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

ORDER P-293

Appeal 900036

Ministry of Health

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O R D E R

BACKGROUND:

The Ministry of Health (the "institution") received the following request:

> 1988, 1989 representations/reports on the potential sale of Connaught, and conditions on such a sale and effect on vaccine supplies.

The institution responded by denying access to the records pursuant to sections 12(1), 13(1), 15(a) and 18(d), (e) and (g) of the Freedom of Information and Protection of Privacy Act (the "Act").

The requester wrote to this office appealing the institution's decision.

The records were obtained and reviewed by the Appeals Officer assigned to the case. Because settlement could not be effected, the matter proceeded to inquiry. An Appeals Officer's Report was prepared and sent to the appellant, the institution and twelve persons or organizations whose interest might be affected by disclosure of the records (the "affected parties"). The Report invited representations regarding the application of the exemptions claimed by the institution, and section 17 of the Act which, in the opinion of the Appeals Officer, was also relevant. The Report also established a numbering system for the 28 specific records at issue in the appeal, which I have adopted for the purpose of this order. Representations were received

from the institution, the appellant and five of the affected parties.

PRELIMINARY ISSUES:

Before I consider the application of the various exemptions to the records, I will address the following three preliminary issues:

(1) my jurisdiction to review the head's decision;

(2) certain records/severances which are not responsive to the appellant's request; and

(3) records for which the institution has abandoned the exemption originally claimed.

(1) jurisdiction to review the head's decision

In its representations, the institution submits that the Commissioner had no jurisdiction to hear this appeal because the appellant filed the appeal 32 days after receiving the institution's response, which is outside the 30-day period provided by section 50(2) of the Act. This submission was also made by counsel for one of the affected parties, Connaught Laboratories Limited ("Connaught").

The institution's decision letter was dated December 21, 1989. The letter of appeal was dated January 19, 1990, and the envelope containing this letter was postmarked in Ottawa on the same date. The letter of appeal was received by our office on January 22, 1990.

Both the institution and the affected party maintain that the Commissioner is limited to the powers prescribed by the Act, and that section 50(2) of the Act should be interpreted literally. Connaught submits that, notwithstanding Order 155, the wording of section 50(2) is "clear and unequivocal and leaves no room for liberal interpretation". The institution submits that if the Commissioner acts "outside the parameters of the Act" and accepts the appeal, this would result in prejudice to the institution because it would "create uncertainty... and interfere with retention schedules for files established in conjunction with the Act".

Section 50(2) states:

> An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

In Order 155, dated March 19, 1990, former Commissioner Sidney B. Linden interpreted section 50(2). He pointed out that the nature of the appeals system established by the Act is informal, and that the overriding policy as defined in section 1 is to promote access to information in the custody or under the control of government institutions. At page 4 of Order 155, Commissioner Linden states that the Act should be interpreted:

> ... liberally in favour of access to the process, rather than strictly to deny access. This is especially true where the alleged lapse of time after the date when an appeal should have been filed is not significant, and where no prejudice has been shown by

> the institution or any other person affected by the alleged delay.

I agree with Commissioner Linden's reasoning. In this case, after the appeal file was opened and notices were sent to the parties, the institution replied by forwarding the records which responded to the appellant's request to this office. The issue of jurisdiction was not raised by the institution at that time or any other time prior to the submission of representations after the appeal had moved into the inquiry stage. The institution's submissions are based on the fact that the appeal was filed 32 days (as opposed to 30 days) after the decision had been made by the institution. No evidence of prejudice has been submitted by the institution or the affected party, and in the circumstances of this appeal, I find that I have jurisdiction to review the head's decision.

(2) records/severances not responsive to the request

The institution submits that 5 records are not responsive to the request. They are:

9. Briefing note, undated

14. Briefing note, October 12, 1989

15. Terms of Reference of Working Group, undated

16. Briefing note, October 6, 1989

17. Notes on Research Priority, undated

Record 12 is a blank page.

I have examined these records and I agree that they fall outside the scope of the appellant's request, and are not at issue in this appeal.

Four other Records (4, 5, 10 and 20) contain some severances which I also find to fall outside the scope of the appellant's request. In Record 4 (undated handwritten notes), the institution has severed the name of an individual. In Record 5, it has severed the name of the same individual along with that person's telephone number. The institution is prepared to release the remaining parts of these two Records. The appellant's request makes no reference to personal information about specific individuals, and I find that the personal information severed from Records 4 and 5 falls outside the scope of the request.

Record 10 is a Briefing Note, dated October 6, 1989 which contains three headings: Issues;, Background; and Current Status. The institution has severed certain information in the "Background" and

"Current Status" portions under sections 12 and 18. The final severance in the "Current Status" portion consists of an individual's name and, for the reasons outlined above, I find that this information falls outside the scope of the request. The other severances in Record 10 will be dealt with in my decision of sections 12 and 18.

Record 20 is a Briefing Note, dated October 6, 1989. An individual's name appears on page 3 in a heading and in the

subsequent paragraph under that heading. Again, I find this information falls outside the scope of the request. The remaining severances in this section of Record 20 will be dealt with in my decision of sections 15(a) and (b).

(3) abandoned exemption claims

In its representations or at subsequent points during the processing of this appeal, the institution and certain affected parties have abandoned all exemption claims with respect to the following records:

1. Action Memo, July 14, 198[?]

18. Facsimile Transmission Sheet, October 10, 1989

26. Executive Summary, August 16, 1989, 21 pages

Because the institution and affected parties are prepared to have these records released in their entirety, it is no longer necessary for me to consider them in the context of this order.

Records at Issue in this Appeal

Therefore, the following records, to which the appellant has been denied access in whole or in part, remain at issue in this appeal:

2. Memorandum, July 13, 1989

3. Letter, June 22, 1989, 2 pages

6. Handwritten notes of meeting, Aug. 25/89, 2 pages

7. Briefing note, undated

8. Cabinet Office Minute, August 23, 1989

10. Briefing note, October 6, 1989 (severances)

* 11. Cabinet Office Minute, August 23, 1989 (duplicate of Record 8)

13. Letter, August 25, 1989, 5 pages

19. Memorandum, October 10, 1989 (severances)

20. Briefing note, October 10, 1989, 4 pages

21. Action request, August 31, 1989 (severances)

22. Action request, October 31, 1989 (severances)

* 23. Cabinet Office Minute, August 23, 1989 (duplicate of Record 8)

* 24. Letter, August 25, 1989, 5 pages (duplicate of Record 13)

25. Letter, August 21, 1989

27. Letter, October 17, 1989, 3 pages

28. Report, no date, 7 pages

Because Records 11 and 23 are duplicates of Record 8 and Record 24 is a duplicate of Record 13, I shall not refer to them in my discussion. My order with respect to Records 8 and 13 shall apply to their duplicates.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether the mandatory exemption provided by section 12(1) of the Act applies to any of the requested records.

B. Whether the discretionary exemption provided by section 15 of the Act applies to any of the requested records.

C. Whether the discretionary exemption provided by section 18(1) of the Act applies to any of the requested records.

D. Whether the mandatory exemption provided by section 17 of the Act applies to any parts of the requested records.

E. Whether section 11(1) of the Act applies to any of the requested records.

F. If the answer to any of Issues B, C and D is yes, whether there is a compelling public interest in disclosure of any record exempted under sections 15, 17 and/or 18 that clearly outweighs the purpose of the exemptions, as provided by section 23 of the Act.

ISSUE A: Whether the mandatory exemption provided by section 12(1) of the Act applies to any of the requested records.

The institution claims section 12(1) with respect to the following 9 Records: 6, 7, 8, 10, 13, 20, 21 and 25.

The institution has relied on the introductory wording of section 12(1) for all records except Record 8, for which it has claimed section 12(1)(a). These provisions read as follows:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,
>
> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

It has been determined in a number of previous orders that the use of the word "including" in the introductory wording of section 12(1) means that the disclosure of any record, not just the types of records listed in various subparagraphs of section 12(1), which would reveal the substance of deliberations of an Executive Council or its committees qualifies for exemption under subsection 12(1). (Order 22)

The institution has agreed that none of the records were actually submitted to Cabinet. Commissioner Tom Wright dealt with a similar situation in Order P-226, dated March 26, 1991. At page 6 of that Order he stated:

> In order for a record which has never been placed before an Executive Council or its committees to qualify for exemption under subsection 12(1), the institution must establish that disclosure of the record would "reveal the substance of deliberations of an Executive Council or its committees". In the context of the subsection 17(1) exemption, I have stated that the disclosure of information contained in a record would reveal information supplied by another party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution [See Order 203 (Appeal 890131), dated November 5, 1990 at p.13.]

I agree with Commissioner Wright's reasoning, and adopt it for the purpose of this appeal. Therefore, records which were never placed before an Executive Council or its committees but whose disclosure would reveal the substance of deliberations or permit the drawing

of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees, could qualify for exemption under section 12(1).

I shall now deal with each of the records exempted by the institution under section 12(1).

Record 6

The institution submits that these handwritten notes, dated August 25, 1989, refer to the fact that the subject matter of the notes was considered by Cabinet, indicate the Cabinet's position, and identify that recommendations were made on those subject matters. Having examined this record, in my view, its release would reveal the substance of deliberations of the Executive Council, and the record is therefore properly exempt in its entirety.

Record 7

This Briefing Note was used to accompany Record 13. Having examined it, I find that disclosure would permit the drawing of accurate inferences as to the substance of deliberations of Cabinet, and it is therefore also properly exempt in its entirety.

Record 8

This record is a minute of the Cabinet meeting of August 23, 1989, and, as such, satisfies the requirements for exemption under section 12(1)(a).

Record 10

The information under the heading "Background" in this Briefing Note repeats the information contained in Record 7, and is therefore properly exempt.

Record 13

The institution submits that this record, a letter dated August 25, 1989, was prepared at the request of Cabinet and outlines the government's position on the proposed takeover of Connaught. I agree that disclosure of this record would reveal the substance of deliberations of Cabinet, and it is properly exempt under section 12(1).

Record 20

The top half of page two of this Briefing Note was exempted under section 12(1). It re-states the deliberations of Cabinet as outlined in Record 8, and is therefore properly exempt.

Record 21

This record is an Action Request, portions of which have been severed under section 12(1). Having reviewed this record, in my view, it contains nothing which would reveal the deliberations

of Cabinet, nor would disclosure of the record enable anyone to draw accurate inferences with respect to the substance of any such deliberations. Therefore, I find that these severances do not qualify for exemption under section 12(1).

Record 25

This record is a covering letter which accompanied Record 26. I have examined the record and, in my view, it does not contain any information which would reveal any deliberations of Cabinet. Therefore, it does not qualify for exemption under section 12(1).

In summary, I find that Records 6, 7, 8 and 13 in their entirety, and parts of Records 10 and 20 qualify for exemption under section 12(1). Records 21 and 25 do not qualify for exemption under this section.

ISSUE B: Whether the discretionary exemption provided by section 15 of the Act applies to any of the requested records.

The institution claims that the following five records qualify for exemption under section 15 of the Act: 2, 3, 19, 20 and 22.

In some instances the institution specifically claims sections 15(a) and (b), while in others it merely claims section 15. Because there is no evidence to suggest that section 15(c) would apply to any of the records, I will restrict my discussions to sections 15(a) and (b).

These sections read as follows:

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

At page 8 of Order 210, dated December 19, 1990, Commissioner Wright outlined the following tests for exemption under section 15:

> In order to qualify for exemption under subsection 15(a), the records must meet the following test:
>
> 1. The institution must demonstrate that disclosure of the records could give rise to an expectation of prejudice to the conduct of intergovernmental relations; and
>
> 2. The relations which it is claimed would be prejudiced must be intergovernmental, that is, relations between an institution and another government or its agencies; and

> 3. The expectation that prejudice could arise as a result of disclosure must be reasonable.
>
> ...
>
> In order to qualify for exemption under section 15(b), the records must meet the following test:
>
> 1. The records must reveal information received from another government or its agencies; and
>
> 2. The information must have been received by an institution; and
>
> 3. The information must have been received in confidence.

For a record to be exempt under these sections, each element of the three part test under either section 15(a) or 15(b) must be satisfied.

The introductory portion of section 15 contains the words "could reasonably be expected to". These words have been interpreted in a number of previous orders involving various exemptions which include that phrase. Section 15 requires that the expectation that disclosure of a record could prejudice the conduct of intergovernmental relations or reveal information received in confidence by the institution from another government or its agencies, must not be fanciful, imaginary or contrived, but rather one that is based on reason.
I shall now deal with each of the records which have been exempted under sections 15(a) and/or (b).

Records 2 and 3

Record 2 is a memorandum from an Assistant Deputy Minister at the institution to a senior Policy Co-ordinator for the Ministry of Industry, Trade and Technology, transmitting Record 3, which is a copy of a letter from the Deputy Minister of the institution to the Deputy Minister of Intergovernmental Affairs. These records refer generally to discussions between the federal and provincial governments regarding a certain aspect of the Connaught sale. The federal Department of Health and Welfare has consented to disclosure of these records. The one provincial government specifically referred to in Record 3 was notified, but declined to make representations.

As far as section 15(a) is concerned, the institution submits that release of the information contained in these two records would "put in the public domain the provinces' positions and the fact that they have been involved in the discussions surrounding the proposed takeover of Connaught". However, the institution does not explain how the release of the information would prejudice relations between the institution and another government or governments, and I find that the requirements of section 15(a) have not been satisfied.

Turning to section 15(b), I find that neither record meets the requirements for exemption. Before even considering the question of confidentiality, in order to satisfy the first part of the test under section 15(b), the institution must establish that release of the record would reveal information received from another government. It is not clear from reading these two records that any information contained in them was provided by another government, and the representations of the institution do not

establish that this was the case. Therefore, I find that Records 2 and 3 do not qualify for exemption under section 15(b).

[I have received representations from one affected party concerning the application of section 17 to Record 3, and I will consider this record in my discussion of Issue D].

Record 19

This record is a covering memorandum from an Assistant Deputy Minister at the Ministry of Industry, Trade and Technology to an official at the institution, attaching a copy of Record 20. Record 19 was released, subject to two severances which deal with attendees and the subject matter of a meeting. The institution has not addressed this record in its representations, and I find nothing in these severances to indicate that sections 15(a) and/or (b) would apply. Therefore, this record does not qualify for exemption under section 15.

Record 20

This record is a Briefing Note dated October 10, 1989, one portion of which on page 3 was severed under sections 15(a) and (b). This portion refers to a particular proposal from a named individual, one provincial government's position regarding the proposal, and another government's possible position. I have already determined that the name of this individual is not responsive to the appellant's request, and will remain severed. As far as the other severances are concerned, I have been provided with insufficient evidence by the institution to establish a reasonable expectation of prejudice to the conduct

of intergovernmental relations if the information contained in the severances is released [section 15(a)], or that the severed information was received in confidence
from either of the two governments referred to in the record [section 15(b)]. Therefore, I find that these severances in Record 20 do not qualify for exemption under sections 15(a) or (b).

Record 22

This record is an Action Request form, dated October 31, 1989. There is no mention of any other governments in this record, and nothing to indicate that release of the information could prejudice relations with other governments. In my view, this record clearly falls outside of the ambit of section 15 entirely, and does not qualify for exemption under that section.

In summary, I find that no portion of Records 2, 3, 19, 20 and 22 qualify for exemption under sections 15(a) or (b).

ISSUE C: Whether the discretionary exemption provided by subsection 18(1) of the Act applies to any of the requested records.

Records 10, 20, 27 and 28 were exempted either in whole or in part under sections 18(1)(d), (e) and (g).

These sections read as follows:

> A head may refuse to disclose a record that contains,

> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> (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.

In its representations, the institution acknowledges that negotiations concerning the takeover have been completed. Because section 18(1)(e) requires that negotiations be carried on currently, or will be carried on in the future, I find that section 18(1)(e) does not apply in the circumstances of this appeal. (Orders 141, 204, P-219, P-278)

Section 18(1)(d) speaks of information which, if disclosed, could reasonably be expected to be injurious to the financial interests of the Government of Ontario or its ability to manage the economy of Ontario. This section requires that the expectation of one of the enumerated harms be based on reason, and that the institution provide evidence in support of its claim that is detailed and convincing. (Orders 188, 163, P-218, P-229, P-248)

As far as section 18(1)(g) is concerned, in Order P-229, dated May 6, 1991, Commissioner Wright established the following test which must be satisfied in order for a record to qualify for exemption. An institution must establish that a record:

1. contains information including proposed plans, policies or projects; and

2. that disclosure of the information could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or

   (ii) undue financial benefit or loss to a person.

I shall now consider each of the records exempted by the institution under sections 18(1)(d) and/or (g).

Record 10

I have already determined that the name of the individual contained in the "Current Status" portion of this record is not responsive to the appellant's request, and will remain severed. The institution claims the name of one of the affected parties and certain date references contained in this portion of the record are exempt under section 18(1). The affected party has consented to disclosure of this information, and, in my view, it does not satisfy the requirements of either section 18(1)(d) or (g), and should be released.

Record 20

Various parts of this record were severed under section 18(1). In its representations, the institution states that section 18(1)(d) applies because, at the time the institution denied access, the proposed takeover was being discussed within the government, and disclosure "could have affected", among other things, the economy of Ontario and the supply and availability of certain products. It further states:

> ... disclosure of the information could have affected the ability of the Government of Ontario to ensure that research money provided to Connaught would be used in Ontario. ... This would affect Ontario-based jobs, investment research and development in Ontario.

In my view, the institution has not provided sufficient evidence to substantiate its claim that such harm could reasonably be expected to result if the information severed from Record 20 were disclosed, and I find that the requirements of section 18(1)(d) have not been satisfied.

With respect to section 18(1)(g), the institution states that: "The proposed plans of the Government of Ontario to seek certain guarantees regarding the proposed merger are evident in the records". Based on the representations provided by the institution, I am unable to determine what proposed plans, policies or projects the institution is referring to, and I find that the first part of the test under section 18(1)(g) has not been satisfied. As far as the second part of the test is concerned, the institution's representations refer to potential harm to certain affected parties. In my view, these types of factors are properly considered in the context of section 17(1),

not section 18(1), and I will address them in my discussion of Issue D.

Records 27 and 28

The institution's representations with respect to these two records focus on the potential harm to certain affected parties if the records were disclosed. As noted above, I find that these considerations are properly dealt with under section 17(1) of the Act, and therefore, these records do not qualify for exemption under sections 18(1)(d) and/or (g).

In summary, I find that Records 10, 20, 27 and 28 do not qualify for exemption under sections 18(1)(d) and/or (g). However, I will consider the possible application of section 17(1) to Records 20, 27 and 28.

ISSUE D: Whether the mandatory exemption provided by section 17 of the Act applies to any parts of the requested records.

The following four records should be considered under section 17(1) of the Act: 3, 20, 27 and 28.

Sections 17(1)(a), (b) and (c) of the Act read as follows:

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

In Order 36, dated December 28, 1988, former Commissioner Sidney B. Linden established a three part test, each part of which must be satisfied in order for a record to be exempt under sections 17(1)(a), (b) or (c). Subsequent to the issuance of Order 36, section 17(1) was amended to include a new section 17(1)(d). This new section is not covered by the test established in Order 36, and is also not relevant in the circumstances of this appeal. The test for exemption under section 17(1)(a), (b) or (c) 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 harms specified in (a), (b) or (c) of subsection 17(1) will occur.

The institution did not provide any representations regarding section 17(1), relying instead on the representations provided by the affected parties.

I shall now consider whether the requirements of the three-part test have been satisfied for each of the records.

Record 3

Connaught submits that this record qualifies for exemption under section 17(1).

With respect to the first part of the test for exemption, Record 3 contains information concerning pricing structure which, in my view, is properly classified as "commercial information".

As far as the second part of the test is concerned, the affected party must establish that the information contained in the records was "supplied in confidence implicitly or explicitly". In her representations, counsel for Connaught acknowledges that she is unable to say with certainty that the information was supplied in confidence, because she has insufficient evidence to support this position. However, she submits that it is a "long-standing, absolute corporate policy that the rationale for pricing structures never be revealed outside the company", and that this points to an implicit understanding of confidentiality if this type of information were to be submitted to the institution. Having reviewed Record 3, and taking into account the submissions made by counsel for Connaught, I find that the second part of the test has been satisfied.

At page 7 of Order 36, Commissioner linden set out the requirements for meeting the third part of the test as follows:

> In my view, in order to satisfy the Part 3 test, the institution and/or third party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a) - (c) would occur if the information was disclosed (emphasis added).

Counsel for Connaught submits that disclosure of the pricing information would "interfere with [its] negotiations with its customers ... and thereby cause undue loss". No evidence has been provided to explain how disclosure could interfere with negotiations, and I am unable to conclude from my review of the record that disclosure could reasonably be expected to interfere with customer negotiations. Therefore, I find that the third part of the test has not been satisfied, and Record 3 does not qualify for exemption under section 17(1).

Record 20

Connaught claims that the 5th paragraph on page 4 of this record contains information regarding pricing, and is exempt under section 17(1).

In my view, the information contained in this paragraph is similar in nature to the information in Record 3, and I find that it does not qualify for exemption under section 17(1) for the reasons noted in my discussion above.

Records 27 and 28

Record 27 is a covering letter to the head of the institution from an official at Institut Merieux which accompanied Record 28. It summarizes several points of discussion included in Record 28. Record 28 is a report entitled "Institute Merieux's Commitments re: Combination with Connaught BioSciences Inc".

During the course of this appeal, Connaught agreed to the disclosure of Record 26, which included much of the same information contained in Records 27 and 28. The portions of Records 27 and 28 which remain at issue are only those which differ from Record 26, and counsel for Connaught has provided representations which address these differences.

The information contained in these records relates to corporate structure and planning, and refers to production and marketing considerations. I find that this information is properly characterized as "commercial information" and that the first part of the section 17(1) test has been satisfied.

As far as the second part of the test is concerned, counsel for Connaught makes the same arguments outlined in my discussion of Record 3, and I find that this part of the test has also been satisfied.

Turning to the third part of the test, Connaught submits that the records outline its corporate plans, and disclosure "would be invaluable to its competitors". According to Connaught, these plans:

> "... precisely detail the markets and products on which Institut Merieux intends to focus and how it intends to implement the plans. Competitors, knowing the exact stage of implementation of the plans, would be able to adjust their own corporate strategies

> accordingly in order to reach certain goals prior to Institut Merieux".

It is submitted that disclosure would prejudice significantly the competitive position of Connaught and Institut Merieux, resulting in a loss to them and undue gain to their competitors [sections 17(1)(a) and (c)], and would inhibit the submission of such corporate strategies to the institution in the future [section 17(1)(b)].

Having reviewed the contents of these two records and carefully reviewed the representations submitted by counsel for Connaught, I find that some, but not all, of the severed information satisfies part three of the test.

In my view, release of information relating to the broad corporate strategies and projected financial, commercial and research activities of Connaught could reasonably be expected to significantly prejudice the company's competitive position [section 17(1)(a)], and/or result in undue loss to the affected party or gain to its competitors [section 17(c)]. However, I find that this rationale does not apply to information specifically related to the Connaught takeover, which is historical in nature and, in my view, not sufficiently connected to ongoing corporate operations to satisfy the requirements of the third part of the section 17(1) test for exemption.

Counsel for Connaught also makes the following submission with respect to its claim for exemption under section 17(1):

> [Record 27] with its enclosure [record 28], describes the commitments made by Institut Merieux to Investment Canada. Pursuant to section 36 of the Investment

> Canada Act, such information is privileged. Subsection 24 (1) of the Access to Information Act mandates non disclosure of information the disclosure of which is restricted by or pursuant to any provision set out in schedule II and Schedule II list section 36 of the Investment Canada Act. A company would expect such information would be similarly protected from disclosure at the provincial level. The information contained in the records at issue in this Appeal is more detailed than that disclosed by Investment Canada.

I have reviewed section 36 of the Investment Canada Act and I note that a number of exceptions apply to the privilege contained in this section. I also note that, according to counsel for Connaught, Record 28 is not identical to the document submitted to Investment Canada, and was in fact prepared specifically for

submission to the institution. Based on the information provided by counsel for Connaught, I am not satisfied that section 36 of the Investment Canada Act applies to preclude the release of the portions of Records 27 and 28 that I have found do not qualify for exemption under section 17(1) of the Act.

In summary, I find that Records 3 and 20 do not qualify for exemption under section 17(1), and that only those portions of Records 27 and 28 noted above satisfy the requirements for exemption.

ISSUE E: Whether section 11(1) of the Act applies to any of the requested records.

The appellant has suggested that section 11(1) may be applicable to the records. The section states the following:

> 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.

Section 11 is a mandatory provision which requires the head to disclose records in certain circumstances. In its representations, the institution outlines the head's position that disclosure of the records would not reveal any grave environmental, health or safety hazard to the public. As per decisions made in previous orders, it is my view that the Information and Privacy Commissioner or his delegate does not have the power to make an Order pursuant to section 11 of the Act. (Orders 65, 187)

ISSUE F: If the answer to any of Issues B, C or D is yes, whether there is a compelling public interest in disclosure of any records exempted under sections 15, 17 and/or 18 that clearly outweighs the purpose of the exemptions, as provided by section 23 of the Act.

In my discussion of Issue D, I found that certain portions of Records 27 and 28 qualify for exemption under section 17(1) of the Act. I must now determine if the so-called "public intent override" applies to any of this exempted information.

Section 23 of the Act states:

> An exemption from disclosure of a record under section 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.

The appellant submits that "the sale has public health and safety issues surrounding it and Ontario has an interest in the outcome", but offers no further evidence to support his position.

Where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions. To find otherwise, would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, I have reviewed the severances which I have found to be exempt under section 17(1), with a view to determining whether there is a compelling public interest which clearly outweighs the purpose of this exemption.

Based on my review of Records 27 and 28, I am unable to conclude that there is a compelling public interest in the disclosure of the portions I have found to be exempt, which clearly outweighs the purpose of the section 17(1) exemption.

I have provided a highlighted copy of Records 10, 20, 27 and 28 to the institution, indicating the severances which I have found are properly exempt under section 17(1), and certain personal information which is outside the scope of this appeal.

ORDER:

1. I order the head to disclose Records 1, 18 and 26 to the appellant in their entirety.

2. I order the head to disclose Records 4 and 5 to the appellant, with the severances of personal information originally made by the head.

3. I order the head to disclose Records 2, 3, 19, 21, 22 and 25 to the appellant in their entirety, and all portions of Records 10, 20, 27 and 28 with the exception of the severances which I have highlighted in the copy of the records provided to the institution.

4. I uphold the head's decision not to disclose Records 6, 7, 8, 11, 13, 23 and 24.

5. I order that the institution not disclose these records described in provision 3 of this Order until thirty (30) days following the date of issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided notice has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that the records listed in provision 3 of this Order be disclosed within thirty-five (35) days of the date of this Order.

6. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o

Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

7. In order to verify compliance with this order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to provisions 1, 2 and 3, upon request.

Original signed by: April 24, 1992
Tom Mitchinson
Assistant Commissioner