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

ORDER PO-2704

Appeal PA-060134-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information for the period of January 1, 1990 to the date of the request:

> (1) Any Requests for Proposals, Requests for Information, Tenders, Notices of Sole Source Contracts, or other documents issued publicly by the Ministry of Health and Long-Term Care (the "Ministry") soliciting drug data subscriptions and services, analysis of drug data and/or consulting services in the area of drug data management.
>
> (2) Any contracts entered into by the Ministry, or the Crown in Right of Ontario on behalf of the Ministry, for the provision of the data and/or services described in #1 of this request.
>
> (3) Any research agreements entered into by the Ministry, or the Crown in Right of Ontario on behalf of the Ministry, under [the *Act*], the *Personal Health Information Protection Act* (PHIPA), or originally entered into under [the *Act*] and continued under PHIPA, with a commercial entity in which the Ministry has provided the commercial entity with access to Ministry drug data (e.g. from the Ministry's Ontario Drug Benefit database).
>
> (4) Any research agreements entered into by the Ministry, or the Crown in Right of Ontario on behalf of the Ministry, under [the *Act*], PHIPA or originally entered into under [the *Act*] and continued under PHIPA, with a commercial entity in which the Ministry has provided the commercial entity with access to Ministry drug data (e.g. from the Ministry's Ontario Drug Benefit database) in which the commercial entity has agreed to provide the Ministry, or any other ministry as the case may be, with non-Ministry drug data and/or analytical or consulting services using Ministry data, regardless of whether or not the Ministry paid for such data or services.
>
> (5) Any non-research agreement entered into by the Ministry, or the Crown in Right of Ontario on behalf of the Ministry, that contains the provisions set out in #3 and/or #4 of this request.
>
> (6) Any communications (e-mail, hard copy, correspondence, telephone interview notes or other) between the Ministry and any commercial entity with which the Ministry has entered into a contract, research or other agreement under #2, #3, #4 or #5 of this request.
>
> (7) Any internal or external Ministry correspondence, e-mails, briefing notes, option papers, analyses, memoranda, Cabinet submissions or any other documents relating to #1 - #6 of this request.

Upon receipt of the request and in accordance with section 28 of the *Act*, the Ministry notified two parties whose interests may be affected by disclosure of the records. One of the parties

indicated that it would not be making submissions on the disclosure of records pertaining to it, and the records relating to this party were subsequently disclosed. The second party (the affected party) replied that it consented to the disclosure of certain records, but objected to the disclosure of other records on the basis that the exemption in section 17(1) (third party information) of the *Act* applied to those records.

The Ministry then issued a decision letter to the requester in which it identified that 185 responsive records had been located in five different Ministry departments. The Ministry stated that it was granting access to a number of responsive records, and denying access to other records on the basis of the exemptions in sections 13 (advice or recommendations), 17 and 19 (solicitor-client privilege) of the *Act*. The Ministry also identified that it had severed some information from the records, as this information was not responsive to the request. In addition, the Ministry provided the requester with an index identifying the records and indicating which exemption applied to which record, and identified the amount of the fee for the records.

The requester, now the appellant, appealed the Ministry's decision that the exemptions applied to the records. The appellant also took the position that the public interest override in section 23 of the *Act* may apply to the withheld records.

During mediation the parties clarified the records remaining at issue, and certain additional records were provided to the appellant. Also during mediation, the appellant raised the issue of whether the Ministry had conducted a reasonable search for the records, and that issue was included in this appeal.

Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the process. A Notice of Inquiry, identifying the issues and inviting representations, was sent to the Ministry and the affected party, initially. Both the Ministry and the affected party submitted representations in response.

The Notice of Inquiry was then sent to the appellant, along with a copy of the complete representations of the Ministry, and the non-confidential portions of the affected party's representations. The appellant provided representations in response, and the non-confidential portions of these representations were provided to the Ministry and the affected party, who were invited to provide reply representations. Both of these parties provided reply representations.

This file was subsequently transferred to me to complete the adjudication process.

RECORDS:

Out of the 185 responsive records, 118 remain at issue in whole or in part. These 118 records consist of e-mails, facsimiles, notes, memos, letters, draft agreements, and other documents, and were located in four separate branches of the Ministry.

The records remaining at issue are:

The Drug Programs Branch (DPB): Records DPB 5, 9-12, 15, 25-30, 32, 33 (in part), 34-36, 39, 43, 46 (in part), 47, 48, 49 (in part), 62, 63 and 65 (in part).

The Legal Services Branch (LSB): Records LSB 1, 3, 5-12, 13 (in part) 14-16, 17 (in part), 18 (in part), 19, 20, 23-25, 27-34, 35 (in part), 36-49, 52-60, 63-70 and 74-93

The Knowledge Management and Reporting Branch (KMRB): Records KMRB 1-5, 6 (in part), 7 (in part), 12 (in part), 13, 17 (in part) and 18

The Supply and Financial Services Branch (SFSB): Record SFSB 1

(The one record which was located in the Access and Privacy Office was disclosed to the appellant and is not at issue in this appeal)

PRELIMINARY MATTER:

Incomplete disclosure

In his representations, the appellant identified some discrepancies between the index description of seven specific records, and those records as they were actually provided to him. In its reply representations, the Ministry addressed this issue. The Ministry explained that the index description of Records KMRB-3 and LSB-1 appear to contain additional pages because blank pages were inserted in the copies that were provided to the appellant for the purpose of clearly identifying section breaks in the original records. With respect to the other five records or portions of records (Records KMRB-7, KMRB-17 (in part), LSB-2, LSB-9 and DPB-26), the Ministry acknowledged that the appellant may not have received all of the pages, and indicated that new copies of these records would be sent to the appellant.

After reviewing the Ministry's reply representations, and Records KMRB-3 and LSB-1, I find the Ministry's explanation to be consistent with the records that were sent to this office. Accordingly, based on the Ministry's response to the appellant's concerns regarding the disclosures that were made, I consider this issue resolved.

DISCUSSION:

RESPONSIVENESS OF RECORDS

The Ministry has withheld portions of the following records on the basis that they are non-responsive to the request:

- LSB file – parts of Records LSB-13, LSB-14, LSB-16, LSB-17 and LSB-38;
- KMRB file – part of Record KMRB-17.

In its representations the Ministry states that these portions of the records fall outside the scope of the request as set out above. The Ministry then encapsulated the scope of the request as follows:

> The scope of the request…covers requests for proposals or similar tenders for drug data subscriptions and services and analysis or consulting services in the area of drug data management, as well as any agreements related to such data or services. The request also covers agreements for the provision of drug data by the Ministry to commercial entities, and related communications and internal Ministry correspondence and other related documents.

The Ministry then explains why the above-noted portions of the records are not responsive to this request:

> With the exception of LSB-38, the non-responsive records pertain to data requests from, and agreements with, *not-for-profit* (i.e. *Non-commercial*) entities, and to internal data sharing arrangements between branches of the Ministry. Furthermore, the relevant portions of these records do not discuss tenders or agreements for consulting or analysis services from these non-commercial entities.

The Ministry states further that Record LSB-38 contains notes made by legal counsel. The Ministry asserts that although these notes were attached to responsive notes in the same file, the content of them does not relate to the subject matter of the request.

The appellant was provided with the Ministry's representations, and simply asks that I assess the Ministry's position in light of the content of the records.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> ….
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. Previous orders of this office have determined that to be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

On my review of Record LSB-38, I agree with the Ministry that the content of the portion that has been withheld as non-responsive does not pertain to the subject matter of the request. I also agree that the subject portion of Record LSB-13 is not responsive to the request; although it relates to items 3 and/or 4, it is specific to a non-commercial entity, and those items of the request were for commercial entities only. Accordingly, the subject portions of records LSB-13 and LSB-38 do not fall within the scope of the request and are not at issue in this appeal.

With respect to the remaining portions of the records, it is clear that the appellant did not restrict items 1, 2 and 7 of the request to only commercial entities. Moreover, taking a liberal approach to the interpretation of the request, I do not agree that the remaining portions, which have been withheld by the Ministry as non-responsive, are not reasonably related to the request, even though they contain references to non-commercial entities. I find that certain portions of two records (Records LSB-14 and 16) are directly related to the subject matter of the request, and that Records LSB-17 and KMRB-17 can be viewed as being reasonably related to the request, in the context of the discussions in which the portions are located. Accordingly, I find that these portions of these four records are responsive to the request.

The Ministry has claimed the application of section 19 for Records LSB-14 and 16, and I will analyse these portions of the records under that heading. Similarly, the paragraph from which the portion of Record KMRB-17 was hived out has been withheld by the Ministry primarily under the exemption at section 13 of the *Act*. I will consider the application of this exemption to the outstanding portion of this record. In addition, except for one sentence (the first sentence in the third paragraph on page 4, which the Ministry claims qualifies for exemption under section 13(1)), the Ministry has not claimed an exemption for the portion of Record LSB-17 that it held as non-responsive (a portion of page 4 of that record). Since the Ministry has not turned its mind to whether or not an exemption should have been claimed for this portion of Record LSB-17, I will return the matter to the Ministry for further action.

SOLICITOR-CLIENT PRIVILEGE

When the request in this matter was filed, section 19 stated as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was subsequently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the version reproduced above applies in this appeal.

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the Ministry must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both. …
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

The Ministry's representations

The Ministry has claimed that section 19 applies to certain identified records, and provides representations specific to those records. The Ministry's representations categorize the records as follows:

DPB-5, 11, 27, 29-30, 34, 46, 48 and 63;
KMRB-17-18;

LSB 5-6, 10-12, 14, 16, 19-20, 24, 27, 29, 33, 39, 49, 52, 55-56, 58-59, 64-69, 75, 77, 80-81, 84 and 92-93:

The Ministry submits that each of these records or portions of records is subject to common law solicitor-client privilege, and states:

> Each of these records, except for KMRB-17, is either a memorandum or email from Ministry legal counsel to Ministry program staff, or a memorandum, email or transcribed phone message from Ministry program staff to legal counsel.
>
> The records that are communications from legal counsel were made for the purpose of providing legal advice directly to program staff, as the contents of the records indicates. The records that are communications from program staff to legal counsel were, similarly, sent for the purpose of seeking legal advice. To the extent that these communications contain background information or other documents that relate to Ministry program operations, this information forms part of a "continuum of communications" aimed at keeping both counsel and program staff informed of proposed program developments, so that legal advice could be sought and given as required. [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), PO-2475]
>
> Furthermore, each LSB record formed part of a lawyer's file that was maintained for the purposes of formulating and giving legal advice, and are accordingly subject to solicitor-client privilege. [*Susan Hosiery Ltd. V. Minister of National Revenue*, [1969] 2 Ex. C. R. 27].
>
> The severed portion of KMRB-17 refers to legal advice sought prior to the creation of that record. The first individual referred to in the severed portion is a Ministry lawyer, and the remainder of the severed portion sets out the issue that was discussed with the lawyer.
>
> All of the above-noted records were internal Ministry communications, and were accordingly made with an implicit expectation and understanding that they would be treated as confidential.

DPB-9-10, 12, 15, 28, 32, 35-36, 39, 43, 47 and 49;
LSB-3, 9, 13, 15, 23, 25, 28, 30-31, 37, 40-48, 54, 57, 74, 76, 78-79, 82-83 and 91:

The Ministry submits that each of these records is subject to common law solicitor-client privilege, and is therefore exempt from disclosure under section 19 of the *Act*. It states:

> Each of these records is comprised either solely or predominantly of a draft agreement or related memorandum that was being prepared by Ministry legal counsel under direction from Ministry program staff. Each of these records was prepared during negotiations about the terms of the relevant agreement, and therefore qualifies for exemption under section 19 of the *Act*. In PO-1864, the

> IPC found that a draft agreement that was still in the negotiation phase constituted "a confidential communication between a lawyer and a client made for the purpose of providing advice on the negotiations toward reaching an agreement." The Ministry respectfully submits that the same reasoning is applicable to these records.
>
> Many of these records contain covering emails or memoranda that either set out changes that were made in the related draft agreements, or provide drafting instructions to Ministry legal counsel. The Ministry submits that these portions of the records also qualify for exemption under section 19, as these emails and memoranda are confidential communications made for the purpose of providing or obtaining legal advice, and because they describe the contents of the related draft agreements.
>
> All of these communications were internal Ministry communications, and were accordingly made with an implicit expectation and understanding that they would be treated as confidential.

LSB-7-8, 32, 34-36, 38, 53, 60, 63 and 85-89:

The Ministry submits that each of these records is subject to common law solicitor-client privilege, and is therefore exempt from disclosure under section 19 of the *Act*. It states:

> Each of these records formed part of a legal advisor's working papers, and related directly to the formulating and giving of legal advice. In fact, each of these records was part of a lawyer's archived files at the time that the access request was received by the Ministry. Accordingly, each of these records is subject to common law solicitor-client privilege.
>
> Some of these records (LSB-7-8, 34, 36, 38, 53, 60, 63 and 85-88) consist solely of legal counsels' handwritten notes. These records consist of meeting notes, lists of legal issues to be brought to the attention of program staff, or notes setting out contract drafting instructions that counsel had received. As such, each of these records relates directly to the formulating or giving of legal advice.
>
> LSB-32, LSB-35, LSB-89
>
> Each of these records is a memorandum or email with written notes added by Ministry legal counsel. The Ministry submits that for each of these records the email or memorandum itself is a privileged communication between Ministry program staff and counsel. Furthermore, the handwritten notes on each of these records is also subject to solicitor-client privilege, as these notes either record subsequent discussions on legal issues (LSB-32 and 89) or, in the case of LSB-35, identify and address legal issues in the memorandum.

LSB-18

With respect to this record, the Ministry states:

> This record is a policy document, with legal counsel's handwritten notes attached. The severed portions of the record indicate issues that counsel identified as having legal implications - therefore, these portions of this record are subject to solicitor-client privilege, as they constitute part of counsel's working papers that were prepared for the purpose of formulating legal advice.

For all of the records which the Ministry claims fall within the exemption in section 19, the Ministry states that the solicitor-client privilege has not been waived.

The appellant's representations

In his representations the appellant acknowledges that, without being able to see the records, it is difficult to argue that section 19 does not apply. However, the appellant goes on to state that it is nevertheless his view that the Ministry may have applied the exemption too broadly. He goes on to make the following points:

> - Not every communication that passes between a solicitor and client qualifies for the privilege.
>
> - Even communications that do contain legal advice often constitute more factual information than actual legal advice.
>
> - Particularly in government, many documents are shared with counsel in [the Legal Services Branch] not for the purpose of seeking or receiving legal advice but for policy, program or business "advice".
>
> - All of the draft agreements that are referenced by description in [the Ministry's submissions] were provided to the third party and, in fact, some of the comments provided on and changes made to these agreements were suggested by the third party. … the Ministry cannot claim section 19 with respect to records that were shared with a party external to the solicitor-client relationship-the privilege is lost. The [IPC's] position has been summarized in Order PO-2509 as follows:
>
> > [C]ommon law solicitor-client privilege can also be lost through a waiver of the privilege by the client. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [198314 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al.,

> *The Law of Evidence in Canada* at p. 669. See also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); R, v. Kompski (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].
>
> Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client's waiver of the privilege can be implied from the actions of the client's solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client's privilege. [J. Sopinka et. al., *The Law of Evidence in Canada* at p. 663. See also: *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211(S.C.C.); *Derby & Co. Ltd v. Weldon* (No. 8),[1991) 1 W.L.R. 73 at 87 (C.A.)].

- The Ministry's submission [that the records were made with the implicit understanding that they would be treated as confidential] … is irrelevant to the application of section 19. The Ministry has been subject to [the *Act*] for close to 20 years and … if such an expectation exists, it is totally unreasonable. Furthermore, as the client, the Ministry has the ability to waive privilege such that even records that may in fact be subject to section 19 may be disclosed.

- LSB-35 - the section "3. Analysis" seems to refer to data analysis so it is difficult to understand how section 19 could apply to this information.

- LSB-69 - pages 6-10 and 13-26 have been exempted from disclosure under both sections 17(1) and 19 - how can a record that the Ministry claims is information received in confidence from a third party be subject to a claim of solicitor-client privilege by the Ministry?

The Ministry's reply representations

The Ministry responded to the appellant's representations.

In response to the appellant's position that the draft agreements were provided to the third party, and that privilege was therefore waived, the Ministry submits that not all of the draft agreements at issue were shared with the third party. The Ministry notes that it is "quite common for Ministry program staff and counsel to exchange numerous drafts of agreements before a draft agreement is shared outside of the Ministry."

In addition, the Ministry submits that, to the extent that the draft agreements were shared with its contractual partners, this did not constitute a waiver of the solicitor-client privilege. The Ministry then provides representations in support of its position that, if the agreements were shared, the sharing "was based on the parties' common interest in completing the transaction to which the agreements relate." The Ministry then refers to the Federal Court of Canada case of *Pitney Bowes of Canada Ltd. v. Canada*, (20030 D.L.R. (4th) 747, and states:

> The nature of the draft agreements at issue in this appeal clearly points to the fact that the agreements were disclosed in furtherance of a "common interest" shared by the Ministry and its contracting partners. Moreover, the draft agreements at issue were drafted not simply for the purpose of formalizing the Ministry's relationship with its contracting partners, but also to ensure that the transaction itself complied with [the *Act*].

The Ministry also addresses the appellant's position that an implicit expectation of confidentiality existed in internal Ministry documents by pointing out that it was not suggesting that the records were not subject to the *Act*. Rather, the Ministry states that it was demonstrating that the records were subject to the section 19 exemption, as to qualify for exemption, "confidentiality is an essential component of [solicitor-client] privilege", and that the Ministry's statement was meant to address this requirement.

Findings

Emails and other communications

The following records consist of e-mails, memoranda and facsimiles, some with attachments, between counsel for the Ministry and staff of the Ministry (the client): LSB-3, LSB-5, LSB-6, LSB-10, LSB-11, LSB-12, LSB-13 (pages 2-6), LSB-14, LSB-15, LSB-16, LSB-19, LSB-20, LSB-23, LSB 24, LSB 25, LSB-27, LSB-28, LSB-29, LSB-30, LSB-31, LSB-32, LSB-35, LSB-39, LSB-40, LSB-41, LSB-43, LSB-45, LSB-48, LSB-49. LSB-52, LSB-54, LSB-55, LSB-56, LSB-57, LSB-58, LSB-59, LSB-64, LSB-65, LSB-66, LSB-68, LSB-74, LSB-84, DPB-5, DPB-9, DPB-10, DPB–12, DPB–15, DPB-29, DPB-30, DPB-46 (in part), DPB-47, DPB-48, DPB-49, and DPB-63.

In addition, certain records located in the LSB or DPB files are either copies of, or are substantially similar to copies of identified LSB records listed above. The paired records that are different from the originals are only different in the fact that some contain handwritten comments on the original version, and in some cases one record forms only part of another, larger record. These records are the following: LSB-33 (identical or similar to LSB-27), DPB-27 (identical or similar to LSB-67), DPB-28 (identical or similar to LSB-66), DPB-32 (identical or similar to LSB-54), DPB-34 (identical or similar to LSB-43), DPB-35 (identical or similar to LSB-42), DPB-36 (identical or similar to LSB-41) and DPB-39 and DPB-43 (both of which are similar to LSB-30).

All of the records set out above, including the listed copies, contain or refer to communications between legal counsel and the client, and include:

- Counsel's advice, position or comments;
- Specific requests for legal advice, sometimes with background information attached;
- Draft agreements, with counsel's comments, suggested changes and revisions;
- Discussions amongst staff referencing counsel's legal advice;

- Documents transferred to legal counsel from staff relating to the issues for which advice had been sought.

I am satisfied that the emails and other correspondence listed above are communications between Ministry counsel and their clients (Ministry employees and staff) or other counsel, which contain legal advice or relate directly to the seeking or providing of legal advice.

Although some of these emails or attachments (for example, Records LSB-23, LSB-24 and LSB-59) may not contain the actual legal advice, they are part of the continuum of communication between the client and the solicitor, and privilege attaches to those records based on the rationale described above in *Balabel*.

Accordingly, I find that these records qualify for exemption under section 19.

Handwritten Notes

As identified by the Ministry, Records LSB-7, LSB-8, LSB-9, LSB-34, LSB-36, LSB-38, LSB 42, LSB-44, LSB-46, LSB-47, LSB-53, LSB-60, LSB-63, LSB-85, LSB-86, LSB-87 and LSB-88 consist of handwritten notes, either as individual documents or connected to draft agreements.

In my view, all of these records, which are contained in the LSB files, can be characterized as Crown counsel's working papers directly related to the formulating of legal advice as per *Susan Hosiery*, and thereby meet the requirements of solicitor-client communications privilege under Branch 1 of section 19.

Other records

LSB-17

This record is described in the index prepared by the Ministry as a "Note by client". The Ministry claims that section 19 applies to portions of this 5-page record (parts of pages 2, 3 and 5), but has not made specific submissions with respect to it. In its general submissions under section 19, the Ministry simply states that all LSB records "formed part of a lawyer's file that was maintained for the purposes of formulation and giving legal advice." Moreover, the Ministry takes the position that because the records were all internal Ministry communications, they were made with an implicit expectation and understanding that they would be treated as confidential.

The Ministry has also claimed section 13(1) for a portion of the record, which I will discuss below. In its submissions under section 13(1), the Ministry described this record as a document that was prepared by a consultant retained by the Ministry.

The portions of this record that the Ministry has withheld under section 19 refer to legal issues, but are located in the "background" section of the document. I am not persuaded that simply because a record is located in a lawyer's file that solicitor-client privilege automatically attaches to it. Other than the general submissions noted above, there is no additional material supporting

the application of the section 19 exemption to these portions of the record. Based on my review of this record, and in the absence of specific representations from the Ministry regarding it, I find that section 19 does not apply. The comments in the record are made by a consultant retained by the Ministry. There is no indication on the face of the record that this consultant is a lawyer or that the information was obtained through or in connection to a solicitor-client communication. Rather, the information forms part of the background information and considerations prepared by the consultant relating to the issue identified in the record.

As a result, I am not satisfied that the portions of pages 2, 3 and 5 which the Ministry claims fall within the section 19 exemption qualify under that section, and I will order that these portions of Record LSB-17 be disclosed.

LSB-18

According to the Ministry:

> This record is a policy document, with legal counsel's handwritten notes attached. The severed portions of the record indicate issues that counsel identified as having legal implications - therefore, these portions of this record are subject to solicitor-client privilege, as they constitute part of counsel's working papers that were prepared for the purpose of formulating legal advice.

The majority of this record has been disclosed to the appellant. It is apparent on my review of the portions at issue that they represent legal counsel's input into issues for which legal advice would be required. As such, I find that they constitute part of legal counsel's working papers that were prepared for the purpose of formulating legal advice as contemplated in *Susan Hosiery*. Therefore, solicitor-client privilege attaches to them and section 19 applies.

LSB-69

This record is a communication between legal counsel and Ministry staff requesting legal advice in relation to an issue connected to an attached package of background documents relating to the affected party. I am satisfied that the record and the attachments constitute a communication between Ministry staff and legal counsel which relates directly to the seeking or providing of legal advice. Accordingly, section 19 applies to exempt it from disclosure.

ADVICE TO GOVERNMENT

The Ministry has taken the position that the exemption in section 13(1) of the *Act* applies to Records LSB-17, LSB-70, KMRB-12, KMRB-13 and KMRB-17, in whole or in part.

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, 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.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

Examples of the types of information that have been found not to qualify as advice or recommendations include:

- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564].

Representations and Findings

The Ministry submits that the relevant portions of the five records constitute "advice or recommendations".

LSB-17

This record is described in the index prepared by the Ministry as a "Note by client". The Ministry states in its representations that this document was prepared by a consultant retained by

the Ministry. In terms of the application of the section 13(1) exemption to the portions of this record for which it claims section 13(1) applies, the Ministry states:

> The two paragraphs under the heading "Recommended Action" on the first page of this record contain specific recommendations related to the issue that the record as a whole deals with. The first of these paragraphs recommends that Ministry senior management should consider the indicated policy decision in a certain manner. The second paragraph recommends that the Ministry should conduct two consultations, in the event that a certain policy option is adopted. Both paragraphs clearly advise specific courses of action that could either be accepted or rejected,
>
> The first sentence in the third paragraph on the fourth page of the record also recommends that Ministry senior management approach the policy decision at issue in a certain manner. …

The appellant did not provide representations on this record.

On my review of this record, I am satisfied that the portions of the first page of this record which the Ministry claims qualify for exemption under section 13(1) do, indeed, contain a "recommended course of action", and qualify for exemption under section 13(1). However, on my review of the first sentence in the third paragraph on the fourth page of the record, I am not satisfied that this portion of the record contains or would reveal "advice or recommendations" for the purpose of section 13(1). The information in this sentence is more in the nature of an observation, and does not contain a "recommended course of action" for the purpose of section 13(1)

Accordingly, I will order that the first sentence of the third paragraph on page 4 be disclosed to the appellant.

LSB-70

The Ministry identifies that this record is a memorandum that was sent by a public servant to a senior Ministry official. The Ministry states:

> The first sentence of the second paragraph of the memorandum refers to a proposal for the Ministry to enter into a certain agreement, with the rest of the memorandum providing other information about the agreement. The recipient of the memorandum was the Ministry official who ultimately would have been responsible for signing the agreement on behalf of the Ministry. The Ministry respectfully submits that the entire memorandum constitutes a recommendation, as its contents clearly suggest that a senior decision-maker adopt a particular course of action on behalf of the Ministry.

The appellant takes issue with the Ministry's position that this document qualifies for exemption under section 13(1), and states that the information in this record "appears to be factual information which should be disclosed pursuant to section 13(2)(a)".

In response, the Ministry states that this record "… is not comprised of factual information, but rather, as indicated in the Ministry's original submissions, recommends a course of action to a senior Ministry official".

I have carefully reviewed this record, which is a one-page memorandum from a public servant to a senior Ministry official. Although this memorandum refers to an attachment, the attachment is not part of this record. On my review of the one-page memorandum which constitutes Record LSB-70, I find that the content of the memorandum is informational only. I am not satisfied that its disclosure, by itself, would reveal "advice or recommendations" for the purpose of section 13(1).

KMRB-12

This record consists of an email and a two-page attachment. The Ministry has disclosed the email to the requester, but takes the position that the two-page attachment qualifies for exemption under section 13(1). The Ministry states:

> The severed portion of the record is a draft set of policy and operational questions that was prepared by a public servant in relation to a third-party proposal that was provided to the Ministry. The covering email to the questions indicates that the public servant who prepared the questions was forwarding them to his manager (the recipient of the covering email) for review and further input. The list of draft questions is therefore a recommendation, as it was put forward by a public servant to his manager as a recommended way for the Ministry to approach the issue being considered.

The appellant states that these pages contain a draft set of policy and operational questions, and that this office "has consistently held that draft documents do not qualify for exemption from disclosure pursuant to section 13(1) … in that they are not advisory in nature". The appellant also states that there is no indication if they were ever asked or not, or even if they were relevant to the discussions at hand.

The Ministry responds to the appellant's position by stating:

> The Appellant suggests that a portion of this record does not qualify for exemption under section 13 because it is a draft set of questions. As the covering email that accompanies the draft questions clearly indicates, however, this set of questions was "draft" in the sense that it was being provided to a Ministry manager for his review. The Ministry relies on its original representations in support of its submission that this portion of [this record] constitutes a recommendation. Furthermore, the Ministry submits that the mere fact that a record contains draft material does not preclude the application of section 13 to

> the record. In PO-2437, the IPC found that draft materials, specifically a draft letter prepared for the Minister of Health and Long Term Care's signature, was exempt under section 13.

On my review of Record KMRB-12, I am not satisfied that it qualifies for exemption under section 13(1). Although I agree with the Ministry that, in certain circumstances, draft documents can constitute advice or recommendations (depending, often, on the manner in which the information is communicated to an ultimate decision-maker), I am not satisfied that the draft document which forms pages 2 and 3 of Record KMRB-12 constitutes "advice or recommendations". The record contains a number of draft questions, which in my view can be characterized as factors, considerations or matters which the author of the record considers requiring clarification or additional information. The Ministry states that these questions were provided to the author's manager for "review and comment"; however, even if the author's manager chose to adopt these questions, or to make changes to them, they would nonetheless simply constitute factors, etc. for consideration and for further information. In that regard, they do not, of themselves, "suggest a course of action that will ultimately be accepted or rejected by the person being advised", rather, they are simply considerations or factors.

KMRB-13

The Ministry states:

> This record consists of a two-page email. It contains a specific recommendation, found half way down the first page, and is followed by a series of bullet points in support of that recommendation. The Ministry submits that the recommendation itself qualifies for exemption under section 13(1) of the *Act*, as this recommendation clearly suggests a certain course of action. The Ministry also submits that the disclosure of the bullet points would allow for accurate inferences to be made about the specific recommendation, as all of the bullet points in the record support the course of action suggested in the specific recommendation.

The appellant states:

> Despite the fact that the Ministry describes only a portion of Record KMRB-13 as containing a specific recommendation, it has wrongly denied access to this document in its entirety.

On my review of Record KMRB-13, I am satisfied that it contains a specific recommendation that qualifies for exemption under section 13(1). I am also satisfied that, given the nature of the comments contained in the rest of this document, the remaining portions of this document also contain information which, if disclosed, would reveal the specific recommendation. Accordingly, I find that section 13(1) applies to this record.

KMRB-17

The Ministry takes the position that the undisclosed portion of KMRB-17 qualifies for exemption under section 13(1). The Ministry states:

> This record consists of two emails from a public servant to her unit manager. The severed portion of the [first] email contains two recommendations - the first sentence of the severed portion offers an opinion on how the Ministry should manage the decision-making process surrounding an issue, while the remainder of the severed portion recommends a procedure that could be followed if an alternative approach was adopted.
>
> The severed portion of the [second] email identifies three policy options, and recommends that these options be put forward to a specified working group. The severed portion also suggests a timeframe for addressing the decision under consideration. Ultimately, as is indicated in the record, the decision of the working group referred to in the severed portion of the record would be put forward as a recommendation to senior Ministry management. Therefore, the Ministry submits that disclosing the severed portion of this email would allow for accurate inferences to be drawn about recommendations made by the listed individuals, as the recommendation made by these individuals could be inferred from other information made available to the requester in relation to this request.

The appellant states:

> The [withheld portion of the first email] would, given that its content is described as 'offering an opinion' appear to be more in the nature of evaluative information which [the IPC] has held does not constitute advice or recommendations for the purposes of section 13 (1).
>
> The [IPC] has generally found that policy options, as contained in [the withheld portion of the second e-mail], do not constitute advice or recommendations as they are descriptive, as opposed to prescriptive - that is, they convey mere information as opposed to expressing a preferred course of action. In this case one policy option is not being recommended over another such that it is submitted that this Record cannot qualify for exemption pursuant to section 13(1).

In its response, the Ministry reaffirms its position, as set out in its representations, regarding the first email. With respect to the second email, the Ministry states that it is exempt under section 13(1) as it "... recommends that certain options be put before a working group, and also because its release would allow for inferences to be drawn about the recommendations that this group made."

On my review of the withheld portion of the first email, I am satisfied that the portions of this email which the Ministry has claimed fall within section 13(1) do, indeed, contain "advice or

recommendations" for the purpose of that section. The email contains specific suggested courses of action to take regarding the subject matter of the email.

However, on my review of the second email, I agree with the appellant that this email contains information in the nature of options, which can be accepted or rejected. Previous orders have clearly identified that options, in themselves, do not qualify as "advice or recommendations" for the purpose of section 13(1). Furthermore, although the Ministry states that "… disclosing the severed portion of this email would allow for accurate inferences to be drawn about recommendations made by the listed individuals …", and that the recommendations could be inferred from other information made available to the requester, the Ministry has not identified what this "other information" is. Without additional information supporting the Ministry's position, I am not satisfied that this second email qualifies for exemption under section 13(1).

In summary, I uphold the Ministry's position that the relevant portions of the first email qualify for exemption under section 13(1), but do not find that the portions of the second email qualify for exemption under that section. I will, accordingly, order that the second email be disclosed.

THIRD PARTY INFORMATION

The Ministry and the affected party take the position that the mandatory exemptions in sections 17(1)(a), (b) and/or (c) apply to the following 14 remaining records or portions of records: DPB-25, DPB-26, DPB-62, DPB-65 (pages 11-15 only), LSB-1, LSB-69 (pages 6-10, 13-23), KMRB-1, KMRB-2, KMRB-3, KMRB-4, KMRB-5, KMRB-6 (in part), KMRB-7 (in part) and SFSB-1.

LSB-1 is a 45-page series of documents (from a binder) consisting of a request by the affected party to the Ministry, and a number of attachments. One of these attachments (pages 33-45) is a copy of the 1999 executed agreement entered into between the Ministry and the affected party. Based on the representations of the parties, it is clear that a copy of this agreement has been previously disclosed by the Ministry. In the circumstances, I will not review the issue of whether these pages qualify for exemption under section 17(1) as to do so would serve no useful purpose.

In addition, I found above that Record LSB-69 is exempt in its entirety under section 19 of the *Act*. Accordingly, I will not consider the possible application of section 17(1) to those portions of this record for which it has been claimed.

Section 17(1)

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;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected 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 Ministry in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Part 1 of the Section 17(1) Test - Type of Information

Both the Ministry and affected party have submitted that the records contain information which qualifies as a "trade secret", "commercial" and/or "financial" information for the purpose of section 17(1). I have also considered whether the information is "scientific" or "technical" information within the meaning of that section. Previous orders have defined these terms as follows:

Trade Secret

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(See Orders M-29, PO-2010)

Scientific Information

Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the *Act*. [Order P-454]

Technical Information

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act*. [Order P-454]

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

Finding

From my review of the records and the representations of the parties, I am satisfied that the records and portions of records at issue contain information that meets the first part of the three-part test in section 17(1). The records relate to the terms of a commercial agreement entered into between the affected party and the Ministry, and contain "commercial information" as they relate to the buying, selling or exchange of merchandise or services. Portions of the records also contain "financial information" (i.e.: identified pricing practices and certain operating costs, etc) or "technical information" … as those terms have been defined by this office in previous orders. Accordingly, I am satisfied that the information for which section 17(1) is claimed meets the requirements for part 1 of the test for the application of section 17.

Part Two of the Section 17(1) Test - Supplied in Confidence

In order to satisfy part 2 of the test, the Ministry and the affected party must establish that the information was "supplied" to the Ministry by the affected party "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be "supplied" to an institution reflects the purpose in section 17(1) of protecting the informational assets of third parties (Order MO-1706).

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020, PO-2043).

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706).

In Confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must be reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly. [Order M-169]

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.

[Order P-561]

Representations

The affected party summarizes its position that the records were "supplied in confidence" as follows:

> [The affected party] supplied all of [the records at issue] in confidence. For each of the [records] confidentiality is implied, and in some cases explicitly stated (Records KMRB-1, KMRB-6, KMRB-7), as each was developed solely for the recipient and is unique in its contents. This assumption of implied confidentiality based on unique contents and targeted development is similar to that seen in order P-807. All of these [records] contain information supplied by [the affected party]. [Records KMRB-6, KMRB-7] contain different versions of the same research proposal and all three constitute records supplied by [the affected party] in confidence. Each of [the identified proposals] is deemed "supplied" as the changes (outlined in attachment to original [records]) do not detract from the drawing of accurate inferences about the original proposal. [LSB-1] contains an appendix of information (Appendix A) supplied by [the affected party] in confidence. This is similar to M-1157 where drawings that were not part of the original documentation were created due to contractual obligations and deemed supplied.

The Ministry also provides representations in support of the view that all of the records at issue were supplied in confidence. The Ministry states:

> All of these records were supplied to the Ministry by the third party - each record clearly indicates that it is a data request from the third party, or a proposal to enter into a commercial relationship.

> Some of the records are explicitly marked as confidential documents. However, the third party would have had an implicit expectation that even those records that are not explicitly labelled as "confidential" would be treated as confidential, owing to the proprietary nature of the information contained in the records, and the Ministry in fact would have received these records on the understanding that their contents should be treated as confidential. Furthermore, to the best of the Ministry's knowledge, each of these records has in fact been treated as confidential and has not been disclosed by the Ministry.

The appellant takes the position that not all of the records at issue were supplied in confidence. He begins by identifying that information, where it appears in a negotiated agreement, cannot be considered to have been "supplied." He then states:

> In addition, even though the final agreements have been disclosed, it is submitted that the same argument applies to the drafts as there appears to be no indication of what, if any information in the drafts, was provided to the Ministry by [the affected party] or vice versa. … since the Ministry had a standard template agreement there appears to have been little, if any, opportunity for [the affected party] to "supply" anything in this context.

The appellant also states:

> The Ministry notes that some of the records are explicitly marked as confidential documents while others are not. This certainly raises the question of whether the argument can be accepted that the non-marked documents should be regarded as having been supplied "implicitly" in confidence. After all, if the third party turned its mind to some of the records, marking them as "Confidential", why would they not have so considered doing this on the remaining documents? The argument made by [the affected party], as well as the Ministry, that given the nature of the information contained in the documents – "unique contents", "proprietary" - the third party would have an implicit expectation of confidentiality does not stand up when, as noted, some records have been labelled as confidential.

Findings

On my review of the records and the representations of the parties, I am satisfied that the records remaining at issue were supplied by the affected party to the Ministry with a reasonably held expectation of confidentiality. All of the records at issue consist of correspondence and attachments provided to the Ministry by the affected party, and I am satisfied that they were supplied by the affected party for the purpose of section 17(1). None of the records remaining at issue is an executed (negotiated) agreement.

With respect to whether the records were supplied "in confidence", the appellant refers to the fact that some were explicitly supplied in confidence, while others were not, and argues that this

suggests that, in the absence of explicit confidentiality, the records were not supplied "in confidence".

Previous orders have established that the provisions of the *Act* apply to information contained in records, notwithstanding the existence of a confidentiality provision or explicit evidence of confidentiality. These orders have also concluded that the existence of an explicit arrangement, though not determinative of the issue, may provide evidence of the confidentiality expectations of the parties. In Order PO-2478 I reviewed previous orders of this office on this issue, and applied them in a situation where an affected party had identified the confidential information in the record at issue, but subsequently argued that an additional portion of the record was supplied in confidence, notwithstanding that it was not expressly identified as confidential. I stated:

> … the confidentiality statement in the record, which identifies clearly those portions of the record that the affected party considered proprietary or confidential, evidences a clear intention on the part of the parties that the listed information was being provided in confidence. It is also clear that this clause is not determinative of whether the information qualifies for exemption under the *Act*, as all three parts of the test must be met; however, the fact that information is referred to in the confidentiality statement is strong evidence of the parties' intentions with respect to whether the information was supplied "in confidence".

I adopt this approach in this appeal. In my view, the fact that records or portions of records were not specifically marked "confidential" is not determinative of the issue of whether or not they were supplied in confidence.

In this appeal, the records remaining at issue consist of correspondence from the affected party to the Ministry relating to prospective commercial arrangements to be entered into between the affected party and the Ministry. Based on my review of these records and the representations of the parties, I am satisfied that they were supplied in confidence for the purpose of section 17(1) of the *Act*.

Part Three of the Section 17(1) Test - Harms

Introduction

To meet this part of the test, 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.)].

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]

The Ministry's Representations

The Ministry provides the following representations with respect to the harms issue, in support of its position that the records qualify for exemption under section 17(1).

On the application of sections 17(1)(a) and (c) the Ministry states:

> The disclosure of the records could reasonably be expected to prejudice the competitive position of the third party. These records contain information that would, if disclosed, provide insight into the third party's data sources, research applications and database structures. The third party's competitors could use this information to replicate the third party's products without investing the time and resources that the third party spent in developing the products. This would allow such competitors to provide the same products at a lower cost than the third party, thus compromising the third party's competitive position.
>
> The third party spent considerable time and effort in preparing the research plans and proposals that are contained in the records. If the records were released into the public domain, the third party could be expected to suffer undue loss, and its competitors could be expected to receive corresponding undue gains, as these competitors could provide similar products without incurring the costs associated with developing the products.

With respect to the application of section 17(1)(b), the Ministry states:

> The disclosure of the records could also be expected to result in similar information no longer being supplied to the Ministry, as the third party would be reluctant to provide similar proposals and research plans to the Ministry in the future if these records were to be disclosed. The affected third party in this appeal indicated that it would not supply this type of information to the Ministry in the future if it is likely to be publicly disclosed. It is in the public interest that this type of information continues to be supplied to the Ministry, as this information allows the Ministry to make informed policy decisions when third parties make data requests.

The Affected Party's Representations

The affected party identifies the section 17(1) harms which it believes will result from disclosure of the records. The general arguments regarding these harms are as follows:

> It is our position that disclosure of the information in [the identified records] would substantially prejudice the competitive position of [the affected party], or interfere significantly with the contracts or negotiations of [the affected party], or would result in undue loss or gain as specified in subsections (a), (b), and (c) of subsection 17(1) of [the *Act*]. All contain information, should it be disclosed, to substantially prejudice the competitive position of [the affected party] as they

> provide competitors insight into [the affected party's] source of data, research applications and database structures. The disclosure of any of the items could result in undue gain to [the affected party's] competitors and undue loss to [the affected party], as the previously mentioned information would be provided without spending the vast amount of time and resources as [the affected party] has done. [The affected party] has put many years of resources into developing these proposals and research plans, which benefit both the Ministry and themselves. The disclosure of these plans and proposals would allow competitors to follow the same plans and develop similar products to [the affected party] without the same expenditures.
>
> We are also of the position that disclosure of this information falls within subsection (b) of subsection 17(1) of [the *Act*] in that it would result in similar information no longer being supplied to the Ministry where it is in the public interest that similar information continues to be so supplied. The proposals and plans in [the identified records] are in the public's interest as they are designed primarily with increasing the quality of healthcare and healthcare knowledge in mind. The release of this information before [the affected party] has had the opportunity to implement the concepts contained in them will discourage both [the affected party] and others from making efforts to contribute to the health care system. The ideas, concept and designs described in these documents continue to be developed. These are unique ideas, and the procedures are not found elsewhere and provide [the affected party] with a competitive advantage while increasing qualities of Health Care. These contain trade secrets of [the affected party] and undue loss would result to [the affected party] should they be disclosed.

The affected party also identifies specific harms which it believes will result from the disclosure of each of the records. I will review those representations as I examine each record, below.

The Appellant's Representations

The appellant takes issue with the harms identified by the affected party and the Ministry, and states:

> In considering the application of section 17(1), three general points must be considered:
>
> 1) The Final Research Agreement entered into between the Ministry and [the affected party] (1998), as well as its renewal (2004), has already been disclosed.
>
> 2) These agreements resulted from negotiations between the parties.

> 3) The agreements at issue are research agreements entered into between the Ministry and a commercial company pursuant to the provisions in section 21(1)(e) of [the *Act*] - as such, there are other relevant issues to be considered which are addressed below.

The appellant then provides specific arguments relating to the possible harms under section 17(1)(a), (b) and/or (c):

> …as a commercial entity, [the affected party] maintains [an identified] website… where the information that he receives from various public and private entities to develop his products and services is set out. It is submitted that the records at issue do not contain any of the types of information that is not already publicly available on the site - any confidential information on the database structures does not appear to be contained in the records. The website does indicate that [the affected party] has access to [identified] data…

The appellant argues that the representations in support of the application of section 17(1) are not sufficiently "detailed and convincing" to support the claim for the application of this exemption.

With respect to the application of section 17(1)(a), the appellant states:

> [The affected party] submits that if the records were disclosed they would substantially prejudice his competitive position as they would provide competitors insight into its "source of data, research applications and database structures." As can be seen from [the affected party's] website, and the example of [an identified product], the fact that [the affected party] receives data from the Ministry is not confidential and, in fact, appears to be a fact that is used in promoting [the affected party's] business products and services. In addition, the records appear to indicate that there are currently no ongoing discussions between the Ministry and [the affected party] such that there are no negotiations that may be 'interfered with' upon disclosure of the records - this is important as the most recently dated responsive record that has been disclosed is … 2005 so if there are contractual discussions taking place at the moment, records dating from this time period should have been so identified as responsive to this request.

With respect to the application of section 17(1)(b), the appellant states:

> As noted above, [the affected party] in effect has a commercial relationship with the Ministry – [it] receives Ministry data pursuant to a research agreement. The agreement allows [it] to receive and commercialize [identified] data in exchange for the provision of reports and analyses to the Ministry - work that the Ministry feels it requires to set policy and for which it does not have the internal resources to do itself. Both parties submit that it is "in the public interest" that such information continues to be supplied.

As noted in the records as well, there are references to the "dollar value" of the reports that [the affected party] provides to the Ministry. What the Ministry has effectively done is to "sole source" a contract to [the affected party], initially in 1998 and renewed in 2004, without going through the analysis required by Ministry and government guidelines to determine if [the affected party] is the only company capable of providing these services or if the government requirements mandate that the work must be put out to tender. This is arguably even more problematic in that it is done under the "research agreement" provisions of [the *Act*]. The records that were disclosed indicate that the only time [the affected party] was actually paid, as opposed to receiving data for his services, was for a consulting contract in the amount of $24,999, just under the $25,000 amount at which the Ministry would have to tender for the services.

Certainly the Ministry has identified a clear need to continue receiving this type of information and that it is in the public interest that it continues to be so supplied. [The affected party] also agrees that it is in the public's interest to do so and that both the public and government benefit. However, given the manner in which the Ministry has structured the receipt of the data, it is submitted that neither party has provided sufficient evidence to support the argument that it must be these particular data analyses and services from this particular third party … that must be continued to be supplied. It is the purposes for which the information provided to the Ministry is used that must be supported on an ongoing basis.

The records do not indicate that the Ministry ever considered whether information that it maintains is necessary to allow it to make policy decisions could be provided by any other organization, or whether there is anything unique or special about [the affected party's] services that it could use to make the case for a "sole source" contract. In addition, the records demonstrate that on the one consulting contract for which [the affected party] was paid, [it] failed to satisfy the timelines as set out and thus required that the Ministry extend the contract in order that the project be completed.

This may well argue in favour of the Ministry considering another or more than one service provider.

For example, on page 2 of DPB-33 there is a reference to presumably another company which the Ministry identifies as potentially requesting the same data and arrangement as [the affected party], and querying whether the Ministry would enter into the same arrangement with that company. This appears to suggest that there is possibly another source of such information and services which would be of value to the Ministry, information that may provide enhanced value - however without the Ministry having tendered for these services it is impossible to assess whether the identified public interest in section 17(1)(b) is being best served. The appellant emphasizes that section 17(1)(b) refers to similar information, as opposed to the same information. Accordingly even if the information currently

> being provided by [the affected party] was no longer supplied, it is submitted that section 17(1)(b) does not apply, as the Ministry itself has identified that there may well be other entities that could continue to support the public interest with similar information.

With respect to the application of section 17(1)(c), the appellant reviews the arguments put forward by the Ministry and the affected party which refers to the time and effort spent in preparing the research plans and proposals that are contained in the records, and that if the records were released into the public domain, the third party could be expected to suffer undue loss, and its competitors undue gains, as these competitors could provide similar products without incurring costs in developing these products. The appellant also refers to the affected party's argument that:

> ... If this document were released it would provide competitors with an ideal data source that they have not yet considered, as well as releasing a laid-out plan of which exact fields to request in order to achieve the study results without the time and money that [the affected party] has invested in researching this plan...

The appellant then states:

> As previously noted, the Ministry Drug plan data is identified on [the affected party's] website as a source of the data for his products and services. It is therefore exceedingly unlikely that any competitor who would be interested in developing a similar proposal would not be aware of this. In addition, the specific data fields that [the third party] receives are identified in the agreements that have been disclosed.
>
> In the unlikely event, that the third party suffered some form of loss from disclosure of the records (e.g. the loss of continued access to the Ministry data), could it be said that such a loss was "undue" and that any speculative gain on the part of another party was "undue"? In fact, it could be argued that the third party's access to the data and ability to commercialize it under the auspices of a "research agreement" has in fact afforded [it] an "undue gain".

Reply Representations

With respect to section 17(1)(a), the affected party reiterates its previous position.

Regarding section 17(1)(b), the affected party responds to the appellant's argument that there are other companies that could provide the same services to the Ministry:

> This is not a reason to disclose [the affected party's] propriety and commercial information to competitors. Order MO-1813 states that "Although one of the central purposes of the *Act* is to shed light on the operations of government, [the equivalent to 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]". … the release of any documents would aid in exploiting [the affected party] in the marketplace. Regardless of what competitors may or may not be able to offer the Ministry, [the affected party] is the one currently providing this service which is in the Ministry's interest and that of the public that this be continued.

With respect to section 17(1)(c), the affected party states:

> Again, the appellant refers to the Released Agreements and information on the website. As stated previously, … the information on the website is only a summary of our products and services.
>
> Information contained within the documents not to be disclosed is confidential and proprietary to [the affected party] and should remain as such. Undue loss to [the affected party] and gain to a direct competitor would occur should these documents be released to the appellant.

After reviewing the appellant's representations, the Ministry addressed certain specific points made by the appellant. The Ministry identifies that it did not apply section 17 to any "draft agreements" as is suggested by the appellant. In addition, the Ministry states:

> … the appellant submits that the disclosure of the relevant records would not result in the harms contemplated by section 17(1)(b), as third parties other than the affected third party in this appeal would still be willing to submit proposals to provide data analysis to the Ministry in return for access to the underlying data. The Ministry respectfully submits that the disclosure of proposals submitted by the affected third party in this appeal would also cause other businesses to refrain from submitting similar proposals in the future, as they would expect the proprietary information in their proposals to remain confidential.

Findings

Based on the representations set out above, on my review of the records at issue, and on the representations of the affected party made for each of the records remaining at issue, which I will address below, I make the following findings:

1997 documents

DPB-25

This record is a 16-page series of documents provided by the affected party. In addition to the representations set out above, the affected party states that, if this document were released it would provide competitors with access to the affected party's business strategy, causing undue loss while providing undue gain to their competitors, and that it would prejudice significantly the affected party's competitive position.

On my review of this record, which is a 1997 document prepared by the affected party, I find that much of the information contained in this record is of a general nature, relating to the proposed agreement to be entered into between the affected party and the Ministry. On my review of the representations, the information in this record, and also based on the age of the record, I have not received "detailed and convincing" evidence that this record qualifies for exemption under sections 17(1)(a), (b) or (c). Accordingly, I will order that it be disclosed.

DPB-26

This record is an 8-page series of documents provided to the Ministry by the affected party. It too is dated in 1997, and the affected party acknowledges that it is an "older document", however, the affected party provides the following additional representations on the application of section 17(1) to this record:

> This [record] details the services [the affected party] will provide…. It also … details the elements on which [the affected party] will build its proprietary forecasting model.

In its reply representations the affected party states:

> All of the [records], other than [DPB-26], address proposals and requests which are separate than those that appear in the released agreements …. [DPB-26] contains additional commercial confidential information which goes beyond that found in [the released agreement] …. [and] contains the details on which [the affected party] builds its forecasting models.

Based on these additional representations of the affected party, and on my review of DPB-26, I am satisfied that it contains information different from that contained in the released agreement, and that the disclosure of this information would result in undue loss to the affected party, or undue gain to the affected party's competitors. Accordingly, I am satisfied that these records qualify for exemption under section 17(1)(c).

1999 documents

KMRB-1

This is a 4-page facsimile transmission from the affected party to Ministry staff. The affected party's specific representations on this record state:

> Release of this document would cause undue harm to [the affected party], and undue gain to competitors as it provides [the affected party's] business strategy. If disclosed to competitors it would provide them potential access to the same data without the research and time invested by [the affected party] resulting in substantial prejudice to [the affected party's] competitive position.

On my review of this record, I find that it contains some general information about the affected party's plans; however, I am not satisfied that the disclosure of this information would result in any of the harms set out in section 17(1), nor have I been provided with detailed and convincing evidence that these harms will result from the disclosure of this record. Accordingly, I find that it does not qualify for exemption under section 17(1).

2000 documents

KMRB-2

This record is a 5-page copy of an 11-screen powerpoint presentation prepared by the affected party. The affected party's specific representations on this record state:

> This document provides a list of the current work that [the affected party] is contracted to do for the client. With this list, competitors could challenge [the] contracts and thereby significantly interfere with contracts and future negotiations of [the affected party]. Since these items were researched and proposed by [the affected party], it would give competitors an unfair advantage to be given the list without also investing in their research and development.

On my review of KMRB-2, I find that the information contained in the presentations is of a general nature, and is also a number of years old. In the circumstances, I am not satisfied that the disclosure of this record would result in any of the harms set out in section 17(1), nor have I been provided with detailed and convincing evidence that these harms will result from the disclosure of this record. Accordingly, I find that it does not qualify for exemption under section 17(1).

KMRB-3

This is a 9-page copy of a document prepared by the affected party entitled "Analytical applications of data". In addition to the representations set out above, the affected party states:

> This [record] contains details of past and present studies as well as descriptions of future studies which requested data could make possible. …
>
> Release of this document would cause undue harm to [the affected party], and undue gain to competitors as it provides contacts and analytical applications that [the affected party] has invested considerable resources to develop. If this document was disclosed to competitors it would provide them access to the same sources and analytical applications that [the affected party] has developed without the resource investment and would prejudice significantly [the affected party's] competitive position.

On my review of this record and based on the specific representations of the affected party that this record contains descriptions of future studies which the requested data could make possible, I am satisfied that its disclosure would result in undue loss to the affected party, or undue gain to

the affected party's competitors. Accordingly, I am satisfied that this record qualifies for exemption under section 17(1)(c).

KMRB-4

This is a 2-page letter from the affected party to the Ministry, with a 9-page attachment relating to research applications.

The affected party argues that the release of this record would provide competitors with access to the affected party's business strategy, causing it undue loss while providing undue gain to their competitors, and would prejudice significantly the affected party's competitive position.

I also note that the information contained in this record is also contained in a portion of Record LSB-1, and that the affected party argued that disclosure of the record would grant competitors access to certain research applications that the affected party has spent years to develop.

On my review of Record KMRB-4 and the affected party's representations, and based on the fact that the record specifically identifies various research applications, I am satisfied that its disclosure would result in undue loss to the affected party, or undue gain to the affected party's competitors. Accordingly, I am satisfied that this record qualifies for exemption under section 17(1)(c).

KMRB-5

This is a 2-page letter from the affected party to the Ministry, with three pages of attachments. The affected party does not provide specific representation on this record and, on my review of the information contained in it, I am not satisfied that its disclosure would result in the section 17(1) harms. Accordingly, I will order that this record be disclosed.

KMRB-6 and KMRB-7:

KMRB-6 (pages 3 - 11) is a 9-page document prepared by the affected party referred to as a "draft proposal". KMRB-7 (pages 2 - 26) is a 25-page document prepared by the affected party referred to as a "proposal" (pages 2 - 13 of this record are similar to pages 14 - 25, with slight changes in format). The information in these records is similar and, in addition to the representations reproduced above, the affected party has specifically stated as follows regarding these records:

> [Records KMRB-6 and KMRB-7] contain different versions of the same research proposal.
>
> Release of these proposals … would result in undue gain to [the affected party's] competitors, as it would provide them with a research proposal that [the affected party] has spent years to develop without them having to make the same investments.

The affected party also provided additional confidential representations regarding these records.

On my review of Records KMRB-6 and KMRB-7, and based on the confidential representations of the affected party, I am satisfied that disclosure of these records would result in undue loss to the affected party, or undue gain to the affected party's competitors. Accordingly, I am satisfied that these records qualify for exemption under section 17(1)(c).

2001 documents:

LSB-1 (pages 1 – 33)

The pages of this record consist of a series of documents from a 39-page binder (although the page numbering on the copy of the record sent to this office goes up to page 45) prepared by the affected party. As noted above, the Ministry inserted blank pages into this record in order to identify section breaks. These blank pages comprise pages 3, 6, 17, 19, 31 and 33.

The record at issue includes a cover page (page 1), a table of contents (page 2), a cover letter (pages 4-5), a letter from the Ministry with "Appendix A" attached (pages 7, 8 and 9), and five documents pertaining to the affected party's proposal (identified in the table of contents as Tabs 2, 3, 4, 5 and 6).

The affected party states that except for its Privacy and Confidentiality Policy (the document found in Tab 5), this record contains data work plan, research application and the affected party's employee agreement. The affected party states further that the record sets out its business strategy and research applications that have taken years to develop. The affected party submits that disclosure of the information in this record would provide its competitors with access to this information without the years of resources that it has invested. As a consequence, the affected party submits that disclosure would provide its competitors with undue gain and could reasonably be expected to impact its competitive position.

In its reply submissions, the affected party explains that the disclosure of the plans and proposals could allow competitors to follow the same plans and develop similar products without the same expenditures.

Having reviewed this document and all of the submissions made regarding this issue, I am not persuaded that section 17(1) applies to all of the information in this record. Specifically, I find that pages 1, 2, 4, 5, 7, 8, 9, 25-30 and 32 are not exempt under section 17(1):

- Page 1 simply identifies the affected party and its proposal, and the affected party has, in its submissions, described the contents of page 2. I find that the affected party has failed to establish that any of the harms in section 17(1) could reasonably be expected to result from disclosure of these pages.

- I find the information in the cover letter (pages 4-5) contains some general information about the affected party's plans; however, I am not satisfied that the

disclosure of this information could reasonably be expected to result in any of the harms set out in section 17(1).

- Pages 7, 8 and 9 comprise correspondence from the Ministry. Although the letter refers to the affected party's proposal, these pages do not contain information received from the affected party, nor would their disclosure reveal any details of the affected party's plans, proposals or business strategies. The letter is primarily an acknowledgement of the proposal and a request for additional information. The attachment sets out the specific information that the Ministry requires in order to proceed with an evaluation of the affected party's proposal. I am not satisfied that the disclosure of this information could reasonably be expected to result in any of the harms set out in section 17(1).

- Pages 25-30 comprise the affected party's Privacy and Confidentiality Policy and page 32 contains a copy of its Employee Confidentiality Agreement. Although not identical, the affected party's Privacy and Confidentiality Policy can be found on its website. Moreover, it appears that the Employee Confidentiality Agreement is required to be signed by all employees of the company and it contains fairly standard wording. I am not persuaded that disclosure of either of these two documents could reasonably be expected to result in any of the harms envisioned by section 17(1) of the *Act*.

I am satisfied, however, that section 17 applies to the remaining portions of this record, specifically:

- Pages 10-16 and 18: These pages consist of specific answers by the affected party to questions raised by the Ministry, as well as a specific work plan. On my review of these pages, I am satisfied that their disclosure could reasonably be expected to result in undue loss to the affected party, or undue gain to the affected party's competitors. The detailed responses and the details contained in the work plan reveal information relating to the affected party's processes and procedures. In the circumstances, and based on the information contained in the records, I find that these pages qualify for exemption under section 17(1)(c).

- Pages 20-24 contain information relating to research applications, and is similar to Record KMRB-4, which I found qualifies for exemption under section 17(1)(c). For the same reasons I found that record to qualify for exemption, I am also satisfied that pages 20-24 of LSB-1 qualify for exemption under section 17(1)(c)

DPB-62

This is a one-page email sent from the affected party to Ministry staff. The affected party states that it contains details on services the affected party provides and proposed changes to them. It also states:

> Release of this document would cause undue harm to [the affected party] and possible gain to competitors as it provides [the affected party's] contacts with the recipient as well as providing insight to services provided. It also provides a unique … business strategy. Since these are services developed by [the affected party] it would provide an unfair gain to competitors in allowing them to offer similar services without the same amount of development time invested by [the affected party]. Disclosure of [this] business strategy would substantially impact on [the affected party's] competitive position.

On my review of this record and the representations of the parties, I am not satisfied that the disclosure of this record would result in any of the harms set out in section 17(1), nor have I been provided with detailed and convincing evidence that these harms will result from the disclosure of this record. The one-page record does refer to some proposed changes to certain services, but I am not persuaded that the disclosure of this information could reasonably be expected to result in the identified section 17(1) harms. Accordingly, I find that it does not qualify for exemption under section 17(1).

2003 documents:

DPB-65 (pages 11-15)

These pages consist of a document with the cover page stating it is a "Project Proposal". The affected party states that this record includes analysis plans and a "cost section", and then states:

> This document contains a research proposal developed by [the affected party]. To release this document would provide competitors with access to one of [the affected party's] business strategy causing [the affected party] undue loss while providing undue gain to their competitors as well as prejudicing significantly [the affected party's] competitive position to competitors [as it] would provide them with undue insight into [the affected party's] research plans as well as providing them with the competitive ability to offer the same or similar services with lower cost and/or times without investing the time and resources to develop such proposals.

On my review of this record, I find that it contains information of a general nature relating to the proposal. In the circumstances, I am not satisfied that the disclosure of this record would result in any of the harms set out in section 17(1), nor have I been provided with detailed and convincing evidence that these harms will result from the disclosure of this record. Accordingly, I find that it does not qualify for exemption under section 17(1).

2005 documents:

SFSB-1

This record is a 6-page facsimile from the affected party to the Ministry, post-dating the last of the "released agreements" referred to by the appellant. The affected party states that this record

is a "detailed data request" from the affected party, and that the request is "still in the discussion stage". It also states that it contains "exact field names and descriptions for the requested data", and that with these field names and descriptions, "someone with the same area of expertise could deduce what is to be analyzed". The affected party also states that no negotiations have taken place regarding this record, and that the information is "still at the discussion stage".

In addition, the affected party states:

> Release of this document would cause undue harm to [the affected party] and possible gain to competitors as this matter is still in discussion and its release would give competitors a jumpstart on developing a similar proposal. It has taken [the affected party] years to develop databases and gain the knowledge and reputation required to know which data sources would be beneficial for study purposes. If this document were released it would provide competitors with an ideal data source that they have not yet considered, as well as releasing a laid-out plan of which exact fields to request in order to achieve the study results without the time and money that [the affected party] has invested in researching this plan. Disclosure of this information would prejudice significantly the competitive position and future negotiations of [the affected party].

Based on my review of the record, the representations of the parties, and on the date of this record and the status of this matter, I am satisfied that this record qualifies for exemption under section 17(1)(a), as its disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party.

In summary, I have found that none of the harms set out in sections 17(1)(a), (b) or (c) have been established for Records DPB-25, KMRB-1, KMRB-2, KMRB-5, DPB-62, DPB-65 and portions of LSB-1. As no other exemptions apply to these records, they should be disclosed to the appellant. However, I am satisfied that the harms contemplated by section 17(1)(c) could reasonably be expected to occur should Records DPB-26, KMRB-3, KMRB-4, KMRB-6 and KMRB-7, and portions of LSB-1, be disclosed, and that the harms in section 17(1)(a) could reasonably be expected to occur should Record SFSB-1 be disclosed. As all three parts of the test apply to these records, they are exempt under the mandatory exemption in section 17(1).

EXERCISE OF DISCRETION

I have found the discretionary exemptions in sections 13 and 19 apply to certain identified records. The section 19 and 13 exemptions are discretionary, and permit 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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

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

The Ministry indicates that in exercising its discretion not to disclose information pursuant to sections 13 and 19, it considered a number of factors, including the following:

- The information contained in the records is recent and sensitive;
- The exemptions were applied in a limited and specific manner, and severances were employed where possible to provide information to the requester;
- The requester is not requesting his or her own personal information, and has not indicated any sympathetic or compelling need to have access to the information;
- The information that was severed falls directly within the wording of the section 13 and section 19 exemptions; and
- The information in the records is sensitive to the Ministry, as it discusses the legal and policy implications of third party proposals, and relates to ongoing contractual relationships with a third party.

With respect to the records for which section 13(1) has been claimed, the appellant responds to the Ministry's representations by identifying that the records are not particularly recent, and that they relate to the initial research agreement entered into between the Ministry and one of the affected parties which has since been superseded by another agreement. He also argues that the records do not qualify for exemption, and that they are not "sensitive".

With respect to the records for which the Ministry has claimed the application of section 19, the appellant submits that:

> …the exemptions were not applied in a limited and specific manner and […] it is possible that more information should have been disclosed; i.e. that the severed information does not fall directly within the wording of the exemption. Similar arguments apply with respect to the Ministry's claim that the information contained in the records is recent and sensitive as factors in the exercise of its discretion in applying section 19 to deny access to the records.
>
> …given the relationship between the Ministry and the third party, disclosure will increase public confidence in the operation of the institution - to allow others to see how the Ministry is disclosing what is in effect government data and whether it is receiving "value for money" for this information.

In reply, the Ministry's notes that this latter comment made by the appellant is not relevant to the issue of whether the Ministry exercised its discretion under sections 13 and 19 properly. The Ministry submits that this argument relates instead to the issue of the application of the public interest override in section 23 of the *Act*. Relying on its original representations, the Ministry submits that it exercised its discretion appropriately in applying the section 13 and section 19 exemptions to the information at issue.

On my review of the representations provided by the parties, and in light of the fact that the Ministry has disclosed certain records to the appellant (including the released agreements) and

carefully severed other records, I am satisfied that the Ministry has properly exercised its discretion in deciding to withhold the records which I have found qualify for exemption under sections 13(1) and 19.

PUBLIC INTEREST OVERRIDE

The appellant has raised the application of the section 23 "public interest override" as a basis for requiring the disclosure of the records at issue in this appeal.

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)]. In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a compelling public interest in disclosure, and (2) this compelling public interest must clearly outweigh the purpose of the exemption.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Any public interest in non-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

In addition, the existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

With respect to section 13, in Order 94, former Commissioner Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

Representations

The appellant makes extensive submissions on this issue, most of which I find are only peripherally related to the "public interest". Accordingly, in addressing this issue, I will only briefly outline his submissions.

The appellant's representations raise concerns about the "Ministry's policy decision to allow the commercialization of … data pursuant to a research agreement," and the "sole source" contract the Ministry has with the affected party. He also identifies that empirical evidence relating to drug utilization and costs are "critical healthcare matters." He takes the position that there is a public interest in disclosure of records that would reveal how the Ministry has engaged external third parties to assist with health policy development in the area of pharmaceuticals. The appellant submits that the Ministry's need for legal advice relating to this matter (as reflected in the number of records for which section 19 has been claimed) supports his argument that disclosure is in the public interest.

The appellant submits further that the public has a right to know that it is receiving the best "value for money" for the provision of these services, particularly since these services are currently being provided in exchange for the affected party accessing the Ministry data under a research agreement, as opposed to a commercial contract.

In its submissions regarding the application of section 23, the Ministry states:

> As characterized by the Appellant, this compelling public interest relates to whether the Ministry is receiving adequate consideration in exchange for the data it has disclosed under the research agreements that have been released to the Appellant in response to his access request. The agreements that have already been provided to the Appellant clearly indicate which data the Ministry has provided to third parties and what the Ministry has received in return from these

> third parties. Therefore, the Ministry submits that the public interest that the Appellant has identified is not compelling, as the Ministry has already disclosed enough information to satisfy the interest that the Appellant has identified.

The affected party's representations echo the Ministry's position regarding this issue.

Findings

Having reviewed the records at issue and the representations of the parties, I find that the public interest override found in section 23 does not operate to override the exemptions which I have found apply to a number of the records at issue. I make this finding on the basis that the appellant has failed to provide sufficient evidence to establish that there exists a compelling public interest in the information which I have found qualifies for exemption. Although there may be a public interest in these records, given their subject matter, I am not persuaded that any such public interest in the disclosure of the portions of the records which I have found qualify for exemption is sufficiently compelling to override the exemptions. Furthermore, I agree with the Ministry and the affected party that many of the appellant's concerns about the public interest in the disclosure of the records relate to the disclosure of the terms of the agreements between the affected party and Ministry. As the Ministry states, the executed agreements have already been provided to the appellant.

Accordingly, I am not satisfied that section 23 overrides the exemptions in the circumstances of this appeal.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In its initial decision letter in response to the seven-part request, the Ministry stated that a search for responsive records was conducted in five program areas of the Ministry: the Drug Programs Branch (DPB), the Legal Services Branch (LSB), the Knowledge Management and Reporting Branch (KMRB), the Supply and Financial Services Branch (SFSB) and the Access and Privacy Office, with the following results:

DPB - The Ministry indicated that it had located records responsive to items 1, 3, 4, 6 and 7 of the request but did not locate any records responsive to items 2 and 5. In total, the Ministry located 72 responsive records.

LSB - The Ministry indicated that it had located 93 records responsive to items 3, 4, 6 and 7 only.

KMRB - The Ministry Indicated that it located 18 records responsive to items 1, 6 and 7 only.

SFSB - The Ministry stated in its decision letter that it had located only one record in this branch, and that this record was responsive to item 3.

Access and Privacy Office - The Ministry indicated that it located one record responsive to item 3 of the request.

As identified above, during mediation the appellant raised the issue of whether the Ministry had conducted a reasonable search for the records.

The Ministry's representations

In the Notice of Inquiry sent to the Ministry, the Ministry was asked to describe the steps it took to locate responsive records. The Ministry indicated that its search was co-ordinated by a program advisor in the Access and Privacy Office (APO), who identified the four Ministry branches outlined above as potentially having responsive records. According to the Ministry the program advisor also searched the APO as well.

With respect to the actual searches that were conducted, the Ministry indicated that a person in each branch who was trained to identify records conducted a search. In particular, the Ministry noted that the search in the Legal Services Branch involved several lawyers familiar with the provisions of the *Act* and with the agreements relating to Drug Program Benefits data. Further, the Ministry stated that searches were conducted for electronic and hard-copy records, and through records archived in the Ministry's records centre.

The appellant's representations

After considering the Ministry's representations, the appellant wrote that he was not satisfied with their explanation of the searches conducted. He noted that, given the nature of the agreement that the Ministry ultimately entered into with the affected party, the office of the Assistant Deputy Minister responsible for the Drug Programs Branch (the ADM) should also have been searched. He also queried the basis on which the program advisor identified the branches to be searched. Additionally, he noted that references in certain records that were disclosed suggest that more records might exist, and provided the following specific examples:

- KMRB-6 and KMRB-10 indicate that the affected party had a number of meetings with the ADM, yet there are no records from these meetings;
- KMRB-16 has an identified date, and it appears that something happened on this matter after this date, yet there are no records documenting the subsequent events;

- LSB-71 refers to a "list" which is not provided;
- LSB-72 refers to an attachment, which is not provided;
- DPB-46 references an e-mail distribution list. The appellant states that the Ministry has not indicated that it severed this distribution list.

The appellant also notes that there do not appear to be any duplicates of records identified and that, given the communications between branches, he would have expected there to be duplication. Finally, he indicated his belief that a research agreement was in place with an additional commercial entity, noting that there were no records identified regarding this entity.

The Ministry's reply representations

The Ministry responded to the appellant's position on a number of these points.

With regard to the appellant's view that a search of other branches, including the ADM's office, ought to have been conducted (based on the nature of the agreement entered with the third party, and the content of Records KMRB-6 and KMRB-10), the Ministry states:

> After reviewing the Appellant's representations, the APO contacted the Assistant Deputy Minister's Office. The Access and Privacy Office was advised that records relating to specific programs of the Ministry are regularly retained in the files of the responsible branch. This practice is consistent across the Ministry. Since the Ministry conducted an exhaustive search for responsive records in all of the responsible branches when it first received the appellant's request, the Ministry would not have any further responsive records relating to the matters discussed in KMRB-6 and KMRB-10.
>
> Staff in the Access and Privacy Office are knowledgeable about the organization and structure of the ministry. Upon receiving a request the advisor contacts those areas of the ministry that are likely to have responsive records. The branch confirms whether or not they have responsive records. At the same time, the branch may indicate another area of the ministry that may hold records. The Access and Privacy Office will then contact that other area to determine if any records exist in that program area.

Concerning the appellant's suggestion that the contents of Record KMRB-16 imply that further action would have been taken in regard to the issues referred to in this record, and that more records dealing with the development of identified guidelines should exist, the Ministry submits that the guidelines that this record refers to were not ever developed, and that the Ministry does not have any other records relating to this issue that would be responsive to the appellant's request.

Concerning the appellant's reference to the fact that referenced attachments to Records LSB-71 and LSB-72 were not provided, the Ministry confirms that both of these records refer to attachments that were not provided to the appellant. However, the Ministry then states that it does not have copies of these attachments. It states:

> LSB-71 and LSB-72 were located in a solicitor's archived file on the agreements that are at issue in this appeal. While the solicitor's file was quite extensive (as is evidenced by the large number of draft documents and other materials that were identified as responsive Legal Services Branch records in the index of records), the attachments that were referred to in LSB-71 and LSB-72 were not in that file.

In response to the appellant's position that an e-mail distribution list referenced in Record DPB-46 was not provided, the Ministry states:

> The Drug Programs Branch is unable to locate the second page of this message, which would contain the email distribution list that the appellant has identified as missing. DPB-46 is, however, a duplicate of LSB-35 (although LSB-35 contains additional hand-written notes that were made by legal counsel). The email distribution list that the appellant is seeking is found on the second page of LSB-35, which has already been provided to the appellant.

With respect to the appellant's concern that duplicates of Legal Service Branch records should exist in the Drug Programs Branch, that Ministry states:

> …the lack of such duplicate records can be explained by the fact that the Drug Programs Branch may not have maintained copies of all of the relevant records. Furthermore, some duplicate records that were located by multiple branches were removed from the batch of records that was provided to the appellant. The Ministry … submits, however, that LSB-9, LSB-10, LSB-11 and LSB-12 were all communications between Ministry counsel and program staff, as the contents of these records clearly indicate.

Finally, addressing the appellant's suggestion that the Ministry should have located more records that relate to another agreement with another commercial entity that has access to identified data, the Ministry states that it is not aware of the arrangement that the appellant is referring to.

Findings

I have carefully reviewed the representations provided by the parties on this issue, as reflected above. Upon my review of the material and the parties' representations, I am satisfied that the searches conducted by the Ministry were reasonable in the circumstances of this appeal.

As set out above, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. The representations provided by the Ministry set out in detail the nature of the searches conducted by the Ministry and the results of those searches. Numerous responsive records were located in five different Ministry departments. The detailed information provided by the Ministry satisfies me that reasonable searches were conducted. Furthermore, although the appellant identified a number of detailed, specific questions regarding the searches, and referred to records in support of his questions, the Ministry responded to those questions with detailed explanations. It also conducted further

inquiries and searches based on the appellant's representations, and no additional records were located as a result of the further searches.

In addition, with respect to the appellant's claim that certain duplicate copies of records ought to exist, the Ministry has provided a satisfactory explanation regarding why such duplicates may not exist. Furthermore, as identified above (particularly under the review of the section 19 exemption claims), a number of duplicate copies of records do exist, and were identified in response to the appellant's request.

In the circumstances, I am satisfied with the explanations provided by the Ministry in response to the appellant's concerns, and I find that the searches conducted by the Ministry for responsive records were reasonable.

ORDER:

1. I order the Ministry to issue an access decision to the appellant for the portion of Record LSB-17 (a portion of page 4 of that record) that it held as non-responsive (except for the first sentence of the third paragraph), treating the date of this order as the date of the request.

2. I find that the portions of pages 2, 3 and 5 of Record LSB-17 which the Ministry claims fall within the section 19 exemption do not qualify under that section, and order that they be disclosed.

3. I find that Record LSB-70, pages 2 and 3 of Record KMRB-12, the second email of Record KMRB-17, and the first sentence of the third paragraph on page 4 of Record LSB-17 do not qualify for exemption under section 13(1), and order that they be disclosed.

4. I find that Records DPB-25, KMRB-1, KMRB-2, KMRB-5, DPB-62, DPB-65 (pages 11-15) and pages 1, 2, 4, 5, 7, 8, 9, 25-30 and 32 of Record LSB-1 are not exempt under section 17(1), and order that they be disclosed.

5. I order the Ministry to disclose the records or portions of records which I have found do not qualify for exemption to the appellant by **September 4, 2008** but not before **August 29, 2008**.

6. I uphold the Ministry's decision to deny access to the remaining records or portions of records on the basis of the exemptions in section 13(1), 17(1) and/or 19.

7. The searches conducted by the Ministry were reasonable, and I dismiss this portion of the appeal.

8. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant.

Original signed by: July 31, 2008
Frank DeVries
Adjudicator