Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 68

Appeal 880007

Ministry of Health

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On November 20, 1987 the Ministry of Health (the "institution") received a request "in the spirit of Bill 34" for access to a variety of records including the "minutes of the Drug Quality and Therapeutics Committee [the "DQTC"] for 1986 and 1987".

2. By letter dated February 2, 1988, the institution responded by saying "...access is granted to the record you have requested and severances are indicated with the corresponding exemptions marked".

3. On February 9, 1988, the appellant wrote to me appealing the head's decision, and I gave notice of the appeal to the institution.

4. Mediation efforts by members of my staff resulted in the disclosure of additional information from the records on May 2, 1988.

5. On July 19, 1988, notice that I was conducting an inquiry to review the decision of the head was sent to the institution, the appellant and 61 affected parties. Enclosed with each notice was a copy of a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report. The Report is sent to all parties affected by the subject matter of the appeal.

6. By letter dated July 19, 1988, I asked all parties to submit written submissions to me by August 15, 1988.

7. As responses from the affected parties began to arrive, it was evident that some of them did not understand the nature of the records at issue in the appeal. The affected parties had never seen the minutes of the DQTC, and assumed that the appellant had requested access to the extensive commercial, scientific and trade secret information routinely submitted by drug manufacturers to the DQTC when applying for listing of a drug product. My staff subsequently determined that the institution had not consulted with the affected parties regarding the release of the records, as required by section 28 of the Act, because the institution had independently decided not to release the information.

This situation caused me some concern, because it raised the possibility that affected parties might be at a disadvantage in being asked to make submissions in ignorance of the general nature of the information at issue in the appeal.

Accordingly, I contacted the institution, and with considerable effort on the part of both its staff and my staff, interested affected parties were provided with either a copy of those parts of the records containing information of concern to them, or a description of the general nature of the information at issue in the appeal. This process took a significant length of time and delayed the disposition of this appeal, but, in my view, these efforts were justified in the interest of fairness to all concerned.

8. By letter dated August 25, 1988, the Pharmaceutical Manufacturers Association of Canada (the "PMAC") requested permission to be added as an interested party to this appeal. They were notified on September 1, 1988 of my decision to add them as an affected party, and were asked to provide me with their written submissions by September 12, 1988.

9. Due to the volume and complexity of the records and the number of exemptions relied upon, several time extensions were provided to various parties in order to allow sufficient time to present representations.

10. Before finalizing its submissions, the institution agreed to provide approximately 50 additional items of

information, which were released to the appellant on September 14, 1988.

11. By September 27, 1988, I had received written submissions from the appellant, the institution, PMAC and 43 of the 61 affected parties.

12. Following careful consideration of all submissions, I wrote to the institution on March 31, 1989 seeking clarification on several issues. Officials from the institution provided this clarification on April 25, 1989.

13. The appellant confirmed with my office on May 2, 1989, that he had withdrawn those portions of his request which had been exempted by the institution under section 21 of the Act. I have therefore not dealt with these severances in the body of this Order.

Preliminary Matters

It is important to note at the outset that the purposes of the Act, as outlined in subsection 1(a) and (b) are as follows:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> ...

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution. It is up to the head to establish the proper application of the exemptions provided by sections 13, 15, 18, and 19 of the Act. Most affected parties in this appeal have relied on the exemption provided by section 17 of the Act to prohibit disclosure of those parts of the records relating to them, and therefore share with the institution the onus of proving that this exemption applies to the relevant parts of the records.

I would like to comment very briefly on the issue of my jurisdiction to deal with this appeal, because it was raised by at least two affected parties. They have argued that because the request was filed in November 1987, before the Act came into force, the request was not technically made pursuant to subsection 24(1) of the Act, and therefore I have no jurisdiction under section 50 of the Act to deal with the appeal.

I do not accept this argument. The institution may have received the request before the Act came into force, but its actions indicate that the request was dealt with as a request under the Act. The head's decision was made on February 2, 1988, after the commencement of the new statute, and, in my view, the requester

has a right of appeal under section 50 of the Act and I have jurisdiction to review the decision of the head.

Background

Before dealing with the issues raised in this appeal, I feel it would be useful to provide some brief background information.

The records in issue in this appeal are the minutes of the Drug Quality and Therapeutics Committee (the "DQTC") meetings for 1986 and 1987. The DQTC is an advisory body created by Order in Council pursuant to section 9 of the Ministry of Health Act, R.S.O. 1980, c. 280, as amended.

The DQTC is made up of 20 professionals with expertise in pharmacology, pharmacy, clinical medicine and other related disciplines. The committee's terms of reference are set out in Order in Council 137/87 dated January 22, 1987 as follows:

1. to advise the Minister on the operation of a program to assist the people of Ontario to obtain prescribed pharmaceutical products of quality at a reasonable cost;

2. to establish criteria to evaluate the quality and therapeutic value of drug products;

3. to recommend to the Minister which drug products have met the prescribed conditions to be eligible to be designated as interchangeable products or listed drug products for the purposes of the Ontario Drug Benefit Act, 1986 (the "ODBA") and the Prescription Drug Cost Regulation Act, 1986 (the "PDCRA");

4. to evaluate pharmaceutical manufacturers and pharmaceutical products;

5. to provide advice on relevant drug, pharmaceutical and therapeutic questions solicited or requested by the Ministry from time to time;

6. to review and assess information related to drug and pharmaceutical products prepared for the Committee and for the Minister by selected consultants from time to time as requested by the Minister;

7. to recommend for distribution to the public and the health professions, information relating to drugs, pharmaceutical products and therapeutic topics; and

8. at the Minister's request to act as liaison between the Minister and professional, education and other groups.

The Drug Benefit Formulary (the "Formulary") and the Comparative Drug Index (the "CDI") are compiled and maintained by the Ministry of Health, with the advice of the DQTC and other associations and groups.

The Ontario Drug Plan ("ODP") was introduced in 1974 with the primary purpose of providing prescription drug products free of charge to the needy, elderly, and disabled persons living in Ontario. All prescribed drug products listed in the Formulary/CDI may be obtained free of charge by eligible persons. Eligible persons are:

1. Age 65 and over. All persons entitled to receive Old Age Security or who have been resident in Ontario for the past 12 months and are either Canadian citizens or landed immigrants.

2. Under age 65. All persons receiving Family Benefits Assistance, General Welfare Assistance, Extended Care benefits, Home Care benefits, residents of Homes for Special Care are also eligible.

A new edition of the Formulary/CDI is issued every six months, and includes all drugs added since the previous edition. The Formulary and the CDI are both documents which list

pharmaceutical preparations arranged in comparative categories and groupings according to the nature, strength and dosage form of the active therapeutic constituent. The Formulary lists all approved drug products, and the CDI lists those drug products which have been approved as interchangeable, pursuant to the PDCRA. Drug products approved for listing in the CDI are also published in the Formulary.

The institution, in its representations, pointed out that all drug manufacturers are eligible to apply to have their products listed in the Formulary/CDI. A manufacturer's submissions must comply with the requirements of either section 12 of Ont. Reg. 89/86 under the ODBA (if the purpose of the submission is to have the drug product listed as a benefit) or section 12 of Ont. Reg. 690/86 under the PDCRA (if the purpose is to have the drug product listed as an interchangeable product).

The Pharmaceutical Manufacturers Association of Canada indicated in its submissions that approximately 2,600 drug products are listed as benefits in the Formulary/CDI and that the Ontario Drug Plan accounts for approximately 40 percent of the Ontario prescription drug market.

It should be clarified that the acceptance of a drug for inclusion in the Formulary/CDI simply expands the market for a drug that has already been approved for sale in Canada. The initial decision as to whether a particular drug can be sold in Canada is made by the Health Protection Branch of the federal department of Health and Welfare Canada ("HPB"). As long as a drug has received a valid Notice of Compliance from the HPB, it is perfectly legal for that drug to be prescribed and dispensed

in Ontario, regardless of whether it is listed in the Formulary/CDI. In most cases, manufacturers will apply to have their drug products included in the Formulary/CDI simply because it opens up a significantly expanded market for the product. However, in some cases, such as drugs that are used almost exclusively in hospitals, a manufacturer may decide not to apply to have the drug listed.

Manufacturers applying for inclusion of a drug product in the Formulary/CDI must submit some or all of the following items of information to the DQTC:

1. evidence that the manufacturer meets the standards contained in Good Manufacturing Practices for Drug Manufacturers and Importers - the manufacturer must provide the most recent Health Protection Branch inspection report;

2. proof of the notice of compliance issued by the HPB and a copy of the product monograph that has been approved by the HPB;

3. a statement that sets out all the representations that are intended to be made by the manufacturer for the promotion of the product with respect to the recommended route of administration of the product, the proposed dosage of the products, the claims for the product, and the contra-indications and side effects of the product;

4. the Drug Identification Number of the drug;

5. the formula of the product in a manner that clearly indicates all the ingredients and the quantities of those ingredients;

6. specifications of a pharmacopoeial or equivalent standard for the active raw materials used to make the product and for the finished product;

7. documentation with respect to the manufacturing and quality control of the product;

8. a sample of the product packaged and labelled as it is being sold at the time of the submission;

9. proof of the availability of the product for sale;

10. a list that sets out the cost to the pharmacist or wholesaler for each package size of the product that is offered for sale;

11. evidence that the manufacturer is able to supply the product at the price quoted to the Minister in a quantity that is sufficient to meet the demands of the product;

12. clinical evidence of the product's therapeutic use and safety;

13. information that relates to the use of the drug as prescribed by physicians, including adverse drug reactions and side effects, if any;

14. where applicable, evidence of the therapeutic need for an additional strength of the drug product;

15. studies that show that the product is stable under the storage conditions specified by the manufacturer for the intended shelf life of the product;

16. dissolution studies or other studies that show the consistency of the manufacturing process of the product;

17. evidence of the therapeutic need for a modified release dosage form;

18. evidence of the rate and extent of absorption for a solid oral dosage form;

19. written authorization enabling the Ministry of Health to access all the product information filed with the HPB regarding the drug product;

20. certificate of analysis that shows that results of the tests that were carried out on the active raw materials used to make the product and the finished product and that compares the results of those tests with the specifications for the active materials and the finished product;

21. a sample of the active raw materials used to make the product;

22. comparative bioavailability studies or comparative clinical studies or both in humans or other in vivo studies that will show the interchangeability of the product with the original product; and

23. evidence that the physical properties of the product do not adversely affect patient acceptance of the product to any greater degree than the original product.

Which of the above-noted items are required will depend on whether the submission is for listing as a benefit or listing as an interchangeable product.

As noted earlier in this Order, many of the affected parties had mistakenly assumed that the minutes of meetings of the DQTC requested by the appellant included all of the appellant included all of the types of information outlined above. In fact, these minutes include some but not all of this information.

The minutes are almost identical in format, and include the following information:

1. there may be an opening remark;

2. the minutes of the previous meeting are adopted with any necessary revisions;

3. business arising from the minutes may be discussed;

4. drugs are reviewed for listing in the Formulary/CDI and the recommendation of the DQTC with respect to the disposition of the drug being discussed is noted, with or without reasons for the decision;

5. other business may be dealt with;

6. a notation that the meeting is adjourned; and

7. the next meeting date is set.

Issues

The issues arising in this appeal are as follows:

A. Whether the head properly applied the mandatory exemption provided by subsections 17(1)(a)(b) and (c) of the Act in severing information from the requested records.

B. Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act in severing information from the requested records.

C. Whether the head properly applied the discretionary exemption provided by subsections 15(a) and (b) of the Act in severing information from the requested records.

D. Whether the head properly applied the discretionary exemption provided by subsection 18(1)(g) of the Act in severing information from the requested records.

E. Whether the head properly applied the discretionary exemption provided by section 19 of the Act in severing information from the requested records.

F. If any of Issues A, B, C or D are answered in the affirmative, whether there is a compelling public interest in the disclosure of any of the severed portions of the records which clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.

G. Whether subsection 11(1) of the Act is applicable to the records at issue in this appeal.

I have included 2 appendices at the end of this Order which are intended to facilitate implementation of my decisions relating to these issues. Appendix "A" identifies each of the records at issue in the appeal; and Appendix "B" identifies the location, according to record, page and paragraph number, for all severances which have been released by this Order.

ISSUE A: Whether the head properly applied the mandatory exemption provided by subsections 17(1)(a)(b) and (c) of the Act in severing information from the requested records.

The institution relied on the mandatory exemption provided by section 17 to sever 361 separate items from the records. Of these 361 severances, 16 were released to the appellant during mediation. My Order, therefore, deals with the proper disposition of the remaining 345 severances.

Section 17 of the Act reads as follows:

> 17.--(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the

public interest that similar information continue to be so supplied; or

(c) result in undue loss or gain to any person, group, committee or financial institution or agency.

(2) A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.

In my Order 36 (Appeal Number 880030), released on December 28, 1988, I outlined the three-part test which must be satisfied in order for a record to be exempt under section 17. The test, as outlined on page 4 of that Order, is as follows:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) exemption claim invalid.

Although my staff and I spent considerable time and effort reviewing each of the 345 severances, it would not be practical for me to outline my reasoning with respect to each severance individually. Instead I have identified five categories of information for which the section 17 exemption was used, and

will provide my reasons for deciding whether the exemption was properly claimed for each of these categories.

Categories of severances under section 17.

I have identified the following five categories of information severed by the head under section 17:

1. information relating to new drug product submissions;

2. information relating to submissions for approval as an interchangeable drug product with one already listed;

3. names of drug manufacturers where recommendations for inspection of facilities were discussed;

4. comments or discussions by the DQTC; and

5. information that would identify the type of drug product under consideration by the DQTC.

I will now discuss the proper application of the section 17 exemption for each of these five categories of information.

Information relating to new drug product submissions.

The majority of the section 17 severances fall into this category. The severed information consists of the brand name of the drug being reviewed by the DQTC; its manufacturer; the non-proprietary or generic name of the drug; its strength,

dosage form and/or active ingredients; and an indication of whether the DQTC decided to recommend acceptance, rejection or deferral of a decision regarding inclusion of the drug product in the Formulary/CDI.

Much of this identifying information about a drug product would not ordinarily qualify for exemption under section 17, because it is already publicly available from other sources, such as the list published by the federal Health Protection Branch of drugs recently approved by them for sale in Canada, the drug monographs prepared and distributed by the manufacturers themselves, advertisements in drug journals, and the Compendium of Pharmaceuticals and Specialities, to name a few.

However, this same information, considered in the context of the DQTC minutes, reveals two additional items of information:

1. the fact that an application for listing in the Formulary/CDI has been made; and

2. the fact that the DQTC has deliberated on the application.

The institution argued that:

> ...the very fact that the DQTC has deliberated on a certain drug product is third party commercial information since it discloses that a drug manufacturer has made a submission to the Ministry.

The following submissions from some of the affected parties support the institution's position:

> ...(T)he company did not anticipate that any of the information submitted to the Ministry would be disclosed or that the fact of its application for listing would be revealed until the product was so listed in the Formulary/CDI...
>
> ...(T)he fact that the company has applied for the listing of a product in the Formulary/CDI is information that would be of significant competitive advantage to its competitors.
>
> In some cases, the application for listing is made prior to the launch of the product in the Canadian market.
>
> Disclosure of the fact that the company has a new product ready for launch or that the company is attempting to have a product listed in the Formulary/CDI would significantly prejudice the company's competitive position and cause it undue loss. In the highly competitive atmosphere of the Canadian pharmaceutical industry, knowledge of product launches and changes in marketing strategy would provide substantial competitive advantages to competitors.
>
> ...the mere knowledge, through the Committee's deliberations, that a product is being reviewed by the Committee and considered for inscription gives prior knowledge to one's competition of a manufacturer's proposed market as to said product. It is an information (sic) of a commercial nature with definite financial consequences since it could result into (sic) the competition knowing when a product shall be marketed in Ontario and could place one's competition into a position to challenge the market and result into (sic) losses for a manufacturer.
>
> The knowledge that a product was approved and the listing in which it will appear is also of a commercial nature...

The appellant's submissions with respect to the application of section 17 are restricted to a statement that he feels the exemption "...is applied too widely".

Having personally reviewed the submissions from the institution, the appellant, the PMAC, and each of the 43 separate submissions made by the affected parties in this appeal, in my view, any information contained in the record that would disclose that an application has been made for listing in the Formulary/CDI would constitute commercial third party information, and thereby satisfy the first part of the test for exemption under section 17.

To meet the second part of the test the information must have been "supplied in confidence, implicitly or explicitly". The institution and the affected parties have provided ample evidence in their submissions to satisfy me that these applications are made in confidence, and I therefore find that the second part of the test has been satisfied.

To meet the requirements of the third part of the Section 17 test, the institution and/or the affected parties must demonstrate that the release of the information contained in the records could reasonably be expected to result in specified harms outlined in subsections 17(1)(a)(b) or (c).

I have received very detailed and cogent submissions on the reasonable expectation that release of the information contained in these records could result in:

- significant prejudice to a third party's competitive position or contractual or other negotiations;

- similar information no longer being supplied to the institution; and

- undue loss or gain to someone.

These submissions place heavy emphasis on the possible misuse of information revealed in the record by fiercely competitive drug companies fighting for their share of the drug market dollar.

Having regard to Ontario's present system for approving new drug products on the Formulary/CDI, I am satisfied that the mere knowledge of an application for a listing could, in itself, result in the types of harm enunciated in subsections 17(1)(a), (b) and (c). Over the years, the participants in this approval process have developed certain expectations as to the appropriate use of the information submitted to the DQTC, and

this in turn has created a commercial value in this information. If these expectations were to change as a result of alterations to the approval process, this could result in the elimination of any commercial value to this information and a corresponding removal of this type of information from the scope of exemption under section 17. I understand that an Ontario government task force is currently reviewing procedures relating to the approval of drug products on the Formulary/CDI, and I would urge those involved with this review to consider the appropriateness of making this type of information routinely available to the public.

However, in my view, under the current process, the exemption provided by section 17 has been properly applied to the category of severance consisting of information relating to new drug product submissions.

Information relating to submissions for approval of an interchangeable drug product.

This category of severances consists of the same type of information provided with new drug product submissions, plus the name of the product with which the manufacturer claimed interchangeability.

Much of the reasoning outlined above with respect to new drug product submissions applies to this second category of severances, and in my view, the tests for exemption under section 17 have been satisfied. The information properly qualifies as commercial information; it was supplied to the institution in confidence; and its disclosure could reasonably be expected to result in the types of harm identified in subsections 17(1)(a)(b) and (c).

Names of drug manufacturers where recommendations for inspection of facilities were discussed.

The institution severed the names of drug manufacturers under section 17 where an accompanying notation in the minutes included a recommendation for inspection of certain facilities.

The fact that the DQTC has recommended an inspection is not information "supplied by the third party", as required by the second part of the test for exemption under section 17, and, in my view, all severances included in this category do not qualify for exemption under section 17.

Comments or discussions by the DQTC.

The institution also severed records where the DQTC had included comments with its recommendations regarding listing or discussion of various drug products. The institution argues the severances were properly exempt under section 17 because negative inferences could be drawn about the product if the information were released.

In my view, these severances are not eligible for exemption under section 17. The comments by the DQTC were not "supplied by the third party", and therefore fail to satisfy the second part of the section 17 test.

Information that would identify the type of drug product under consideration by the DQTC.

The institution severed certain words which, in the opinion of the institution, would in themselves identify the drug product under consideration.

I have reviewed these severances and, in my view, they meet the requirements for exemption under section 17 of the Act.

ISSUE B: Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act in severing information from the requested records.

The institution has cited section 13(1) as an alternative exemption for all section 17 exemption claims. In addition, subsection 13(1) was claimed as the basis for severing 15 records which were not subject to a claim for exemption under section 17. Four of these severances were released during mediation, leaving 11 to be disposed of by this Order.

In my discussion of Issue A, I have determined that the head properly applied the exemption under section 17 with respect to all severances, with the exception of 84 severances which fall into one of the following two categories:

- names of manufacturers where recommendations for inspection of facilities were discussed; and
- records containing comments or discussions by the DQTC.

My discussion of Issue B will be restricted to these two categories of severances, plus the 11 severances noted above.

Subsection 13(1) of the Act provides:

> 13.--(1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

To meet the requirements for exemption under subsection 13(1), the DQTC must first qualify as "...a public servant, any other person employed in the service of an institution or a consultant retained by the institution."

As noted earlier, the DQTC is an advisory body created by Order in Council pursuant to section 9 of the Ministry of Health Act, supra. Section 9 reads as follows:

> The Lieutenant Governor in Council or the Minister may appoint committees to perform such advisory functions as are considered necessary or desirable in order to assist the Minister in the discharge of his duties.

In my view, the role of the DQTC as an advisory body to the Minister places it squarely within the scope of entities intended to be covered by subsection 13(1).

I must now determine whether the information severed by the head under subsection 13(1) qualifies as "advice or recommendations".

As far as the records containing comments or discussions by the DQTC and the names of manufacturers where recommendations for inspection of facilities were discussed by the DQTC are concerned, in my view, they meet the requirements for exemption under subsection 13(1). In all instances, the severed information fits into one or the other of these categories of records. In my view, these are precisely the types of information intended to be the subject of a claim for exemption under subsection 13(1). In addition, I have reviewed the list of exceptions to this exemption outlined in subsection 13(2) and feel that none apply to these severances.

As far as the other 11 severances are concerned, nine of them consist of recommendations to the Minister on action to be taken involving all generic drug manufacturers listed in the Formulary; recommendations on the listing of a specific drug product; advice to the Minister on responding to a manufacturer's inquiries; recommendations to accept drug inspection reports for named manufacturers; and recommendations for policy issues to be discussed by the DQTC. I have reviewed these severances and feel that these nine severances fall within the scope of the subsection 13(1) exemption.

The remaining two severances consist of the names of individuals participating in meetings of the DQTC. In one case, the institution has claimed exemption under subsection 13(1) as an

alternative to exemption under subsection 21(2)(e); and in the other, while not specifically identifying subsection 21(2)(e), the severance contains the same type of information and was presumably also intended to be subject to the subsection 21(2)(e) exemption. As noted earlier in this Order, the appellant has withdrawn those parts of his request which are subject to the institution's claim for exemption under section 21, and, in my view, these remaining two severances appropriately fall into this category and are not covered by the scope of this Order.

ISSUE C: Whether the head properly applied the discretionary exemption provided by subsections 15(a) and (b) of the Act in severing information from the requested records.

The institution has claimed exemption under subsections 15(a) and (b) with respect to nine severances. The information contained in these severances consist of agenda references relating to specific federal-provincial policy matters and requests for information.

Subsections 15(a) and (b) read as follows:

> 15. A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

(b) reveal information received in confidence from another government or its agencies by an institution;

...

and shall not disclose any such record without the prior approval of the Executive Council.

The institution submitted that, in order for the DQTC to function effectively, it must have the ability to deal with other government bodies - specifically the Federal Health

Protection Board - in confidence. The institution has strongly and convincingly argued that anything that would compromise this confidentiality could have serious consequences for the future exchange of information necessary for the DQTC to carry out its mandate.

Evidence has been presented which satisfies me that the information severed under subsection 15(b) was received in confidence from other government bodies. I have also reviewed all relevant submissions and the severances themselves, and, in my view, they properly fall within the scope of subsections 15(a) and/or (b). I am also satisfied that the head did not err in the exercise of his discretion in favour of refusing to disclose these severances.

ISSUE D: Whether the head properly applied the discretionary exemption provided by subsection 18(1)(g) of the Act in severing information from the requested records.

The institution originally relied on subsection 18(1)(g) to claim 42 severances. Fifteen of these severances were released during mediation, therefore my Order will deal with the proper disposition of the remaining 27 severances. The information contained in these severances consists of recommendations and advice on the nature and/or the specifics of pending policy decisions under consideration by the DQTC.

Subsection 18(1)(g) of the Act reads as follows:

> 18.--(1) A head may refuse to disclose a record that contains,
>
> ...
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

The institution has provided very detailed submissions, including an affidavit, which sets out the nature of the pending policy decisions that would be prematurely revealed if the information contained in these severances was disclosed.

I have reviewed all submissions and the severed information and, in my view, the information contained in all but three of these severances properly qualifies for exemption under subsection 18(1)(g).

Items 4, 6 and the body of item 34, in my opinion, fall outside the scope of the exemption and should be released. As far as item 4 is concerned, in my view, the institution has not established a reasonable expectation that the harm outlined in

subsection 18(1)(g) would occur if the severed information was disclosed; item 6 does not contain information which would qualify as "proposed plans, policies or projects of an institution"; and only the heading, and not the body, of item 34 falls within the scope of the exemption.

I am satisfied that the head has properly exercised his discretion in applying the subsection 18(1)(g) exemption to the severances withheld from disclosure.

ISSUE E: Whether the head properly applied the discretionary exemption provided by section 19 of the Act in severing information from the requested records.

The institution has claimed exemption under section 19 as the basis for severing information from five records.

Section 19 of the Act reads as follows:

> 19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

In Order 49, relating to Appeal numbers 880017 and 880048, I dealt with the proper application of the section 19 exemption. As outlined in that Order, section 19 provides an institution with a discretionary exemption covering two possible situations:

(1) a head may refuse to disclose a record that is subject to either of the two branches of the common law solicitor-client privilege; and

(2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

A record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied.

After considering all relevant submissions and reviewing the severances in question, in my view, none meet the requirements for exemption under section 19, and all five severances should be released to the appellant.

As I stated at page 12 of my Order 49, supra, to qualify under the common law solicitor-client privilege, a record must either:

- represent a communication of a confidential character between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice; or
- be material written, prepared or obtained predominantly for the purpose of litigation or in anticipation thereof.

Neither of these requirements is evident on the face of the five severances, and the institution has not established either requirement during the course of this appeal.

To qualify under the second part of the test, the exempt information must have been prepared by or for Crown counsel. This was not the case with respect to any of the severances claimed by the institution under section 19.

ISSUE F: **If any of the Issues A, B, C or D are decided in the affirmative, whether there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemption pursuant to section 23 of the Act.**

Section 23 of the Act provides:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

As I have stated in a number of previous Orders, two requirements contained in section 23 must be satisfied in order to invoke the application of what has been referred to as the "public interest override": there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question. (emphasis added)

The Act is silent as to who bears the burden of proof in respect of section 23. However, it is a general principle that a party asserting a right or a duty has the onus of proving its case and, therefore, the burden of establishing that section 23 applies falls on the appellant.

The appellant has provided no details in his submissions to support the position that section 23 should apply to the severances made by the institution. I have also reviewed the

severed information and have reached the conclusion that the circumstances are not sufficient to trigger the override provisions of section 23. In my view, the public's interest in

knowing that all drug products are safe for marketing in Canada is satisfied at the time an individual product is approved by the federal government's Health Protection Branch; the DQTC is simply involved in recommending already-approved drug products for inclusion on the Formulary/CDI.

ISSUE G: Whether subsection 11(1) of the Act is applicable to the records at issue in this appeal.

Subsection 11(1) of the Act provides:

> 11.--(1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Subsection 11(1) imposes an obligation on the head to overlook exemptions provided in the Act where it is reasonable to believe that release of a record will reveal a grave hazard to the public.

In his submissions, the appellant stated:

> I believe that section 11 is applicable as the public interest and safety is served by knowing which drugs are accepted, rejected, deferred/eventually accepted.

Having reviewed all severances made by the institution in this appeal, I am satisfied that none contain information which could in any way trigger the disclosure obligations imposed on the head by subsection 11(1) of the Act.

In summary, my Order is as follows:

1. I order the head to disclose to the appellant, within thirty-five (35) days of the date of this Order, those portions of the records identified in Appendix B, attached hereto and forming part of this Order.

2. I uphold the decision of the head to withhold disclosure of all remaining portions of the records at issue in this appeal.

3. I order the head to advise me in writing within five (5) days of the date of disclosure, of the date on which disclosure was made.

4. I order the head to make available to a member of my staff, upon request, a copy of the records disclosed to the appellant.

Original signed by: June 28, 1989
Sidney B. Linden Date
Commissioner

"APPENDIX A"

DOCUMENT NO.	DESCRIPTION
	1986
1	Minutes of January 22, 1986
2	Minutes of February 5, 1986
3	Minutes of February 19, 1986
4	Minutes of March 5, 1986
5	Minutes of Category B Sub-Committee Meeting of March 18, 1986
6	Minutes of March 19, 1986
7	Minutes of April 16, 1986
8	Minutes of May 7, 1986
9	Minutes of May 21, 1986
10	Minutes of June 11, 1986
11	Minutes of June 25, 1986
12	Minutes of September 3, 1986
13	Minutes of Category B Sub-Committee Meeting of September 11, 1986
14	Minutes of September 17, 1986
15	Minutes of October 1, 1986
16	Minutes of October 15, 1986
17	Minutes of Policy Meeting of October 16, 1986
18	Minutes of November 5, 1986
19	Minutes of December 3, 1986

DOCUMENT NO.	DESCRIPTION
	1987
20	Minutes of January 21, 1987
21	Minutes of March 4, 1987
22	Minutes of April 1, 1987
23	Minutes of Category B Sub-Committee Meeting of April 22, 1987
24	Minutes of Category A Sub-Committee Meeting of April 29, 1987
25	Minutes of May 6, 1987
26	Minutes of June 3, 1987
27	Minutes of July 8, 1987
28	Minutes of September 9, 1987
29	Minutes of Category A Sub-Committee Meeting of September 16, 1987
30	Minutes of Category B Sub-Committee Meeting of September 17, 1987
31	Minutes of September 23, 1987
32	Minutes of October 7, 1987
33	Minutes of November 4, 1987

APPENDIX B

PORTIONS OF THE RECORD TO BE RELEASED

ITEM #	DOCUMENT #	PAGE #	PARAGRAPH #	EXEMPTION CLAIMED
4	6	4	3	s.18(1)(g)
6	7	3	1	s.18(1)(g)
Body of #34	25	1	2	s.18(1)(g)
1	3	3	6	s.19
2	3	4	1-5	s.19
3	3	5	1-3	s.19
4	4	1	1	s.19
5	4	2	1-2	s.19