Date: 20071024

Docket: T- 838-06

Citation: 2007 FC 1091

Toronto, Ontario, October 24, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

TORONTO SUN WAH TRADING INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to s. 44 of the *Access to Information Act* R.S.C. 1985, c. A-1 (the "Act"). Toronto Sun Wah Trading (the "Applicant") is challenging the decision made by the Canadian Food Inspection Agency (CFIA) to release certain documents in response to an access to information request that it had received under the Act. The Applicant is asking the Court to order that the CFIA not disclose the documents in question.

BACKGROUND

[2] In November of 2005 there was an outbreak of salmonella poisoning among people that had eaten bean sprouts in various areas in southern Ontario. The CFIA issued a Health Hazard Alert

notifying the Canadian public that mung bean sprouts manufactured by the Applicant may contain salmonella bacteria. The Applicant voluntarily recalled its bean sprouts from the market.

[3] In December of 2005 the CFIA received an access to information request for information that it held relating to the bean sprout recall investigation file at the Office of Food Safety and Recall. The request was made by a law firm, which stated that it was considering launching a claim for compensation for people who had been affected by the salmonella outbreak. The claim, I am told, has been filed.

[4] After reviewing its documentation relating to the bean sprout recall the CFIA determined that some of the information requested contained references to the Applicant. Therefore, pursuant to the Act's notification requirements involving disclosure of documents containing third party information, the CFIA sent a letter dated April 14th, 2006 to the Applicant advising it of the access request along with the documents that it was proposing to release.

[5] The Applicant objected to the release of the documents on a number of grounds, including that they contained personal information, propriety and confidential information under sections 19(1) and 20(1)(a)-(d) of the Act. As a result of the submissions made to the CIFA by the Applicant, the CIFA agreed to exempt portions of the information from disclosure. It exempted some documents in their entirety and severed portions of the remaining documents, however, it rejected some of the Applicant's arguments. On April 27th, 2006 the CIFA sent a revised set of proposed

documents for disclosure to the Applicant and stated that the Applicant was entitled to apply for judicial review in accordance with s. 44 of the Act if it had any further objections.

[6] This application is now brought under s. 44 with respect to the April 27th, 2006 letter and the documents that it proposed to release. The information still at issue is contained in 10 documents. The Applicant asks that the Court order that the disclosure of documents be prohibited because they are exempt from disclosure under subsections 19(1) and 20(1)(a)-(d) of the Act. The Attorney General of Canada (the "Respondent") takes the position that the remaining documents and portions thereof are not exempted by the Act from disclosure and that the CFIA is bound by the Act to release them to the public.

RELEVANT LEGISLATION

[7] Several sections of the Act are relevant to this application. The purpose of the of the Act is contained in section 2(1):

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government	2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

> information should be reviewed independently of government.

[8] I am satisfied this section provides a framework through which to view a request to exempt information from disclosure. It is a codification of the principle that the public should have a right to access government information and therefore, absent any other consideration, the presumption is that information will be released. As stated by the Respondent, it was held in *Maislin Industries Ltd. V. Canada (Minister of Industry Trade and Commerce)* [1984] 1 F.C. 939 (F.C.T.D) (*"Maislin")* that two things follow from section 2(1): (1) that the public access to information should not be frustrated by the Courts except on the clearest grounds; therefore, doubt ought to be resolved in favour of release of the information (2) the burden of persuasion must rest upon the party resisting disclosure. I am entirely in agreement with the above principle.

[9] Therefore, the starting point is that the government, which is in this case the CFIA, is under a duty to release the information. However, this duty is not absolute and is subject to various exemptions in the Act. The burden of demonstrating that the information fits into one of these exemptions rests on the party resisting disclosure, who must prove that one of the exemptions apply to the information on a balance of probabilities (*Northern Cruiser Co. v. Canada* [1995] F.C.J. No. 1168 at para. 4). The grounds mentioned in the Applicant's arguments as relevant to this case are the subsections dealing with personal information 19(1) and 20(1)(a)-(b), which deal with third party information. These sections read as follows:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.

19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la Loi sur la protection des renseignements personnels.

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

(a) trade secrets of a third party;

a) des secrets industriels de tiers;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

…

…

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

[10] Despite mentioning subsection 19(1) in the issues section of their factum, the Applicant has not advanced any submissions on this section and it is not clear how any of the documents in question could fall under the definition of personal information in 19(1) as an overview of the documents in question show that the parts that contained personal information were exempted by CFIA after the Applicant's first round of objections. Therefore, it will only be the submissions dealing with subsections 20(1)(a)-(d) that will be dealt with in these reasons.

STANDARD OF REVIEW AND ROLE OF THE COURT

[11] Before turning to the documents at issue and assessing them in relation to the Act, it is first necessary to establish the role of the Court in relation to this application. It is well established that a judicial review under s. 44 of the Act does not place the traditional limitations on a reviewing Court. Instead, in judicial reviews under s. 44 of the Act the Court conducts a *de novo* review of the records in question (*Air Atonabee Ltd v. Canada (Minister of Transport),* [1989] F.C.J" No. 453 at p. 9 (QL) *(*"*Air Atonabee*")). The Court decides the matter on a standard of review of correctness and the question is one of mixed fact and law (*Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)* (2003), 305 N.R. 317 (F.C.A.) at para 11-15).

ANALYSIS

[12] In order to avoid disclosure the Applicant must demonstrate on a balance of probabilities that the documents fit into one the exemptions laid out in section 20(1). Based on the evidence that they have presented to the Court, I am not convinced that this is the case.

[13] The documents in question are 4 pages of issue detail reports, made by the CIFA on their visits to the Applicant's premises. They contain general information about the Applicant's business operations as well as some detail about samples that were taken of different lots of bean sprouts. These documents are numbered 000197,00198 and 000218. Documents 000212 and 000213 are virtually identical to documents 000197 and 00198 and will therefore not be independently addressed. Certain parts of the information have been removed as a result of the Applicant's submissions to the CIFA. The next set of documents is an email cover sheet and 4 pages of Notices of Detention relating to Toronto Sun Wah (documents 000369-000373). These list the names of some of the Applicant's suppliers as well as the quantities of product that were detained. The final document are a number of pages of a plant audit that took place in 2003 (documents 000381-000402). All of these documents are heavily edited. In particular, virtually no information other than the blank form remains on the plant audit that took place in 2003. The only thing that a reader is able to ascertain from the document is that an audit took place at that time.

[14] The way that subsections 20(1)(a)-(d) should be applied to a given fact scenario has been defined in previous jurisprudence. Although a few specific issues relating to the documents will be addressed in more detail later in this analysis, an overview of the scope of these exemptions is useful at the outset as they clearly show how these subsections do not apply to the documentation in question. For the most part, the elaboration of these sections corresponds with the submissions of the Respondent, as they reflect the current interpretations and jurisprudence on the sections at issue. The Applicant either agrees with the Respondent as to the correct application of these provisions,

fails to suggest an alternate interpretation or provides little or no argument as to why the Court should accept the interpretation it suggests.

20(1)(a): trade secrets

[15] The authoritative decision with respect to the definition of what constitutes a trade secret under the Act is found in *Société Gamma Inc. v. Canada (Department of Secretary of State)* [1994] F.C.J. No 589 ("*Société Gamma")*. In *Société Gamma* Mr. Justice Strayer held that the definition of trade secret must necessarily be narrow, as it should be assumed that this subsection was not meant to overlap with the other exemptions offered by subsection 20(1). Therefore, not all confidential information that is supplied to the government will qualify as a trade secret. He goes on to state:

> a trade secret must be something, probably of a technical nature, which is guarded very closely and is such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure. (at para. 7 (QL))

This definition has been further elaborated in jurisprudence with the result that in order to qualify as a trade secret the information in question must be quite specific in nature and usually deals with matters to do with mechanical arts and applied sciences (*Canadian Tobacco Manufacturers Council v. Minister of National Revenue,* 2003 FC 1037 (F.C.) at para 105).

[16] Given this very narrow definition of a trade secret is it clear that none of the documentation at issue falls in this exemption. Although the Applicant alleges much of the information are its trade

secrets, as shown below none of these things are technical in nature and there is no evidence that they have a particular value and are highly guarded by the Applicant.

20(1)(b) confidential financial, commercial, scientific or technical information

[17] The wording of paragraph 20(1)(b) of the Act stipulates a number of conditions that must be met in order for a record to be exempted under this subsection. These are:

> (1) financial, commercial, scientific or technical information,
> (2) confidential information,
> (3) supplied to a government institution by a third party, and
> (4) treated consistently in a confidential manner by the third party.

[18] First, the record must be financial, commercial, scientific or technical information. *Air Atonabee* held that these terms should be accorded their ordinary meaning. In the present case the Applicant alleges the records contain commercial and technical information and the Respondent does not challenge this. I accept that given the common understanding of these terms there is commercial information contained in the documentation and, to a lesser degree, information that is technical.

[19] Once it is confirmed that the records do contain this type of information the records must be assessed to see whether they are "confidential" when viewed on both a subjective and objective basis (*Maislin Industries, supra; H.J. Heinz Co of Canada Ltd. V. Canada (Attorney General) [2006] F.C.J. No 1724*). Therefore, although the subjective expectations of confidentiality will be taken into account it is also necessary for the Applicant to show that the information is objectively

confidential. In other words, the information must be shown to be "confidential by its intrinsic value" (*Société Gamma*, *supra* at para 8).

[20] Just how to assess the confidentiality component of subsection 20(1)(b) was laid out in *Air Atonabee*. In *Air Atonabee* the Court set out the objective indicia of confidentiality as:

> a. that the content of record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
> b. that the information originated and was communicated in a reasonable expectation of confidence that it would not be disclosed, and
> c. that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication (at p. 12 (QL).

[21] Of particular importance in this case is whether the information in question is already available to the public or whether it would be obtainable by a member of the public acting on their own. The Respondent provides news reports available on the internet which contain some of the information in the documents. *Canadian National Railway Co. v. Canada (Attorney General)*, [2002] F.C.J. No 1283 *("Canadian Railway")* establishes that even if the information is not readily available, the Court will still consider the information obtainable by the public if it would be possible for the public to access it, regardless of the fact that it might be impractical or time consuming. In addition, simply by taking available information and repackaging it, a third party cannot create a "confidentiality cloak" if the information is already in the public domain

(*AstraZeneca Canada Inc. v. Canada (Health)* [2005] F.C.J. No. 789 at para 29). Therefore, even if the information is not in the same format in the documents and in the news reports, if the same information can be gathered then the documents cannot be considered confidential.

[22] The manner in which the information was communicated to the government forms the second part of the confidentiality analysis. In this situation the Applicant asserts that the information was given to the government in confidence and in the belief that the information would be kept confidential. There is no evidence to contradict this, however this must also be assessed objectively, taking into account the nature of the information.

[23] With respect to the relationship between the parties in the present case, it is important to note the aspects of the relationship between the Applicant and the CFIA that support the information being disclosed as well as support the information remaining confidential. In the present case the issue is one of health and safety. In order to maintain food safety and the integrity of the food inspection process it is important that companies, such as the Applicant, make full disclosure to the CIFA about their operations. However, it is also important to have the public quickly and fully informed about issues relating to food safety and to have public awareness on this topic. Therefore, as was held in *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 26 C.P.R. (3d) 407, 53 D.L.R. (*"Canada Packers")* there is a strong public interest in obtaining access to the information. In the present case, this issue is not determinative as the information in question does not fit into subsection (b) for other reasons, however, in this case this factor does not point determinatively one way or the other.

[24] After confidentiality has been addressed it is necessary to turn to the third criteria of subsection 20(1)(b): whether the information was given to the government by the third party. *Canada Packers* makes it clear that information that was observed by government inspectors does not constitute information that was given by the third party. Therefore, it is only information that is supplied from the third party that is covered. If information was simply noticed by officials while at the Applicant's premise, this does not constitute information supplied by the Applicant. In the present case, there is information contained in the document that is objected to by the Applicant which consisted of general observations made by the inspection team after visiting the Applicant's premises. These observations are therefore not covered.

[25] With respect to whether the information has been treated as confidential by the third party, both the statements of the party as well as an objective assessment of the situation must take place. When a party states that the information has always been kept confidential it is important to note that they must provide some sort of evidence that this is the case. *Cistel Technology Inc. v. Canada (Correctional Service)* 2002 FCT 253 (*"Cistel")* holds that the party seeking to exempt the information from disclosure must demonstrate that the information has been treated consistently in a confidential manner with evidence that goes beyond assertions. As the Court in *Cistel* stated when rejecting the applicant's assertion of confidentiality :

> the applicant has not satisfied me that the information was treated consistently in a confidential manner. There is an affidavit in which the Chief Executive Officer of the applicant states that it was treated in a confidential manner, but there is no indication of how this was done. There is no reference to "confidential" on any of

> the invoices and no facts set out in the affidavit to indicate how the applicant was consistently treating the information as confidential. The mere assertion in the affidavit, without direct cogent evidence on how the applicant treated the information in a confidential manner, is insufficient to establish that the exemption ought to apply (at para 12)

[26] Although much of the information that is alleged by the Applicants to fall under the 20(1)(b) exemption is either available to the public or information that is not supplied by the third party there is some information that makes it to the final stage of the test. However, given the test outlined above the Applicant has not met the burden placed on it to establish that it has consistently treated the information as confidential. Some specifics will be addressed below, but since the information is not intrinsically confidential in nature and there is nothing but the Applicant's assertion that it was considered confidential the remaining information fails this part of the test for an exemption.

20(1)(c) information that could result in material financial loss

[27] In order to fall under this exemption it is necessary for the Applicant to submit proof on a balance of probabilities that the material financial harm or the competitive interests of the third parties would be prejudiced (*Air Atonabee, supra).* It is not enough for the Applicant to make assertions that their interests would be harmed in a general manner or speculate that the release of the information would harm their interests, rather they must demonstrate a reasonable expectation of probable harm (*Canada Post Corp v. Canada (Minister of Public Works and Government Services),* [2004] F.C.J. No. 415; *Canada Packers Inc., supra*)). It has been held that it is not enough for an Applicant merely to affirm by affidavit that the harm would result from the information's release. The Applicant must provide further evidence to enable the Court to make findings that the harm

alleged would occur (*Canadian Broadcasting Corporation v. National Capital Commission* [1998], 147 F.T.R. para 25 and 28 (*"Canadian Broadcasting")).*

[28] As discussed below, the Applicants cite this section several times but as the information they are objecting to is quite general in nature, it is difficult to see how it would make the Applicant lose their competitive advantage or cause material financial loss. The Applicant does not satisfactorily explain how or why this harm would flow as a result of the release of the information, therefore, their arguments under this subsection cannot succeed.

20(1)(d) information that interfere with contractual or other negotiations

[29] Similar to the situation outlined above for subsection (c) it is important to note that in order to succeed in this subsection the Applicant must establish harm in relation to an actual contract or other business negotiation. It is not enough for the applicant to allege that future, unspecified, negotiations might be affected. In absence of more concrete evidence documents will not be exempted under this subsection. (*Canadian Broadcasting, supra* at para 29*).*

[30] The Applicants only cite this section generally and in relation to "negotiations with suppliers" regarding the release of the edited Plant Audit Document. They fail to provide any evidence of specific harm and so their arguments on this section must also fail.

The Specifics of the Documents

[31] The majority of the Applicant's arguments relate to the Issue Detail Reports (documents 000197/212,100098/213, and 000218) and both the Applicant and the Respondent go through these documents paragraph by paragraph. Reviewing the Applicant's submissions in relation to the legal tests outlined above, it becomes clear that in relation to the Issue Detail Report, the only section that is at issue is subsection (b). At several points in the Applicant's submissions the Applicant alleges that the information could be covered by subsections (a) and (c) as well, however in no case does the Applicant goes beyond stating that these sections apply and there is no specific or meaningful evidence provided to support these statements.

[32] In addition to the lack of meaningful evidence provided by the Applicant, a review of the documents leads the Court to a conclusion that these subsections (a) and (c) clearly should not apply. Information such as customer names, the sizes of packaging offered by the company, simple lot codes and general information as to where to company delivers its mung beans to do not fall under the definition of a trade secret according to the test outlined above. The Applicant also relies on section 20(1)(c) claiming that it will suffer financial loss if competitors are able to see their customer base, know information about its deliveries and the geographical areas to which it delivers. It is unlikely that the information contained in this document would have this affect since, the information is general in nature and the majority of this information is already known to the public through media reports. Even if this were not the case the Applicant has not provided any evidence to substantiate their assertion. According to *Canadian Broadcasting* without such evidence the Court is obliged to release the information and not exempt it under this subsection.

[33] The main analysis for this document is in relation to subsection (b). As outlined above a number of criteria must be assessed in order to hold that the information in question is covered by this subsection. One of the main problems with the Applicant's arguments is that much of the information that it objects to is already available to the public or easily obtainable.

[34] A great deal of the information that the Applicants are objecting to can be readily gathered or inferred through newspaper reports from as far away as China, which are available on the internet, as shown in the Respondent's materials. This information includes the objections raised by the Applicants regarding the association of the names Toronto Sun Wah with Hollend Enterprises, the geographical area where the Applicant delivered its product (by reference to the communities affected by the outbreak), that the Applicant sold its products in packages of varying weights and the naming of three of the Applicant's clients. Simply because the information was not in the exact form as it was in the newspaper reports, does not mean that it can be considered confidential when it was widely available to any member of the public who had access to the internet.

[35] There is some information on the Issue Detail Reports 000197 and 000198 regarding the Applicants operations, however despite the fact that these do contain commercial information this information is very general and nothing suggests that it is inherently confidential in nature. In addition, some of it could simply be the results of observations of the Applicant's operations, thus that information was not supplied by the Applicant. Nor is there anything other than the Applicant's assertions to support the idea that this is regarded as confidential information by the Applicant. It

would seem odd if, as suggested by the Applicant that all information regarding its operations were always considered confidential, such as the fact that it receives shipments between 0 and 4 times a month or that some of their clients order bean sprouts in containers with plastic lids and some do so without.

[36] Lacking information that is obviously confidential in nature and given the fact that there is a presumption of disclosure, the onus is on the Applicant to demonstrate with some evidence, beyond mere assertions, that this information is always considered confidential by the Applicant. The Applicant has failed in this task and thus the Applicant cannot succeed.

[37] The same can be said about the Issue Detail Report number 000218. This document contains information about meetings with the firm's management team. In its original form this document raised concerns about personal information; however, all of the personal details concerning the management team have been redacted. The one exception is the name of the President of the company, whose name is available on the internet.

[38] The Applicant takes special issue with the last paragraph of this document which discloses that a white coat bearing the name of "Planway Poultry Visitor" was worn during the sample collection. The Applicant states this may lead people to come to incorrect conclusions about the nature of the relationship between the companies and may be used by their competitors against them. Regardless, in lieu of any evidence that this information will cause harm the fact that it was

observed by the inspectors is correct; there is no exemption under the Act to protect against others making incorrect inferences.

[39] This is the same situation as the paragraphs that state that there was a voluntary recall done by Toronto Sun Wah. This is indeed correct, and whatever inferences that may be made about this are beyond the scope of the exemptions, unless the Applicant can demonstrate that this type of information would result in material financial harm (*Burns Meat Ltd. v. Canada (Minister of Agriculture), (1987),* 14 F.T.R. 137 (Fed. T.D.) affirmed (1988), 87 N.R. 97 (Fed. C.A.)). The Applicant has not done so in the present case.

[40] The objections raised by the Applicant to the notice of detention and the heavily redacted Plant Inspection Report , can be addressed in much the same way as the Issue Detail Reports discussed above. The Applicant claims that the Notices of Detention should not be released because it states the names of the Applicant's suppliers, which are trade secrets under 20(1)(a), that the disclosure of the amount detained would put them at a competitive disadvantage under 20(1)(c) and that it might effect negotiations that the Applicant is currently having with its suppliers under 20(1)(d). The problem with all of their arguments is that they are not supported by anything more than vague generalities. Therefore, they cannot be successful under the legal tests of these subsections, as there must be something specific harm alleged under subsections (c) and (d) and the information in question fails to meet the definition of a trade secret.

[41] Finally with respect to the Plant Audit, the Applicant states that it is not relevant. Although this may be true, relevancy is not one of the grounds that a third party can object to under the Act. The Applicants other objection to this document, that its disclosure could damage their competitive position, is also unsustainable. Besides supplying no more than a general assertion on this point, the document is so devoid of content so as to make it impossible to obtain any information from it, other than the fact that the audit took place.

CONCLUSION

[42] It well may be that some of the information that is to be released is confidential information under section 20(1)(b) of the Act. However, there is no information contained in the documents that obviously falls under this exemption, and the jurisprudence is clear that the burden rests on the party resisting disclosure. In the present case the Applicant has failed to provide any evidence beyond assertions that the documents should be kept confidential and fall under section 20(1) of the Act. In light of this fact and because it is clearly articulated that information should presumptively be released the Court cannot come to any other conclusion but that the CFIA was correct in its decision to disclose the information.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application be dismissed with costs in favour of the Respondent.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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