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

FINAL ORDER PO-2369-F

Appeal PA-010080-2

Ministry of Health and Long-Term Care

Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Health and Long-Term Care (the Ministry), under the *Freedom of Information and Protection of Privacy Act* (the *Act*). It arises out of a request by an organization (the appellant) for access to records relating to four named corporations and two federal government agencies, in the following terms:

> …all documents that the Ministry has with regards to the following companies:
>
> [named company "A"]
> [named company "B"]
> The Canadian Development Corporation
> Ontario Development Corporation
> Health Canada's Health Protection Branch and /or Bureau of Biologics
>
> Specifically, I am requesting:
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "A"] and [named company "B"];
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "A"] and The Canadian Development Corporation;
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "A"] and the Ontario Development Corporation;
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "A"] and Health Canada's Health Protection Branch and /or Bureau of Biologics;
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "B"] and The Canadian Development Corporation;
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "B"] and the Ontario Development Corporation;

> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "B"] and Health Canada's Health Protection Branch and /or Bureau of Biologics;
>
> The period for which I am seeking all these documents is January 1, 1980 to December 31, 1986 inclusive.

The general subject matter of the request is the Canadian blood system in the 1980's, and the relationships between the named companies and federal and provincial governments in this system.

After locating the records, the Ministry issued a decision in which it denied access to all of them, relying on a number of exemptions under the *Act*, including section 14(1) (law enforcement). The appellant appealed this denial of access, as well as other aspects of the decision. In Interim Order PO-2069-I, I decided that section 14(1) did not apply to exempt the records from disclosure. I also determined that the Ministry had conducted a reasonable search for records.

Remaining in dispute was the application of the other exemptions relied on by the Ministry to deny access: sections 12 (Cabinet records), 13 (advice to government), 15 (intergovernmental relations), 17 (third party commercial information), 18 (economic interests of government), 19 (solicitor-client privilege), 21 (personal privacy) and 22(a) (records publicly available). Each of the records at issue was the subject of one or more of these exemption claims. As well, the Ministry took the position that some of the records were not responsive to the request.

Following the interim order, I issued a Supplementary Notice of Inquiry to the Ministry and to a number of affected parties, inviting them to provide representations on the facts and issues raised by the appeal. Included in these affected parties are the ministers of health of all the provinces and territories, as well as the Minister of Health for Canada. These governments were invited to provide representations on the application of section 15 to the records. The affected parties also included the successors to three commercial entities (named company "A" and two others) and two organizations (the Canadian Red Cross and Canadian Blood Services) whose interests might be affected by disclosure of the records. These parties were invited to provide representations on the application of section 17(1) to the records.

I received representations from seven provinces or territories objecting to release of the information in the records. Four provinces or territories did not respond to the Notice. The Minister for Canada consents to release of the information. One commercial party does not consent to release of its information, but decided to provide no representations on the application of section 17(1). Another commercial party objects to release of its information but again provided no representations on the application of section 17(1). The third commercial party did not take a position on the issues, nor did it provide representations. The Canadian Red Cross (Red Cross) consents to release of the information and Canadian Blood Services takes no position on the issues.

The Ministry did not provide any representations in response to the Notice. During the course of this appeal, however, it has issued several revised decisions (in October, November and December of 2003) in which it released a number of records to the appellant. Further, the Ministry has advised that, apart from section 15, it no longer relies on the discretionary exemptions originally claimed.

I sent the Supplementary Notice to the appellant in accordance with the revised positions taken by the Ministry, and invited it to provide representations. I enclosed the representations of Alberta Health and Wellness (Alberta) with specific portions severed, as well as those of Newfoundland and Labrador. Although Alberta requested that its representations not be shared with the appellant, I determined that with the exception of specific portions, the representations did not meet the criteria of this office for withholding them.

The appellant has declined to make representations.

Following my review of the representations submitted, I invited further representations on certain issues from the provinces and territory objecting to disclosure, and received responses from Alberta, Prince Edward Island and Saskatchewan.

The issues before me are whether the records are exempt from disclosure under sections 12, 15(a), 15(b), 17(1) or 21(1), whether some records are responsive to the request, and whether affected parties may claim the application of certain discretionary exemptions not relied on by the Ministry.

RECORDS:

At the outset of this inquiry, there were 1257 records at issue. As a result of the Ministry's disclosure of additional records, the number remaining at issue has been considerably reduced. The records at issue before me are those described in the index provided to the appellant in August 2001, less those released to the appellant in October, November and December of 2003. The index indicates which exemptions the Ministry relied on to deny access to each of the records listed.

The records consist of correspondence, memos, notes, reports, minutes and agendas of meetings, position papers, briefing notes, conference proceedings and other documents all generally related to the Canadian blood system in the 1980's, the involvement of the Ontario and other Canadian governments in managing that system, and the relationship between these governments and other companies or organizations in the system.

BACKGROUND TO THE APPEAL:

The involvement of the federal and provincial governments in Canada's blood supply has been described in the Final Report, Commission of Inquiry on the Blood System in Canada (Public

Works and Government Services Canada, 1997) (Krever Report, or Report). Much of the following background information is taken from that Report. The Inquiry was established in October, 1993 to "review and report on the mandate, organization, management, operations, financing and regulation of all activities of the blood system in Canada, including the events surrounding the contamination of the blood system in Canada in the early 1980's" (Report, Introduction, p. 5).

The Inquiry held 274 days of public hearings from 1993 to 1996, and collected approximately 175,000 documents, about 19,750 of which were filed as exhibits. Most of these were bound into 436 exhibit briefs that were distributed to "all persons and organizations with standing", which numbered about 30 (Report, Introduction, p.6). As well, exhibits were made available to the media in a press room during the course of the Inquiry (Report, Appendix C, Rules of Procedure and Practice for the Commission of Inquiry, s. 14).

One of the organizations about which the Inquiry heard much evidence was the Canadian Blood Committee (CBC, or the Committee), established in 1981. This was an intergovernmental committee, intended to have representatives from all provincial and territorial governments and the federal government. Its purpose was to direct the Canadian blood system, through policy and funding decisions. The Committee was born out of recommendations from previous ad hoc committees that concluded that Canada lacked both a national blood policy and a clear authority over its blood system, such as existed in the United States in the form of the Food and Drug Administration (see Report, Chapter 5).

The Report lists fourteen individuals who testified on behalf of the CBC or one of its subcommittees. The Report describes the structure of the CBC, its terms of reference, membership, and powers. It provides an account of the work of the CBC in the 1980's, until it was replaced by the Canadian Blood Agency in 1991. The discussion at certain meetings of the CBC or its subcommittees in this period is referred to, based on the minutes of these meetings, other documentary evidence, and oral evidence. The Report also describes the details of correspondence or discussions between the CBC and other agencies or organizations, including the Red Cross.

The Report details the relationship between the CBC, the Federal-Provincial Program and Budget Review Committee (FPPBRC), the Red Cross and private companies engaged in the fractionation (processing) of plasma from blood donations into blood products (two of the affected parties were fractionators during this period). It describes, for instance, some of the negotiations over blood fractionation contracts in this period and the efforts to develop national self-sufficiency in fractionation. The Report also describes the arrangements under which provinces paid for fractionated blood products distributed by the Red Cross within their respective boundaries. One of the responsibilities of the CBC was the approval of the budget of the Red Cross, and the Report describes the Committee's review of the Red Cross budgets in the 1980's. Some of the aspects of the budget discussions detailed in the Report related to the decision by the Red Cross to introduce HIV screening of blood and plasma donations, the efforts by the Red Cross to expand the use of plasmapheresis (the collection of plasma only), and the

conversion from non-heat-treated concentrates, used in the treatment of hemophilia, to heat-treated concentrates.

In its conclusions, the Report was critical of the effect that considerations of provincial industrial policy had on the domestic fractionation industry, as brought to bear through the CBC. It recommended, among other things, that a national blood supply system be established in which provincial boundaries were not barriers to the rational distribution of blood components.

In this decision, the CBC, its sub-committees, the FPPBRC and other intergovernmental committees whose information is found in the records are referred to by their acronyms or collectively as the "committees".

DISCUSSION:

RESPONSIVENESS

As set out above, the request covers records within a specified time frame, from January 1, 1980 to December 31, 1986. Amongst the records located by the Ministry are a number that fall outside of this time frame. Although some of the records are undated, I have inferred their dates from their contents and their apparent relationship to other records. As the request is clear and specific as to the time parameters of the records sought, I find that records created outside of this time frame are not responsive to the request. These records are therefore not at issue in this appeal: Records 68 to 79, 774, 777, 778, 779 and 1214.

The Ministry also identified certain other records as non-responsive, but provided no representations to support its position. Given the breadth of the records that the Ministry decided were covered by the scope of the request, and in the absence of submissions, I find no meaningful difference between these records and the rest of the records at issue. I therefore find that these other records are responsive and remain at issue in this appeal.

In its submissions, one of the provinces states that some of the records are not relevant to the request. This province submits that these records set out its position on blood fractionation and cannot be linked to the specific companies named in the request.

Prior orders of this office have stated that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act* [Orders P-134, P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. It appears that the Ministry applied a liberal interpretation of the scope of the request in this case. Although some of the records in this appeal do not specifically name one of the companies or organizations referred to in the request, the Ministry has decided that they "reasonably relate" to the request, and I see nothing improper in its decision in this regard. I am satisfied that, apart from the records that fall outside of the time frame of the request, the records before me are responsive to the request.

RELATIONS WITH OTHER GOVERNMENTS

The background information set out above provides a context within which to consider whether the records in this appeal are exempt from disclosure under section 15, which provides:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution; or
>
> (c) reveal information received in confidence from an international organization of states or a body thereof by an institution,
>
> and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of sections 15(b) and (c) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

Preliminary Issue

In this case, the Ministry applied section 15(a) to most of the records at issue, and section 15(b) to Records 256, 356, 814, 816, 1201 and 1247. In addition, the Ministry referred to section

"15(1)" in denying access to Records 1090, 1096, 1115, 1116 and 1117. In the case of these records, I have considered whether they are exempt from disclosure under either section 15(a) or 15(b).

The provinces providing representations support the Ministry's application of section 15(a) to the records. Some of the provinces also assert that section 15(b) applies to all of the records at issue. A preliminary issue that arises under section 15, therefore, is whether these provinces may rely on section 15(b) with respect to records beyond those identified by the Ministry.

At the outset, it is important to note two features of the exemption under section 15. Firstly, it is a *discretionary* exemption. That is, it is within an institution's discretion whether to apply the exemption, and an institution may decide to disclose information even if the elements of sections 15(a), (b) or (c) are met.

Further, although an institution is obliged to give notice to certain parties under section 28(1) before granting a request for access to records, the obligation under section 28(1) does not extend to governments or their agencies that may have an interest under section 15.

These two features are consistent with the discussion of this exemption in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), at pages 306 to 307:

> The government of Ontario may receive documents or acquire information from governments of other jurisdictions in circumstances in which it is expected that the material will be treated as confidential. Should there be an exemption for information received in confidence from other governments?
>
> ….instances may arise in which information is supplied by another government on the understanding that it not be disclosed to the public by representatives of the government of Ontario. It is our view that an Ontario freedom of information law should expressly exempt from access material or information obtained on this basis from another government. Failure to do so might result in the unwillingness of other governments to supply information that would be of assistance to the government of Ontario in the conduct of public affairs. An illustration may be useful. It is possible to conceive of a situation in which environmental studies (conducted by a neighbouring province) would be of significant interest to the government of Ontario. If the government of the neighbouring province had, for reasons of its own, determined that it would not release the information to the public, it might be unwilling to share this information with the Ontario government unless it could be assured that access to the document could not be secured under the provisions of Ontario's freedom of information law. A study of this kind would not be protected under any of the other exemptions which we have proposed (except to the extent that the document contains "advice and

> recommendations") and accordingly, could only be protected on the basis of an exemption permitting the government of Ontario to honour such understandings of confidentiality.

As expressed in the Williams Commission Report, the importance of an exemption permitting a provincial institution to insulate information received from other governments from disclosure is that it enables Ontario to receive useful information that it might otherwise not be able to obtain. Without the ability to honour expectations of confidentiality, Ontario would be prejudiced in its ability to obtain information from other jurisdictions.

All of the above suggests strongly that the scheme of the *Act* does not allow for a third party claim that a record is exempt under section 15. This is consistent with the approach of this office with respect to discretionary exemptions in general. In Order P-435, for instance, Assistant Commissioner Tom Mitchinson decided that an affected party was not entitled to raise section 15(b) on its own accord, relying on his discussion in Order P-257:

> In Order P-257 I addressed the situation where an affected person attempts to raise the application of a discretionary exemption which was not claimed by the institution. At page 5 of that order I stated:
>
> > As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released. If, during the course of an appeal, a head indicated a change in position in favour of release of information not covered by sections 17(1) or 21(1), again, this would almost always be an acceptable course of action, consistent with the purposes of the *Act*. In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In

> my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.
>
> In my view, this appeal does not raise the type of situations described in Order P-257, and, because the Ministry has not claimed section 15(b) of the *Act* as a basis for exempting the record at issue in this appeal, I find that this section is not applicable.

I agree with the above, and find it applicable to the circumstances before me. In any event, in this appeal, it is apparent that the provinces referring to section 15(b) are concerned with the protection of confidences shared as part of intergovernmental relations. The records that they seek to exempt under section 15(b) are the same as those whose disclosure they assert would prejudice the conduct of intergovernmental relations under section 15(a). In essence, the interests they seek to protect through section 15(b) are not distinguishable from their interests under section 15(a).

Based on the above, I find it is only necessary for me to consider whether section 15(b) applies to the specific records to which the Ministry applied this exemption. However, I will begin with a discussion of the application of section 15(a) in this appeal.

Section 15(a)

Representations

As I have indicated, the Ministry chose not to submit representations. Seven of the eleven provinces or territories notified of the appeal object to disclosure of the records on the basis of the harm described in section 15(a). Four provinces or territories took no position and provided no representations. The federal government does not object to disclosure of all the records.

Most of the representations from the provinces or territories were fairly brief, and it is unnecessary to describe them here. Alberta provided detailed representations capturing the concerns raised by the other governments. Alberta submitted that the records in question contain materials created or received by the CBC or various sub-committees. A member from Alberta participated on the CBC, along with representatives from each province and one from the federal government. Alberta considered and expected that its participation on the CBC would be based on confidentiality, taking into consideration what it refers to as the long-standing practice and tradition that materials submitted to or prepared for intergovernmental committees are confidential unless otherwise stated.

Alberta submits that the records contain significant confidential policy and financial information. The CBC served as a forum for provinces to share information regarding various

intergovernmental issues related to the national blood system in Canada. The records were required in order that the CBC could properly undertake its work, and so that member governments could discuss and exchange information. The information shared with the CBC and amongst its members may have been used to advise each government's decision makers in their respective ministries about policy options. The discussions about CBC decisions often contained significant government policy issues, and are found in some of the CBC minutes and documents appended to those minutes.

It is Alberta's view that disclosure of the information will reveal information received from Alberta or its agents, the disclosure of which will harm intergovernmental relations between Ontario and Alberta. It submits that the ability to share information and conduct frank and open discussions with its counterparts in Ontario and other jurisdictions will be harmed because not respecting the confidentiality of intergovernmental information will make the process of cooperative work and deliberation on all future committees more difficult. Alberta states that disclosure will set a precedent that will jeopardize the functioning of all federal/provincial/territorial committees and working groups.

Following receipt of representations, I decided to seek further representations from the objecting governments, as indicated above. In a letter, I stated, among other things:

> It is not within my capacity to determine whether all of the records at issue in the appeal before me were filed as exhibits to the Krever Commission. Based on a brief review, it does appear that many were. Upon my review of parts of the Final Report, it appears that there is good reason to believe that the records relating to the work of intergovernmental committees at issue in this appeal were likely made exhibits to the Commission.
>
> May I therefore have your views on whether you support my preliminary assessment that the records at issue were likely made exhibits to the Commission, and therefore made publicly available?
>
> Even if it is not possible to confirm whether or not this is the case for every record, may I have your views on whether the work of the Krever Commission affects the outcome of this appeal? If, as appears to be the case, the Krever Commission inquired in some detail into the workings of the CBC and other related committees, what prejudice, if any would ensue from the disclosure of the records relating to these committees to the appellant?

I received supplementary representations from three provinces in response to my letter. Saskatchewan submitted that although it would be difficult to deny access to any records that were tabled with the Krever Commission and are now part of a record that is in the public domain, this would have to be determined on a record-by-record basis.

PEI submitted that it does not support my preliminary assessment that the records at issue were likely made exhibits to the Commission and therefore made publicly available. The Krever Report does not contain the documents filed as exhibits, and it is difficult to ascertain whether the records at issue are the same as those filed as exhibits. PEI repeats its objection to disclosure on the basis of harm to intergovernmental relations.

In response to my letter, Alberta submitted two sets of representations. In the first, it refers to the statement in the Report that "most" of the documents received were bound and distributed as exhibits as refuting my preliminary assessment. It also cites the Rules of Procedure of the Commission providing that documents received by the Commission were to remain confidential until disclosed as exhibits. Alberta also submits that certain records were withheld from the Commission on the basis of privilege. It states that although it appears that exhibits were distributed to persons and organizations with standing, to its knowledge, the exhibits were not made available to the public by the Commission. There is no repository where they are available for inspection by the public, and without evidence to the contrary, the exhibits should not be treated as publicly available.

Alberta objects to the disclosure of records in circumstances where I am not able to confirm or deny whether the specific information contained in each particular record has been disclosed through the Krever Report. It states that it was compelled to provide its records to the Krever Commission under the *Inquiries Act* and did so on the understanding that they would remain confidential unless disclosed (in a limited way) as exhibits. Producing the records under those circumstances does not constitute a waiver to claim confidentiality over records and information in other forums.

Alberta also submitted a second letter containing supplemental representations that it described as "*in camera*". Because it was unnecessary to ask the appellant to respond to these representations, it was not necessary to determine whether they met this office's criteria (as out lined in IPC Practice Direction 7) for withholding them. On reviewing them for the purposes of this decision, I note that some portions would have met the criteria, in that they reveal the substance of records claimed exempt, but that much of the submissions are general and would not have qualified for withholding. My description of Alberta's representations in this decision is in keeping with this assessment.

Alberta submitted that although the Krever Report discusses several matters related to the records, it continues to object to disclosure of the records on the basis that they contain a level of detail of information not discussed in the Report. As an example, Alberta submits that the Report discusses at length many issues relating to the involvement of various provincial governments on and with the Committees. However, the records contain detailed information regarding the views, positions, policies and concerns of the representatives of various provincial governments (including Alberta) with respect to the issues of the time. Some minutes of meetings, for instance, detail discussions regarding operational, policy and budgeting matters including details about distribution of products, cost estimates, and proposals relating to

contractual concerns. Other minutes detail discussions, options and decisions relating to third party contract negotiations.

Alberta also submits that although the Report does not discuss in much detail the day to day operations of the various committees, the records contain detailed information on these topics. For example, specific meeting minutes provide detailed information regarding discussions, options and recommendations for a number of policy issues including program rationales and priorities, program expansions, contract negotiations, budget and cash flow items. Other meeting minutes contain specific information relating to product quantities, supplies, equipment, costs, contractual concerns and budgeting matters.

In addition to its concern over prejudice to intergovernmental relations, Alberta states that there has also been a considerable amount of litigation surrounding these issues and disclosure of this information could seriously jeopardize the positions of Alberta and/or third parties in current and future legal proceedings.

Another subject of discussion in the Report is the award of contracts to various private third parties. Again, Alberta submits that the records contain additional and more specific information on this subject than is revealed in the Report. An example is the discussion in the Report over the problems associated with contracts entered into by the Red Cross with respect to processing blood products, Ontario's ultimate agreement to cover the additional costs of re-negotiating certain contracts, and negotiations related to entering into other contracts. In Alberta's submission, it identifies records which provide more detail on this issue, such as a letter in which one province discusses its understanding of the terms and amounts related to Ontario's commitment, and a letter in which Health Canada proposes specific amendments to wording of a draft contract with a private third party.

Alberta submits that disclosure of information relating to negotiations and terms of contracts impairs its ability to conduct government business competitively. For the committees to properly undertake their work, it was necessary to obtain confidential and proprietary information from private third parties. If those agencies cannot protect the confidential business information, third parties will be highly reluctant to provide it in the future.

Analysis

A number of decisions of this office have upheld the application of section 15(a) to records of intergovernmental committees, in recognition of the value of intergovernmental relations and of the purpose served by non-disclosure in supporting the work of such committees. In Order PO-2249 for example, I upheld a decision to deny access to the agendas and minutes of meetings of provincial and territorial medical directors, stating:

> Based on the representations before me, I am satisfied that the records relate to intergovernmental relations. The meetings of the provincial and territorial medical directors that are documented in the records represent working relationships

between their governments used as a vehicle to discuss issues of common concern surrounding the payment for medical services.

I am also satisfied that disclosure of much of the information in the records could reasonably be expected to prejudice the conduct of intergovernmental relations. The general purpose of the meetings is the exchange of information about payment for medical services under the different provincial and territorial health insurance plans. I accept the representations of the Ministry and other provinces and territories that during the course of the discussions, government representatives provide information about negotiations, funding and management issues related to their plans. Although much of the information provided is factual, in the sense of reporting on the treatment of particular medical services under the different health insurance plans, participants may also provide information that departs from the official position of the provinces they represent, or that reports on ongoing negotiations or shares initial policy thinking or planning.

I also accept that the participants in these meetings have a shared expectation that their discussions are "in camera", and this permits them to be frank in providing their views and information on the issues discussed. The minutes are quite detailed in recording the input of the provincial and territorial representatives on the matters under discussion. I find that disclosure of the information in the records could reasonably be expected to result in less candour at the meetings, less sharing of information and generally less of an inclination to continue with these informal exchanges.

The representations of the provinces and territories establish that these meetings are a valuable means for these governments to share information and make use of informal working relationships to assist in developing their own policies on payment for medical services. Disclosure of the proceedings of the meetings could reasonably be expected to undermine these relationships and, therefore, to prejudice the conduct of intergovernmental relations.

I am therefore satisfied that section 15(a) would apply to exempt disclosure of the agendas, minutes and supporting material found in the records.

Although I agree with the above analysis, I find that there are important differences between the circumstances of this appeal, and those in Order PO-2249 as well as other orders that have applied section 15(a). First, as all parties recognize, the Krever Commission conducted a thorough examination of the blood system in Canada. Its very mandate necessarily included a review of the work of the committees discussed in the records. Among the specific subjects the Commission examined was the "organization and effectiveness of past and current systems designed to supply blood and blood products in Canada" (Report, Introduction, p. 5).

I agree with Alberta that the records contain a greater level of detail about the discussions and work of the committees than is found in the Report. This is not surprising. What is significant, however, is that the Commission provided the public with a level of insight into the affairs of intergovernmental committees that would not otherwise have been available. In fulfilling its mandate, the Commission necessarily overturned normal expectations about the confidentiality of the work of these intergovernmental committees.

Further, in providing this glimpse into the affairs of intergovernmental committees involved in the blood system, the Commission canvassed some of the issues facing these committees in detail. Occasionally, the Report describes the positions taken by governmental representatives on specific issues. For example, in Chapter 5, the Report quotes from meeting minutes that set out discussions within the CBC about funding requests from the Red Cross in 1984 and 1985 (see page 109). The Report refers to positions taken by provincial representatives on the selection of a fractionator (Chapter 4, pages 78 to 82). In discussing the implementation of HIV testing of blood donations, the Report describes the positions taken by some provincial representatives to the CBC on this issue (Chapter 12, pages 318 to 323).

The very fact that the Commission publicly reviewed the discussions and decision-making within the CBC and other related committees is a reflection of the extraordinary circumstances under which the Commission was created, and the breadth of the mandate given to it in response to those circumstances.

It is within this context that I have come to the conclusion that disclosure of the records at issue, which relate to the direction of the Canadian blood supply through the CBC and other committees in the period 1980 to 1986, could not reasonably be expected to prejudice the conduct of intergovernmental relations by Ontario, within the meaning of section 15(a).

In my view, in its application to the work of intergovernmental committees, section 15(a) may be seen as protecting against two distinct kinds of prejudice. First, disclosure has the potential to prejudice ongoing work of an existing intergovernmental committee or body. Second, even if the specific work of an identified committee or body is not at issue, disclosure may undermine the conduct of intergovernmental relations in general, in that governments will be less willing to share information in other contexts.

In this appeal, it is notable that the committees whose work is detailed in the records no longer exist, and that the records are now 18 to 24 years old. The decision-making processes reflected in the records have long reached their conclusion. The possibility that disclosure could prejudice the current work of the committees named in the records therefore does not exist.

What remains is the possibility that disclosure of the records will affect the general willingness of provincial and territorial governments to engage in intergovernmental relations for the public benefit. It is this more general type of prejudice that is identified in the representations of the objecting provinces and territory. Alberta's submission, for instance, states that disclosure will

set a precedent that will jeopardize the functioning of all federal/provincial/territorial committees and working groups.

I find that in the unique circumstances of this appeal, disclosure of the records could not reasonably be expected to have such a result. While it may be that many intergovernmental committees function under general understandings of confidentiality, the work of the committees at issue in this appeal has been so publicly and extensively scrutinized that the usual climate of confidentiality no longer pertains to them. For this reason, I find it unlikely that disclosure of these records will chill intergovernmental relations in other areas. Coupled with the extensive passage of time since these records were created, the circumstances before me are simply so extraordinary that I am not convinced that disclosure of the records will set a precedent that will prejudice the conduct of intergovernmental relations in general.

I also note that the various governments involved in these committees are far from unanimous on the prospect of disclosure of the records. As I have indicated, the federal government does not object to disclosure. The Ministry denied access in reliance on section 15(a), but has provided no representations (despite the burden of proof placed on it by section 53). Four other provinces and a territory have not submitted representations or taken a position on the issues.

Although not directly relevant to this appeal, it is also interesting that some jurisdictions have imposed time limits on the application of their exemptions based on intergovernmental relations [see Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s.21(4) (15 years) and PEI's *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, c. F-15.01, s.19(4) (20 years)], suggesting a recognition of a diminishing prejudice over time.

In arriving at my conclusions, I have carefully considered the representations of Alberta and the other objecting governments on the issues raised under section 15(a). I conclude that my findings under section 15(a) do not depend on my ability to confirm whether all of the records were made exhibits to the Commission, and accordingly made publicly available. It is apparent from the Report and from the list of witnesses (fourteen of whom gave oral testimony about the CBC and its sub-committees) that the Commission received a great deal of evidence about these committees. Whether or not all of the records have been made publicly available, I am satisfied that the work of the committees, as reflected in the records, has been the subject of considerable public discussion.

Although in its representations, Alberta referred to the possibility that some records were withheld from the Commission on the basis of privilege, it does not provide any submissions on this beyond the general assertion. I am not convinced that any privilege applies to exempt the records from disclosure. The *Act* does not provide for a general claim of privilege. Included in the exemptions recognized under the *Act* are certain specific privileges (such as solicitor-client privilege). In the absence of any identification of what privilege is at issue and any support for its application, I am unable to accept a generalized assertion of privilege.

I am not convinced that the Commission's Rules of Procedure pertaining to the confidentiality of documents received during the course of the Inquiry has a bearing on the issues before me. Those Rules address procedures before the Commission and were not intended to extend in their reach to issues under the *Act*. I find no lawful basis to reach any other conclusion in this regard.

Alberta also refers to the potential effect that disclosure may have on current and future legal proceedings. However, I have not been provided with information about any specific legal proceedings, or any other evidence to substantiate this concern.

Alberta also expresses a concern that disclosure of the records will result in the release of information about private third parties, and that if intergovernmental agencies cannot protect confidential business information, third parties will be highly reluctant to provide it in the future. This is, in my view, a concern that is addressed under section 17(1) (third party information), rather than section 15(a). As I indicated above, during this inquiry, I notified three commercial parties of this appeal and invited them to submit representations on the application of section 17(1), discussed below.

In conclusion, I am not satisfied that disclosure of any of the records at issue can reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario of its institutions, within the meaning of section 15(a).

Section 15(b)

As indicated above, the Ministry relied on section 15(b) in denying access to Records 256, 356, 814, 816, 1090, 1096, 1115, 1116, 1117, 1201 and 1247.

The Ministry did not provide submissions on the application of section 15(b). The objecting provinces and territory submit that, as part of the work of the committees, information was created or exchanged between the provincial and federal governments under a mutual expectation of confidentiality. The gist of these representations is set out above.

Although I have found that it is not available to other governments to claim the application of section 15(b) to records which the Ministry chose not to exempt under this provision, their representations are still relevant to establishing whether the denial of access to Records 256, 356, 814, 816, 1090, 1096, 1115, 1116, 1117, 1201 and 1247 is justified under section 15(b).

I find that disclosure of Record 256 would not reveal information received in confidence from another government or one of its agencies. It sets out positions taken by an intergovernmental committee as a whole, without revealing information of any specific government.

Record 356 contains correspondence setting out the position of a province on certain issues. Even if I accept that this qualifies as the "information" of that province, the position taken by the province in question was discussed in the Krever Report. In light of this, I find that disclosure of

Record 356 would not "reveal" information received in confidence by this province, as it is already publicly known.

For the same reasons, I am also not convinced that disclosure of Records 814, 816, 1115, 1116 and 1117 would reveal information received from another government in confidence, as the subject matters of these records has been discussed in the Krever Report.

With a specific exception, I also find that disclosure of Records 1201 and 1247 (which are duplicates) would not reveal information received from another government in confidence. These records consist of a position paper drafted by staff employed by an intergovernmental committee, on the issue of subsidies to the fractionation industry. The exception is a portion of the report consisting of a table setting out actual provincial costs in purchasing blood products over a two-year period. It is reasonable in the circumstances, and having regard to the submissions of the parties, to conclude that this information was conveyed by each of the provinces under a reasonable expectation of confidentiality. Further, it is not apparent to me that this information was publicly canvassed during the Krever Commission's inquiry. I find, therefore, that this table ("Annex A") qualifies for exemption under section 15(b).

Section 15(b) is a discretionary exemption. It permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information

  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

In this case, I find that the Ministry failed to exercise its discretion in applying section 15(b), as I have not been provided with any information about what factors it took into account in applying section 15(b).

In the normal course, I would in such circumstances send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573], recognizing that this office may not substitute its own discretion for that of the Ministry [section 54(2)].

In this matter, however, I have decided to permit the appellant an opportunity to determine whether, in light of the extensive disclosure resulting from my decision, it wishes to pursue access to Annex "A" of Records 1201 and 1247. I will therefore remit this issue back to the appellant.

I now turn to consider the application of section 17(1).

THIRD PARTY INFORMATION

Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, an institution and/or a third party 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

In this case, the Ministry identified section 17(1) as a basis for denying access to approximately 170 of the records remaining at issue. On the basis of its decision and my review of the material in this appeal, I notified three commercial parties, the Red Cross and the Canadian Blood Services, and invited them to submit representations on the application of section 17(1).

One of the commercial parties did not send representations or take a position. A second commercial party states that while it does not consent to disclosure of the records that the Ministry identified as affecting its interests, it did not intend to make submissions. A third commercial party states that it objects to disclosure of the records affecting its interests, but again makes no submissions on section 17(1).

As indicated, the Canadian Blood Services takes no position on release of the records, and the Red Cross consents to disclosure.

In its representations, Alberta submits, among other things, that it is an affected party for the purposes of section 17(1).

Because of my conclusion under part 3 of the three-part test for exemption under section 17(1), it is unnecessary for me to discuss parts 1 and 2.

Part 3: harms

Under section 53, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. Affected parties who rely on the exemption provided by section 17 to resist disclosure of information share with the institution the onus of proving that this exemption applies to a record or parts of it.

To meet part 3 of the test for exemption under section 17(1), the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In this appeal, only Alberta provided any representations on the issue of whether disclosure of the information in the records could reasonably be expected to lead to the harms described in section 17(1). It submits that the records include confidential commercial information regarding the buying and selling of blood products. A number of the records contain contractual information and information relating to the negotiation of contracts, as well as financial information related to those contracts. It states that disclosure of these records would significantly impair the competitive position of Alberta and other third parties, within the meaning of section 17(1)(a).

Referring to section 17(1)(b), Alberta also submits that disclosure would result in similar information no longer being supplied where it is in the public interest that it continue to be supplied.

Further, Alberta states that section 17(1)(c) applies in that disclosure of the information could seriously jeopardize the positions of the third parties, including itself, in current and future legal proceedings.

Commercial affected parties

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

In this appeal, Alberta's representations on the potential for harm to the interests of the commercial parties are very general, and do not take account of the specific context. I find that they fall short of providing detailed and convincing evidence on this issue. This is not surprising, in that the commercial third parties would be in the best position to provide evidence on any expected harm to their commercial interests. In this appeal, they have not done so.

Further, the harms described in section 17(1) are not established through a review of the records themselves. Taking into account that the information in them is between 18 and 24 years old, and that there has been considerable public scrutiny through the Krever Commission of many of the issues addressed in the records, I am not convinced that disclosure of the records could reasonably be expected to result in the types of harms described in section 17(1).

I therefore find that there is a lack of detailed and convincing evidence to establish that disclosure of the records could reasonably be expected to result in any of the harms described in section 17(1), in relation to the commercial affected parties.

Alberta as a third party under section 17(1)

It is not apparent to me that section 17(1) applies to the interests of a provincial government, given the existence of the exemption in section 15. It is, however, unnecessary for me to decide whether it is available to Alberta to claim the benefit of the section 17(1) exemption as I find that it has also failed to meet part 3 of the three-part test for exemption under this section.

I am not convinced, given the age of the records and the broad changes that have been made to the blood supply system in Canada since the time these records were created, that disclosure of the information in the records could reasonably be expected to prejudice the competitive position of the province of Alberta, within the meaning of section 17(1)(a). I am also not convinced, for

the same reasons, that disclosure could reasonably be expected to lead to the harms in sections 17(1)(b) or (c).

In relation to Alberta's submission on the possibility of prejudice in relation to legal proceedings, it has provided no information about this potential prejudice beyond a general assertion. There is an absence of detailed and convincing evidence to support the conclusion that disclosure of the records will result in undue loss or gain to Alberta through its effect on legal proceedings.

In conclusion, it has not been established that disclosure of the records could reasonably be expected to lead to any of the harms described in section 17(1), in relation to the interests of the commercial affected parties or of Alberta. As all parts of the three-part test for exemption under section 17(1) must be satisfied, I find that this exemption does not apply.

Notice issue in relation to additional records

Because section 17(1) is a mandatory exemption, I also considered whether it might arguably apply to any records remaining at issue to which the Ministry did not specifically apply it, and which the affected parties therefore may not have had an opportunity to review. I also reviewed the records to determine whether any additional affected parties ought to be notified of this appeal.

Upon my review, I have identified a record that may arguably contain the commercial information of additional parties not yet notified (Record 499), in the form of price quotations. As this information can be severed from the other information in the record, and the other information is not exempt, I will order partial disclosure of this record only.

I have also identified a record whose disclosure may arguably affect the interests of one of the commercial affected parties and which that party may not have had an opportunity to review (Record 611). This record appears to be a report to the Board of Directors of the commercial party, analyzing the company's prospects in the immuno-assay market.

Record 756 arguably affects the interests of additional parties beyond those already notified. Its relationship to the request is less apparent than other records at issue, as it relates to prices for vaccines.

Record 1086 contains the minutes of a meeting to discuss the renegotiation of a contract with one of the commercial affected parties. Although other records relating to this renegotiation process were sent to this party to review, it is not apparent whether these records were made available to it. However, I am satisfied that part of Record 1086 (the first page, which is a cover memo) is not subject to any exemption, and I will order it disclosed.

In conclusion, I am satisfied that section 17(1) does not apply to exempt the records at issue from disclosure, with the exception of those records identified above as requiring further notice. With respect to those I will, consistent with the approach I have decided to take under section 15(b),

remit the matter back to the appellant initially, to determine whether it continues to seek access to these records.

I now turn to consider the application of section 12(1), the Cabinet records exemption.

CABINET RECORDS

Section 12(1) reads:

> 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,
>
> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
>
> (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; and
>
> (f) draft legislation or regulations.

Section 12(2) provides certain exceptions to the section 12(1) exemption:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> (a) the record is more than twenty years old; or
>
> (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-11, P-22 and P-331].

A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-506].

In this appeal, the Ministry identified section 12(1) as the basis for denying access to approximately 70 of the records remaining at issue. The Ministry did not make submissions in support of the application of section 12(1), and I reviewed the records to determine whether their contents might assist in determining whether this mandatory exemption applies. On my review, I find that many of the records to which the Ministry applied section 12(1) are now more than twenty years old. Some of the records I reviewed are undated, but I was able to infer their dates from their contents and their apparent relationship to other records.

The records that are more than twenty years old are: Records 135 to 139, 268, 270, 357, 467, 484, 485, 486, 535, 536, 577, 578, 579, 740, 741, 794, 796, 798, 799, 801, 802, 861, 999, 1022, 1079, 1088, 1165, 1167, 1173, 1174, 1178, 1180, 1181, 1185, 1186, 1187, 1188, 1198, 1220, 1236, 1238, 1239, 1241 and 1256. These records fall under the exception in section 12(2)(a), and therefore do not qualify for exemption from disclosure under section 12(1). As no other exemption applies to the above records, I will order them disclosed.

Based on the contents of the other records I reviewed, I am satisfied that disclosure of the following records would reveal the substance of deliberations of Cabinet or its committees, within the meaning of section 12(1): Records 555 to 559, 621, 763, 770, 1164, 1167, 1199, 1231, 1232, 1235, 1240, 1242, 1246, 1248 to 1250. These records are accordingly exempt from disclosure under this section.

The first five pages of Record 1169 are the same as Record 1167, and I find these pages exempt from disclosure on the same basis. However, Record 1169 contains additional attachments whose relationship to Cabinet deliberations is not apparent, and the disclosure of which I am not satisfied would reveal the substance of any deliberations of Cabinet. I find that these

attachments are not exempt under section 12(1). In the absence of any other applicable exemption, I will order three of the attachments to Record 1169 to be disclosed.

PERSONAL INFORMATION/UNJUSTIFIED INVASION OF PERSONAL PRIVACY

The Ministry relied on section 21(1), the personal privacy exemption, to refuse access to Records 180, 310, 315, 398, 897, 942, 1197 and 1215.

The personal privacy exemption only applies if the records contain "personal information" as defined in the *Act*. That term is defined in section 2(1) to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. In Order PO-2225, Assistant Commissioner Tom Mitchinson offered the following analysis of this issue:

> Based on the principles expressed in these orders, the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> ….
>
> The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

Based on my review of the records, I find that Records 180, 310, 398, 942, 1197 and 1215 contain the personal information of identifiable individuals. Beyond those identified by the Ministry, I also find that Records 258, 452, 453, 583 and 584 contain the personal information of identifiable individuals. In all of these records, I am satisfied that the information of these individuals either appears in a context that is personal, rather than business or professional, or if it appears in a business or professional context, reveals something personal about the individual.

Record 897 does not contain personal information. It consists of a package of correspondence from which all personal identifiers have been removed. Record 315 also does not contain any personal information, as its author and recipient are both acting in a business or professional capacity in this correspondence and nothing in the record reveals anything of a personal nature

about these individuals. As Records 897 and 315 do not contain personal information, they do not qualify for exemption under section 21(1).

In relation to the records containing personal information, where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. Under section 21(1)(f), disclosure is prohibited unless that disclosure would not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

I have no submissions on whether disclosure of the personal information in the records would constitute an unjustified invasion of personal privacy. In order for the exemption not to apply to this information in the circumstances of this appeal I must, as noted, be satisfied that disclosure would *not* be an unjustified invasion of personal privacy. In the absence of submissions or evidence to that effect, it is not necessary to consider whether the information may fall under any of the presumptions in section 21(3), or whether any of the criteria favouring privacy protection in section 21(2) may apply. I am not satisfied that disclosure would *not* constitute an unjustified invasion of personal privacy. I find, therefore, that section 21(1)(f) applies to exempt the personal information in the records from disclosure.

I find, however, that the personal information in Records 310, 398, 452, 453, 583 and 584 can be readily severed from the rest of these records. As no other exemptions apply to this other information, I will order that it be disclosed.

In sum, Records 315 and 897 are not exempt under section 21(1), or under any other provision. Section 21(1) applies to exempt portions of Records 310, 398, 452, 453, 583 and 584, and Records 180, 258, 942, 1197 and 1215 in their entirety.

OTHER ISSUES

Section 22

Section 22(a) states:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

As indicted above, one of the commercial affected parties asserts that section 22(a) applies to exempt records from disclosure, in that many of the documents have already been "published" as exhibits to the Krever Commission.

Although the Ministry originally claimed that section 22(a) applies, it withdrew its reliance on this section. As with section 15, section 22(a) is a discretionary exemption. For the same reasons as expressed above in my discussion of section 15(b), I find that an affected party cannot raise section 22(a), where the institution has specifically declined to apply it.

Effect of legislation in other provinces

In their representations, some of the provinces submit that access to these records would be refused under the equivalent to section 15 in their access to information laws. Some have enclosed the provisions applicable in their jurisdictions.

I have reviewed the legislative provisions referred to. All provide for an exemption to disclosure based on the protection of intergovernmental relations. All are similar to section 15 in conferring discretion to refuse access based on prejudice to intergovernmental relations although in some, disclosure of certain types of information received from another government requires the consent of the other government. Interestingly, as I have noted above, in some provinces the exemption based on intergovernmental relations does not apply to information that has been in existence in a record beyond a certain number of years.

The submissions of the provinces on this issue do not go so far as to suggest that I must apply the statutory provisions of their jurisdictions and, clearly, what is before me is the application of the specific provisions of Ontario's *Act* to records in the possession of the Ministry. One province characterizes the matter as a question of "courtesy" that Ontario ought to treat information arising out of intergovernmental relations in the same way that it would.

In a general sense, consistency in the application of similar exemptions found in access to information legislation across the different jurisdictions in Canada is a worthy objective. Arguably, it may be particularly desirable in the case of an exemption that recognizes and supports provincial and federal co-operation, as in the case of section 15 and its equivalents. However, it must also be recognized that each legislature has decided on the particular wording through which the exemption protecting intergovernmental relations is expressed, which will determine the result of the application of the exemption to their respective records. For instance, while in some provinces the equivalent to section 15(b) is a mandatory exemption, in others, including Ontario, it is discretionary.

Further, it is significant that the equivalent to section 15(a) is expressed in all jurisdictions as a discretionary exemption. This explicitly allows for the possibility that different governments may arrive at different results in the application of this discretion to similar records, taking into account the circumstances before them.

It is thus not necessary for me to consider whether the records at issue would be exempt under the legislation of other provinces. What is before me is the application of the *Act* to records in Ontario, and the hypothetical treatment of similar records in another jurisdiction does not affect my determinations here. I therefore conclude that although the legislative provisions to which I have been referred are useful background to my determinations, they do not affect my specific findings under section 15 in this appeal.

Effect of Quebec's *Archives Act*

The representations of Quebec state that some of the records (specifically, correspondence from Quebec's Minister of Health of the time) have been "deposited into the National Archives of Quebec and…the file is subject to restriction of access until 2008 under Quebec's *Archives Act* (see attached)."

No further submissions on this point were provided. I have reviewed the *Archives Act* attached to Quebec's representations, a section of which was highlighted for my review. This *Act* provides generally for the preservation of documents through public and private archives in the Province of Quebec. The highlighted section states the circumstances under which certain records exempt from disclosure under Quebec's access to information laws may nevertheless be disclosed. I am unable to find anything in this section or otherwise in the *Archives Act* that precludes disclosure of the records before me pursuant to the provisions of Ontario's *Freedom of Information and Protection of Privacy Act*, and there is nothing in Quebec's representations that provides any further basis for reaching such a conclusion. I therefore find that the *Act*, and not the *Archives Act* of Quebec, is determinative in the context of this appeal.

ORDER:

1. I order disclosure of all the records in their entirety, with the exception of Records 180, 258, 310, 398, 452, 453, 499, 555 to 559, 583, 584, 611, 621, 763, 756, 770, 942, 1086, 1164, 1167, 1169, 1197, 1199, 1201, 1215, 1231, 1232, 1235, 1240, 1242, 1246, 1247 and 1248 to 1250. Records 68 to 79, 774, 777, 778, 779 and 1214 are not responsive to the request and do not form part of these order provisions.

2. I order disclosure of Records 1201 and 1247, with Annex "A" severed.

3. I order disclosure of Record 1169 with seven pages severed.

4. I order disclosure of Records 310, 398, 452, 453, 583 and 584, with personal information severed.

5. I order Record 499 disclosed with the exception of pricing information contained on the first and second page.

6. I order the first page of Record 1086 disclosed.

7. For greater certainty, I have highlighted the portions to be severed from Records 310, 398, 452, 453, 499, 583, 584, 1086 and 1169 on the copies of the relevant records sent to the Ministry along with this order.

8. Copies of the records ordered to be disclosed shall be sent to the appellant by **March 29, 2005**, but not before **March 18, 2005**.

9. In order to verify compliance, I reserve the right to require the Ministry to provide me with a copy of any of the records disclosed to the appellant pursuant to the above provisions, upon request.

10. With respect to the portions of Records 499, 1086, 1201 and 1247 and the entirety of Records 611 and 756, which I have decided warrant further notification of affected parties, I remit the matter back to the appellant. If the appellant wishes to pursue access to these records, it is directed to notify me of this in writing by no later than **April 12, 2005**.

Original signed by: February 22, 2005
Sherry Liang
Adjudicator