



# ORDER P-583

## Appeal P-910609

### Ministry of Finance (Ontario Securities Commission)

## ORDER

#### BACKGROUND:

The Ministry of Financial Institutions (now the Ministry of Finance) (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of all records relating to an investigation conducted by the Ontario Securities Commission (OSC) into a loan made by a company to a controlling shareholder of another company. The Ministry denied access to the responsive records pursuant to sections 14(1)(d) and 14(2)(a) of the Act. The requester appealed the Ministry's decision.

During the course of the appeal, the Ministry released portions of the records and located additional records responsive to the request. The Ministry issued two subsequent decision letters claiming the application of sections 13(1), 14(1)(g), 17(1), 19 and 21 of the Act. The appellant narrowed the scope of the appeal to exclude the names and other personal identifiers of individuals who had filed complaints regarding the loan with the Ministry. These names and identifiers are no longer at issue and will not be addressed in this order.

Notice that an inquiry was being conducted to review the decision of the Ministry was sent to the appellant, the Ministry and six persons whose interests may be affected by the disclosure of information at issue in this appeal (the affected persons). Representations were received from the appellant, the OSC, on behalf of the Ministry and one affected person.

While these representations were being considered, Commissioner Tom Wright issued Order M-170 which interpreted several statutory provisions of the Municipal Freedom of Information and Protection of Privacy Act in a way which differed from the interpretation developed in previous orders. Since a new approach to the operation of the Municipal Freedom of Information and Protection of Privacy Act was being adopted and because similar statutory provisions under the Act are at issue in the present appeal, it was determined that copies of Order M-170 should be provided to all the parties. The parties were then afforded the opportunity to state whether the contents of Order M-170 would cause them to change or supplement the representations which they had previously made. Additional representations were received from the OSC, on behalf of the Ministry.

#### THE RECORD:



The Ministry has organized the records into the following groupings:

**RECORD A:** Correspondence: a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, q, r, s, t, u

Interview notes: a, b, c, d, e, f, g, h, i

Analysis: a, b, c, d, e, f, g, i

Documents: Folders A and B

**RECORD B:** B1, B2, B3, B4, B5

**RECORD C:** C1, C2, C3

**RECORD D:** Record D71 is not responsive to the request and not included in the following list:

Package 1: D1 (attachment only), D2, D7, D14, D19, D23, D28, D37, D41, D43, D44, D45, D52, D59, D60, D68, D74

Package 2: D1, D3, D4, D5, D6, D8, D9, D10, D11, D12, D13, D15, D16, D17, D18, D20, D21, D22, D24, D25, D26, D29, D30, D34, D36, D39, D46, D47, D48, D53, D55, D58, D61, D62, D63, D70, D77, D78, D82, D83, D84, D85, D86, D87, D88, D89, D90, D91, D92, D93, D94, D95, D96, D97, D98, D99, D100, D101, D102, D103, D104, D105, D106, D107, D108, D109, D110, D111, D112, D113, D114, D115

Package 3: D27, D31, D32, D33, D35, D38, D40, D42, D49, D50, D51, D54, D56, D57, D64, D65, D66, D67, D69, D72, D73, D75, D76, D79, D80, D81

The records contain a number of duplicate documents. In addition, some "records" as identified by the Ministry are actually comprised of more than one document. For example, Record A-Correspondence: (a) actually consists of 11 different documents, portions of which are duplicated in Record D1 and other correspondence sub-files. Where possible, for ease of reference, I have numbered each document, i.e. Record A-Correspondence: a(i), (ii) etc.

Appendix A sets out each document at issue, its description, duplicates(if any), the exemption(s) claimed by the Ministry and the disposition in this order. My decision on the first enumerated record will apply to its duplicates, if any. Because, as I have indicated, the appellant narrowed the scope of the appeal to exclude those records in which only the identifiers of the complainants were not disclosed to him, the number of records described in the Appendix is necessarily much smaller than that indicated by the Ministry as being responsive to the request.

As I have indicated, during the course of this appeal the Ministry issued three decision letters, providing four different indices to the records with the exemptions claimed for each. Along with its representations, the Ministry provided this

office with a "Matrix of Documents" indicating the exemptions claimed for the records at issue. In some cases, this is not consistent with the

exemptions cited and discussed in the representations themselves. Where there is an inconsistency, I have considered only those exemptions included in the representations themselves.

In addition, where a discretionary exemption had been cited in a previous index or decision letter but was not mentioned in the representations or matrix, I have not considered it. Where an exemption has been cited in the representations as being applicable to a duplicate record, I have considered it with respect to both records.

In addition, the Ministry did not provide representations with respect to Record B2. Upon review of this record, I find that there are no mandatory exemptions which apply, and I order Record B2 to be disclosed to the appellant.

## **ISSUES:**

The issues in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.
- C. Whether the mandatory exemption provided by section 17(1)(b) of the Act applies.
- D. Whether the discretionary exemptions provided by sections 14(1)(d) and/or 14(1)(g) of the Act apply.
- E. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.
- F. Whether the discretionary exemption provided by section 19 of the Act applies.
- G. Whether the discretionary exemption provided by section 13 of the Act applies.
- H. With respect to any exempt records, whether there is a compelling public interest in disclosure of the records which clearly outweighs the purpose of the exemption(s).

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.**

Section 2(1) of the Act states, in part, that:

"personal information" means recorded information about an identifiable individual.

I have carefully reviewed all the records that the Ministry claims contain personal information.

It has been established in a number of previous orders that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not "personal information" (Orders P-326, P-333 and P-377). In this appeal, some of the individuals' information arises in the context of their professional capacity, either as employees of the Ministry or as officers or employees of a company and, in my view, is not "personal information". However, some of these records also contain information which falls within the definition of personal information and relates to individuals other than the appellant. These records will be addressed under the appropriate issues.

In my view, Records A-Correspondence: (a)(iii), B5, and C1 do not contain any personal information. Section 21 of the Act was the only exemption applied to Record A-Correspondence: (a)(iii). As it does not contain personal information, section 21 cannot be applied to deny access to this record and I order that it be released to the appellant.

In addition, the only personal information contained in Record A-Correspondence: (s) is the identity of a complainant, information which is no longer at issue in this appeal. As section 21 was the only exemption applied to this record, I order the Ministry to release this record to the appellant, with the identity of the complainant severed.

It is also my opinion that the only personal information remaining at issue found in Records A\_Correspondence: (r), D28, D37 (the internal memorandum dated July 30, 1991-3 copies), D41 (the internal memorandum dated July 31, 1991), D43 (the internal memoranda dated June 12, 1991), D45, D59, D60 (the internal memoranda dated June 26, 1991, July 4, 1991 and July 5, 1991), D68, D70, D74, D75 and D97 is the identities of complainants. As this information is no longer at issue, I will not consider these records under Issue B.

**ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.**

Under Issue A, I found that certain records contain the personal information of individuals other than the appellant.

In its representations, the Ministry claims that, of the records remaining at issue, section 21 of the Act applies to the following records:

Record A: Correspondence: (a)(i) and (ii), (b)(i) and (ii), (e), (n), (q) and (r)

Record A: Interview Notes: (a), (b), (c), (d), (e), (f), (g) and (i)

Record A: Analysis: (a), (b), (e), (f), (i)(i)-(xix)

Record B: B1, B3 and B5

Record C: C1, C2 and C

Record D: D19, D27, D28, D37, D38, D40, D41, D43, D44, D45, D49, D51, D59, D60, D64, D65, D68, D69, D70, D74, D75 and D97

The Ministry has not claimed that the exemption provided by section 21 of the Act applies to several additional records. However, because the personal information exemption found in this section of the Act is mandatory unless one of the exceptions listed in section 21(1) is applicable, I will consider the application of section 21 to the following records as well:

Record A: Correspondence: (h)(ii), (j) and (u)

Record A: Interview Notes: (h)

Record A: Analysis: (c)

Record B: B3

Section 21 of the Act prohibits the disclosure of personal information to any person other than to the individual to whom the information relates, except in certain circumstances listed under the section.

In my view, the only exception to the section 21(1) mandatory exemption which has potential application in the circumstances of this appeal is section 21(1)(f), which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2), (3), and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. In Order M\_170, Commissioner Tom Wright addressed the interrelationship between sections 14(2), (3) and (4) of the Municipal Freedom of Information and Protection of Privacy Act (which are similar to sections 21(2), (3) and (4) of the Act) in the following way:

... [W]here personal information falls within one of the presumptions found in section 14(3) of the Act, a combination of circumstances set out in section 14(2) of the Act which weigh in favour of disclosure, cannot collectively operate to rebut the presumption.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I adopt this approach for the purposes of this order.

In its representations, the Ministry relies on section 21(3)(f) of the Act to support its position that the disclosure of the information contained in these records would constitute a presumed unjustified invasion of the personal privacy interests of individuals other than the appellant. This provision states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

I agree with the Ministry's views. The records clearly describe the financial history and/or activities of various individuals, particularly that of the major shareholder referred to earlier. Accordingly, I find that the requirements for a presumed unjustified invasion of the personal privacy of one or more of these individuals under section 21(3)(f) have been established for all or portions of the following records:

Record A: Correspondence: (a)(i), (ii); (b)(i), (ii); (e); (h)(ii); (j); (n); (u)

Record A: Interview Notes: (a), (b), (c), (d), (e), (f), (g), (h), (i)

Record A: Analysis: (b) and (c)

Record B: B1

Record C: C2 and C3

Record D: D19, D51 (portions of the May 13, 1991 letter), D69

I have considered section 21(4) of the Act and find that none of the personal information at issue falls within the ambit of this provision. The appellant has argued that the public interest override set out in section 23 of the Act applies.

Because he has also argued that section 23 applies to records that have been exempted under other sections of the Act, I will address all of the public interest arguments under Issue H.

**ISSUE C: Whether the mandatory exemption provided by section 17(1)(b) of the Act applies.**

In its representations, the Ministry claims that the exemption provided by section 17(1)(b) of the Act applies to the following records:

- Record A: Correspondence: (f), (j) and (k)
- Record A: Analysis: (c), (i)(i)-(xix)
- Record A: Documents: Folder A: (a) and (b)
- Record B: B4

As I have disposed of Record A-Analysis: (c) under Issue B, I will not consider it here.

Section 17(1)(b) of the Act provides:

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,

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;

For a record to qualify for exemption under section 17(1)(b), the Ministry and/or the affected person resisting disclosure must satisfy each part of the following three-part test:

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 the harm specified in section 17(1)(b) will occur.

[Order 36]

**Part 1**

Having reviewed the records remaining at issue to which the Ministry has applied section 17(1)(b) of the Act, I am satisfied that they contain commercial and/or financial information. In my opinion, the first part of the section 17 test has been satisfied.

## **Part 2**

The Ministry and the affected person who provided representations both submit that the records at issue were supplied to the Ministry in confidence. The Ministry states:

Each item was provided by [the affected person]'s counsel in response to staff requests and each sets out information which [the affected person]'s counsel understood staff would hold in confidence.

The affected person submits:

As stated to the OSC at the time that the materials were voluntarily released by [the affected person] to the OSC, [the affected person] wished to keep the details of the transaction confidential ... It was in the spirit of co-operation that all records with respect to this transaction were given by [the affected person] to the OSC along with other details of other transactions which were of a confidential nature. On the understanding that the information would remain confidential, no attempt was made to withhold documentation based on any privilege that might have been or may still be available to [the affected person].

I am satisfied that in the circumstances of this appeal, the information at issue was supplied to the Ministry in confidence. In my view, the second part of the section 17 test has been met with respect to all of the records for which the Ministry has claimed the application of section 17(1)(b) with the exception of Records A-Correspondence: (j) and (k). These records are correspondence from OSC counsel to two affected parties. Disclosure of these records would not reveal financial or commercial information supplied in confidence to the Ministry. As each part of the three-part section 17 test must be satisfied, I find that these two records do not qualify for exemption pursuant to section 17(1)(b).

## **Part 3**

To satisfy the third part of the test, the Ministry and/or the affected person 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 section 17(1)(b) would occur if the information was disclosed. Generalized assertions of fact in support of what amounts, at most, to speculations of possible harm do not satisfy the requirements of the third part of the test (Orders 36, P-373, P-394 and P-400).

In their representations, both the Ministry and the affected person describe the circumstances under which the information was provided to the Ministry. As indicated above, the affected person voluntarily provided extensive information in the spirit of co-operation to assist the Ministry in its investigation even though the information was of a



sensitive nature. Both parties stress that this information was provided on the understanding that it would remain confidential. Both the Ministry and the affected person have described potential negative consequences to the affected person should certain information be released.

The Ministry, when conducting investigations, relies on the co-operation of its sources in order to obtain the maximum amount of relevant information possible in order to reach an informed and proper conclusion. This, in turn, benefits those members of the public affected by the results of the investigation. Release of information supplied in confidence, particularly information provided voluntarily, could have a damaging effect on the Ministry's ability to conduct investigations in the future. This, clearly, would not be in the public interest.

Based on the representations of the Ministry and the affected person and a careful review of the records, I am satisfied that Records A-Correspondence: (f), A-Analysis: (i)(i)-(xix), A\_Documents: Folder A: (a) and (b) and B4 satisfy the requirements of section 17(1)(b) of the Act.

**ISSUE D: Whether the discretionary exemptions provided by sections 14(1)(d) and/or 14(1)(g) of the Act apply.**

Sections 14(1)(d) and (g) of the Act state:

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

- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

In order for the records to qualify for exemption under sections 14(1)(d) and/or 14(1)(g) of the Act, the matter which generated the records must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This definition reads:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

In Order 30, former Commissioner Sidney B. Linden established that investigations of complaints by the OSC under the provisions of the Securities Act are properly considered law enforcement matters. Accordingly, this element of sections 14(1)(d) and (g) has been satisfied.

#### **Section 14(1)(d)**

In its representations, the Ministry claims that section 14(1)(d) of the Act applies to Records A-Correspondence: (j) and (k), B1, B3 and B4.

As I have disposed of Records B1 and B4 in Issues B and C respectively, it is not necessary for me to consider these records further.

Generally section 14(1) of the Act provides that an institution may refuse to disclose a record where disclosure could reasonably be expected to produce the types of harms outlined in subparagraphs (a) through (I) of the section. In my view, the exceptions to access set out in section 14(1) of the Act require that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the specific information and the harm which is alleged (Order M-202).

With respect to section 14(1)(d) specifically, the Ministry must provide evidence of the circumstances in which the information was provided to the Ministry by the informant in order to establish confidentiality (Order 139).

The Ministry submits:

The first two of these items [Records B1 and B3] are Commission staff's handwritten notes of an interview conducted with persons who were participating in the staff investigation on the basis that the information would remain confidential. Due to the position of these individuals and the nature of the information to which they were privy, disclosure of the information in any format would disclose the identity of the individuals.

With respect to Records A-Correspondence: (j) and (k), the Ministry submits that these records "should be released only if appropriately severed in order to prevent disclosure of the identity of the person to whom each of those letters was written, pursuant to subsections 14(1)(d) and (g) of the FOI Act."

Record A-Correspondence: (j) is a letter from the Ministry to an individual asking if s/he might be available to discuss matters relevant to the investigation. There is no indication in the record whether the individual accepted the invitation or whether s/he eventually provided any

information. However, it is clear from other records at issue in this appeal that this individual was, in fact, interviewed by OSC staff and provided certain information to them on a confidential basis.

Record A-Correspondence: (k) is a letter from the Ministry to counsel for one of the affected persons. As is evident from the contents of the letter and other records at issue, this individual in fact provided information to the OSC on a confidential basis. I am, therefore, satisfied that both of these individuals can be considered as "confidential sources"

and that section 14(1)(d) of the Act applies to the portions of these records that would disclose the identity of these individuals. The remainder of these records would not disclose information furnished to the OSC only by these individuals.

Record B3 is a two-sentence Ministry internal memorandum indicating that examinations involving two individuals have yet to take place. As is the case with Records A\_Correspondence: (j) and (k), the record does not indicate whether the examinations eventually took place or whether information was provided by the individuals. Other records at issue confirm that the examinations were conducted and document the information provided by these individuals. Accordingly, I find that section 14(1)(d) applies to the two names in this record.

Section 14(1)(d) of the Act is a discretionary exemption. I have reviewed the Ministry's representations on this issue and find nothing improper in the manner in which it was exercised. Accordingly, I would not alter it on appeal.

### **Section 14(1)(g)**

Of the records remaining at issue, the Ministry claims that section 14(1)(g) applies to Records A-Correspondence: (q), D27, D28, D37, D38, D40, D41, D43, D44, D45, D49, D51, D59, D60, D64, D65, D68, D69, D70, D74, D75 and D97. As the Ministry has also claimed the application of this exemption to Records-A Correspondence: (j) and (k), I will consider it in the context of those portions of the record which I did not find exempt pursuant to section 14(1)(d).

As the Ministry notes in its representations, the records in question are primarily letters from members of the public to the Ministry and responses or draft responses to those letters. The Ministry has severed the identities of complainants, and has released to the appellant a major portion of the records to which section 14(1)(g) was applied.

In its representations, the Ministry does not explain why the information at issue should be considered "law enforcement **intelligence** information" nor how the disclosure of the information could reasonably be expected to interfere with the gathering of law enforcement intelligence information.

In my view, the Ministry has not established the applicability of section 14(1)(g) of the Act to the records for which this exemption has been claimed.

As there are no longer outstanding exemptions applied to Records A-Correspondence: (j) and (k), D27, D38, D40, D45, D49, D51, D64, D65, D68, D69, D70, D75 and D97, I order these records released to the appellant in accordance with the highlighted copies I have provided to the Ministry with its copy of this order. The highlighted portions represent complainant identifiers which, as I have indicated are not at issue in this appeal.

### **ISSUE E: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.**

Of the records remaining at issue, the Ministry claims in its representations that section 14(2)(a) applies to Records A-Correspondence: (i), A-Interview Notes: (h), A-Analysis: (a), (b), (e) and (f), B5 and C1.

Section 14(2)(a) of the Act states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order to properly exempt a record under section 14(2)(a), the Ministry must demonstrate that the record satisfies each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with the law.

[Order 200]

In order to satisfy the first part of the test, that is to constitute a report, a record must consist of a formal statement or account of the results of the collation and consideration of information (Order 200).

Having reviewed the records, it is my view that only Records A-Correspondence: (i), and A-Analysis: (a) and (f) are reports and the first part of the test has been met with respect to these three records.

Record A-Interview Notes: (h) consists of notes of questions OSC staff wished to ask certain parties they would be interviewing in the course of their investigation. Record A-Analysis: (b) is interview notes. Record A-Analysis: (e) is a memo prepared by legal counsel commenting on the transaction under investigation. Record B5 consists of handwritten notes concerning some issues involved in the investigation. Record C1 contains notes taken by OSC counsel at a meeting involving OSC staff and representatives of one of the affected parties. It is my view that these records are not reports and, in my opinion, cannot be exempt under section 14(2)(a) of the Act.

As there are no outstanding exemptions applied to Records B5 and C1, I order them released in full to the appellant.

In order to satisfy the second part of the test, the report must have been prepared as part of the actual investigation, inspection or law enforcement activity (Order 188). In other words, the author of the document must be, at the time of preparing the document, engaged in the conduct of an investigation (Order 170). Records A-Correspondence: (i) and A-Analysis: (a) and (f) were prepared in the course of an investigation pursuant to the Securities Act, satisfying the second part of the test.

With respect to the third part of the test, the Ministry and more particularly the OSC, has the function of enforcing and regulating compliance with the law, in this case, the Securities Act.

Therefore, I find that Records A-Correspondence: (i) and A-Analysis: (a) and (f) are properly exempt under section 14(2)(a) of the Act.

I have considered all of the circumstances of this appeal and am satisfied that there was nothing improper in the Ministry's exercise of discretion in this case.

**ISSUE F: Whether the discretionary exemption provided by section 19 of the Act applies.**

In its representations, the Ministry claims that section 19 applies to the following records remaining at issue: Records A-Correspondence: (g), (h), (i) and (ii), (q), (r) and (u); Record A-Interview Notes: (h), Records A-Analysis: (b) and (e) and D14.

Section 19 of the Act states:

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.

This section consists of two branches, which provide the Ministry with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order to qualify for exemption under Branch 1 (the common law solicitor-client privilege), the Ministry must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**  
(b) the communication must be of a confidential nature, **and**  
(c) the communication must be between a client (or his agent) and a legal advisor, **and**  
(d) the communication must be directly related to seeking, formulating or giving legal advice;

**OR**

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

In referring to the records at issue and others to which section 19 was originally applied, the Ministry in its representations states:

... each of these items is subject to solicitor-client privilege and each of them is a memorandum between Commission staff lawyers and sets out views and recommendations with respect to legal advice to be provided to the Commission with respect to whether or not proceedings should be recommended as a result of the investigation.

I do not agree with the Ministry's description of all of the records for which the section 19 exemption was claimed. As I have stated previously, Record A-Interview Notes: (h) consists of lists of questions to be posed to individuals to be interviewed. Record A-Correspondence: (h)(ii) is an update of action taken and remaining steps to be taken as outlined in an earlier memorandum. Record A-Correspondence: (u) is handwritten notes by Enforcement Senior Counsel, consisting of a point form chronology, list of issues and items to do. There is no indication in the record that these notes are for use by anyone other than the author. Record A-Analysis: (b) is described in the Ministry's index as handwritten background notes for a memorandum setting out facts as understood from interviews of various individuals and a review of certain documents. In my view, this record does not contain legal advice.

There is no indication in the Ministry's representations that any of the records at issue are or will be used for ongoing or anticipated litigation. In addition, with respect to the records mentioned in the previous paragraph, I am not satisfied that these records were prepared for use in giving legal advice. Accordingly, I find that Records A-Correspondence: (h)(ii) and (u); Records A-Interview Notes: (h), and A-Analysis: (b) are not exempt under section 19 of the Act.

Record D14 is an internal OSC memorandum which records the results of a staff member's review of the public files of a named corporation. Attached to the memorandum is the corporation's 1987 prospectus. In my view, this record does not qualify for exemption under either branch of section 19.

As there are no outstanding exemptions with respect to these records, I order them released to the appellant, subject to severances as described elsewhere in this order.

Records A-Correspondence: (g), (h)(i), (u), (q) and (r); A-Analysis: (e) are properly exempt under section 19 of the Act in that they were prepared by Crown counsel for use in giving legal advice.

I have considered all of the circumstances of this appeal and am satisfied that there was nothing improper in the Ministry's exercise of discretion in this case.

**ISSUE G: Whether the discretionary exemption provided by section 13 of the Act applies.**

In its representations, the Ministry claims that section 13 applies to Records D28, D37, D41, D43, D44, D52, D59, D60 and D74. These records consist mainly of internal memoranda and draft responses to members of the public. The drafts were circulated to a number of Ministry and OSC staff for comments, suggestions, and revisions.

Section 13(1) of the Act reads as follows:

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.

It has been established in a number of previous orders that advice for the purposes of section 13(1) must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process (Orders 118, P-304, P-348, P-356 and P-402). "Recommendations" should be viewed in the same vein (Orders 161, P-248, P-348, P-356 and P-402).

Of the records or portions of records remaining at issue to which section 13(1) has been applied, I find that Records D28, D37, D41 (with the exception of the letter of complaint dated April 2, 1991 which is not at issue), D43, D44, D59, D60 (with the exception of the letter of complaint dated 23 May, 1991 which is not at issue) and D74 qualify for exemption under section 13(1) of the Act.

Record D52 consists of facts and does not, in my opinion, contain advice or recommendations. This record does not qualify for exemption under section 13(1). As section 13(1) was the sole exemption claimed for this in record and, in my view, no mandatory exemptions apply, I order Record D52 released to the appellant.

Section 13(2) of the Act lists certain exceptions to the exemptions in section 13(1). In my opinion, none of these are relevant in the circumstances of this appeal.

I have considered all of the circumstances of this appeal and am satisfied that there was nothing improper in the Ministry's exercise of discretion in this case.

**ISSUE H: With respect to any exempt records, whether there is a compelling public interest in disclosure of the records which clearly outweighs the purpose of the exemption(s).**

Section 23 of the Act states:

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. [emphasis added]

Section 23 does not apply to information which has been found to be exempt under sections 14 or 19 of the Act, so my discussion of section 23 is restricted to those records or portions of records which I have found to be exempt under sections 13, 17 and 21 of the Act.

In his representations, the appellant expresses the view that the investigation and the resulting records are a matter of public interest.

There are certain requirements in section 23 of the Act which must be satisfied in order to invoke the application of the so-called "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 (Order 24).

While the burden of proof as to whether an exemption applies falls on the institution, the Act is silent as to who bears the onus of proof in respect of section 23. 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 records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

The appellant raises the issue of possible public interest in the disclosure of the records at issue in this appeal. However, he has not provided any evidence or arguments in support of his position.

I have reviewed the records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest which clearly outweighs the purpose of the exemption.

In my view, there is no compelling public interest at stake and find that section 23 of the Act does not apply in the circumstances of this appeal.

## **ORDER:**

1. I order the Ministry to disclose the following records in their entirety to the appellant: Records A-Correspondence: (a)(iii), B-2, B-5, C-1, D-14 and D-52.
2. I order the Ministry to disclose the following records to the appellant in accordance with the highlighted copies I have provided with this order to the Freedom of Information Co\_ordinator of the Ministry. The portions which are highlighted should **not** be disclosed: Records A-correspondence (h)(ii), (j), (k), (s) and (u); A-Interview Notes: (h), A-Analysis: (b), B-3, D-27, D-38, D-40, D-45, D-49 (the tracking system), D-51 (the May 13, 1991 letter), D-64, D-65, D-68, D-69, D-70, D-75 and D-97.
3. I uphold the Ministry's decision not to disclose the balance of the records.



4. I order the Ministry to disclose the records referred to in Provisions 1 and 2 within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
5. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 1 and 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ November 23, 1993

**APPENDIX A**

<b>RECORD NUMBER</b>	<b>DUPLICATE(S)</b>	<b>DESCRIPTION</b>	<b>MINISTRY'S REPS.</b>	<b>ORDER</b>
A-Corresp: (a)(i)	A-corresp (a)(ix), (h)(iii), D1 (with notes)	Two page letter of complaint dated Apr. 9/90 to OSC (two paragraphs)	14(1)(g), 21	Decision upheld
A-Corresp: (a)(ii)	D1 (package 1) D1 (package 2 - part)	Four page draft agreement dated Mar. 13/90 (attached to (i))	14(1)(g), 21	Decision upheld
A-Corresp: (a)(iii)		OSC memo dated Apr. 11/90 re: complaint	21	Disclose in full
A-Corresp: (b)(i)	D2, D23	Six page summary entitled "State of Negotiations"	14(1)(g), 21	Decision upheld
A-Corresp: (b)(ii)	D2	Appendix A - 2 page draft agreement attached to A corresp. (b)(i)	14(1)(g), 21	Decision upheld
A-Corresp: (e)	D4, 23	Shareholder report dated May 15/90 prepared by complainant [para 3, page 3]	14(1)(g), 21	Decision upheld
A-Corresp: (f)		Letter dated May 23/90 from counsel for one affected party to OSC	17(1)(b)	Decision upheld
A-Corresp: (g)	A corresp. (h)	OSC memo to file dated Jun. 16/90 re: complaint and proposed investigation (including handwritten notes)	19	Decision upheld
A-Corresp: (h)(i)		Memo dated Jun. 26/90 from OSC general counsel to other OSC counsel (2 copies)	19	Decision upheld
A-Corresp: (h)(ii)		OSC memo dated Sept. 25/90 from general counsel's office updating Jun. 16/90 memo re: status of investigation plan	19	Disclose in part
A-Corresp: (i)		OSC memo dated Jun. 27/90 to counsel	14(2)(a), 19	Decision upheld
A-Corresp: (j)		Letter dated Jun. 28/90 from OSC special counsel to potential witness	14(1)(d), (g), 17(1)(b)	Disclose in part
A-Corresp: (k)		Letter dated Jul. 12/90 from OSC special counsel to counsel for one affected party	14(1)(d), (g), 17(1)(b)	Disclose in part
A-Corresp: (n)		Memo to file dated Oct. 19/90 from OSC legal counsel	19, 21	Decision upheld

**Legend:** Corresp = Correspondence  
REPS. = Representations

A-Corresp: (q)	D6, D7, D49	OSC memo dated Dec. 12/90 from Associate General Counsel to Director Enforcement re: letter of complaint	14(1)(g), 19, 21	Decision upheld
A-Corresp: (r)		OSC memo dated Dec. 19/90	19, 21	Decision upheld
A-Corresp: (s)		OSC memo to file dated Jan. 7/91	21	Disclose in part
A-Corresp: (u)		Five handwritten pages of notes	19	Disclose in part
A-Interview Notes: (a)		Letter dated Oct. 12/90 from former OSC counsel to OSC Associate General Counsel (2 copies)	14(2)(a), 19, 21	Decision upheld
A-Interview Notes: (b)	B1 is handwritten version of the memo	Memo to file from OSC General Counsel's office re: meeting of Jul. 17/90 (typed)	14(2)(a), 19, 21	Decision upheld
A-Interview Notes: (c)		OSC memo to file dated Oct. 19/90 re: meeting of Oct. 16/90 (typed)	14(2)(a), 19, 21	Decision upheld
A-Interview Notes: (d)		OSC memo to file dated Oct. 22/90 re: interview of Oct. 19/90 (typed)	14(2)(a), 19, 21	Decision upheld
A-Interview Notes: (e)		OSC memo to file dated Nov. 6/90 re: interview of same day (typed)	14(2)(a), 19, 21	Decision upheld
A-Interview Notes: (f)		OSC handwritten notes dated Nov. 14/90, 3 p.m. (4 pages)	14(2)(a), 19, 21	Decision upheld
A-Interview Notes: (g)		OSC handwritten notes dated Oct. 16/90 (15 pages - 3 different sets)	14(2)(a), 19, 21	Decision upheld
A-Interview Notes: (h)		OSC notes: 2 handwritten + 3 typed pages of issues/questions for interviews	14(2)(a), 19	Disclose in part
A-Interview notes: (i)		OSC handwritten notes (22 pages - 3 sets)	14(2)(a), 19, 21	Decision upheld
A-Analysis: (a)		OSC memo dated Nov. 21/90 from Counsel to Associate General Counsel + General Counsel stamped "Draft" (20 pages)	14(2)(a), 19, 21	Decision upheld
A-Analysis:(b)		OSC handwritten notes (7 pages)	14(2)(a), 19, 21	Disclose in part

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REPS. = Representations

A-Analysis: (c)	A-Analysis:(d)	Executed agreement dated Feb. 23/90 (5 pages)	17(1)(b), 19	Decision upheld
A-Analysis: (e)		OSC memo dated Oct. 11/90 (3 pages)	14(2)(a) 19, 21	Decision upheld
A-Analysis: (f)		OSC memo dated Oct. 15/90 (21 pages)	14(2)(a), 19, 21	Decision upheld
A-Analysis: (i)(i)-(xix)	A documents folder B(a).	Series of documents reviewed by OSC counsel in office of counsel for affected party	17(1)(b), 21	Decision upheld
A-Documents: Folders A: (a) and (b)		Documents re: loan agreement given to OSC by counsel for affected party	17(1)(b)	Decision upheld
B - 1	A-Notes:(b) is typed summary	OSC handwritten notes of an interview conducted on Jul. 19/90	14(1)(d), 14(2)(a), 21	Decision upheld
B - 2		Half-page handwritten notes re: possible form of OSC pronouncement	Nil	Disclose in full
B - 3		Memo dated Aug. 7/90 from OSC special counsel to general counsel re: progress report	14(1)(d), 21	Disclose in part
B - 4		Letter dated Nov. 27/90 from counsel for one affected party to OSC	14(1)(d), 17(1)(b)	Decision upheld
B - 5		Handwritten notes of OSC staff counsel re: background of loan	14(2)(a), 21	Disclose in full
C - 1		Handwritten notes of meeting of Oct. 30/90 involving OSC staff and representatives of affected party	14(2)(a), 21	Disclose in full
C - 2		Handwritten notes of OSC staff meeting of Nov. 20/90 re: understanding of loan transaction	14(2)(a), 21	Decision upheld
C - 3		OSC staff notes re: events of loan based on staff interviews	14(2)(a), 21	Decision upheld
D- 14		OSC memo dated Apr. 19/90 to Milrod from Avisar re: Corporation, attaching prospectus	19	Disclose in full

**Legend:** Corresp = Correspondence  
REPS. = Representations

D - 19		Draft of letter dated Feb. 16/90 from one affected party to another (forwarded to MacNeil of OSC)	14(1)(g), 21	Decision upheld
D - 27		Undated letter from Charlton to complainant in response to Apr. 2/91 letter	14(1)(g), 21	Disclose in part
D - 28		Memo dated Aug. 6/91 from Milrod to Taber re: letter for Minister's signature	13(1), 14(1)(g), 21	Decision upheld
D - 37		OSC memo dated Jul. 30/91 from Milrod to Taber re: draft letter for Minister's signature, enclosing letter (3 copies)	13(1), 14(1)(g), 21	Decision upheld
D - 38		Letter dated Aug. 20/91 from Charlton to complainant	14(1)(g), 21	Disclose in part
D - 40		Letter dated Jul. 12/91 from Minister to complainant	14(1)(g), 21	Disclose in part
D - 41		OSC memo dated Jul. 31/91 from Milrod to Taber re: letter for Minister's signature, enclosing 2 draft responses with comments	13(1), 14(1)(g), 21	Decision upheld
D - 43		OSC memo dated June 12/91 to Milrod from Taber attaching draft letter to complainant	13(1), 14(1)(g), 21	Decision upheld
D - 44		OSC memo dated Jun. 17/91 from Milrod to Taber re: and enclosing draft letter to complainant	13(1), 14(1)(g), 21	Decision upheld
D - 45		OSC memo dated May 14/91 from Taber to Milrod et al re: and enclosing letter to complainant	14(1)(g), 21	Disclose in part
D - 49		Memo and tracking system re: complainant's letter	14(1)(g), 21	Disclose in part
D - 51		Corresp. tracking system, letter to complainant dated May 3/91, amending agreement dated Aug. 18/89, letter of complainant dated May 3/91	14(1)(g), 21	Disclose in part

**Legend:** Corresp = Correspondence  
REPS. = Representations

D - 52		Memo dated Jun. 13/91 from Taber to Milrod re: companies involved in loan	13(1)	Disclose in full
D - 59		Cover memo dated Sept. 27/91 from Milrod to Taber re: unhappy investor	13(1), 14(1)(g), 21	Decision upheld
D - 60		Memos dated Jun. 26/91, Jul. 4/91 and Jul. 5/91 attaching draft letters for Wright to complainants	13(1), 14(1)(g), 21	Decision upheld
D - 64		Letter dated Jul. 30/91 from Minister to complainant	14(1)(g), 21	Disclose in part
D - 65		Letter dated Jul. 30/91 from Minister to complainant	14(1)(g), 21	Disclose in part
D - 68		Memo dated Oct. 22/91 to Milrod from Pozderka re: memos for letter replies	14(1)(g), 21	Disclose in part
D - 69		Undated letter from complainant to Braithwaite - received Oct. 29/91	14(1)(g), 21	Disclose in part
D - 70		Undated letter from Milrod to complainant	14(1)(g), 21	Disclose in part
D - 74		Memo dated Dec. 18/91 from Milrod and Taber to Wright re: Minister's letter to complainant (attached)	13(1), 14(1)(g), 21	Decision upheld
D - 75		Staff memo dated Dec. 16/91 re: outstanding public inquiries	14(1)(g), 21	Disclose in part
D - 97		Letter dated May 3/91 from Taber to complainant	14(1)(g), 21	Disclose in part

NOTE: Named individuals are OSC or Ministry staff at the time of the investigation.

**Legend:** Corresp = Correspondence  
REPS. = Representations