



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

# **ORDER P-1019 (ORDER ADDENDUM)**

**Appeals P-9400788 and P-9500016**

**Ministry of Economic Development, Trade and Tourism**



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## **NATURE OF THE APPEALS:**

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Ministry of Economic Development and Trade (now the Ministry of Economic Development, Trade and Tourism) (the Ministry) to obtain access to a number of documents relating to a named corporation (the Corporation). These records were:

- (1) Back issues of a particular newsletter.
- (2) Documentation which the Corporation provided to the Government of Ontario to release certain "held-back" funds.
- (3) The Renewal Plan Report of the Corporation.
- (4) A contract entered into between the Corporation and the government.
- (5) The Corporation's business plan.

The requester is the president of a company which competes with the Corporation in a particular business area.

The Ministry advised the requester that it did not have any records which responded to parts 1 and 4 of his request. While the Ministry was able to locate the Renewal Plan Report (the renewal plan), the business plan of the Corporation and three related records, it decided to withhold these documents from the requester in their entirety. The requester appealed this access decision to the Commissioner's office. Appeal Number P-9400788 was opened as a result.

The Ministry also requested a 30 day time extension to search for other documents which related to part 5 of the request. The Ministry located an additional 13 records which were responsive to the request but again denied access to these documents in their entirety. The requester also appealed this decision to the Commissioner's office which then opened Appeal Number P-9500016.

In its decision letters, the Ministry has relied on the following exemptions to deny access to various records:

- Cabinet records - sections 12(1)(b) and (d)
- third party information - sections 17(1)(a), (b) and (c)

A Notice of Inquiry was provided to the appellant, the Ministry and the Corporation. Representations were received from all parties.

In its submissions, the Ministry indicated that it wished to rely on both sections 12(1)(b) and (d), and sections 17(1)(a), (b) and (c) to withhold each of the 18 records from disclosure. Since both these provisions are mandatory exemptions, I would have considered their application to these documents in any event.

During the course of these appeals, the Ministry agreed to disclose portions of the Corporation's renewal plan (Record 5) to the appellant. The appellant also indicated that he did not wish to receive any information relating to the identity of the Corporation's clients or to the work that the Corporation performed for them.

There are 18 records at issue in these appeals. These documents consist of reports, plans, cash flow projections, letters, an application and a memorandum. Since the records identified in both appeals are similar in nature and relate to the appellant's original request, I have decided to treat them together for the purposes of this order. The records are more fully described in Appendix "A" which is attached to this order.

## **PRELIMINARY ISSUES:**

### **THE APPLICATION OF THE ACT TO THE CORPORATION**

In its representations, the Corporation points out that it has not been designated as an "institution" for the purposes of the Act. On this basis, it submits that the Legislature has acknowledged the need to protect the Corporation's sensitive commercial information from disclosure.

The Corporation then refers to the legal principle that "a party cannot do indirectly that which it cannot do directly". Based on this principle, it believes that it would be wrong for the appellant to obtain information about the Corporation indirectly from the Ministry when the Corporation does not have a direct legislative obligation to disclose this information as an institution under the Act. The Corporation cites the case of Madden v. Nelson and Fort Sheppard Railway [1899] A.C. 626 (H.L.) in support of this proposition.

In Order P-1001, Inquiry Officer Anita Fineberg considered a similar argument raised by the Corporation. After pointing out that the Madden case was decided in an entirely different statutory context, she approached the issue in the following fashion:

One of the purposes set out in section 1(a)(i) of the Act is to provide a right of access to information under the custody or control of an institution in accordance with the principle that information should be available to the public. It is my opinion that the issue raised by the Corporation must be based on the wording and intent of the Act.

Although the Corporation is not listed among those entities which are defined as "institutions" for the purposes of the Act, there is nothing in the Act which expressly excludes from its application records which originated from third parties such as the Corporation.

Section 10(1) of the Act provides as follows:

Every person has a right of access to a record or a part of a record **in the custody or under the control of an institution** unless the record or the part of the record falls within one of the exemptions under sections 12 to 22. [emphasis added]

In Order P-239, Commissioner Tom Wright addressed a similar argument made by the Office of the Ontario Ombudsman. In that case, the Ombudsman submitted that because the Ombudsman's office is not an institution listed in the Act, it would be inappropriate to construe the Act as applicable to records prepared by the Ombudsman which might be found in the possession of institutions. Commissioner Wright stated:

It is my opinion that to remove information originating from non-institutions from the jurisdiction of the Act would be to remove a significant amount of information from the right of public access, and would be contrary to the stated purposes and intent of the Act.

He concluded that the Act applied to information that originated in the Ombudsman's office which was in the custody or under the control of an institution. To state this proposition a bit differently, the Act will apply to information in the custody or control of an institution notwithstanding that it was created by a third party. I accept this approach and adopt it for the purposes of these appeals.

There are innumerable individuals, organizations, agencies and businesses that interact with government institutions on a daily basis. During the course of these interactions, information about these entities often comes into the possession of these institutions. In drafting its freedom of information legislation, the government determined that such information should be subject to the provisions of the Act, unless the exemptions contained in the statute applied. These exemptions are designed to not only protect the interests of government institutions, but also those of third parties (such as individuals, agencies and organizations) whose information may come into the custody or control of an institution as well. Based on the scheme of the Act, therefore, a third party, such as the Corporation, will have the opportunity to fully argue that its interests will be harmed by the release of such information.

In its representations, the Corporation has not provided any evidence to indicate that the Legislature intended that the Corporation should be treated differently from any other third party agency or business which provides information to an institution. Nor is there any dispute that the records at issue are in the custody of the Ministry.

In the result, Inquiry Officer Fineberg concluded that the records in question were subject to the provisions of the Act. I agree with the approach outlined in Order P-1001 and adopt it for the purposes of the present appeals. The result is that the information contained in the records provided to the Ministry by the Corporation falls within the parameters of the Act. I must now determine whether the statutory exemptions claimed by the Ministry and the Corporation apply to this information.

## **THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS**

Upon receipt of these appeals, the Commissioner's office provided the Ministry with two Confirmation of Appeal notices. These notices indicated that, based on a policy issued by this office, the Ministry would have 35 days from the date of each notice (expiry dates were provided) to raise any additional discretionary exemptions not claimed in its decision letters. No additional exemptions were raised during this period.

In its representations, the Ministry indicated for the first time that it wished to rely on section 18(1)(d) of the Act (damage to the financial interests of the Government of Ontario) to deny access to each of the 18 records. By this time, the expiry dates provided in the Confirmation of Appeals had passed by over three months in one appeal and four months in another.

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.

The Commissioner's office has applied this line of reasoning in many orders and refused to consider a discretionary exemption raised late in the appeals process. I have also decided to adopt this approach for the purposes of the present appeals.

In this case, the Ministry was advised of this office's policy on the subject yet decided to rely on a new discretionary exemption three to four months after the Confirmation of Appeals were issued. While the Ministry has argued in general terms that the section 18(1)(d) exemption should apply to the records at issue, it has failed to advance any arguments to indicate why the 35-day time limit should not apply in the present appeals. In the absence of these submissions, I will not consider the application of the section 18(1)(d) exemption in the context of these appeals.

## **THE RAISING OF A DISCRETIONARY EXEMPTION BY A THIRD PARTY**

In its representations, the Corporation has also taken the position that the records at issue should be exempt from disclosure under the discretionary exemption found in section 18(1)(d) of the Act. As indicated previously, this provision was not raised by the Ministry during the 35-day period specified in the policy adopted by the Commissioner's office.

As a general rule, the responsibility rests with the head of a ministry to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. This result would occur, for example, where the release of a record would seriously jeopardize the rights of a third party.

In the present case, the Corporation has made extensive representations on why the records at issue should be withheld under sections 12(1) and 17(1) of the Act. These submissions very carefully itemize the harms that the Corporation believes it will suffer should the documents be disclosed. I would also point out that the object of section 18(1)(d) is to protect the interests of the Government of Ontario and not those of third parties.

On the basis that the Corporation has been able to fully argue its case and given the nature of the interest involved, these appeals do not represent the exceptional sort of case where it would be appropriate for me to consider a discretionary exemption not properly raised by the Ministry. The result, therefore, is that I am not prepared to apply section 18(1)(d) to the records at issue.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

The Ministry and the Corporation claim that section 17(1)(a), (b) or (c) of the Act applies to exempt each of the 18 records from disclosure. For a document to qualify for exemption under these provisions, the Ministry and/or the Corporation must satisfy each element 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 harms outlined in section 17(1)(a), (b) or (c) will occur.

A number of orders have determined that information contained in a record would reveal information "supplied" by a third party, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

Furthermore, for a party to establish that information was "supplied in confidence", it must show that the supplier of the information had a reasonable expectation that the information would be treated in confidence.

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case including whether the information was:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

I will now consider the representations of the parties on the application of section 17(1). The Ministry indicates that the Corporation was established as a Schedule 3 Ontario Crown agency in order "to enhance the economic and social well-being of Ontario through research, development and technology transfer activities, especially through assistance to industry". While the Ministry states that the Corporation is a "not-for-profit foundation", the Corporation has provided evidence that it is an independent business which competes with other publicly-supported research and development organizations both within Canada and internationally. For the purposes of these appeals, it is important to note that the provincial government subsidizes the operations of the Corporation through annual monetary grants.

The Ministry indicates that, over the last few years, the Corporation has been involved in an intensive strategic planning process where it has carefully considered its future role and business activities. This process included (1) a review of potential market opportunities, (2) the study of the Corporation's operating units, (3) business and cash flow projections and (4) an evaluation of the Corporation's strengths and weaknesses. The Ministry notes that the results obtained from these and related activities were compiled in a "Renewal Plan Report", which constitutes Record 5 for the purposes of the present appeals. The conclusions articulated in this report were, in turn, incorporated into the Corporation's Business Plan for the years 1994 to 1997 (Record 1 in these appeals).

With this background in mind, I will now consider each aspect of the section 17(1) test with respect to Records 2 through 18. I will deal with Record 1 in my discussion of the Cabinet records exemption.

### **Part 1 of the Test**

In its representations, the Ministry submits that the contents of these documents either constitute trade secrets or contain scientific, technical, commercial or financial information for the purposes of the first part of the test. The Corporation, on the other hand, states that the records are made up of commercial and financial information.

Following a review of these documents, and based on the definitions for these terms that have been established in previous orders, I find that each of the records contains financial and/or commercial information. Thus, the first part of the section 17(1) test has been satisfied.

### **Part 2 of the Test**

In order to meet part two of the test, the Ministry and the Corporation must initially establish that the information contained in the records was supplied to the Ministry and then show that this information was supplied in confidence either implicitly or explicitly.

Both the Ministry and the Corporation submit that the information found in these documents was supplied to the Ministry by the Corporation. The appellant, however, relies on a series of orders issued by the

Commissioner's office which have considered whether information contained in an agreement entered into between a ministry and a third party was supplied by the third party. The general conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the third party. Since the information contained in an agreement is typically the product of a negotiation process involving the parties, that information will often not qualify as having been "supplied" for the purposes of section 17(1) of the Act.

The appellant submits that the information contained in the renewal and business plans did not reach the Ministry in its original form. Rather, he argues that the contents of these documents were finalized through a process of ongoing negotiations between the Ministry and the Corporation.

I have carefully considered the appellant's submissions. While it is possible that parts of the records could have been modified as a result of discussions between the parties, I do not consider this process to be analagous to that of negotiating a contract. In addition, based on my review of the documents, I am persuaded that these records reached the Ministry in more or less their original form. The result is that, subject to the two exceptions which I shall describe below, the information found in these documents was supplied to the Ministry by the Corporation for the purposes of the Act.

The first exception involves Appendix 6 of Record 4, which is entitled "Draft Business Case for a Plastics Technology Alliance". Both the Ministry and the Corporation acknowledge that this document was prepared by the Technology Task Force of the Ministerial Advisory Committee on Plastics and not by the Corporation. The Ministry further indicates that this study was publicly funded and that it has previously received copies of the report. On this basis, the Ministry takes the position that this document was not supplied by the Corporation for the purposes of the Act and that it may be disclosed to the appellant. I agree with the Ministry that this document fails to meet the first aspect of the "supplied in confidence" test.

This document, however, also refers to the interests of a number of third parties in addition to the Corporation. To date, these parties have not been notified of the appellant's access request. Based on the scheme of the Act, it will be necessary to determine whether or not these parties object to the disclosure of the record. Prior to making the necessary inquiries, however, I will ask the appellant to confirm that he still wishes to obtain access to this appendix.

The second exception relates to a series of questions listed on page 1 of Record 9 which is a letter sent to the Deputy Minister of the Ministry by the President of the Corporation. These questions constitute a restatement of a number of questions originally posed to the President by the Deputy Minister. Following my review of these questions, I have concluded that they were not supplied to the Ministry for the purposes of the Act in that they were originally authored by the Deputy Minister.

The result is that both Appendix 6 of Record 4 and the questions listed on page 1 of Record 9 do not satisfy the first aspect of the "supplied in confidence" test. Consequently, they do not qualify for exemption under section 17(1) of the Act. I find, however, that all of the remaining information found in the 17 records was supplied to the Ministry for the purposes of the Act.



The Ministry and the Corporation then submit that the information contained in each of the records was provided to the Ministry in confidence, either explicitly or implicitly. The Corporation states that it reasonably expected that this information would be treated in confidence. To support this assertion, it has provided an affidavit signed by the Ministry official responsible for the Corporation's affairs. This individual indicates "that there was an explicit verbal understanding of confidentiality" with respect to this information. This official has also confirmed that he would not discuss the contents of these records with other government staff without the Corporation's consent.

The Corporation then points out that it has consistently treated the information contained in the records in a confidential fashion. The Corporation also submits that the information found in these documents is necessarily confidential by an objective standard in that it is commercially sensitive and, thereby, valuable to the Corporation. It also confirms that the information at issue, because of its sensitive nature, has never been made available to the public. Finally, the Corporation indicates that the purpose for which the information was supplied to the Ministry (to persuade Treasury Board to release funds to the Corporation) was not one for which public disclosure was contemplated.

In his representations, the appellant indicates that the Corporation is an agency of the Ontario government and, in this respect, has specific responsibilities to the government and to the public which are not required of public corporations. He then points out that Guideline 6-1-25 enacted by Management Board of Cabinet prescribes that:

As a general rule every action in the public sector must be able to bear the test of public scrutiny ... Unless there is reasonable justification to do otherwise, work with government and its agencies should be conducted in an open manner.

The appellant has also provided the Commissioner's office with a copy of the Corporation's newsletter which indicates that the renewal report (Record 5) was considered both by the government and other stakeholders. He then indicates that a copy of the record was made available at the Corporation's Business Resource Centre which is open to the public. (The Corporation, on the other hand, states that these materials were not placed in the public domain.)

The appellant then argues, based on the approach adopted in several previous orders, that where information is available from a source to which the public has access, there can be no reasonable expectation that any of the harms contemplated under section 17(1) will occur.

I have carefully considered the representations of the parties along with the circumstances of this case. Based on the evidence before me, I find that the Corporation did not make these documents publicly available. I also find that, at the time that the Corporation supplied the information in question to the Ministry, it had a reasonable expectation that the contents of these documents would be treated in confidence. On this basis, I find that each of the 17 records (with the exception of the portions of Records 4 and 9 which I have noted above) were supplied to the Ministry in confidence for the purposes of the second part of the section 17(1) test.

### **Part 3 of the Test - Sections 17(1)(a) and (c)**

I will first consider whether the Ministry and the Corporation have demonstrated that the harms described in sections 17(1)(a) and (c) of the Act could reasonably be expected to occur if the 17 records at issue are disclosed. These provisions deal, respectively, with prejudice to the Corporation's competitive position and undue loss or gain to any person or group.

In its representations, the Corporation first submits that all of the information respecting its business activities must be retained in "the most strict and absolute confidence". It takes this position for two reasons. First, the Corporation indicates that it is involved in a highly sensitive and competitive business. Second, since the survival and growth of the Corporation is important to the provincial economy, it believes that its records should be accorded an elevated level of protection. The Corporation elaborates on its position as follows:

If any information originating from [the Corporation] is disclosed to a third party in a manner not intended by [the Corporation], even if the information does not specifically identify a particular business client of [the Corporation] or the client's confidential information, many of [the Corporation's] clients may perceive that a significant business risk exists where their information could be disclosed in the future. For [the Corporation] to advise those clients that there is little or no risk of their confidential information being disclosed is not the issue: the issue is that the clients will have a perception that [the Corporation] is no longer a secure, confidential organization with which to deal.

In the research and development sector, where a client's existence is often based upon the confidentiality and security of its information, no risk, not even a perceived risk, is worth taking for many of these clients. Accordingly, it can be reasonably expected that in the event of the disclosure of any of the records at issue, [the Corporation's] clients will seriously consider [the Corporation's] ability to adequately protect their information and therefore to be able to provide them with the service they require. This will result in undue loss to [the Corporation] should those business clients ultimately decide to no longer purchase [the Corporation's] services for reasons of information security and confidentiality concerns. The potential loss to [the Corporation] is a real and substantial risk.

The Corporation provides several additional arguments to substantiate its position that the disclosure of the information will either significantly prejudice its competitive position under section 17(1)(a) of the Act and/or cause it undue loss under section 17(1)(c) of the Act. The Corporation's most cogent submissions are the following:

- (1) Much of the information contained in the records describes the profitability associated with various markets, product lines and service sectors. If this information is disclosed, the Corporation's commercial information and marketing strategies will be appropriated by competitors to the detriment of the Corporation. On this basis, the economic benefits which would otherwise accrue to the Corporation would be unduly and unfairly lost.

- (2) Other information found in the records outlines in considerable detail the current financial position of the Corporation. Examples would include cash flow, indebtedness, revenue sources, refinancing requirements and future expenses. The release of this information would prejudice the Corporation's current competitive position and its ability to negotiate favourable contracts with clients.
- (3) The disclosure of the information contained in the records which relates to the Corporation's knowledge-base, equipment, operating costs and performance profile would provide competitors with a further competitive advantage in that they would be able to assess the Corporation's industrial capabilities. Should this result occur, the competitive advantages accruing to the Corporation would be further eroded.
- (4) Based on the principle of law articulated in the case of Lac Minerals v. International Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14 (S.C.C.), it would be wrong for the appellant to reap a competitive advantage by securing commercially valuable information which the Corporation has compiled through its own time and efforts.

The appellant, for his part, submits that the information at issue does not qualify for exemption under either section 17(1)(a) or (c) of the Act. The major arguments which he advances to support this proposition are:

- (1) The Corporation is classified as a Schedule III Operating Agency of the Government of Ontario. While section 17(1)(c) of the Act specifically applies to agencies (among other groups), section 17(1)(a) does not refer to the agency category. On this basis, the Corporation (which is itself an agency) cannot rely on section 17(1)(a) of the Act to protect its commercial and financial interests.
- (2) The Corporation has consistently taken the position that it does not compete with public and private sector organizations, particularly within Ontario (several examples of this position are provided). On this basis, it is not possible that the competitive position of the Corporation could be significantly harmed for the purposes of section 17(1)(a) of the Act.
- (3) Members of the public can routinely obtain access to the business plans of a number of other Schedule III agencies in the province (several examples are provided).
- (4) It is inappropriate for the Corporation to withhold access to its monthly financial statements since these must be consolidated on an annual basis for inclusion in the Corporation's annual report.

The appellant also believes that the Corporation has strayed from its original research and development mandate and that it is now competing directly in a number of service sectors. He feels that it is wrong for

the government to subsidize these sorts of activities. Finally, the appellant believes that the public has a right to know the extent to which the Corporation plans to make further inroads into private sector activities.

In order to determine whether section 17(1)(a) or (c) applies to the records at issue, I will need to describe each of the documents in greater detail.

Record 2 is a Market Studies Report which describes the key business areas in which the Corporation is involved. This document deals with such topics as the nature of its customer base, the Corporation's major competitors, its market plans, its present and future strategic alliances and the relative competitive advantages and disadvantages of each business in which the Corporation is involved.

Record 3 is an Operating Units Report which discusses each of the major business areas in which the Corporation operates. Among the topics canvassed in this document are market opportunities, the strengths and weaknesses of each business unit, the financial health of the individual enterprises and the major strategies proposed to strengthen each operation.

Record 4, which constitutes the Appendices to the Business Plan Report, further explores aspects of the Corporation's business operations. The document considers such topics as the benchmarking of administrative costs and the establishment of sectoral partnerships within various industries in which the Corporation participates.

Record 5 is the Renewal Plan Report prepared by the Corporation. This document deals with such items as the revenue sources of the Corporation, its financial performance and proposed commercial strategies. The Ministry has disclosed the majority of this record to the appellant and what remains at issue are certain deletions which appear on various pages of the document.

Record 6 sets out the Corporation's cash flow projections for the period 1994 to 1996. In Record 7, the Corporation has provided the Ministry with detailed information on how these projections were developed.

Record 8 is a letter authored by an official of the Corporation which was sent to a consultant employed by Technology Ontario. Attached to this correspondence is the Corporation's Draft Business Plan for the period January to April 1994. This document considers such items as corporate assets, income and expenses, and monthly cash flows. Record 12 is a memorandum prepared for a Vice-President of the Corporation which clarifies the cash flow projections found in Record 8, while Record 15 is a document which itemizes the Corporation's estimated renewal costs for this four month period.

Record 9 is a letter prepared by the President of the Corporation for the Deputy Minister of the Ministry. In this correspondence, the President responds to certain questions posed by the Deputy on the present and future relationship between the Corporation and the government.

Record 10 constitutes an Interim Report prepared by the Corporation which deals with the subject of "Opportunities for Renewal". As its title suggests, this document discusses potential business opportunities in which the Corporation could become involved. The record also outlines a number of the Corporation's specific commercial strategies.

Record 11 is a letter authored by the President of the Corporation to an Assistant Deputy Minister at the Ministry. This document discusses strategies which the Corporation will pursue to implement its renewal plan.

Record 13 is a "Management Renewal Report" prepared by the Corporation for transmittal to the Ministry. This document outlines the steps which the Corporation has taken to strengthen its financial performance and to implement its Renewal Plan.

Record 14 is a report prepared by the Corporation entitled "Corporate Renewal Project Purposes and Beliefs". This document also describes how the Corporation will implement its renewal plan and goes on to discuss how it will locate new markets and clients.

Record 16 is a further report entitled "Corporation Renewal Plan, a Submission to the Ministry of Economic Development and Trade, Commentary and Conclusions". In this document, the Corporation comments on its renewal plan and provides further information on its client base, financial status and future business direction.

Records 17 and 18 constitute two further reports prepared by the Corporation entitled "Renewal Compendium Technology Scan" and "Renewal Compendium [Corporate] Opportunities", respectively. These documents were developed to enable the Corporation to choose among competing business directions.

I first wish to address the difference in wording found in sections 17(1)(a) and (c) of the Act. While it is true that the section 17(1)(a) exemption does not specifically apply to agencies, it does refer to organizations. In my view, the Corporation can reasonably be thought of as an organization and, on this basis, I believe that it is entitled to avail itself of the protection afforded under this statutory provision. Second, I find as a matter of fact that the Corporation competes with other publicly supported research and development facilities both within Canada and internationally.

Following a careful review of the documents at issue, I accept the Corporation's arguments that the disclosure of Records 2, 3, 6, 7, 12, 17 and 18 in their entirety and the **non-highlighted** portions of Records 4, 5, 8, 9, 10, 11, 13, 14, 15 and 16 would reveal sensitive financial and commercial information about the Corporation. This would include the Corporation's present financial position, its strategies for business growth and customer service, its research and development initiatives and its assessment of future commercial opportunities. I am satisfied that this information, if released, could reasonably be expected to either (1) prejudice significantly the competitive position of the Corporation under section 17(1)(a) of the Act and/or (2) result in undue loss to the Corporation (and undue gain to its competitors) under section 17(1)(c) of the Act.

I believe, however, that the disclosure of the following records or portions thereof could not reasonably be expected to produce the harms contemplated under either section 17(1)(a) or (c) of the Act;

- (1) pages 1 to 4 of the Overview section of Record 4 in their entirety;

- (2) the cover page of Appendix IV in its entirety and the highlighted portions of pages i, 10, 61, Tables 3-2 and 5-1, and pages 1 to 4 and 6 of Appendix IV of Record 5;
- (3) the highlighted portion of page 1 of Record 8;
- (4) pages 1, 7 and 8 in their entirety and the highlighted portions of pages 2 to 5 and 6 of Record 9;
- (5) the cover page, pages 1 to 5, 19, 20, 22 and 24 in their entirety and the highlighted portions of pages 6 to 18, 21 and 23 of Record 10;
- (6) the highlighted portions of pages 1 and 2 of Record 11;
- (7) the cover page, the index page, pages 2 and 11, page 1 of Appendix i, pages 1 to 3 of Appendix ii and pages 1, 3, 4 and 6 of Appendix iii in their entirety and the highlighted portions of pages 1, 3 to 10 and pages 2, 5 and 7 of Appendix iii of Record 13;
- (8) pages 1 to 4 in their entirety and the highlighted portions of page 5 of Record 14;
- (9) page 1 in its entirety and the highlighted portion of page 2 of Record 15;
- (10) pages 1 to 3 in their entirety and the highlighted portions of pages 4 to 9 of Record 16.

In forming this conclusion, I have taken into account the objects of Ontario's freedom of information scheme (which are described in sections 1(a)(i) and (ii) of the Act) as well as the institution's obligation under section 10(2) of the Act to disclose as much of a record as can reasonably be severed without releasing information which is subject to the third party information exemption. I would also note that, in some cases, the information which I have ordered to be disclosed is already contained in documents which have been placed in the public domain (e.g. the Corporation's Renewal Bulletin and its annual reports). Finally, with respect to Record 5, some of the information which I have directed to be released has previously been disclosed elsewhere in this document.

As indicated previously, the appellant has stated that he does not wish to receive any information relating to the identity of the Corporation's clients or to the work that the Corporation performs for them. On this basis, I have removed this information from the scope of these appeals. Had the appellant, however, continued to seek this information, I would have concluded that the names of the Corporation's clients and the work which the Corporation conducted for them was exempt from disclosure under section 17(1) of the Act.

Prior to leaving my discussion of this exemption, I wish to address the Corporation's argument that every piece of information which it provided to the Ministry must be withheld from disclosure in order for the Corporation to retain the confidence of its client base. I regard this position as too extreme. I believe that section 17(1) of the Act provides a more appropriate and legislatively sanctioned approach for determining whether the disclosure of information would injure the interests of a third party. For such injury to be established, the third party (or the institution) must demonstrate that one or more of the types of harms enumerated in this section could reasonably be expected to occur from disclosure of the information. I also believe that, with freedom of information schemes in place in all major jurisdictions across North America, private sector clients have come to understand the public's right to access information which falls into the hands of organizations such as government ministries.

It is also important to note that the Corporation's records only came into the possession of the Ministry because the Corporation was seeking a large grant of public funds to enhance its capital base. In this scenario, I believe that the public has a legitimate interest in knowing whether the government's decision to allocate tax dollars has been made wisely. That level of scrutiny is even more crucial in the present climate of severe fiscal restraint. To state the matter a bit differently, if an organization chooses to seek funding from the government, it must as a corollary be prepared to accept the level of public scrutiny contemplated under the Act.

To summarize, I find that the third part of the section 17(1)(a) and (c) test has been satisfied with respect to Records 2, 3, 6, 7, 12, 17 and 18 in their entirety and the non-highlighted portions of Records 4, 5, 8, 9, 10, 11, 13, 14, 15 and 16. The result is that all of the records, or the relevant portions thereof, meet all three parts of the test and qualify for exemption under either sections 17(1)(a) or (c) of the Act.

### **Part 3 of the Test - Section 17(1)(b)**

I will now consider whether the highlighted portions of Records 4, 5, 8, 9, 10, 11, 13, 14, 15 and 16 qualify for exemption under section 17(1)(b) of the Act. In order for this provision to apply, the Ministry and/or the Corporation must establish that:

- (1) the disclosure of the information in the records could reasonably be expected to result in similar information no longer being supplied to the institution; and
- (2) it is in the public interest that similar information continue to be supplied to the institution in this fashion.

In its representations, the Corporation argues that, should the contents of Records 4, 9, 10 or 11 be disclosed, it will decide to no longer supply similar information to the Ministry. It also submits that there is an important public interest in ensuring that discussions between the Corporation and the Ministry are as open and frank as possible. That is the case because (1) the Government of Ontario relies heavily on the advice of the Corporation in order to advance sound economic and technological policies and (2) the Ministry requires full and complete information from the Corporation so that it can make proper decisions regarding the public funding of this Crown agency.

The Corporation further suggests that Record 4 was not provided to the Ministry for the direct purpose of obtaining funding but rather "to demonstrate that the [Corporation] had the necessary data and information to support its Business Plan". The Corporation goes on to state that, under no circumstances, would it have provided this document to the Ministry if there was any possibility that it would be disclosed.

The Corporation then refers to Records 9, 10 and 11, which consist of letters which its officers sent to the Ministry. It indicates that these letters were submitted to assist the Ministry to develop the government's research and development policy, to determine the role of the Corporation within this strategy and to obtain feedback on how the Corporation could advance its public mandate. The Corporation submits that it is in the public interest that information of this nature continue to be supplied to the government.

With respect to the other six records at issue, the Ministry indicates that if any confidential or valuable information is disclosed, "[the Corporation] will be required to be much more cautious and, accordingly, less open and frank, in its dealings with the government". It submits that it will only provide the Ministry with information that is strictly required.

The appellant, for his part, points out that under the provisions of the statute which establishes the Corporation, it is required to provide the Executive Council with an annual report. This report is to include a financial statement as well as a description of the work undertaken by the Corporation in the previous year. The appellant also indicates that under Directive 6-3 enacted by Management Board of Cabinet, all Schedule III agencies are obliged to prepare three to five year rolling corporate plans for the final approval of the responsible minister and Treasury Board. On this basis, the appellant concludes that the Corporation is obliged to provide the government with any information that it seeks. The appellant then relies on the wording of Orders P-314 and P-359 for the proposition that, "where legislation requires that information be provided to a ministry, the institution cannot establish that the disclosure of the information would result in similar information no longer being supplied".

Finally, the appellant notes that the 1992 and 1993 annual reports issued by the Corporation acknowledge that "the Corporation is dependent on continued funding from the Province of Ontario". He observes that, without such funding, the Corporation could not exist in its present form. On this basis, the appellant submits that, for economic reasons, the Corporation is obliged to provide information to the Ministry to enable it to continue as a viable commercial entity.

I must now determine, in the context of these appeals, whether the release of the records at issue could reasonably be expected to result in similar information no longer being supplied to the Ministry. At the outset, let me observe that while the Corporation's enabling statute and the relevant Management Board Guidelines require that the Corporation provide certain types of information to the government, not all of the records at issue fall into these categories. In a number of instances, the Corporation has voluntarily supplied the Ministry with customized documents in order to persuade the government to continue to provide funding for its capital and operating needs.

Based on the evidence before me, the Corporation has for many years obtained financial grants from the government to supplement the revenues which it derives from commercial ventures. I also accept that, without such continued funding, the Corporation's financial base would be weakened. Given its historical dependence on government funding, I must conclude that the Corporation would have a very powerful



incentive to provide the Ministry with whatever information is required in order to maintain this funding stream. On this basis, I must conclude that a decision in the present appeals to order the disclosure of the information at issue could not reasonably be expected to result in the Corporation no longer supplying similar information to the Ministry.

Based on the determination which I have made, it is not necessary for me to go on to decide whether it is in the public interest that similar information continue to be supplied to the Ministry in this fashion. The result, therefore, is that the Ministry and the Corporation cannot rely on section 17(1)(b) to withhold access to the information in question.

In forming this conclusion, I appreciate that much of the information contained in the 17 records contains confidential information about the financial status of the Corporation and its commercial strategies. I believe, however, that my earlier decision to withhold the great majority of the information contained in the records from disclosure under sections 17(1)(a) and (c) of the Act will adequately protect the interests of the Corporation and its clients.

## **CABINET RECORDS**

The Ministry claims that the introductory wording of section 12(1) and/or sections 12(1)(b) and (d) of the Act apply to exempt each of the 18 records from disclosure. Since I have previously determined that Records 2, 3, 6, 7, 12, 17 and 18 in their entirety and the non-highlighted parts of Records 4, 5, 8, 9, 10, 11, 13, 14, 15 and 16 are exempt from disclosure under section 17(1) of the Act, my discussion of the Cabinet records exemption will be limited to Record 1 and to the highlighted portions of Records 4, 5, 8, 9, 10, 11, 13, 14, 15 and 16.

The relevant parts of the Cabinet records exemption state that:

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,

...

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

...

- (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;

...

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 the Executive Council or its committees (not just the types of records listed in the various parts of section 12(1)), qualifies for exemption under section 12(1).

Other orders have held that a record which has never been placed before an Executive Council or its committees may nonetheless qualify for exemption under the introductory wording of section 12(1). This result will occur where a government organization 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.

I will first determine whether the records at issue are exempt from disclosure under the introductory wording of section 12(1). This preamble states that an institution must refuse to release a record where such disclosure would reveal the substance of deliberations of an Executive Council or one of its committees. Although the Ministry has claimed that all of the records at issue are exempt from disclosure under the Cabinet records exemption, it has focussed its representations on Records 1 and 5.

Record 1 consists of an Application and Report to Treasury Board prepared by the Ministry to which is attached a "Business Plan Summary" authored by the Corporation. The appellant has previously indicated that he does not wish to receive access to the portion of this document prepared by the Ministry. On this basis, the only part of Record 1 which I need to consider is the Business Plan Summary.

This summary contains a detailed analysis of the goals and directions of the Corporation for the 1994 to 1997 period. Among the subjects which this report addresses are (1) the Corporation's client base, (2) its core operations and emerging businesses, (3) some proposed marketing, technology and business development strategies, (4) a detailed financial overview of the Corporation and (5) future financial projections.

In its representations, the Ministry indicates that this record was submitted to Treasury Board for consideration on October 31, 1994. At the relevant point in time, Treasury Board was one of the government's Cabinet committees. Both the Ministry and the Corporation state that the purpose of this application was to provide a report on the Corporation's business plan and to request the release of certain funds for the Corporation.

I have carefully reviewed the contents of this document along with the representations of the parties. I find that the disclosure of Record 1 would reveal the substance of deliberations of a Cabinet committee in that it would reveal the theme or subject of the Treasury Board's discussions. That is, whether the business case provided by the Corporation was sufficient to persuade the government to release funds to this organization.

On this basis, the document qualifies for exemption under the introductory wording of section 12(1) of the Act.

The Corporation submits that the remaining records are subject to the Cabinet records exemption for three reasons:

- (1) These documents were either placed before Treasury Board directly or were "created as a direct result of a request from Treasury Board via the [Ministry] in order to assist the Government in its deliberations with respect to [the Corporation]".
- (2) The information contained in these records relates to the Corporation's renewal and business initiatives. The same type of information was summarized in the documents which were placed before Treasury Board. Thus, the disclosure of the records would be tantamount to disclosing the substance of deliberations of the Cabinet committee.
- (3) The disclosure of these records would permit the drawing of accurate inferences about the deliberations undertaken by Treasury Board.

I will deal with each of these arguments in turn. At the outset, there is no evidence before me to indicate that the relevant portions of Records 4, 5, 8, 9, 10, 11, 13, 14, 15 and 16 were either placed before Treasury Board directly or that this committee (as opposed to the Ministry) requested that they be created. Furthermore, even if such a direct request had been made, the Ministry and the Corporation would still have the onus of establishing that the disclosure of the information in question would reveal the substance of the committee's deliberations.

Second, I do not accept the Corporation's position that simply because the information found in a record resembles that which was provided to Cabinet in a summary form automatically means that such information falls under section 12(1) of the Act. In my view, an interpretation of this sort would remove large amounts of information from public disclosure and is inconsistent with the principle articulated in section 1(a)(ii) of the Act that necessary exemptions from the right of access should be limited and specific.

In order to determine whether the release of such related information would reveal the substance of deliberations of Cabinet or one of its committees, I believe that it is necessary to examine the context in which the information appears in the record. In my view, where the record does not specifically connect the information with the specific issues to be discussed by Cabinet or one of its committees, it cannot reasonably be said that the disclosure of this information would reveal the substance of deliberations of these bodies.

I have carefully reviewed the contents of the portions of the ten records at issue. I find that their contents do not constitute an assessment of the Corporation's business case for government funding, which was the specific issue canvassed by Treasury Board. On this basis, I find that the disclosure of this information would not reveal the substance of deliberations of this Cabinet committee. I further find, based on the facts of this case, that the release of this information would not permit the drawing of accurate inferences about the actual deliberations undertaken by Treasury Board.

I have, however, determined that the second paragraph on page 2 of Record 9 would reveal the substance of a previous Cabinet decision and, hence, must be withheld under section 12(1) of the Act.

The Ministry and the Corporation next claim that the relevant parts of Records 4, 5, 8, 9, 10, 11, 13, 14, 15 and 16 must be withheld under section 12(1)(b) of the Act. For this exemption to apply, the record in question must contain policy options or recommendations and it must have been submitted or prepared for submission to the Executive Council or its committees. I have carefully reviewed the parts of the ten records at issue and find that these documents do not contain policy options or recommendations. I also find that none of these records was submitted or prepared for submission to Treasury Board. On this basis, I find that section 12(1)(b) does not apply to the documents at issue.

The Ministry then submits that section 12(1)(d) of the Act applies to exempt the same ten records from disclosure. For the Ministry to successfully rely on this provision, it must demonstrate that the relevant parts of these documents were either used for or reflect consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.

I have carefully reviewed the contents of these documents. I find that there is no evidence before me to indicate that these records were either used for or that they reflect consultations among members of the Crown for the purposes outlined in section 12(1)(d). On this basis, I find that this exemption does not apply to the portions of the records at issue.

In the result, only Record 1 and the second paragraph on page 2 of Record 9 qualify for exemption under section 12(1) of the Act.

### **ORDER:**

1. I uphold the Ministry's decision to deny access to Records 1, 2, 3, 6, 7, 12, 17 and 18 in their entirety and the **non-highlighted** portions of Records 4, 5, 8, 9, 10, 11, 13, 14, 15 and 16.
2. I order the Ministry to disclose to the appellant;
  - (a) pages 1 to 4 of the Overview section of Record 4 in their entirety;
  - (b) the cover page of Appendix IV in its entirety and the highlighted portions of pages i, 10, 61, Tables 3-2 and 5-1, and pages 1 to 4 and 6 of Appendix IV of Record 5;
  - (c) the highlighted portion of page 1 of Record 8;
  - (d) pages 1, 7 and 8 in their entirety and the highlighted portions of pages 2 to 5 and 6 of Record 9;
  - (e) the cover page, pages 1 to 5, 19, 20, 22 and 24 in their entirety and the highlighted portions of pages 6 to 18, 21 and 23 of Record 10;
  - (f) the highlighted portions of pages 1 and 2 of Record 11;

- (g) the cover page, the index page, pages 2 and 11, page 1 of Appendix i, pages 1 to 3 of Appendix ii and pages 1, 3, 4 and 6 of Appendix iii in their entirety and the highlighted portions of pages 1, 3 to 10 and pages 2, 5 and 7 of Appendix iii of Record 13;
  - (h) pages 1 to 4 in their entirety and the highlighted portions of page 5 of Record 14;
  - (i) page 1 in its entirety and the highlighted portion of page 2 of Record 15;
  - (j) pages 1 to 3 in their entirety and the highlighted portions of pages 4 to 9 of Record 16.
3. To facilitate compliance with the terms of Provision 2, I order the Ministry to disclose the records referred to in Provision 2 by January 8, 1996, subject to any judicial review application which may be brought and to any stay of disclosure of records which are the subject of such application.
4. I order the appellant to advise the Commissioner's office within thirty (30) days after the date of this order whether he wishes to obtain access to the document entitled "Draft Business case for a Plastics Technology Alliance" which is referred to as Appendix 6 in Record 4. This correspondence should be directed to the Registrar of Appeals, c/o Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
5. In order to verify compliance with 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 of this order.

December 19, 1995

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Irwin Glasberg  
Assistant Commissioner

**POSTSCRIPT:**

I would like to thank the parties for the thorough representations which they provided to the Commissioner's office in support of their respective positions. These submissions materially assisted me in resolving the difficult issues raised in these appeals.

## APPENDIX "A"

### INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION ON RECORD
1	Document entitled "Application and Report to Treasury Board" dated October 31, 1994 to which is attached a Business Plan Summary prepared by the Corporation	12(1)(b) and (d) and 17(1) (a), (b) and (c) for each record	Withheld
2	Document entitled "Business Compendium Markets Studies Draft Report" dated April 7, 1994 which was prepared by the Corporation		Withheld
3	Document entitled "Business Compendium Operating Units Draft Report" dated April 7, 1994 which was prepared by the Corporation		Withheld
4	Document entitled "Business Compendium Appendices Draft Report" dated April 7, 1994 which was prepared by the Corporation.		Withheld subject to determining whether the appellant still wishes to receive access to Appendix 6.
5	Renewal Plan Report dated October 1993 prepared by the Corporation		Disclosed in part
6	Cash flow projections for the Corporation for the 1994 to 1996 period		Withheld
7	Letter from the Senior Vice-President (the SVP) of the Corporation dated December 10, 1993 to an official of the Ministry enclosing a document on cash flow projections for the Corporation for the 1994 to 1996 period		Withheld
8	Letter from the SVP dated December 6, 1993 to a consultant employed by Technology Ontario enclosing a Draft Business Plan for the Corporation for the January to April 1994 period		Disclosed in part
9	Letter dated November 29, 1993 from the President of the Corporation (the President) to the Ministry's Deputy Minister where the President provides responses to six specific questions.		Disclosed in part
10	Report prepared by the Corporation dated August 15, 1993 entitled "Corporate Renewal Plan Interim Report Opportunities for Renewal"		Disclosed in part

RECORD NUMBER	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION ON RECORD
11	Letter from the President of the Corporation dated July 13, 1993 to an Assistant Deputy Minister at the Ministry which relates to the renewal plans of the Corporation		Disclosed in part
12	Memorandum from an employee of the Corporation dated November 3, 1993 entitled "January to March 1994 Cashflow"		Withheld
13	Report prepared by the Corporation dated November 2, 1993 entitled "Management of Renewal a Report to the Ministry of Economic Development and Trade"		Disclosed in part
14	Document prepared by the Corporation dated July 5, 1993 entitled "Corporate Renewal Project Purposes and Beliefs"		Disclosed in part
15	Fax page from the President dated January 25, 1994 to a Ministry official to which is attached a document relating to the Corporation's renewal costs for the January to April 1994 period		Disclosed in part
16	Report prepared by the Corporation dated November 1993 entitled "Corporation Renewal Plan, a Submission to the Ministry of Economic Development and Trade, Commentary and Conclusions"		Disclosed in part
17	Report prepared by the Corporation dated October 1993 entitled "Renewal Compendium Technology Scan"		Withheld
18	Report prepared by the Corporation dated October 1993 entitled "Renewal Compendium [Corporate] Opportunities"		Withheld