presents a more general exception to the issue of notice by the Bureau to parties prior to the communication of confidential information. The Bureau receives a very large number of complaints every year relating to false or misleading representations and deceptive marketing practices, some of which fall more directly within the mandate of another organization. When acknowledging receipt of such complaints, parties providing the information may be told that in order to deal more effectively with the matter, their name and details of their complaint may be forwarded to the relevant Canadian or foreign law enforcement agency.

#### **4. POLICY AND PRACTICE**

##### **4.1 To Canadian Law Enforcement Agencies**

- 4.1.1 The Act does not provide a definition of the term "Canadian law enforcement agency". In addition to municipal, provincial and federal police forces, the Commissioner's view is that the term includes any federal or provincial authority that enforces acts or regulations that provide for criminal, civil or administrative sanctions.

- 4.1.2 As noted above, the authority to communicate information under section 29 of the Act is discretionary, although the Commissioner's policy is to minimize the communication of confidential information. Communication of information to Canadian law enforcement agencies by the Bureau is generally restricted to the following circumstances:

- to transfer information that the Bureau believes is required for the enforcement operations of the agency, where the information reveals an apparent criminal offence and, particularly, where there is a threat to public security or safety;

- to provide information in order to secure the necessary cooperation or assistance of the agency in the administration or enforcement of the Act, e.g., assistance in the execution of a search warrant. In such cases, the information is generally limited to that necessary to enable the agency to provide the needed assistance;
- when a Canadian law enforcement agency has expressly requested confidential information for the purpose of carrying out its mandate; and
- to share intelligence through the Bureau's law enforcement partnerships to combat more effectively mass marketing fraud and deceptive marketing practices.

4.1.3 Except for matters relating to the provisions of the Act dealing with misleading representations and deceptive marketing practices, matters necessitating that the Bureau communicate information to Canadian law enforcement agencies are relatively few in number. Even then, the Bureau will communicate confidential information only after it is satisfied that the receiving agency will respect the confidentiality of the information to be communicated.

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

### **4.2.1 General**

4.2.1.1 The Bureau may also communicate confidential information for the purposes of the administration or enforcement of the Act. Matters that may require persons who perform duties or functions under the Act to exercise this discretion are most often specific inquiries under section 10 or preliminary examinations. They can also be more general matters, such as developing and participating in national and international enforcement initiatives, and engaging in activities to advocate for competition. For all such matters, care is taken to refrain from, or to minimize, the communication of

confidential information.

4.2.1.2 More specifically, although not limited to the following, the communication of confidential information for the purposes of administration or enforcement of the Act may occur in the following situations:

- when eliciting information from market participants, such as customers, suppliers or competitors, that may be used as evidence to determine whether the Bureau's or a third party's assessment of a matter is accurate. In such situations, care is taken to refrain from, or to minimize, the communication of confidential information. Such communication will only occur if it is not otherwise reasonably possible to obtain necessary information from these third parties;
- when obtaining an opinion or analysis by an industry, legal, economic or other expert on some or all aspects of the matter in question<sup>5</sup>;
- when obtaining enforcement assistance from foreign law enforcement authorities;
- when coordinating enforcement actions with foreign law enforcement authorities<sup>6</sup>;
- when assessing the accuracy or the evidentiary value of information;
- when making application to the courts for the use of formal investigative powers pursuant to sections 11 or 15 of the Act;

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<sup>5</sup> Experts or other "temporary, technical and special assistants" retained under section 25 of the Act are bound by the confidentiality provisions of the Act in the same way as Bureau staff.

<sup>6</sup> The Bureau will communicate confidential information only after it is fully satisfied of the assurances provided by the foreign authority with respect to the confidentiality and use of the information to be communicated.

- when making an application to the courts for the use of the wiretapping provisions contained in the *Criminal Code*; or
- when initiating proceedings pursuant to the Act before the courts or the Competition Tribunal.

4.2.1.3 Representations by the Commissioner before regulatory bodies under sections 125 and 126 of the Act are part of the administration or enforcement of the Act. However, the issue of dealing with information protected by section 29 rarely, if ever, arises. If, in the course of making an intervention, the issue of communicating confidential information were to arise, such communication would only take place if measures were put in place to protect the confidentiality of the information and if the information could not be obtained through the regulatory body's own processes.

4.2.1.4 Furthermore, 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 and enforcement of the Act. This is done through the Commissioner's Annual Report, as well as news releases and other publications. In addition, in 2005, the Bureau published its policy regarding the use of technical backgrounders to increase transparency and to provide useful information on how the Act is enforced. In determining whether or not to publish a technical backgrounder, and what information to publish in a technical backgrounder, the Bureau will be guided by section 29 and subsection 10(3) of the Act and the principle of minimal disclosure. To ensure that commercially sensitive information is not inadvertently communicated, the Bureau will allow the affected party or parties to review the technical backgrounder shortly before its publication in order to provide them with an opportunity to identify any confidential information that, in their opinion, should be removed (and any factual errors that, in their opinion, should be corrected). While consideration will be given to the comments of the party or parties prior to the publication of the technical backgrounder, the Bureau will make the final determination regarding the content of that document.

4.2.1.5 Finally, the Commissioner, as an advocate for competition, is engaged in activities, such as market studies, that are designed to improve the understanding of the effects of competition on the economy and to improve the effectiveness of the Bureau's application of the Act. Any confidential information voluntarily provided to the Commissioner during the course of such activities is protected by section 29. Additionally, the communication of confidential information through the publication of a market study is treated in a manner similar to that of communication through the publication of a technical backgrounder.

## **4.2.2 Foreign Authorities**

4.2.2.1 With the increasing globalization of business activities, including actions that raise competition law issues in both the criminal and civil fields of competition law, cooperation with foreign counterparts has become crucial to the effective enforcement and administrative activities of competition authorities around the world. To this end, the Bureau is committed to enhancing the effectiveness of Canadian enforcement efforts through cooperation with foreign authorities enforcing similar legislation. In conducting these cooperative activities, the Bureau may need to communicate confidential information to a foreign authority either on its own initiative or on that of the foreign authority. The decision to communicate confidential information to foreign authorities is not taken lightly.

4.2.2.2 While respecting the requirements of section 29, the Bureau may communicate information in specific circumstances to foreign authorities to address a matter under the Act. 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. The Bureau also requires that use of the confidential information by the foreign authority will be limited to the specific purposes for which it is provided.

4.2.2.3 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. Communication by the Bureau of confidential information will typically take place where there is a bilateral or multilateral cooperation instrument in force. 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.

4.2.2.4 As noted above, in the current globalized economy, with many industries operating across borders, the investigation of anti-competitive activity under the Act may necessitate working with and providing information to foreign law enforcement authorities. Specific kinds of potentially anti-competitive activity, such as multi-jurisdictional cartel behaviour and cross-border mergers, may be subject to cooperative investigations by authorities in two or more jurisdictions. Such investigations can relate to the same product or geographic markets or to different but closely related ones. In assessing whether to communicate confidential information in these circumstances, the Bureau will consider the laws protecting confidentiality in the requesting country, the purpose of the request, and any agreements or arrangements with the country or the requesting authority. If the Bureau is not satisfied that the information will remain protected or only used for its intended purpose, the information will not be communicated.

4.2.2.5 A specific example of effective information exchange with foreign law enforcement authorities is the information sharing protocols in place with respect to mass marketing fraud and deceptive marketing practices. The Fair Business Practices Branch of the

Bureau has agreed with its counterparts in Australia, the United Kingdom and the United States to certain procedures for sharing information on these matters.

Furthermore, the Bureau may disclose information on complaints to foreign authorities for the purposes of identifying and coordinating enforcement actions or priorities on combating mass marketing fraud and deceptive practices, such as telemarketing or internet-based scams and mail fraud schemes. Cooperation among authorities is critical to investigating such activities, which often take advantage of the jurisdictional limitations and the autonomous actions of enforcement authorities.<sup>7</sup>

4.2.2.6 Likewise, foreign authorities typically communicate confidential 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. Whenever a foreign authority proposes or agrees to communicate confidential information, the Bureau is prepared to provide such assurances. If the Bureau intends to use the information for any other purpose, before doing so, it will provide notice to and seek the consent of the foreign authority.

4.2.2.7 Occasionally third parties may initiate legal actions to obtain access to confidential information that is in the possession of the Bureau, where such information was provided by a foreign authority. In these rare situations, the Bureau will vigorously resist the action and will make all appropriate legal arguments regarding confidentiality and privilege to prevent disclosure. The Bureau will also notify any parties who have provided information that is covered by such legal actions that an application for access to that information has been made. The final disposition of such matters rests with the courts.

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More information on these information sharing protocols can be found in the background statement available on the Bureau's Web Site at <http://www.competitionbureau.gc.ca>

## 5. MUTUAL LEGAL ASSISTANCE TREATIES

5.1 In addition to receiving confidential information under section 29, foreign authorities may request information under bilateral and multilateral cooperation treaties. These instruments do not compel state parties to share information, nor do they provide any additional authorization to communicate confidential information. These treaties are negotiated through the provisions of the *Mutual Legal Assistance in Criminal Matters Act* for criminal matters or Part III of the Act for civil matters (“Mutual Legal Assistance”), and are generally referred to as Mutual Legal Assistance Treaties (“MLAT”s).

5.2 MLATs are administered by Canada’s Department of Justice and typically allow the state parties to the treaties to request assistance in obtaining evidence located in the other jurisdiction through such means as depositions, interviews, searches and requests for records. These treaties include specific confidentiality provisions. The evidence provided to a foreign jurisdiction under an MLAT is not necessarily in the Bureau’s possession and may not involve an enforcement matter that the Bureau is examining. Also, the information obtained by the Bureau as a result of an MLAT request is not communicated pursuant to section 29, but pursuant to the obligations arising from the MLAT. Assistance in civil matters may be provided by way of an MLAT under Part III of the Act, which came into force in June 2002. Part III of the Act contains specific confidentiality provisions in section 30.29.<sup>8</sup>

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<sup>8</sup> **30.29** (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 for the purposes of the administration or enforcement of this Act,

(a) the contents of a request made to Canada from a foreign state or the fact of the request having been made; or

(b) the contents of any record or thing obtained from a foreign state pursuant to a Canadian request.

(2) 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, any information obtained under section 30.06 or 30.11.

(3) This section does not apply in respect of any information that has been made public.

5.3 It is beyond the scope of this Bulletin to discuss in detail matters under these provisions and any applicable treaties.<sup>9</sup>

## 6. TO THE MINISTERS OF TRANSPORT AND FINANCE

6.1 The Commissioner can communicate to the Minister of Transport or the Minister of Finance under section 29.1 or 29.2, respectively, information otherwise protected under section 29, as well as “any information collected, received or generated by or on behalf of the Commissioner, including compilations and analyses”. Such communication can only be made to the Minister of Transport when the information is to be used for the purposes of sections 53.1 or 53.2 of the *Canada Transportation Act*, or to the Minister of Finance for the purposes of making a decision on 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*.

6.2 Requests by either Minister must specify the information that is required. In the case of section 29.1, requests by the Minister of Transport must also state that the information is required for the purposes of sections 53.1 or 53.2 of the *Canada Transportation Act* and identify the transaction being considered thereunder. In the case of section 29.2, requests by the Minister of Finance must also state that the information is required to consider a merger or a proposed merger under the statutes listed in the section or to determine whether to provide a certificate described in paragraph 94(b) of the Act<sup>10</sup>.

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<sup>9</sup> More detailed information on the process under mutual legal assistance legislation and individual treaties can be found in the Federal Prosecution Service Deskbook on the Department of Justice web site. <http://www.justice.gc.ca/en/dept/pub/fps/fpd/ch43.html>

<sup>10</sup> **94.** The Tribunal shall not make an order under section 92 in respect of  
(b) 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* in respect of which the Minister of Finance has certified to the Commissioner the names of the parties and that the merger is in the public interest -- or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts;

6.3 In both cases, communication of any information provided by the Commissioner can only be made to persons performing duties relating to the specific matters under consideration by the relevant Minister. There is no discretion allowed under section 29.1 or 29.2 of the Act for further communication of the information obtained by a person under either of those sections except to other persons exercising the same duties or functions.

## **7. OTHER TOPICS**

### **7.1 The Bureau's Immunity Program**

7.1.1 The Bureau's immunity program encourages parties who have engaged in criminal anti-competitive conduct prohibited by the Act to come forward to admit their illegal activity and offer to cooperate with the Bureau's investigation and any subsequent prosecution. Where the applicant party meets the requirements of the program, the Bureau will recommend that the Director of Public Prosecutions of Canada provide the applicant with immunity from prosecution.

7.1.2 The Bureau treats as confidential, the identity of a party requesting immunity. The only exceptions to this policy are where:

- disclosure is required by law;
- disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
- disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- the party has agreed to disclosure;
- there has been public disclosure by the party; or
- disclosure is necessary to prevent the commission of a serious criminal offence.

7.1.3 Furthermore, the Bureau treats as confidential, information obtained from a party

requesting immunity, subject only to the exceptions listed in 7.1.2 above, or where disclosure of such information is otherwise for the purpose of the administration or enforcement of the Act.

7.1.4 The Bureau will not disclose the identity of a party, or the information obtained from that party, to any foreign law enforcement agency, without the consent of the party.<sup>11</sup>

7.1.5 It is the Bureau's policy with respect to private actions under section 36 of the Act, to provide confidential information and evidence only in response to a court order. In connection with information obtained under the Immunity Program, the Bureau will take all reasonable steps to protect the confidentiality of the information.

## **7.2 Whistle-blowing and Confidentiality**

7.2.1 Under section 66.1 of the Act (commonly referred to as the whistle-blowing 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.<sup>12</sup>

7.2.2 When such an assurance has been provided, the identity of the person cannot be

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<sup>11</sup> For more details on the immunity program, see the Bureau web site:  
<http://www.competitionbureau.gc.ca>

<sup>12</sup> **66.1** (1) Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification.  
(2) The Commissioner shall keep confidential the identity of a person who has notified the Commissioner under subsection (1) and to whom an assurance of confidentiality has been provided by any person who performs duties or functions in the administration or enforcement of this Act.

communicated under section 29 of the Act. The Bureau will make every effort to ensure that the identity of a whistle-blower and any information that could reveal such identity is kept confidential.

### **7.3 Binding Written Opinions**

- 7.3.1 Promoting compliance with the Act is a fundamental objective of the Bureau. Under section 124.1 of the Act, a person can apply to the Commissioner, with supporting material, for a binding written opinion on the applicability of the Act to proposed conduct or to a proposed practice, and the Commissioner may provide a written opinion as guidance to the person.
- 7.3.2 The Bureau's policy on the use of confidential information is unlikely to limit the scope of this activity because although the general policy on the communication of confidential information applies to binding written opinions, these opinions are based only on information provided by the party requesting the opinion and no third party contacts are made.
- 7.3.3 An exception to this policy is with respect to requests for written opinions addressing paragraph 74.01(1)(b) of the Act concerning representations relating to the 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. As noted earlier, any individuals involved in such a review are retained under section 25 of the Act and are therefore bound by the confidentiality provisions in section 29.
- 7.3.4 Furthermore, the situation may arise where actions on which a request for a binding written opinion has been made become, at a later time, subject to, part of, or relevant to an investigation or inquiry under the Act. At that time, information provided to the Bureau in respect of the request would be treated under section 29 in accordance with the principles and policy set out in this Bulletin.

## **7.4 The Right of Access to Records**

- 7.4.1 Section 18 of the Act deals with the care and detention of records or other things obtained pursuant to sections 11, 15 or 16 of the Act. Subsection 18(2) of the Act entitles persons from whom such records or other things were obtained to inspect them. The Act does not provide any right to inspect records or other things to persons other than those from whom they were produced or obtained.

## **7.5 Requests Under the *Access to Information Act***

- 7.5.1 The purpose of the *Access to Information Act* (“ATIA”) is to provide members of the Canadian public access to information contained in records under the control of a government institution. Under the ATIA, the Department of Industry is the government institution of which the Bureau is a part. While the ATIA sets up a general right of access, it contains provisions allowing for exemption from disclosure for specified types and classes of records. The most important is the mandatory exemption under section 24 of the ATIA for disclosure of records containing information covered by section 29 of the Act. For practical purposes, this exemption covers all third party confidential information contained in Bureau records.

## **7.6 Private Actions for Damages**

- 7.6.1 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 another court under the Act. 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, that could be relevant to their claims. However, it is important to note that section 36 does not provide a general right of access to records in the Bureau’s

possession or control.

- 7.6.2 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.
- 7.6.3 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.

## **7.7 Private Access to the Competition Tribunal**

- 7.7.1 Section 103.1 of the Act permits 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. Under section 103.2, the Commissioner may intervene in any application made under sections 75 or 77 by a person granted leave under section 103.1. When such interventions are made, the Bureau's policy with respect to the communication of confidential information will be the same as with other applications before the Tribunal or courts.
- 7.7.2 If the Commissioner does not intervene, and if one of the parties involved in an application under section 103.1 requests confidential 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.