Federal Court Cour fédérale

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Docket: T-528-12
T-1451-12
T-1165-12
T-1166-12

Citation: 2014 FC 392

Ottawa, Ontario, April 28, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

PORTER AIRLINES INC

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

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I. Overview

[1] This is a consolidated application under section 44 of the *Access to Information Act*, RSC, 1985, c A-1 (*Act*). It pertains to the disclosure by Transport Canada (Department) of certain information in relation to four separate requests for access to information under the *Act*. The applicant, Porter Airlines Inc (Porter), requests an order under section 51 of the *Act* prohibiting this disclosure.

[2] Various provisions in the *Act* define the character of documents that are exempt from disclosure. Consequently, this application turns on a question of characterization, namely, whether or not the documents at issue fall within the ambit of the exemptions against disclosure under the *Act*. I conclude that while information related to Porter's unique safety protocols and personal information are exempt from disclosure, the remainder, including the Department's regulatory conclusions with regard to that information, is not.

II. Background

A. *Basic Facts*

[3] The basic facts in this case are undisputed.

[4] Porter holds an Air Operator (AO) certificate and an Approved Maintenance Organization (AMO) certificate under the *Canadian Aviation Regulations*, SOR/96-433. As a consequence, Porter is responsible for developing a Safety Management System (SMS), a documented process for risk management.

[5] As part of the Department's regulatory oversight of airlines it periodically conducts program validation activities to verify the regulatory compliance of an airline's safety protocols. When the Department concludes that an airline's safety protocols do not satisfy regulatory requirements, it requires the airline to create a Corrective Action Plan (CAP) to resolve the issue. The Department then approves the CAP and monitors its implementation. In certain instances, the Department may issue a Notice of Suspension and make the submission of a CAP a condition of rescission of the Notice of Suspension.

[6] The Department received four access to information requests in relation to [omitted]. The information gathered by the Department that it considered relevant to those requests make up the disputed information in this case. With respect to all four requests, the Department provided notice to Porter, Porter objected to the release of the disputed information, and the Department ultimately decided to release all of the information, except portions that the Department agreed were exempt from disclosure in relation to either privacy or confidentiality concerns raised by Porter.

[7] In this Court, Porter applies for judicial review of all four of the Department's decisions to release the disputed information.

B. *Consolidated and Related Proceedings*

[8] There are four access to information decisions under review. Three of those decisions have been consolidated. Further, a fourth decision, while not consolidated, was heard together with the consolidated proceeding. All four fit within the same factual and legal matrix.

[9] There are two timelines relevant to these proceedings: the timeline of [omitted] and the timeline of the Department's decisions on access to information requests relating to that [omitted].

[10] The history in respect of Porter's regulatory proceedings is as follows:

[omitted]

[11] In sum, [omitted]. Porter was merely provided [omitted].

[12] The Department's decisions regarding the four access requests (with their corresponding docket number) proceeded as follows:

[omitted]

[13] In sum, the three later decisions of the Department (T-1451-12, T-1165-12, and T-1166-12), which all relate to information about [omitted], were consolidated. The first decision of the Department (T-528-12), which related to [omitted], while not consolidated, was heard together with the consolidated proceeding.

[14] These reasons address the judicial reviews of all four decisions of the Department. All four decisions are factually related: the subject matter of the first decision [omitted] was the basis for the subject matter of the later three consolidated decisions [omitted]. Further, the same legal principles govern the review of all four decisions. A single judgment is expeditious without any sacrifice to the merits of the legal issues.

III. Standard of Review

[15] The appropriate standard of review in this case is correctness. As a majority of the Supreme Court of Canada found in *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 53:

> [W]hen a third party […] requests a "review" under s. 44 of the Act by the Federal Court of a decision by a head of a government institution to disclose all or part of a record, the Federal Court judge is to determine whether the institutional head has correctly applied the exemptions to the records in issue.

[16] As a consequence, at issue is whether the Department correctly characterized the documents in question when it determined that they were not subject to the exemptions against disclosure under the *Act*.

IV. Analysis

[17] Subject to section 20 of the *Act*, "the head of a government institution shall refuse to disclose any record requested under this *Act* that contains" certain types of information (section 20(1)). In this case, the principle exemptions at issue are found in sections 20(1)(*b*), 20(1)(*c*), and 20(1)(*d*) of the *Act*. All of these exemptions are mandatory (section 20(1) of the *Act*). Consequently, if the information in question fits within any of the exemptions, it must not be disclosed.

[18] There was also a minor dispute (addressed briefly in written argument) about exemptions under section 19 of the *Act* that I will also address.

[19] The disputed information may be divided into two types of information. This is a critical observation which has implications throughout the analysis of the exemptions under section 20 of the *Act*.

A. *The Key Dichotomy: Porter's SMS Information vs the Department's Regulatory Conclusions*

[20] Porter and the Department both predicated their positions on a single conglomeration of information: the "disputed information." Referring to the reports in question in this singular way is misleading when assessing the application of the exemptions under the *Act*.

[21] Rather, the disputed information may be divided primarily into two different types of information: (1) Porter's SMS information (which Porter reported to the Department); and (2) the Department's regulatory conclusions regarding [omitted].

[22] This dichotomy is not novel. Indeed, the jurisprudence with respect to the section 20 exemptions has consistently referred to this dichotomy. In *Air Atonabee Ltd v Minister of Transport*, 27 CPR (3d) 180, 1989 CarswellNat 585 (FCTD) [*Air Atonabee* cited to WL Can] the dichotomy was drawn between "communications which originate with the applicant" and "comments or observations of public inspectors based on their review of" those communications (at paras 49-51). Further, in *Air Transat AT Inc v Canada (Transport Canada)*, [2001] CarswellNat 1965 (FCTD) at para 14 [*Air Transat* cited to WL Can], the court noted that ""[a] distinction should be made between the analysis done by the government organization from information obtained during the inspection and the information supplied directly to the inspectors by the third party." Finally, in *Merck Frosst*, the Supreme Court of Canada discussed how the

records in issue contained both "information supplied by Merck" in addition to "the analysis and observations of the reviewers, their conclusions and recommendations" (at para 152).

[23] Further, the jurisprudence has consistently held that regulatory conclusions are generally not subject to the exemptions, whereas information supplied to the Department for its regulatory assessment generally is. For example, in the two main cases involving the regulatory assessment of airlines cited in argument, the information supplied by the airlines was subject to exemptions from disclosure, whereas regulatory conclusions were not (see *Air Atonabee*, at paras 72-74; *Air Transat*, at para 20).

[24] In this case, rather than grappling with this dichotomy, counsels' submissions were two ships passing in the night, each arguing that the disputed information in its entirety was either Porter's SMS information (in the case of Porter), or the Department's regulatory conclusions (in the case of the Department). Neither is correct. On the contrary, the disputed information contains both SMS information and regulatory conclusions.

[25] Admittedly, the two may intersect. For example, in its memorandum of argument the Department described how the disputed information "contain[s] summary statements indicating whether [Porter] [omitted], and [the Department's] reasons for supporting these findings." It is precisely those "reasons" that may refer to unique aspects of Porter's SMS system. Indeed, the Program Validation Report issued to Porter consisted of [omitted] including "specific references to the samples of company records." That being said, with effective and creative redaction, there is no need for Porter's confidential SMS information to be disclosed with the Department's conclusions.

[26] For its part, Porter attempted to argue that the Department's regulatory conclusions could not be severed from its confidential SMS information. In particular, Porter argued that this case was analogous to *Air Transat*, in which Justice Rouleau found that the inspectors' conclusion "could not be dissociated" from the information supplied by the airline because they were "so closely related" (at para 16). This is a misreading of that decision. Justice Rouleau ultimately concluded that findings by the inspector could be disclosed while documents submitted by the airline could not (at para 20). In other words, Justice Rouleau was able to "dissociate" regulatory conclusions from documents submitted by the airline with respect to disclosure under the *Act*. Justice Rouleau's comments about the regulatory conclusions not being capable of dissociation from the information supplied by the airline were directed to the content of a comprehensive regulatory report and not to the limits of redaction. Put differently, Justice Rouleau was commenting on how, when drafting inspection reports, the Department must include both its regulatory conclusions and the SMS information which substantiates those conclusions, not that, when releasing information under the *Act*, it is impossible to redact the portions including SMS information.

[27] Porter's SMS information could only be inextricably linked with the Department's regulatory conclusions in so far as [omitted]. To characterize a basic regulatory conclusion as confidential technical information within Porter's "unique SMS system" would amount to a blanket protection of all regulatory conclusions. The mere fact that [omitted], but rather, basic binary conclusions about whether that SMS information (which is itself undisclosed) [omitted].

[28] With the crucial dichotomy between regulatory conclusions and SMS information established, I turn to the exemptions.

B. *Section 20(1)(b): The Confidential Information Exemption*

[29] Section 20(1)(*b*) of the *Act* exempts the following information from disclosure:

financial, commercial, scientific or technical information that is confidential information and is treated consistently in a confidential manner by the third party	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

[30] Section 20(1)(*b*) has four discrete requirements: (1) the information must be either financial, commercial, scientific, or technical; (2) the information must be confidential; (3) the information must be supplied to a government institution by a third party; and (4) the information must be treated consistently in a confidential manner by that third party (*Air Atonabee*, at para 34).

(1) Undisputed Requirements

[31] The first and fourth requirements are not in dispute between the parties. I will therefore be brief in their respect.

[32] Regarding the first requirement, the disputed information is both commercial and technical (as those terms are commonly understood: *Air Atonabee*, at para 36; *Merck Frosst*, at para 139).

[33] The Federal Court's finding in *Air Transat*, at para 15 (var'd on appeal but not on this point), that plant inspection reports are "unquestionably" technical information under section 20(1)(*b*) supports the conclusion that the disputed information in this case satisfies the first *Air*

Atonabee requirement. The reports in *Air Transat* contained similar information to the SMS reports in this case. Consequently, there is jurisprudential support for the SMS information constituting, at a minimum, technical information.

[34] Regarding the fourth requirement, the disputed information was consistently treated confidentially by Porter. The affidavits of Mr. Deluce (President and CEO of Porter) provided ample evidence in this regard. The disputed information is held in strict confidence, cannot be disclosed by employees unless specifically required, and is never made public.

[35] Having addressed the first and fourth requirement, I turn to a more detailed analysis of the two disputed criteria: whether the information was supplied to the government by a third party and whether the information is confidential.

(2) Information Supplied to the Government by a Third Party

[36] This criterion demonstrates the importance of distinguishing Porter's SMS information from the Department's regulatory conclusions when analyzing the disputed information under the exemptions. The former is information supplied to the Department by a third party (Porter), and therefore meets this criterion of confidentiality under section 20(1)(*b*). The latter does not.

[37] The jurisprudence demonstrates, properly in my view, that regulatory conclusions based on the review of third party documents do not constitute information supplied to the government by a third party. As the Court found in *Air Atonabee*, and as the Supreme Court of Canada affirmed in *Merck Frosst*, at para 156:

> where the record consists of the comments or observations of public inspectors based on their review of the records maintained

> by the third party at least in part for inspection purposes […] the information is not to be considered as provided by the third party.

[38] For its part, Porter argued that *Merck Frosst* "acknowledged that information generated by an institution, such as the Department, may qualify for protection from disclosure if it summarized information that has come from a third party, such as Porter." I agree. However, the basic regulatory conclusions of the Department do not summarize Porter's confidential SMS information, and therefore are not within the ambit of this reservation.

[39] In *Merck Frosst*, the Supreme Court of Canada summarized the approach to whether information was supplied by a third party as follows:

> whether confidential information has been "supplied to a government institution by a third party" is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue. The exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. (at para 158; emphasis added).

[40] In essence, the Supreme Court of Canada was making clear that confidential information does not lose its confidentiality merely by a change in letterhead. The intention of Parliament to protect confidential information under the *Act* would be gutted if the Department could receive confidential information, paraphrase it, and then disclose that same information to the public. Thus, Porter's SMS information, no matter its form within the disputed information, may not be disclosed. However, the Department's regulatory conclusions related to that SMS information do not "summarize" Porter's SMS information. Rather, they are based on the Department's analysis of that SMS information and whether or not [omitted].

[41] On this point, Porter also argued that the Department's regulatory conclusions could not be dissociated from Porter's SMS information, making all of the disputed information exempt from disclosure. As I already explained above, this argument fails. In the main, regulatory conclusions need not contain any SMS information. Porter's reliance, for this proposition, on a single out-of-context statement from *Air Transat* (at para 16) is a thin reading of that case and disregards how, four paragraphs later, Justice Rouleau ultimately ruled in favour of disclosing the Department's findings from the documents supplied by the airline (at para 20).

[42] Before leaving this point, I note again, that there may be circumstances where the regulatory conclusion necessary discloses information that would otherwise be confidential. Put otherwise, there are circumstances where creative redaction will reach its limits. In this case, the Court's attention was not drawn to any such scenario in the disputed information.

[43] In sum, the Department's regulatory conclusions were not "supplied to a government institution by a third party" and therefore cannot be exempt under section 20(1)(*b*). In contrast, Porter's SMS information was "supplied to a government institution by a third party," and does meet this criterion from *Air Atonabee*. There is no need to consider the final *Air Atonabee* factor (confidentiality) regarding the Department's regulatory conclusions because all of the criteria must be met simultaneously. Regardless, I will analyze both the Department's regulatory conclusions and Porter's SMS information with respect to each of the *Air Atonabee* factors for the sake of a complete record.

(3) Confidential Information

[44] There are three criteria that must be met to qualify information as confidential: (1) no prior public disclosure; (2) a reasonable expectation of confidence; and (3) public benefit (*Air Atonabee*, at 20).

[45] Before analyzing these criteria, it is instructive to note how the Supreme Court of Canada characterized the nature of the confidentiality inquiry under section 20(1)(*b*):

> Once the relevant legal principles are established, whether or not a record is confidential is primarily a question of fact. Care must be taken, therefore, not to over-generalize the holdings of particular cases, by failing to give due regard to the evidence which was before the court in those cases (*Merck Frosst*, at para 150).

[46] With that in mind, I turn to three criteria of confidentiality from *Air Atonabee*.

(a) *Prior Public Disclosure*

[47] There is no prior disclosure of the disputed information. This conclusion applies to both the Department's regulatory conclusions and Porter's SMS information.

[48] With respect to prior public disclosure, an additional aspect of the record should be noted. [omitted].

[49] Relying on this fact, the Department advanced a novel argument. In the Department's view, its prior inadvertent disclosure that [omitted] satisfies the prior disclosure requirement. Such an interpretation belies the principles underlying both the *Act* and *Air Atonabee* and amounts to favouring form over substance.

[50] Whether or not a document has been previously disclosed to the public, in fact, is a criterion directed at the ultimate question of whether or not the information contained in that document is confidential, in substance. The inadvertent disclosure of an otherwise confidential document does not, in substance, undermine the confidential nature of the information it contains. For example, a leak in the government's servers publicly disclosing the Social Insurance Numbers of various Canadian citizens surely speaks more to an error in government than the lack of confidentiality over what is ostensibly sensitive and private information. It does not mean that further disclosure and dissemination is therefore warranted and in the public interest.

[51] Rather, the "prior disclosure" requirement is directed at information otherwise publicly accessible which, by virtue of being conventionally accessible, lacks confidentiality. For example, information purposefully (as opposed to inadvertently) posted on government websites (such as Statistics Canada) would qualify as having been previously disclosed in a manner that is suggestive of that information lacking confidentiality.

[52] *Merck Frosst* is consistent with a purposive interpretation of what constitutes prior disclosure. In that decision, Merck argued that certain information was still confidential, even though it was previously disclosed to the public, because Merck dealt with that information confidentially in its internal operations. A majority of the Supreme Court of Canada rejected this argument because Merck's internal operations were irrelevant to the question of whether or not the information was, in fact, previously disclosed to the public. Importantly however, that prior disclosure was not the inadvertent disclosure of otherwise confidential and unavailable

information, as it was in this case. Rather, the information in *Merck Frosst* was a compilation of published scientific articles contained in Merck's New Drug Submission.

[53] Further, the argument of the Department creates the perverse incentive of releasing "purportedly" confidential information for the purpose of legitimizing its subsequent disclosure. While I doubt that such inappropriate conduct would be pursued by the government, at a minimum, the government should not be rewarded by allowing that careless disclosure to form the basis of its justification for the disclosure of Porter's otherwise confidential information.

[54] Finally, even if a prior inadvertent disclosure were envisioned by the three prong test in *Air Atonabee*, the prior disclosure relied upon by the Department cannot undermine the confidentiality of the disputed information because the two do not completely overlap. The prior disclosure related merely to [omitted]. Such a narrow prior disclosure cannot undermine the confidentiality attaching to all of the disputed information, the content of which extends well beyond these two facts.

[55] In sum, the government's prior inadvertent disclosure of any document cannot undermine its confidentiality with respect to the exemption under section 20(1)(*b*). Consequently, this first aspect of confidentiality under *Air Atonabee* is satisfied by the disputed information.

(b) *Reasonable Expectation of Confidence*

[56] The second criterion – that the disputed information originated and was communicated in a reasonable expectation of confidence – is only met in part. More precisely, while Porter's SMS information was disclosed with a reasonable expectation of confidence, there was no reasonable

expectation of confidence in the Department's regulatory conclusions in light of that confidential information (the dichotomy discussed earlier).

[57] Under this heading, Porter and the Department argued for opposite conclusions based on irreconcilable factual claims. Porter argued that the disputed information contains exclusively SMS information that it reasonably expected would be kept confidential because of the Department's express assurances to that effect. In contrast, the Department argued that the disputed information contains "nothing but Transport Canada's opinions, comments, conclusions and recommendations arising from its regulatory assessment process." As I explained earlier, these submissions obscure the dichotomy between regulatory conclusions and SMS information. Each must be analyzed separately.

[58] I agree with Porter that its unique SMS information should be exempt from disclosure. It reported that information to the Department with express assurances from the Department that it would remain confidential. There are few circumstances in which a more reasonable expectation of confidence could be found.

[59] That said, Porter's argument on this point referred exclusively to its SMS information, which is only part of the disputed information. The Department's regulatory conclusions, with respect to which there were no assurances of confidentiality, are consequently not exempt from disclosure. Even Porter's own authorities support this conclusion. Porter cited two cases in which an airline's information was exempt from disclosure under the *Act*, but that information was the airline's unique safety protocols, not regulatory conclusions related to those protocols (see: *Wells v Canada (Minister of Transport)*, [1995] FCJ No 1447 (FCTD) at para 9; *Wells v*

Canada (Minister of Transport), [1996] FCJ No 598 (FCTD) at paras 5 and 12). These cases only provide further evidence of the Court's consistent treatment of regulatory conclusions as subject to disclosure under the *Act*.

(c) *Public Interest*

[60] The final *Air Atonabee* criterion regarding confidentiality is whether maintaining the information as confidential serves the public interest. More precisely, this "public benefit" criterion was described in *Air Atonabee* as follows:

> 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 para 45).

[61] In essence, the public benefit criterion is directed at the characterization of the relationship between the government (the Department) and the party supplying the information (Porter).

[62] The passage above from *Air Atonabee* outlines two types of relationships deserving of confidential status under section 20(1)(*b*): (1) fiduciary relationships; and (2) relationships that simultaneously meet two criteria (a) being not contrary to the public interest, and (b) being fostered for public benefit by confidential communication (see *Canadian Imperial Bank of Commerce v Canada (Canadian Human Rights Commission)*, 2007 FCA 272 at para 68). The relationship between Porter and the Department is not fiduciary. Consequently, maintaining confidentiality over the disputed information will only serve the public interest if Porter's

relationship with the Department is not contrary to the public interest and the public interest will be fostered by treating the relationship as confidential. As the jurisprudence consistently demonstrates, it is not for the public benefit to maintain confidentiality over regulatory conclusions.

[63] The public benefit/public interest criteria were considered in the context of airlines and their regulators in *Air Atonabee*. In that decision, Justice MacKay concluded, properly in my view, that confidential information originating from the airline should be exempt from disclosure because it satisfies both criteria:

> […] it is consistent with the public interest and the relationship would be fostered for the benefit of the public, in my view, by treating as confidential those communications which originate with the applicant where the applicant has considered them confidential. In this case the third party would be encouraged to be open and frank with inspectors if its understanding about the restricted purposes and circulation of its communications is recognized and respected (at para 49).

[64] Consequently, Porter's unique SMS information, which falls within "communications which originate with the applicant where the applicant has considered them confidential," satisfies the public benefit criterion.

[65] However, Justice MacKay also recognized that regulatory conclusions are not subject to the same restrictions because their sustained confidentiality is contrary to the public benefit except in exceptional circumstances:

> Where the records are from department sources, not otherwise exempt from disclosure under section 20(1), the general purpose of the Act – which identifies as a public interest given priority by Parliament the provision of access to government controlled

> records – should be given effect unless the relationship between the third party and government is exceptional and warrants treating the records as confidential (at para 49).

[66] The Department's regulatory conclusions are records "from departmental sources," and are therefore not precluded from disclosure under section 20(1)(*b*). Porter's relationship with the Department is hardly exceptional; the relationship between a private corporation and its regulator is ubiquitous.

[67] For its part, Porter advanced two arguments as to why the disputed information should be exempt from disclosure. While Porter's arguments focussed only on its unique SMS information, in light of the dichotomy of information that I identified earlier, I will apply its analysis to both the SMS information and the Department's regulatory conclusions.

[68] Regarding Porter's unique SMS information, I have already concluded that this information should not be disclosed. I agree with Porter's submission that the disclosure of its unique SMS information would provide competitors with "unfair insight into Porter's commercial and technical processes and procedures" contrary to public benefit.

[69] Regarding the Department's regulatory conclusions, to the extent that Porter's argument may be applied to such conclusions, I disagree that they should be exempt from disclosure. Porter argues that a "[f]ailure by the Department to safeguard sensitive commercial information" will undermine the "full and frank disclosure" of relevant information by Porter and other airlines. However, extrapolating this logic to regulatory conclusions undermines the express purposes of the *Act*.

[70] The exemptions from disclosure under the *Act* are the exceptions to the general rule that the public has a right to access government information. Section 4(1) of the *Act* provides for the general rule of disclosure upon request, and section 2(1) of the *Act* is explicit about exemptions being exceptions that are "limited and specific":

> 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 information should be reviewed independently of government.
>
> 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.

[71] The general nature of the rule favouring access to information, and the corresponding limited nature of the exemptions, defeat Porter's argument that regulatory conclusions about its safety record should not be disclosed for fear that it will undermine a culture of open reporting. Put briefly, Porter's argument applies to every possible instance of government reporting and is therefore as expansive and general as possible (as opposed to "limited and specific"). While such an argument related to promoting open reporting was accepted in *Air Atonabee*, the court in that case limited the exemption to "communications which originate with the applicant" (at para 49) just as I have concluded here with Porter's SMS information.

[72] Porter's legal obligation to disclose information to regulatory bodies is not unique. Similar legal obligations are held by many corporations in a regulatory context. Consequently, Porter's argument applies generally, and cannot be seen as a "limited and specific" exception to disclosure. A fear that disclosure of regulatory findings would hinder communication would apply to other federally regulated industry, well-beyond airlines. I cannot accept that this Court should preclude the disclosure of regulatory findings on the basis that it will encourage regulated entities to not disclose information that they are legally required to disclose.

(4) Conclusion Regarding Section 20(1)(b)

[73] Under section 20(1)(*b*) of the *Act*, Porter's SMS information should be exempt from disclosure, whereas the Department's regulatory conclusions, should not be exempt from disclosure.

[74] In sum, Porter's SMS information should be exempt from disclosure because it satisfies all of the criteria in section 20(1)(*b*): it is confidential technical information that was supplied to the Department by Porter who treats it in a consistently confidential manner. Further, in regard to its confidentiality, the SMS information was not previously publicly disclosed, Porter had a reasonable expectation of confidence over it, and maintaining its confidentiality fosters a relationship between Porter and the Department that supports the public benefit by encouraging open reporting.

[75] In contrast, the Department's regulatory conclusions should not be exempt from disclosure because they do not satisfy all of the criteria in section 20(1)(*b*). This is principally because those conclusions were not provided to the Department by a third party. Rather, the

Department, with reference to Porter's SMS information came to its own conclusions about how that SMS information compared to various regulatory requirements. Failing this requirement, the regulatory conclusions cannot be exempt from disclosure under section 20(1)(*b*).

[76] In light of the above findings, the disputed information, once it is cleansed of confidential SMS information (through redaction), is not precluded from disclosure under section 20(1)(*b*) of the *Act*.

C. *Section 20(1)(c): The Financial Prejudice Exemption*

[77] Section 20(1)(*c*) of the *Act* exempts the following information from disclosure:

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

[78] Sections 20(1)(*c*) and 20(1)(*d*) are harms-based exemptions that focus on potential harms flowing from the disclosure of information, unlike section 20(1)(*b*), which centred on the characterization of the information itself.

[79] Flowing from the language of the provision, there are two principal considerations under section 20(1)(*c*), both of which were analyzed in *Merck Frosst*: (1) the degree of likelihood of harm required, and (2) the type of harm. Both of these considerations support disclosure of the Department's regulatory conclusions.

(1) The Degree of Likelihood of Harm Required

[80] The standard of proof associated with section 20(1)(*c*) is somewhat unique. Consequently, I will describe with the greatest possible precision how the standard of proof has been characterized by the Supreme Court of Canada.

[81] I begin with the label assigned to the standard of proof. In *Merck Frosst*, the Supreme Court of Canada affirmed a "long accepted formulation" of the Federal Court and the Federal Court of Appeal, that the wording "reasonably be expected to" in section 20(1)(*c*) translates into a legal standard of proof of a "reasonable expectation of probable harm" (at para 196).

[82] Next, the Supreme Court expanded on this standard of proof through implicit characterization, meaning, that the Supreme Court described a reasonable expectation of probable harm by situating it between the two standards of proof from which it differs:

> A third party claiming an exemption under s. 20(1)(*c*) of the Act must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur (at para 199).

[83] In essence, the Supreme Court's statement above draws the boundaries within which a "reasonable expectation of probable harm" is situated: above the lower bound of "a mere possibility" and below the upper bound of "on a balance of probabilities." The Supreme Court of Canada provided further precision by adding that these boundaries outline "a standard considerably higher than mere possibility, but somewhat lower than 'more likely than not'" (at para 203). Further, the Supreme Court elaborated on the substance of these upper and lower bounds. It described "a mere possibility of harm" as based in a fear of harm that is "fanciful,

imaginary or contrived" rather than based on reason, and it described a balance of probabilities as "prov[ing] that harm is more likely than not" (at para 204).

[84] Finally, the Supreme Court expanded on the standard of proof through explicit characterization, meaning, that it described what a reasonable expectation of probable harm itself entails, rather than what it does not entail. The Supreme Court described a reasonable expectation of probable harm itself as "an expectation for which real and substantial grounds exist when looked at objectively" (at para 204).

(2) The Type of Harm Required

[85] In *Merck Frosst*, the Supreme Court of Canada opined that the list of harms in section 20(1)(*c*) is "disjunctive," meaning, that it is sufficient for Porter to show either that the disclosure of the disputed information will result in "material financial loss or gain" to Porter or "prejudice [Porter's] competitive position" (at para 212). Consequently, the Supreme Court was explicit that "it is not necessary for the third party to show that the 'prejudice' to his or her competitive position also results in 'harm'" (at para 212).

[86] More specific to this case, the Supreme Court of Canada also commented on the harm of "public misunderstanding" caused by disclosure. On this point, the Supreme Court opined:

> The courts have often -- and rightly -- been sceptical about claims that the public misunderstanding of disclosed information will inflict harm on the third party […] If taken too far, refusing to disclose for fear of public misunderstanding would undermine the fundamental purpose of access to information legislation. The point is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it. In my view, it would be quite an unusual case in which this sort of claim for exemption could succeed (at para 224).

(3) No Demonstrated Expectation of Harm in this Case

[87] The expectation of harm is assessed through objective and subjective lenses. Here, it is difficult to accept that, objectively viewed, there is a reasonable expectation of harm. [omitted]. I cannot accept that this information, once released, would affect the travel choices of reasonable passengers in the spring of 2014. In particular, I cannot accept that [omitted] amounts to "real and substantial grounds" supporting the expectation of harm to Porter. Mr. Deluce himself notes that [omitted]. Surely then, any alleged harm to Porter would be the consequence of public misunderstanding, a harm that has been expressly cautioned against by the Supreme Court with respect to supporting an exemption under the *Act*.

[88] While Mr. Deluce was not cross-examined, and the Department filed no evidence for its part, the evidence of Porter still fails to meet the legal threshold of a reasonable expectation of probable harm. I accept much of Mr. Deluce's evidence, particularly [omitted]. However, [omitted] and objectively viewed, no nexus or proximity between the release of these regulatory conclusions and a probability of financial harm, either in terms of financial loss to Porter or injury to its competitive position has been demonstrated.

D. *Section 20(1)(d): The Negotiations Prejudice Exemption*

[89] Section 20(1)(*d*) of the *Act* exempts the following information from disclosure:

information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

[90] As no factual basis has been established which would support the application of this exemption it cannot apply to the disputed information. Mr. Deluce's affidavit provided no specific or compelling examples of actual or probable negotiations that would or could suffer as a consequence of releasing the disputed information. Consequently, this ground will not be considered further.

E. ***Section 19: The Personal Information Exemption***

[91] There was a relatively brief dispute between the parties with respect to exemptions under section 19 of the *Act*, which exempts the following information from disclosure:

…any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.	…de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.

[92] Under section 3 of the *Privacy Act*, RSC 1985, c P-1, "personal information" is defined as "information about an identifiable individual that is recorded in any form."

[93] The Department acknowledges that the disputed information may contain Mr. Deluce's personal information; however, the Department also argues that Porter's privacy concerns regarding that personal information are addressed by redacting that personal information from the disputed information while disclosing the remainder. I agree. No document was identified which, if properly redacted, gave rise to the disclosure of personal information.

[94] As a consequence, subject to the redaction of Mr. Deluce's personal information, the disputed information is not precluded from disclosure under section 19 of the *Act*.

V. Conclusion

[95] The *Act* was not meant to prevent from disclosure regulatory conclusions made by various governmental agencies. Rather, the *Act* was meant to facilitate access to such information, and consequently, to promote transparent regulatory processes and an informed public.

[96] The Department was correct in its decision to release the disputed information, subject to redactions directed at Porter's unique SMS information and Mr. Deluce's personal information. In particular, the Department's regulatory conclusions regarding Porter's SMS should be released.

[97] If there are further disputes between the parties with respect to the difference between regulatory conclusions and confidential SMS information, they may return to this Court for further guidance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. Any submissions on costs are due within twenty days of the date of judgment.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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