



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

ORDER P-883

Appeal P-9400375

Ministry of Consumer and Commercial Relations



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Consumer and Commercial Relations (the Ministry) received a request from a brewing company for information regarding service charges and user fees levied by Brewers Retail Inc. and its predecessor, Brewers Warehousing Company Limited, against brewing companies. The requester also sought access to documents that related this information to the agreement in principle and the subsequent Memorandum of Understanding (the MOU) entered into between Canada and the United States to resolve the beer trade dispute between the two countries. The appellant is currently involved in litigation related to these matters.

The Ministry located a total of 74 records which were responsive to the request and disclosed 36 records to the appellant. The Ministry decided, however, to deny access to the remaining 38 records in their entirety based on the following exemptions contained in the Act:

- Cabinet records - sections 12(1)(d) and (e)
- advice or recommendations - section 13(1)
- relations with other governments - section 15
- third party information - section 17(1)
- valuable government information - section 18(1)(a)
- solicitor-client privilege - section 19

A Notice of Inquiry was provided to the parties to the appeal, including 11 companies and individuals whose interests might be affected by the disclosure of the records (the affected parties). Representations were received from the Ministry, the appellant and seven affected parties.

A description of the 38 records which remain at issue in this appeal along with the exemptions claimed for each is contained in Appendix "A" which is attached to this order.

PRELIMINARY ISSUE:

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

On June 23, 1994, the Commissioner's office provided the Ministry with a Confirmation of Appeal which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of the confirmation (that is, until July 29, 1994) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

It was not until December 21, 1994 when the Ministry provided its representations in response to the Notice of Inquiry that the Ministry indicated for the first time that it wished to claim additional discretionary exemptions for three records originally identified in its decision letter. These records and the additional exemptions now being claimed are:

- (1) Record 23: section 13(1)
- (2) Records 6 and 11: section 15(a)
- (3) Record 13: section 18(1)(e)

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, I explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. I indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act.

I also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, I made the point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In this appeal, the Ministry did initially claim two of the exemptions in question, but only for other records. In effect, the Ministry now seeks to extend the application of these exemptions to include additional records. In my view, the objective of the 35-day policy is equally applicable to this situation.

The Ministry was advised of the policy in question yet now wishes to apply the discretionary exemptions cited above to the records indicated almost six months after the Confirmation of Appeal was issued.

The Ministry has provided no explanation as to why it now wishes to apply section 13(1) of the Act to Record 23. The Ministry has explained that, although section 18(1)(a) was originally applied to Record 13, this was a typographical error which should have read 18(1)(e). I note that in the Ministry's index listing the records and the exemption claims, the exemption is described as "trade secret", which, in my view, indicates an intention to claim section 18(1)(a) as opposed to 18(1)(e).

The Ministry requests that I consider the application of section 15 to Records 6 and 11 "as the original exemptions were claimed without the benefit of legal counsel".

In my view, the 35-day "window of opportunity" provided to institutions to raise new discretionary exemptions is intended to allow the Ministry to address precisely the kinds of situations which have arisen in

this case (that is, review of records, correction of typographical errors and/or consultation with legal counsel). During this period, it is incumbent on the institution to confirm the discretionary exemptions on which it will rely as the appeal proceeds through the mediation and inquiry stages of the process. The Ministry has been involved with this appeal for some six months and has provided no explanation as to why it failed to notice these errors and omissions earlier. Accordingly, I do not accept its submissions that the 35-day time limit should not apply in the present appeal.

Therefore, I will not consider the application of section 18(1)(e) to Record 13. As the Ministry is no longer claiming the application of section 18(1)(a) or any other discretionary exemptions to this record, and no mandatory exemptions apply, it should be disclosed to the appellant. In addition, I will not consider the application of section 15 to Records 6 and 11, nor section 13(1) to Record 23.

The Ministry has indicated that it is no longer claiming that section 17(1) of the Act applies to Record 23. As this exemption is mandatory, I will consider its possible application to this record in my discussion of third party information. For the same reason, I will also consider the application of section 17(1) to Record 28.

EXEMPTIONS AND TESTS

I will now more fully describe the exemptions which the Ministry has claimed in conjunction with the tests developed by the Commissioner's office to determine when these exemptions will apply to particular record categories.

Cabinet Records - Section 12

Section 12 of the Act states, in part, as follows:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

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

It is possible that a record which has never been placed before an Executive Council or its committees may qualify for exemption under the introductory wording of section 12(1). This result will occur where a ministry establishes that the disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or that its release would permit the drawing of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees.

For a record to qualify for exemption under section 12(1)(d) of the Act, the institution must establish that the record:

- (a) reflects consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; **or**
- (b) was used for the making of government decisions or the formulation of government policy.

[Orders 134 and 206]

To qualify for an exemption under section 12(1)(e) of the Act, the institution must establish that the record itself has been prepared to brief a minister of the Crown in relation to matters that are either:

- (a) before or proposed to be brought before the Executive Council or its committees; **or**
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

[Order 131]

Advice or Recommendations - Section 13(1)

Section 13(1) of the Act states that:

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 and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

Relations With Other Governments - Sections 15(a) and (b)

[IPC Order P-883/March 2, 1995]

For a record to qualify for exemption under section 15(a) of the Act, the institution must establish that:

1. 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.

[Order 210]

For a record to qualify for exemption under section 15(b) of the Act, the institution must establish that:

1. the records reveal information received from another government or its agencies; **and**
2. the information was received by an institution; **and**
3. the information was received in confidence.

[Order 210]

Solicitor-Client Privilege - Section 19

Section 19 of the Act consists of two branches, which provide an institution 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).

Third Party Information - Section 17(1)

For a record to qualify for exemption under section 17(1)(a), (b) or (c) of the Act the institution and/or the affected parties 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 one of the harms specified in section 17(1)(a), (b) or (c) will occur.

[Order 36]

DISCUSSION:

I will now consider the exemptions claimed by the Ministry in light of the tests and interpretations which I have set out to determine whether the exemptions apply to the records at issue.

CABINET RECORDS

The Ministry has claimed that section 12(1) of the Act applies to exempt Records 1, 2, 5, 6, 7, 11 and 34 from disclosure.

The Ministry has explained that discussions involving the beer trade dispute were held at the highest levels of government. The Ministry, as the institution assigned the responsibility of dealing with this issue, committed itself to keeping the Executive Council apprised of developments in the dispute and agreed to return to Cabinet for approval of any settlement on the issue.

The dispute was also the subject of discussion at the Policy and Priorities Board (the Board), which is a committee of Cabinet. The issue was before this committee on May 31, June 7 and July 30, 1993, as well as on other occasions.

Record 1 is entitled "Policy and Priorities Board Discussion Item - Beer Trade Dispute, May 31, 1993". The Ministry states that this document was prepared to brief the Minister of Consumer and Commercial Relations (the Minister) regarding the beer dispute for the discussion which occurred at the Board's meeting of this date. Record 7, which is entitled "Approval Paper and Briefing Note on Concluding Beer Trade Dispute with the U.S.", was used to brief the Minister for the Board meeting of July 30, 1993. I have carefully reviewed Records 1 and 7 and am satisfied that they qualify for exemption under section 12(1)(e).

The Ministry indicates that Record 2 represents the print copies of transparency slides which were presented to the Board by the Minister at its meeting of May 31, 1993. I have carefully reviewed this record and am satisfied that the disclosure of this document would reveal the substance of deliberations at a committee of Cabinet. Record 2 is, therefore, exempt under section 12(1).

The Ministry states that Record 5 was used to brief a minister of the Crown on the province's position in regard to the beer dispute and related trade issues. It states that this position would have been developed by Cabinet or the Board. I am satisfied that Record 5 is exempt under section 12(1)(e).

Record 6 is a letter from the Deputy Minister to the Secretary of Cabinet. The Ministry submits that the record and the issues identified in this document would have formed part of the Cabinet discussion on the

beer dispute. I have carefully reviewed the record, which contains an update on recent developments involving the beer dispute and related trade issues with particular emphasis on the Ministry's actions. The Ministry has not provided any evidence to indicate that this record was the subject of consultations among ministers. Nor have I been provided with any evidence to indicate that the disclosure of this letter would reveal the substance of the deliberations of an Executive Council or its committees. Record 6 is, therefore, not exempt under section 12(1).

Record 34 is a briefing note for the Minister on issues concerning the beer dispute. The focus of this document is the lawsuit brought by the appellant. The Ministry submits that the Minister has used this briefing note as a basis for keeping Cabinet informed of developments in the beer issue and that this is one such development. While the Ministry has provided evidence that the general issue involving the dispute was discussed by the Executive Council and its committees, it has not submitted any evidence that this particular issue, the appellant's litigation, was ever considered by these groups. Accordingly, I am not satisfied that Record 34 directly reveals the substance of deliberations of Cabinet or one of its committees. Therefore, this record is not exempt under section 12(1).

The Ministry has claimed section 12(1)(d) for Record 11. This package contains a covering memorandum and a briefing note sent to the Premier by the Deputy Minister during the course of the discussions on the beer dispute. The Ministry submits that the record was also distributed to other Cabinet ministers and reflects consultation among the ministers on matters relating to the making of government decisions and the formulation of government policy. The Ministry states that the document was drafted as a result of decisions made at the Board on June 7, 1993.

I am not satisfied that the record reflects consultation among the ministers. However, since it was drafted as a result of decisions made by a Cabinet Committee, Record 11 is exempt under the introductory wording of section 12(1).

In summary, I find that Records 1, 2, 5, 7 and 11 qualify for exemption under section 12(1), while Records 6 and 34 do not.

ADVICE OR RECOMMENDATIONS

I have carefully reviewed the records remaining at issue for which the Ministry initially claimed section 13(1), that is, Records 6, 17 and 34.

I have previously described Record 6. The Ministry submits that this document contains, by implication, the Deputy Minister's recommendation that Cabinet support the position of the Ministry and allow it to maintain carriage of the beer issue. It states that the document would have been developed as a result of recommendations and advice received from the Deputy Minister's staff. I have reviewed Record 6 and find that it contains an update to the Secretary of the Cabinet on the beer dispute, but does not relate to a suggested course of action which will be accepted or rejected by the Secretary. I find, therefore, that Record 6 is not exempt under section 13(1) of the Act. The Ministry has not claimed that any additional exemptions apply to this document. This record should, therefore, be disclosed to the appellant.

Record 17 is a memorandum from the Director of Policy and Planning Branch at the Ministry to the Director of Legal Services. The Ministry submits that the record contains recommendations regarding regulations under the Liquor Licence Act. Although Record 17 provides information and discusses a course of action, I have been provided with no evidence to indicate that the course of action could be accepted or rejected by the Director of Legal Services. Rather, this document appears to contain instructions to the Director of Legal Services outlining the drafting work which the legal department must undertake in order to implement the terms of the agreement with the United States as a Settlement of the General Agreement on Trade and Tariffs (GATT) panel on beer. I find, therefore, that Record 17 is not exempt under section 13(1). This was the only exemption claimed by the Ministry to apply to this record. Accordingly, it should be disclosed.

I have previously described Record 34. The Ministry submits that the record contains advice on the nature of the issues in the beer dispute and how to deal with them, as well as the implications of the civil litigation involving the appellant. I have reviewed Record 34 and find that it mainly contains factual information for the Minister. Several previous orders issued by the Commissioner's office have held that the response portions of such issue sheets may qualify for protection under section 13(1) under the category of advice or recommendations. I find, however, that Record 34 does not contain any information which relates to a course of action which the Minister might either accept or reject as part of the policy development process in this case. Moreover, I find that the content of the response section, like the rest of the document, is purely factual in nature. Thus, Record 34 does not qualify for exemption under section 13(1) and should be disclosed to the appellant.

In summary, I find that section 13(1) does not apply to Records 6, 17 or 34.

RELATIONS WITH OTHER GOVERNMENTS

I will now consider whether the exemption in section 15 applies to Records 9, 12, 14 and 15.

Record 9 is a draft agreement between the United States and the federal government concerning the beer trade. The Ministry submits that the agreement was provided to the province for comment in confidence. It states that disclosure of the record could reasonably be expected to prevent the federal government from sharing information with Ontario in the future. The Ministry submits that, as this is a draft document, the United States also has the expectation that the document will not be disclosed. Therefore, both sections 15(a) and (b) of the Act apply. I have reviewed Record 9 and am satisfied that it qualifies for exemption under section 15.

Record 12 is Ontario's proposal for resolving the beer trade dispute. The Ministry states that it was submitted to the federal government, and that the province must be able to provide such input without fear of its position being disclosed. Fear of disclosure would hinder Ontario's ability to convey to the federal government its position on matters of this nature and, accordingly, disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations between the province and the federal government. I have reviewed Record 12 and am satisfied that it qualifies for exemption under section 15.

Record 14 is a proposed agenda for a meeting with one of the Ministry's Assistant Deputy Ministers (ADM) and representatives of the federal government. It includes an attached detailed outline of the points the ADM would cover at the meeting concerning Ontario's strategy for the federal government's negotiations with the United States over the beer trade. Record 15 is a similar document outlining the points which the Ontario representatives wished to bring to the attention of the federal government on this issue. The substance of both of these documents is similar to the information contained in Record 12 and, for the same reasons, I find that section 15 applies to them.

Therefore, I conclude that Records 9, 12, 14 and 15 all fall within the scope of section 15 and should not be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

I have considered the records for which the section 19 exemption has been claimed in conjunction with the representations provided to me and the tests previously outlined in this order. This exemption has been claimed to apply to Records 18-21, 24-29, 31, 33 and 35-37.

The Ministry retained outside counsel for the purpose of providing legal advice on matters concerning GATT and the beer trade with the United States. Records 18, 19, 20, 21, 25 and 27 are correspondence from this individual to an employee of the Ministry's Policy Branch. I find that each of these six documents constitute written communications of a confidential nature between a solicitor and his client which relate to the provision of legal advice. On this basis, these records qualify for exemption under section 19 of the Act.

Record 26 is a draft of a report to GATT regarding the panel on provincial beer marketing practices. Attached to this document is a draft of a news statement outlining Ontario's response to the panel. Both documents were forwarded to outside counsel for comment. The drafts were prepared for counsel for use in giving legal advice and this advice is contained in counsel's handwritten comments. Record 26 thus qualifies for exemption pursuant to section 19.

Record 29 is a letter from a Ministry Policy Branch employee to legal counsel in which he seeks legal advice on several issues. As such, this document is subject to common law solicitor-client privilege.

The Policy Branch employee who authored Record 29 sent it to both outside counsel and a consultant who was retained by the Ministry to provide advice on the GATT beer trade dispute. Counsel's response is contained in Record 27 which I have found satisfies the common law solicitor-client privilege. The consultant's reply constitutes Record 28.

The Ministry claims that Branch 1 of section 19 applies to Record 28 as it is a communication of a confidential nature between a consultant and an employee of the Ministry which would **reveal** the advice which the employee sought from counsel.

The Ministry relies on Orders P-402 and P-424 to support this proposition. Order P-402 involved a written communication from an institution employee who was not a legal advisor to another institution

employee. The communication reported on the author's meeting with a legal advisor and the advice she received. In holding that this communication was subject to the common law solicitor-client privilege, former Assistant Commissioner Tom Mitchinson relied on a prior decision of former Commissioner Sidney B. Linden in Order 150, in which he stated:

In my view, an Appeal Assistant acts as an agent of the Board member in the review and analysis of a Rent Review Hearings board file. If legal advice from a legal advisor is required, the Appeal Assistant acts as the agent of the Board member in seeking and receiving this advice, and communications between the Appeals Assistant and a legal advisor constitute communications between a client and his/her solicitor.

Former Assistant Commissioner Mitchinson applied the same reasoning to the record before him.

In my view, the records at issue in both Orders P-150 and P-402 are distinguishable from Record 28 in this appeal. The records at issue in those orders contained the actual legal advice. The matter to be determined was whether the communication was between a client (or his agent) and his solicitor. In these cases either the advice requested or received did not come directly from the lawyer or client but involved another individual, who could be characterized as an agent of the client.

In this case, Record 28 contains no legal advice. Nor is there any issue of whether either the employee who requested the information or the consultant who responded were acting as "agents" for either the client or the solicitor.

In Order P-424, the issue was again whether the recipient of the lawyer's communication was an agent of the client. Commissioner Tom Wright determined that he was and that the record satisfied all the elements of common law solicitor-client privilege. I do not see any principle in this order which is applicable to the present case.

The Ministry also refers to Order P-477 as being relevant to the analysis. This order is similar to those previously cited by the Ministry in that the disputed document contained the legal advice which the institution employee had received from counsel.

Thus, all the orders cited by the Ministry deal with situations in which the clients involved acted through agents. This is clearly not the case with respect to Record 28.

In addition, I have reviewed the case law on solicitor-client privilege and have been unable to find any precedents that would support the proposition that a communication such as the memorandum at issue would be privileged at common law. Accordingly, I find that Record 28 does not qualify for exemption pursuant to Branch 1 of section 19 of the Act. The Ministry does not claim that Branch 2 applies.

Another outside counsel also provided legal advice to the Ministry. This information is contained in Record 33 which is also exempt pursuant to section 19.

Record 24 is an internal Ministry memorandum from legal counsel to a Ministry employee. The contents are directly related to the provision of legal advice from a solicitor to his client. The document itself is a confidential communication. Therefore, Record 24 is subject to the common law solicitor-client privilege.

Records 31, 35, 36 and 37 were all prepared by counsel to the Liquor Control Board of Ontario (the LCBO). The Ministry states that the LCBO is an agency of the Ministry.

Record 31 is a proposed draft agreement concerning the purchase of foreign beer by the LCBO. Counsel, who prepared the draft, circulated it to various Board employees for comment. I agree with the Ministry that this is a communication of a confidential nature between a solicitor and client directly related to the provision of legal advice.

Records 35, 36 and 37 all relate to the litigation involving the appellant. I find that these documents were prepared in contemplation of litigation and that there was a reasonable prospect of litigation at that time. Branch 2 of the section 19 exemption, therefore, applies to these documents.

To summarize, I find that Records 18-21, 24-27, 29, 31, 33 and 35-37 are exempt pursuant to section 19 of the Act.

THIRD PARTY INFORMATION

The Ministry claims that section 17(1) of the Act applies to Records 3, 4, 8, 10, 16, 22, 30, 32 and 38. As I have previously indicated, I will also consider the application of this provision to Records 23 and 28.

The appellant has recently confirmed that she is not seeking access to any information which relates to two unions which were notified as affected parties. Accordingly, I will not consider any portions of the records containing information about these two groups. Where such information appears on any of the records I have ordered disclosed, I have highlighted it in blue.

These portions should **not** be disclosed to the appellant.

Record 3 is entitled "Ontario Beer Competitiveness Strategy - Facts and Assumptions". The Ministry submits that it contains the commercial and financial information of two companies which was supplied with the implicit understanding that it would remain confidential. It states that financial details of companies involved in the highly competitive brewing industry are extremely sensitive, and that such details were supplied solely for the purposes of negotiating a beer trade agreement with the United States.

One of the two companies states that it did not provide the Ministry with the information pertaining to it in Record 3. It also states that the information is incorrect.

The other affected party states that disclosure of such records could harm the future of sectoral partnerships with the Ontario governments. A tri-partite working group, consisting of the brewing industry, its unions and

the provincial government was formed to develop a competitiveness strategy for the beer industry and beer trade dispute. This was the basis upon which information was shared with the province.

I have carefully reviewed this document. The commercial and financial information contained in this record is not broken down between the two companies; rather a global figure is assigned to both. Given that one of the companies claims that it did not even supply any information to the Ministry, I cannot conclude that section 17(1) applies to this information.

There are portions of this record that contain the financial and commercial information of two other affected parties which submit that it was supplied implicitly in confidence for the purposes of negotiating a beer trade agreement with the United States. These companies have detailed the harms which would result upon disclosure of this information. I am satisfied that all three parts of the section 17(1) test have been satisfied with respect to the information about these two companies and it should not be disclosed. I have highlighted this in yellow on the copy of Record 3 provided to the Freedom of Information and Privacy Co-ordinator of the Ministry with a copy of this order.

Record 4 is a 19-page discussion paper entitled "Adjustment Options to Ontario's Control Board Practices". The Ministry again contends that this document contains the commercial or financial information of the company which denies having supplied it to the Ministry. I cannot conclude that any information related to this company satisfies the section 17(1) test. I order that this record be disclosed to the appellant with the exception of the portions highlighted in blue.

Record 8 is a minister's briefing note prepared for the Minister of Economic Trade and Development. This Ministry is also involved in issues related to the beer dispute between Canada and the United States. The Ministry's submissions do not explain how this document may be characterized as containing the types of information described in section 17(1). Nor do the representations state who "supplied" the information to the Ministry. I can only conclude that the Ministry means that another institution, in this case, the Ministry of Economic Trade and Development is the "supplier" of the information. The Ministry has referred me to the submissions of that institution which states that it has no concerns regarding the disclosure of this record. Accordingly, this note should be disclosed to the appellant in its entirety.

Record 10 is a comparison chart entitled "Beer Trade Dispute: A further Proposal to the U.S.?: Stakeholder Positions". I have highlighted the portions of this record related to the unions in blue. The chart contains financial and commercial information about two of the affected parties. I accept their submissions that this information was supplied implicitly in confidence to the Ministry to assist in the resolution of the beer trade dispute between the United States and Canada. Both companies have provided convincing evidence on the harm to their competitive positions should this information be disclosed. I have highlighted in yellow those parts of Record 10 which satisfy the section 17(1) exemption.

Record 16 is a letter from the Deputy Minister to one of the affected parties. In it, the Deputy Minister outlines the changes that would be required to the method of beer distribution in Ontario if the MOU became the basis of a final settlement of the beer dispute between the United States and Canada. The Ministry refers to the submissions of the affected party on this record. Neither these submissions, nor my independent review of this document, indicate that the letter contains any of the types of information listed in section 17(1) that the affected party could be said to have provided to the Ministry. The third party

information exemption is not satisfied and Record 16 should be disclosed to the appellant in its entirety.

The Ministry refers to the submissions of the affected party with respect to Record 22. This is a document containing the views of this company in achieving closure of the trade dispute. I find that this record does not contain the commercial or financial information of the company. Rather, it outlines the strategy, terms and conditions which the company believes should be adopted to reach a final agreement. As the first part of the section 17(1) test has not been satisfied, it is not necessary for me to consider parts two and three. This record should be released in its entirety.

Record 23 is a memorandum drafted by the consultant. The consultant provides the Ministry with his thoughts on closure. The consultant has provided submissions on the harms which could occur should this document be released. Specifically, he has outlined his concerns about the prejudicial effect this might have on Canadian interests in future negotiations as well as his own ability to continue to provide information to the government. He has made reference to the harms outlined in sections 17(1)(a), (b) and (c) of the Act.

However, his representations do not make any reference to Record 23 as containing any of the types of information required to satisfy the first part of the section 17(1) test. I have carefully reviewed this document and find that the only commercial information it contains is the fact that the consulting company had provided its services to the Ministry. I accept the consultant's submissions that the company did so on a confidential basis and that disclosure of this fact could reasonably be expected to result in undue loss to his firm should he not be able to retain the government as a client in the future. Accordingly, I have highlighted in yellow the portions of this record which are exempt pursuant to section 17(1) and should not be disclosed. The balance of Record 23 is not exempt and should be disclosed to the appellant.

I have also applied this analysis to Record 28 which I have previously described. I have highlighted those portions of this record which should not be disclosed when the Ministry releases the balance of this record.

There are three pieces of correspondence which comprise Record 30. The affected party with an interest in the information contained in the second and third documents does not object to its disclosure. The remaining page is merely a cover memorandum listing a series of documents which are purportedly attached to this package. These documents are not included. As none of the section 17(1) elements are present with respect to Record 30, it should be released to the appellant in its entirety.

The Ministry has referred me to the submissions of the affected party with an interest in Record 32. This party has no objection to its release. It should be disclosed to the appellant.

Record 38 is a letter from one of the affected parties to the Ministry. The subject of the letter is the litigation involving the appellant. The Ministry submits that this letter contains commercial and financial information of the affected party which was supplied to the Ministry explicitly in confidence as evidenced by the "Private & Confidential" designation on the document. The Ministry then requests that I consider the submissions of the affected party.

The affected party indicates that this letter represents an effort to keep the Ministry informed of developments taking place within the beer industry which impact upon government policies. It states that the information in the document is a response to claims by the appellant in the lawsuit that the industry acted

improperly but did so in compliance with policies created by the government. The affected party claims that disclosure of Record 38 would negatively impact on future sectoral partnerships, such as the one in this case between the brewing industry, unions and the government. The particular harm alleged is the diminished disclosure of information to the government in the future.

Record 38 outlines the information which the affected party will be included in its affidavit filed as part of its response to the appellant's lawsuit. It lists the various sections to be included in the affidavit and provides an overview of the points to be made under each heading. It does not contain any commercial or financial information related to the affected party. Rather, it outlines factual matters related to the structure of the beer industry, the regulatory history and the Canada-United States beer dispute, a reference to the description of the affected party and the appellant. The affected party has not submitted any detailed and convincing evidence that disclosure of the small portion of the letter which contains the information in question would result in such information no longer being provided to the government. Accordingly, I find that this document is not exempt pursuant to section 17(1) of the Act. It should be released to the appellant in its entirety.

To summarize, I find that only portions of Records 3, 4, 10, 23 and 28 satisfy all three parts of the test for exemption under section 17(1) of the Act.

ORDER:

1. I uphold the decision of the Ministry to deny access to Records 1, 2, 5, 7, 9, 11, 12, 14, 15, 18, 19, 20, 21, 24, 25, 26, 27, 29, 31, 33, 35, 36 and 37 in their entirety and the portions of Records 3, 4, 10, 23 and 28 which are highlighted on the copy of these records provided to the Freedom of Information and Privacy Co-ordinator of the Ministry with a copy of this order.
2. I order the Ministry to disclose to the appellant Records 6, 8, 13, 16, 17, 22, 30, 32, 34 and 38 in their entirety and the **non-highlighted** portions of Records 3, 4, 10, 23 and 28.
3. I order that the records identified in Provision 2 be released to the appellant within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
4. In order to verify compliance with the provisions of this order, I reserve the right to require that the Ministry provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

Anita Fineberg
Inquiry Officer

_____ March 2, 1995

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DISPOSITION
1	Policy and Priorities Board Discussion re: Beer Trade Dispute, May 31, 1993	12(1)(e), 13(1)	Decision upheld
2	Report re: Beer Trade Dispute, May 31, 1993	12(1)(e), 13(1)	Decision upheld
3	Ontario Beer Competitiveness Strategy - Facts and Assumptions, Dec.18, 1991	17(1)	Disclose in part
4	Discussion Paper - Adjustment Options to Ontario's Control Board Practices Dec. 18, 1991	17(1)	Disclose in part
5 (Ministry #6)	Briefing Notes: Ontario's Position for Negotiating GATT Response with the Federal Government, Dec. 20, 1991	12(1)(e), 13(1)	Decision upheld
6 (Ministry #7)	Deputy Minister's letter to Cabinet re: update on the progress of efforts relating to beer and trade issues, April 2, 1992	12(1)(e), 13(1)	Disclose in full
7 (Ministry #8)	Approval Paper and Briefing Note re: concluding Beer Trade Dispute with the U.S., July 30, 1993	12(1)(e), 13(1)	Decision upheld
8 (Ministry #9)	Minister's Briefing Note re: Canada-U.S. Beer Dispute - Beer I, July 22, 1993	17(1)	Disclose in full
9 (Ministry #10)	Draft Agreement Between the Government of U.S. and Canada concerning trade and commerce in beer, June 24, 1993	15(1)(a)	Decision upheld
10 (Ministry #11)	Beer Trade Dispute - A further proposal to the U.S.?: Stakeholder Positions, June 14, 1993	17(1)	Disclose in part
11 (Ministry #12)	Memorandum with Briefing Note to Premier of Ontario from Deputy Minister re: Beer Trade Dispute with the U.S., June 11, 1993	12(1)(e), 13(1)	Decision upheld
12 Ministry #13)	Ontario Proposal sent to Federal Government, June 10, 1993	15(a)	Decision upheld
13 (Ministry #14)	Chart re: Ontario Position with U.S., June 2, 1993	18(1)(a)	Disclose in full

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DISPOSITION
14 (Ministry #16)	Agenda for meeting with Federal Government re: beer trade dispute, May 6, 1993	15(a)	Decision upheld
15 (Ministry #17)	Meeting with Federal Government re: beer trade dispute, April 29, 1993	15(a)	Decision upheld
16 (Ministry #24)	Letter to Beer Distributor from Deputy Minister re: Canada/U.S. agreement, May 5, 1992	17(1)	Disclose in full
17 (Ministry #27)	Memorandum to legal counsel from Policy and Planning Branch re: regulation changes to LLA & LCA June 2, 1992	13(1)	Disclose in full
18 (Ministry #32)	Letter to Policy Branch from legal counsel re: letter from brewing company, Oct. 25, 1993	19	Decision upheld
19 (Ministry #33)	Memorandum to Policy Branch from legal counsel re: micro-breweries, Aug. 23, 1993	19	Decision upheld
20 (Ministry #34)	Memorandum to Policy Branch from legal counsel re: final version of Canada-U.S. MOU, July 2, 1993	19	Decision upheld
21 (Ministry #35)	Memorandum to Policy Branch from legal counsel re: Canada-U.S. MOU, June 21, 1993	19	Decision upheld
22 (Ministry #36)	Report re: Brewer's views on achieving closure, June 9, 1993	17(1)	Disclose in full
23 (Ministry #37)	Memorandum to Policy Branch from consultant re: closure of Beer I, May 27, 1993	17(1)	Disclose in part
24 (Ministry #38)	Memorandum to Agencies Relations Branch from legal counsel re: BRI Retail Monopoly, May 13, 1993	19	Decision upheld
25 (Ministry #39)	Fax to Policy Branch from legal counsel re: memorandum on micro-breweries, May 15, 1992	19	Decision upheld
26 (Ministry #40)	Memorandum to Policy Branch from legal counsel re: Canadian GATT Statement/Ontario Statement, March 27, 1992	19	Decision upheld
27 (Ministry #41)	Memorandum to Policy Branch from legal counsel re: GATT - Trade Legal Advice, Jan. 13, 1992	19	Decision upheld
28 (Ministry #42)	Memorandum to Policy Branch from consultant re: comments on questions Jan. 7, 1992	19	Disclose in part
29 (Ministry #43)	Letter to legal counsel from Policy Branch re: GATT Trade Legal Advice, Jan. 3, 1992	19	Decision upheld

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DISPOSITION
30 (Ministry #48)	Memorandum to Director, Agency Relations Branch MCCR from Executive Director, Corporate Services, LCBO, re: Package on Beer, Nov. 24, 1993	17(1)	Disclose in full
31 (Ministry #49)	Memorandum to Acting Director, Policy and Issues Management, Controller and Director LCBO from legal counsel re: LCBO - Foreign Brewer Agreement for Purchase of Foreign Beer, June 30, 1993	19	Decision upheld
32 (Ministry #55)	Fax to MCRR from External Affairs re: Beer Cost of Service, May 29, 1991	17(1)	Disclose in full
33 (Ministry #56)	Legal opinion to Government of Ontario re: pricing practices of LCBO, March 28, 1990	19	Decision upheld
34 (Ministry #59)	Minister's Briefing Note re: Brewing Company	12(1)(e), 13(1)	Disclose in full
35 (Ministry #61)	Memorandum to LCBO, Oct. 12, 1993, with attached memorandum to LCBO Chair from legal counsel, Sept. 29, 1993	19	Decision upheld
36 (Ministry #62)	Internal LCBO memorandum from legal counsel, with draft letter to MCCR Policy Division, Oct. 18, 1993	19	Decision upheld
37 (Ministry #63)	Letter to MCCR Policy Division from LCBO legal counsel re: Brewing Co., Oct. 28, 1993	19	Decision upheld
38 (Ministry #64)	Letter to Deputy Minister, from The Brewers of Ontario re: Brewing Corporation Legal Action, April 6, 1994	17(1)	Disclose in full