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How *Is* the Sausage Made?: Public Access to Third Party Information in Government Records

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The decision in *Concord Premium Meats Ltd. v Canada (Food Inspection Agency)*, 2020 FC 1166, illustrates how Canadian freedom of information legislation balances the public right to access government records with the goal of avoiding harm to third parties as a result of disclosure of these records.

The federal *Access to Information Act*, RSC 1985 c A-1 (the "Act"), like similar provincial legislation, generally protects third parties' commercial, financial and technical information supplied in confidence to government institutions by exempting it from the government's obligation to disclose records when an access to information request is made. Nevertheless, regulated businesses are often concerned that public disclosure of other information – such as inspection reports and analyses, or regulatory observations and conclusions prepared by government officials – will cause harm to their financial or competitive position. Typically, these concerns relate to anticipated damaging media coverage resulting from the disclosure.

The Federal Court's decision explains that a third party business seeking to block public access to otherwise accessible government records based on a claim that anticipated negative, inaccurate or unfair media coverage will cause it commercial harm faces a relatively stringent evidentiary burden. However, the court also highlighted and recommended the use of "explanatory notes" to provide additional context or background to the requester when delivering responsive records as a way of mitigating potential or perceived harm.

Background

In 2017, the Canadian Food Inspection Agency ("CFIA") commissioned a study of sausages sold in grocery stores. The study showed that some of the 100 sausages sampled contained meat products other than those identified on the label. For example, 6% of beef sausages sampled also contained pork and 20% of the chicken sausages also contained turkey.

The CFIA study attracted media coverage when its results were published in a scientific journal in July 2017. What appeared to garner the most attention – or the most headlines – was the revelation that one sample of pork sausage contained horse meat. Some of the 2017 media stories about the study also included reference to the phenomenon of "food fraud" in which producers deliberately substitute cheaper product to increase profits.

The sausages tested were produced by various companies. Neither in the journal article nor in any of the media articles was any producer identified.

The access to information request in issue was made by a journalist not long after the study's results were first published. The request sought the identities of the companies that produced the sausages sampled, the brand names under which they were sold, and where they were purchased, as well as CFIA records relating to its subsequent investigation into the mislabelled sausages.

The CFIA searched its files and identified 177 pages of responsive records relating to the Applicant, Concord Premium Meats Ltd. (the "Company"). Pursuant to s. 27 of the Act, the CFIA gave the Company notice of the access request and, pursuant to s. 28, received its submissions objecting to disclosure. The CFIA agreed to certain redactions suggested by the Company and then made its final decision regarding disclosure.

The Company requested a review of the CFIA's decision by the Federal Court under s. 44 of the Act out of a concern that disclosure of the responsive records would identify it as one of the manufacturers whose sausages were the subject of the CFIA's studies and inevitably lead to harmful media coverage reporting that link.

Third Party Information Exemptions

Subsection 20(1) of the Act provides[1] that a government institution must refuse to disclose:

(a) trade secrets of a third party;

(b) a third party's confidential financial, commercial, scientific or technical information supplied to the government in confidence;

(c) information that could reasonably be expected to cause "material financial loss or gain to" or "prejudice the competitive position of" a third party; and

(d) information the disclosure of which could interfere with a third party's contractual or other negotiations.

The Company's challenge was focused on s. 20(1)(c), but it also argued that certain records should not be disclosed under s. 20(1)(b) and (d).

Exemption for Confidential Commercial Information Supplied in Confidence

The exemption under s. 20(1)(b) is class-based. It protects confidential information supplied by a third party to the government in confidence; it does not require proof of harm. Accordingly, the CFIA agreed not to disclose records that were clearly internal company documents and to redact references to specific confidential information supplied to the CFIA by the Company in confidence (some of these redactions were agreed or clarified at and following the court hearing in February 2020).

However, the Company sought to also block disclosure of (1) certain data showing the deviation between the amount of meat it received at its facility and the amount it actually produced and (2) the Corrective Action Plan the CFIA required the Company to develop following its study.

While the CFIA agreed that the actual weight of the meat received and produced by the Company should not be disclosed because it qualified as exempt confidential information, it refused to redact certain relative values its investigators derived from these amounts in the course of their inspection of the Company's "traceability" policies and procedures. The CFIA argued that these values constituted "regulatory observations" that do not constitute information supplied by the Company and, having been separated from any raw figures, that they do not reveal the Company's confidential information. The court agreed.

Similarly, the court ordered that the Company's Corrective Action Plan be disclosed: "information generated in the course of regulatory inspections is not confidential according to an objective standard". Though supplied by the Company to the CFIA, the Plan "reflects many of the observations and findings of the CFIA investigation, and then addresses these concerns", and therefore does not qualify as the Company's confidential information for the purpose of the s. 20(1)(b) exemption.

Establishing a Reasonable Expectation of Probable Harm

A party opposing disclosure under s. 20(1)(c) or (d) of the Act must demonstrate a "reasonable expectation of probable harm", a standard of proof somewhere between a "mere possibility" and "on a balance of probabilities". This requires the third party to tender evidence capable of establishing that harm is a "reasonably probable consequence of releasing the records" in issue. Under s. 20(1)(c), the harm that must be proven is either "material financial loss" or "prejudice to competitive position"; under s. 20(1)(d), it is interference with contractual or other negotiations.

Mere speculation or assertions that harm will "undoubtedly occur" will not meet this burden. Similarly, anticipated negative or inaccurate media reporting is not sufficient. An actual evidentiary record is required.

Under s. 20(1)(c), the Company pointed both to what it submitted were incorrect or misleading statements in the scientific article publishing the results of the CFIA's study and to press coverage that followed as tangible proof of the harm that would result from disclosure.

In particular, the Company highlighted a statement in the journal article co-authored by a CFIA official that suggested that the sausages caught by the CFIA study – five "turkey" sausages that contained only chicken – may have been evidence of an "economically motivated" substitution. The Company submitted that prior to the publication of the article, the CFIA investigation had concluded that the mislabelling of its sausages was not a deliberate act.

In addition, the Company filed examples of previous media coverage, which it described as negative and sensationalist, as evidence that disclosure would result in press that would cause it harm. It highlighted stories that referred to the detection of horse meat in some sausages in close proximity to mention of the incorrectly labelled "turkey" sausages, and others that discussed the "turkey sausage error" when describing the phenomenon of "food fraud".

The court accepted that the Company's evidence went beyond mere speculation, but it was still not convinced that it established a reasonable expectation of probable harm.

The court based this conclusion on the fact that considerable time had passed since the CFIA study was published, and on a careful assessment of both the previous media coverage and what the records would actually reveal in the redacted form in which they were to be disclosed. In particular, the court noted that the records showed that the Company had corrected issues identified in the CFIA study and investigation. It also held that much of the previous media coverage was not actually sensationalist or unbalanced. Indeed, several stories in the record reported that the problem that caused the "turkey sausage error" had been corrected.

Finally, the court found that two of the Company's primary concerns – that the media would improperly associate it with the headline-grabbing horse meat contamination issue or suggest that it had engaged in economically-motivated food fraud – could be effectively addressed through the CFIA's undertaking (made at or after the court hearing) to append an "explanatory note" to the disclosure package delivered to the journalist requester. This note would make clear that the CFIA investigation did not reveal any food fraud and that the manufacturer that had produced the sausage containing horse meat had ceased operations.

The court held that the CFIA's commitment to issue the explanatory note meant that the Company's fears now qualified as mere speculation, insufficient to meet its onus under s. 20(1)(c).

Finally, the Company's argument under s. 20(1)(d) was dismissed summarily because it had no evidence that any ongoing, current negotiations would be obstructed by disclosure of any records, as required by the jurisprudence.

Take-Aways

Unlike truly confidential commercial and technical information, regulatory observations and conclusions made by government about regulated businesses will usually be disclosed under freedom of information legislation. Anticipated negative or inaccurate media coverage based on that disclosure is not normally sufficient to prevent disclosure.

Regulated third party businesses concerned about potential unfair or inaccurate media coverage resulting from disclosure of government records, and government institutions with the obligation to respond to access requests, should consider whether an "explanatory note" appended to the disclosure package might allay these concerns.

This might also make for a less protracted process in some cases. It is no secret that many Canadian journalists believe the federal access to information regime, in particular, is ineffective on a variety of levels, including because of how long it can take to receive responsive records. In this case, the journalist requester waited three and a half years for this part of their request to be resolved. Public access to government-held information is, in theory, an important public purpose in a democratic society, but to truly fulfill that purpose, access should be timely.

[1] In 2019, amendments were made to the Act, including the addition of s. 20(1)(b.1), which also exempts confidential information relating to emergency management plans under the federal *Emergency Management Act*.

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