



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

ORDER P-946

Appeal P-9400778

Ministry of Consumer and Commercial Relations



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Consumer and Commercial Relations (the Ministry) received a request for general information relating to franchising in Ontario, as well as to the possibility of creating franchising legislation in the province. The requester also sought access to specific information related to a named franchisor (the Franchisor) involved in a dispute with some of its franchisees. The requester is a reporter with an interest in these issues.

The Ministry initially granted access to several records and denied access to others, either in whole or in part. At that time, the Ministry advised the requester that, pursuant to section 28 of the Act, it was notifying a number of third parties whose interests might be affected by disclosure of several additional records on which it had yet to make an access decision.

The requester appealed the denial of access. In his letter of appeal, the appellant claimed that there was a public interest in the disclosure of the records.

The Ministry subsequently notified a total of 11 individuals, companies, committees and associations (the affected parties). Upon receiving the consent of five of these parties and the partial consent of another, the Ministry forwarded some additional documentation to the appellant. The Ministry denied access to those records related to the two affected parties who objected to the disclosure of records affecting their interests and a portion of the records for which limited consent had been received. The Ministry advised the appellant that it had not received a response from three of the affected parties and would be making a decision on the relevant records in 30 days. It did not do so.

A Notice of Inquiry was sent to the Ministry, the appellant and six of the affected parties whose interests in the records were still outstanding. Representations were received from the Ministry, the appellant, counsel jointly representing two of the affected parties associated with the Franchisor, and one other affected party, the Alberta Securities Commission (the ASC).

The 52 records remaining at issue are described in Appendix "A" to this order, according to the index and numbering system used by the Ministry. In this order, I will refer to the records by their index number and document number as follows: (1)2 to refer to Record #2 in Index #1.

In its submissions, the Ministry indicates that it is no longer claiming that section 14(1) applies to exempt Record (2)36 from disclosure. As this is a discretionary exemption, I will not consider it in this order. In addition, as section 21 is a mandatory exemption, I will consider its application to some records for which the Ministry has not claimed its application.

At this time, the Ministry continues to rely on the following exemptions to deny access to the Records in Appendix "A", either in whole or in part:

- Cabinet records - section 12(1)
- advice to government - section 13(1)
- relations with other governments - section 15
- third party information - section 17(1)
- invasion of privacy - section 21.

DISCUSSION:

CABINET RECORDS

The Ministry claims that section 12(1)(e) of the Act applies to exempt the following Records:

- (2): 5, 6, 10, 11, 16, 17, 18, 21, 23, 27, 31, 32, 33, 34, 35, 36 and 38
- (3): 8

from disclosure.

Section 12(1) of the Act states, in part, as follows:

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

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

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

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

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

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

[Order 131]

With the exception of Records (2)10 and (3)8, all of the documents to which the Ministry has applied the section 12(1)(e) exemption consist of briefing notes and issue sheets. They cover the time period from January 28, 1993-June 27, 1994 and all concern the issue of franchising legislation in Ontario and, in some cases, make reference to the dispute involving the

Franchisor and some of its franchisees.

The Ministry submits that these records were prepared to brief the Minister of Consumer and Commercial Relations (the Minister) and/or the Premier on matters that were proposed to be brought before Cabinet. The Ministry also claims that these documents "also reflect consultation amongst ministers relating to government decisions or the formulation of government policy". The Ministry states that there was constant communication and consultation between the Premier and the Minister on this issue.

The difficulty with the Ministry's position is one of timing. Section 12(1)(e) is prospective, or at least meant to cover issues that are presently the subject of interministerial consultations or currently before the Executive Council or its committees (Order 40). Moreover, the fact that these issues **may** be revisited is insufficient to substantiate a claim for exemption under section 12(1)(e).

With respect to this issue the Ministry states that:

The Ministry of Consumer and Commercial Relations and the Premier's office intended to take the issue of franchising legislation and the high profile [Franchisor] dispute to Cabinet. The whole issue of whether to enact franchising legislation in Ontario was to have been discussed at Cabinet in the context of the [Franchisor] dispute but the election call intervened. The Ministry of Consumer and Commercial Relations has every intention of bringing this issue forward once the election is completed.

Based on several factual matters, I cannot conclude that section 12(1)(e) applies to these records. First of all, given the dates of these records, it is clear that these matters are currently neither before the Executive Council nor its committees; nor are they the subject of interministerial consultations. Secondly, there is no indication in the records, themselves, that the issue is one which the Ministry will or has the intention to bring to Cabinet in the future.

The Cabinet submission, Record (2)10, referred to by the Ministry in its submissions in support of this assertion, is entitled "Ontario Retail Sector Strategy Workplan" and, in fact, indicates that the purpose of the submission is to obtain approval for a sector strategy workplan for the retail sector. It is, in fact, a submission prepared by the Ministry of Economic Development and Trade (now the Ministry of Economic Development, Trade and Tourism) (MEDT). The submission contains only one very minor reference to franchisors and franchisees. This reference does not in any way relate to the issues pertaining to the Franchisor and/or legislation regulating franchises as set out in the briefing notes and issue sheets. Thus, I do not accept the Ministry's assertion that this record "... support's the Institution's position that the issue of franchising and the [Franchisor] dispute were going to be discussed by Cabinet".

The Franchisor dispute was widely reported in the media in the spring of 1993, and, as has been the case when such disputes become public, there were many groups lobbying for the implementation of legislation to regulate franchising in the province of Ontario. The most recent of the documents to which the Ministry has applied the Cabinet records exemption is dated June 27, 1994. The provincial election was called on April 11, 1995, some 10 months later. Obviously, with the change in government, the intentions of the then government, whatever they may have been, cannot automatically be applied to the legislative agenda of the new Cabinet. Based on the records themselves and the information provided by the Ministry in its submissions, there is no evidence before me to indicate that the issue of whether to enact franchise legislation is a matter "that is proposed to be brought before the Executive Council or its committees ..." within the meaning of section 12(1)(e) of the Act.

Record (3)8 is a discussion paper on franchising dated November 1987. The Ministry submits that this record was used to advise the Minister of the background and issues involving franchising and franchising legislation and thus "... was a record prepared to brief a minister of the Crown in relation to matters that are proposed to be brought before the Executive Council."

I find, however, that the Ministry has not provided evidence to show that the matters discussed in Record (3)8 were or are proposed to be brought before the Executive Council.

In my view, the Ministry has failed to establish a claim for exemption for any of these records under section 12(1)(e). I have been provided with no evidence to indicate that the matters referred to in the briefing notes and the issue sheets were ever considered by Cabinet, or that these matters are to be addressed by the Executive Council or one of its committees in the future. Furthermore, given the results of the election referred to by the Ministry, it is unclear whether this issue will be on the agenda of the new Cabinet. Based on all of these factors, and the purposes of the Act as set out in section 1(a)(ii) that exemptions from the right of access should be limited and specific, I find that none of these records are exempt pursuant to section 12(1)(e) of the Act.

Because section 12(1) is a mandatory exemption, I have also considered whether any of the other sections or the introductory wording applies to any of these records. During the course of this inquiry, the MEDT indicated to the Ministry that Record (2)10, the Cabinet submission, in fact went before Cabinet on February 23, 1994. In my view, this document is clearly a record containing policy options or recommendations which has been submitted to the Executive Council. It, thus, qualifies for exemption pursuant to section 12(1)(b) of the Act.

I find that none of the other sections or introductory wording of section 12(1) apply to any of the other documents which the Ministry has claimed are exempt pursuant to section 12(1)(e) of the Act.

ADVICE OR RECOMMENDATIONS

The Ministry submits that Records:

- (2): 5, 6, 11, 12, 16, 17, 18, 21, 23, 27, 31, 32, 33, 34, 35, 36 and 38
- (3): 3, 5, 8, 9, 11, 13 and 15

qualify for exemption pursuant to section 13(1) of the Act.

Section 13(1) of the Act states that:

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

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the

records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of the exemption under section 13(1) of the Act. He stated that "[t]his exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy making".

The Index 2 Records

With the exception of Record (2)12, I have previously described the Index 2 records which the Ministry claims are exempt pursuant to section 13(1) as briefing notes and issue sheets. Record (2)12 is a document entitled "Strategy Paper Resolving Differences in the Franchising Industry". (The content of this record is very similar to that contained in Record (2)11.)

Records (2): 16, 17, 18, 27, 31, 32, 33, 34, 35, 36 and 38 all contain "response" sections which the Ministry claims contain the advice or recommendations of a public servant in the form of a suggested course of action as to how the Minister should respond to public inquiries or questions in the House on the matters discussed in these documents. The Ministry refers to a number of past orders of the Commissioner's office, including P-771, in support of its position that the response sections of each of these records is exempt pursuant to section 13(1) of the Act.

As the Ministry suggests, several previous orders issued by the Commissioner's office have held that the response portions of issues sheets may qualify for protection under section 13(1) under the category of advice or recommendations. However, in Order P-771, Assistant Commissioner Irwin Glasberg declined to follow that approach. He concluded that the contents of the response sections of issue sheets were purely factual in nature and did not contain information relating to a suggested course of action which might be accepted or rejected as part of the deliberative process.

I concur with the approach taken by Assistant Commissioner Glasberg and adopt it for the purposes of this appeal. I find that the response sections of Records (2): 16, 17, 18, 27, 31, 32, 33, 34, 35, 36 and 38 do not contain any information which relates to a course of action which the Minister or Premier (the individuals for whom the Ministry states the briefing notes were prepared) might accept or reject as part of the policy development process in this case. Moreover, I find that the content of the responses is purely factual in nature.

The Ministry further claims that some of the remaining portions of these issue sheets and briefing notes, as well as the other Index 2 records (5, 6, 11, 12, 21 and 23), outline the author's advice and recommendations as to what type of issues are involved in the examination of franchise legislation, or proposals for the direction that the government should take on the franchising issue. The Ministry states that some of this advice or recommendations is in the form of questions that should be asked prior to making a decision on legislation. In other cases, the Ministry claims that the advice or recommendations is in the form of proposals for the direction the government should take on the franchising issue.

I have carefully reviewed all of the Index 2 records. I find that Records (2): 5, 6, 16, 23, 27, 31, 35 and 38 merely contain a factual outline of the background to the franchisor-franchisee conflict, a description of the general conflict between these two entities and the specific situation involving the Franchisor, and an analysis of whether regulation is the appropriate government response to the issues raised by the franchise system. I find that these documents do not contain any advice or recommendations within the policy-making system of government. The result is that section 13(1) does not apply to exempt

these documents from disclosure. Records (2): 5, 6, 16, 23, 27, 31, 35 and 38 should be disclosed to the appellant in their entirety.

I also find that section 13(1) does not apply to exempt Records (2): 17, 18 and 36 from disclosure. However, as they contain some personal information, I will consider these records further in my discussion of "Invasion of Privacy" below.

As I have indicated, Records (2)11 and (2)12 are very similar. Record (2)11 is a Ministry briefing note entitled "Resolving Differences in the Franchising Industry". It sets out the proposed direction for the government to take to avoid or resolve disputes between franchisors and franchisees. Record (2)12 is a strategy paper with the same title. Attached to this document are four appendices: (1) Comparison Chart of Franchisors' and Franchisees' Concerns; (2) Overview of Franchise Sector; (3) Description of Australian Franchise Code of Practice; and (4) Applicability of Sector Partnership Fund. Only portions of Appendices 1, 3 and 4 are at issue.

I find that all of the portions of Records (2)11 and (2)12 (the strategy paper itself) which have not been disclosed, with two exceptions noted below, qualify for exemption pursuant to section 13(1) as they describe in detail a recommendation as to how the Ministry may get involved in solving disputes between franchisors and franchisees. One exception is the section on page 3 of Record (2)11 entitled "Related Examples of Non-Regulatory Approaches" which, in my opinion, contains no advice or recommendations, merely a comparison between the suggested proposal in the document and other examples of such an approach. I note that the comparable section in Record (2)12 has already been disclosed to the appellant. Thus, this portion of Record (2)11 should also be disclosed.

The other exception is the last sentence of both Records (2)11 and (2)12. I find that this contains neither advice nor recommendations but merely a statement of how the recommendation would be consistent with another government approach to address certain industry concerns. Thus, this sentence, as it appears in both Records (2)11 and (2)12, should also be released to the appellant.

The portion of Appendix 1 to Record (2)12 which has not been disclosed is part of the column titled "MCCR Comments". I find that this does not contain any advice or recommendations.

I uphold the Ministry's decision to exempt the last sentence of Appendix 3 as constituting advice and recommendations for the purpose of section 13(1) of the Act. The portion of Appendix 4 which has not been disclosed represents an assessment of the recommendation proposed in the strategy paper itself. I find that it constitutes advice and recommendations in that it essentially sets out the advantages of such an approach and provides the rationale for the recommendation (Order P-529).

Record (2)21 contains a list of steps which must be undertaken before the government proceeds with certain issues. I find that these do not constitute "advice or recommendations" for the purposes of section 13(1) of the Act as this record indicates that this course will, in fact, be followed. There is no suggestion in the record that it may be accepted or rejected. Further, the suggestions contained on page 2 of this document are matters which will all be "reviewed" at a future date. Thus, this document should be disclosed to the appellant in its entirety.

I do find that portions of Records (2): 32, 33 and 34 constitute advice and recommendations pursuant to section 13(1) of the Act. I have highlighted these portions on the copy of the records provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portions should not be released.

The following is a summary of my findings on the application of the section 13(1) exemption to the Index 2 records for which it was claimed:

- (1) Records (2): 5, 6, 16, 21, 23, 27, 31, 35 and 38 do not qualify for exemption. They should be disclosed to the appellant in their entirety.
- (2) Records (2): 17, 18 and 36 do not contain advice and recommendations within the meaning of section 13(1) of the Act. However, as they contain some personal information, I will discuss these documents further below.
- (3) Portions of Records (2): 11, 12, 32, 33 and 34 satisfy the section 13(1) exemption. These records should be disclosed with the exception of the portions which I have highlighted on the copy of the records provided to the Freedom of Information and Privacy Co-ordinator of the Ministry with a copy of this order.

The Index 3 Records

The Ministry claims that Records (3): 3, 5, 8, 9, 11, 13 and 15 of this index are exempt either in whole or in part pursuant to section 13(1) of the Act.

Record (3)3 consists of a series of memoranda concerning franchising legislation. Hard copies of several slides presented to the Ministry Management Committee are also included as part of this record. I find that portions of one of the memoranda contain the advice and recommendations of its author as to how the Ministry could address one of the issues involving such legislation. One of the slides sets out eight options; another recommends that three of these options should be adopted. Although the Ministry states that the pros and cons of the various options are given, neither the "Options" nor the "Recommendations" slide contains any such references. Thus, I find that only the "Recommendations" slide forms part of the deliberative process of the government and, therefore, qualifies for exemption pursuant to section 13(1) of the Act.

Record (3)5 is a memorandum from the Senior Policy analyst to the Director of the Policy and Planning Branch. The document summarizes the discussion of various individuals who met to discuss the recommendation that was to be presented to the Ministry Management Committee meeting. I agree with the position of the Ministry that this memorandum contains advice and recommendations provided by the meeting participants as to how the Ministry should proceed with the franchising issue. Included in this record is an issues management document on how the government should address the problems in the franchisor/franchisee relationship. The Ministry specifically claims that the information about possible solutions to the franchising issue and possible implications of these solutions are exempt pursuant to section 13(1). There is no advice or recommendation provided with respect to the alternative which should be adopted. In the absence of such a recommended direction, I find that section 13(1) does not apply to the issues management document and this portion of Record (3)5 should be disclosed to the appellant.

I have previously described Record (3)8. The Ministry claims that Parts 12, 13 and 14 of this report contain the advice and recommendations of the author of the report which could either be accepted or rejected by Ministry management. Part 12 contains seven options for the Ministry. Following a brief description of each option are the headings entitled "Advantages" and "Disadvantages". Part 13 is a conclusion which summarizes the options and Part 14 puts forward two of the options as recommendations. Reviewing all these materials together, I find that all of the information in these parts, with the exception of the option headings and descriptions, form part of the deliberative process of government and are exempt pursuant to

section 13(1). I have highlighted the exempt portions on the copy provided to the Ministry's Freedom of Information and Privacy Co-ordinator. In addition, this record contains some personal information which I will discuss under the heading of Invasion of Privacy below.

Record (3)9 is a briefing note prepared for the Assistant Deputy Minister (the ADM) on the issue of franchise regulation and a meeting with the franchise association. The Ministry claims that portions of the briefing note contain advice and recommendations. I disagree. These portions of the document provide information to the ADM as to why the arrangement between the Ministry and the franchise association with respect to resolving franchisor/franchisee disputes did not always work out. I do not find that any portions of this document constitute advice and recommendations. It should be disclosed to the appellant in its entirety.

The Ministry submits that Record (3)11, a memorandum on the issue of franchise regulation, contains the advice and recommendations of the author as to the current franchising relationships in the province. I do not accept this submission. I find that the contents of this document provide an analysis of certain media reports on franchising problems and an assessment of whether they raised any new issues. In addition, the record contains a discussion of whether any of the options the Ministry was considering would have prevented the problems identified in the media reports. In my view, this record cannot be said to provide advice in the sense of giving direction, which may be accepted or rejected, as part of the deliberative process. On this basis, the section 13(1) exemption does not apply to this record and it should be disclosed in its entirety.

The response section of the briefing note which constitutes Record (3)13 has been exempted under section 13(1). The Ministry relies on its submissions made with respect to the response sections of the briefing notes at issue in Index 2. Based on the reasoning I applied to those documents, I find that section 13(1) does not apply to the response section of Record (3)13 and the entire document should be disclosed to the appellant.

Record (3)15 is a memorandum from the Director of the Ministry Policy and Planning Branch to the Deputy Minister. The author of the record reports the results of a study of franchisors and franchisees and contains a recommendation as to what the Ministry should do with the results. I find that this portion of the record, which I have highlighted, contains advice and recommendations within the meaning of section 13(1). The balance of the document should be disclosed.

The following is a summary of my findings on the application of the section 13(1) exemption to the Index 3 records for which it was claimed:

- (1) Records (3): 9, 11 and 13 do not qualify for exemption. They should be disclosed to the appellant in their entirety.
- (2) Portions of Records (3): 3, 5, 8 and 15 satisfy the section 13(1) exemption. These records should be disclosed with the exception of these exempt portions which I have highlighted on the copy of these records provided to the Freedom of Information and Privacy Co-ordinator of the Ministry with a copy of this order. In addition, there is one page of Record (3)8 which I will consider further in my discussion of Invasion of Privacy.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry submits that Record (3)2 is exempt pursuant to sections 15(a) or (b) of the Act. The ASC supports this

position.

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

1. the relations must be intergovernmental, that is relations between an institution and another government or its agencies; **and**
2. disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

[Order P-908]

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

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

[Order 210]

Record (3)2 is a package of materials sent from the ASC to the Ministry regarding a co-operative research study on the need for franchise legislation. Thus, I find that disclosure of this document would reveal information received by the Ministry from an agency of the government of the province of Alberta.

The ASC states that the information was shared with the Ministry on the understanding that it "... would be kept confidential within government for use by government". The Ministry states that, as the document was marked "Confidential", it was supplied by the government of Alberta in confidence. Although it is unclear whether the "Confidential" stamp was intended for the Ministry or for the internal circulation of the document within the ASC (for which it was originally prepared), I am satisfied that it was on this basis that the Ministry received the record.

Accordingly, all three parts of the section 15(b) test have been satisfied and Record (3)2 is exempt from disclosure on this basis.

THIRD PARTY INFORMATION

PRELIMINARY MATTERS

The Ministry has identified the following 18 records as "potentially" exempt from disclosure pursuant to the provisions of section 17(1) of the Act:

- (1): **4, 6, 15, 16, 19, 20, 21** and 23
- (2): 1, 7, 13, 14, **22, 29**, 37, 39 and 41
- (3): **7**

However, the Ministry further indicates that it will not and, in fact, has not provided any submissions on the application of this exemption to the records in bold-face type and requests that "... the Commission consider the representations of the third parties to whom the information relates when determining whether section 17 applies to those records".

I have carefully reviewed the records for which the Ministry no longer claims the application of section 17(1), the submissions of the affected parties and the responses of these parties to the section 28 Ministry notifications referred to on page 1 of this order. I will analyze these records as follows:

- (1) In response to the Ministry's section 28 notice, the party with an interest in Record (1)6 indicated that he had no objection to the disclosure of this document. The ASC, in responding to the Notice of Inquiry in this appeal, did not object to the disclosure of Record (1)21. Accordingly, Records (1)6 and (1)21 should be released to the appellant in their entirety.
- (2) Record (3)7 is a letter from the president of a franchise association to the Minister in which he raises some general issues on behalf of the organization. The Ministry notified this individual, on behalf of the association, with respect to several similar documents and received his consent to disclose those records. However, it did not notify the president with respect to this document. I believe that the association should be afforded the opportunity to make submissions on this point. I shall reserve my decision on this document until such notification occurs.
- (3) The party with an interest in Record (2)29 has never been notified of this request or appeal. The Ministry has maintained the application of section 17(1) to the other records which may affect this party's interests, namely Records (2): 37, 39 and 41. However, this party should be afforded the opportunity to make submissions on the application of section 17(1) to Record (2)29. In addition, the Ministry appears never to have made a decision on Record (2)24 which may affect this party's interest as well. Accordingly, the Ministry will have to make an access decision with respect to this record.
- (4) With respect to Records (1)4 and (2)22, this order serves to notify counsel for the principals of the Franchisor that the Ministry has decided to disclose these records and, in accordance with section 28(8) of the Act, counsel is hereby informed that he may appeal this aspect of the Ministry's decision to the Commissioner within 30 days after the date of this order. Unless such an appeal is commenced within 30 days after the date of this order, the appellant shall be given access to these records.
- (5) In his submissions, counsel for two of the principals of the Franchisor indicates that the Ministry only provided him with three documents and "... believes that it [the Franchisor] has a substantial and direct interest in many more documents than those few which have been provided to it." I have carefully reviewed the records which I have ordered disclosed in this order and have concluded that counsel has had (or will have with respect to Records (1)4 and (2)22), the opportunity to comment on any records in which his clients may have a substantial and direct interest.
- (6) In response to the Ministry's section 28 notice, the party whose interests might be affected by the disclosure of Records (1): 15, 19 and 20 provided a detailed response objecting to the release of these documents. I will consider these objections in my order.

To summarize, in this order I will consider the application of section 17(1) of the Act to the following records:

- (1): 15, 16, 19, 20 and 23
(2): 1, 7, 13, 14, 37, 39 and 41

APPLICATION OF THE EXEMPTION

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the institution 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 institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

The Ministry claims that Records (1)16, (1)23, (2)1, (2)7, (2)13, (2)14, (2)37, (2)39 and (2)41 all contain commercial and/or financial information. Counsel for the Franchisor and the party with an interest in Records (1): 15, 19 and 20 do not make specific submissions on this point.

Records (1): 15, 16, 19 and 20

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.

Records (1): 15, 19 and 20 consist of correspondence to the Ministry from a Federation which had communicated with the Ministry to discuss fair franchising practices. This documentation indicates the general position of the Federation with respect to franchising legislation. Record (1)16 is an Executive Summary prepared by the Federation on the "Need for Franchising Legislation in Ontario". It is the position of the Ministry that this document contains financial information concerning the nature of franchise agreements and the financial success of these agreements. While I agree with this characterization, I have some doubt as to whether this is the type of information designed to be protected by section 17(1) of the Act.

In essence, the Federation is a lobby group which supports the development and implementation of franchise legislation in the province. To this end it has provided the Ministry with information, including Record (1)16, to advance this position. The contents of this document are not based on any commercial information related to the Federation itself. That is to say, information related to the buying, selling or exchange of goods or services undertaken by the Federation. Rather, it sets out the views and opinions of this group with respect to the position of the government on a particular issue.

Notwithstanding my doubts about the application of part one of the test, I will consider whether the second and third parts of the test are satisfied with respect to these documents.

To satisfy part two of the test, the information must have been provided to the Ministry by the Federation, either explicitly or implicitly in confidence. While neither the Ministry, nor the Federation directly addresses this point, it is clear from their submissions that it is the position of both of these parties that these documents were supplied implicitly in confidence. I agree and find that part two of the test has been satisfied.

The Federation argues that the harms described in parts (a), (b) and (c) of section 17(1) will occur should these documents be disclosed. The Ministry's submissions relate to section 17(1)(b) of the Act.

It is the position of the Federation that disclosure of these documents would result in the loss of business to potentially many franchised stores in the province. The Federation submits that this would occur because the three franchisor companies in this retail sector would, based on statements previously made, carry out their intention to consider and possibly implement corporate, rather than franchised, stores should franchise legislation be pursued. The Federation refers to two incidents in the past in which individual franchisees have lost their business as a result of attempting to organize other franchisees to discuss approaches to franchise legislation.

The submissions state that this resulted from the retribution of major franchisor companies in their business sector. In particular, the Federation reports the concerns of the individuals who comprise its Board of Directors as listed on the Federation letterhead (found on Records (1): 15, 19 and 20).

The Federation also states that disclosure of these records would interfere in the delicate negotiations which it has undertaken to discuss a resolution to these issues.

Finally, the Federation states that, had it been aware that these documents would potentially be subject to disclosure, it would never have provided them to the Ministry. It claims that release of the documents would preclude it from doing so in the future. The Ministry notes that it is in the public interest that such materials continue to be provided to the government for the purpose of allowing the government to make informed decisions about legislative enactments.

I have carefully considered these submissions, particularly in light of the Federation's comments about the sensitivity of these matters. First, I would note that while the Federation expressed its views very strongly in response to the Ministry notification, it failed to respond to the Notice of Inquiry sent out by this office. Second, despite the seriousness of the concerns expressed, the Federation has made very general assertions about the harms it maintains will result upon disclosure of these records. For example, it has not described the nature of the negotiations which it states may be damaged upon disclosure of these records. While I agree that input from such organizations is important in assisting the government to develop legislative enactments, I do not agree that release of these documents, and, in particular, Record (1)16, would dissuade groups such as the Federation from providing such information in the future. I believe that it is in the interests of the Federation to continue to provide its perspective to the government in order to advance its lobbying activities and to attempt to persuade the government to enact the legislation it desires.

I am persuaded, however, that disclosure of the information related to the Board of Directors of the Federation could reasonably be expected to result in undue loss to these persons and/or their businesses. Thus, the result is that Record (1)16 should be disclosed in its entirety and the non-highlighted portions of Records (1): 15, 19 and 20 should be released to the appellant.

Records (1)23, (2)7, (2)13 and (2)14

These documents all consist of correspondence to the Ministry from the Franchisor.

Record (2)7 is a cover letter enclosing a copy of a version of its franchise agreement. The agreement clearly contains commercial and financial information. The covering letter is marked "Confidential". The Ministry states that it treated the document in this manner and counsel for the Franchisor submits that it was supplied with the expectation that it would remain confidential. The agreement itself contains a confidentiality clause stating that it shall remain confidential in the hands of any party. Based on this information, I find that parts one and two of the section 17(1) test have been met.

The Franchisor states that, given the competitive nature of its business, disclosure of the agreement would provide its competitors with valuable information on its operation and, thereby, threaten its competitive position in the industry. I accept these submissions and thus find that Record (2)7 qualifies for exemption pursuant to section 17(1) of the Act.

In Records (1)23, (2)13 and (2)14, the Franchisor provides the Ministry with certain information about the proceedings involving the arbitration of a dispute between the Franchisor and its franchisees. The dispute dealt with commercial transactions involving these parties. The rulings and the findings of the arbitration are confidential as a result of a publication ban imposed on the proceedings.

Based on the submissions of the parties, I find that these documents contain commercial information supplied to the Ministry in confidence. Thus, parts one and two of the section 17(1) test have been satisfied.

I will now consider the third part of the section 17(1) test. I am cognizant of the fact that the Ontario Court of Appeal recently dismissed the Franchisor's application for leave to appeal the decision of the Ontario Court (General Division). This decision upheld the ruling of the arbitrator appointed to resolve the dispute between the Franchisor and some of its franchisees. However, despite the current status of this matter, given the history of these parties, and the fact that there are still outstanding commercial relationships between them, I am of the view that disclosure of Records (1)23, (2)13 and (2)14 could reasonably be expected to interfere with their contractual or other negotiations. Therefore, I find that the third part of the section 17(1) test has been satisfied with respect to these records and they should not be disclosed to the appellant.

Record (2)1

This document is an updated version of the franchise agreement which constitutes Record (2)7. This was sent to the Ministry by a representative of the franchisees under cover of a letter marked "Personal and Confidential". For the same reasons as I have applied to Record (2)7, I find that Record (2)1 is exempt pursuant to section 17(1).

Records (2): 37, 39 and 41

These documents are all correspondence to the then Minister from parties to the litigation involving the Franchisor and its franchisees. The Ministry submits that these records are commercial in nature and that they relate to the commercial impact on the franchisees should they be unsuccessful in their dispute against the Franchisor. As distinct from Records (1): 15, 16, 19 and 20, these records contain information with a direct commercial effect on the parties which sent the letters, and

contain a description of some of the specific commercial and financial problems these parties were experiencing in their dealings with the Franchisor. I find that they contain financial and/or commercial information.

The Ministry also states that this documentation was provided with an implicit understanding of confidentiality. Given the circumstances that existed at the time these materials were sent to the Ministry, I accept this position.

The Ministry claims that disclosure of these documents could reasonably be expected to invite further harassment and/or intimidation of the franchisees by the Franchisor. In addition, because of the ongoing nature of the negotiations between the parties to the dispute, the Ministry claims that disclosure could reasonably be expected to interfere significantly with these negotiations. I agree with the Ministry that the alleged harms could result from disclosure of Records (2): 37, 39 and 41 and, therefore, find that they are exempt pursuant to section 17(1) of the Act.

INVASION OF PRIVACY

The Ministry claims that the portions of Records (1)2, (1)11, (1)14, (2)36, (2)40, (3)1 and (3)6 are exempt from disclosure pursuant to the provisions of section 21 of the Act. In addition, as I have previously indicated, I will also consider if portions of Records (2)17, (2)18 and (3)8 fall within this exemption.

The first determination in this analysis is whether the information at issue constitutes "personal information". Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed all the records referred to above. With the exception of Record (1)11, they all contain the personal information of individuals other than the appellant. The appellant has indicated that he is not seeking access to such information unless it relates to the individuals involved with the Franchisor. This includes the curriculum vitae of the researcher that forms part of Record (3)4. Accordingly, the personal information found in Records (1)2, (1)14, (2)40, (3)1, (3)4, (3)6 and (3)8 is not at issue in this appeal. As this was the only part of these documents that was not disclosed to the appellant (with the exception of Record 3(8) which I have previously addressed), I need not consider them further.

The information withheld from Record (1)11 is the name and business address of the director of an association that had written to the Minister concerning franchising legislation. I disagree with the Ministry's characterization of this individual as having written in an individual capacity. Rather, I find that this information relates to his professional responsibilities and, thus, does not constitute his personal information. Accordingly, it cannot qualify for exemption pursuant to section 21 of the Act. As this was the only information withheld from Record (1)11 this document should be disclosed to the appellant in its entirety.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of

this information except in certain circumstances.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

The Ministry claims that the information at issue in Record (2)36 relates to the individual's employment and financial history. In my view, the information describes this individual's financial activities within the presumption in section 21(3)(f) of the Act.

I find that the personal information contained in Records (2)17 and (2)18 also describes the financial activities of this individual.

Thus, disclosure of the personal information contained in Records (2): 17, 18 and 36 constitutes a presumed unjustified invasion of the personal privacy of this individual. None of this information falls within section 21(4) of the Act. The appellant has submitted that there is a public interest in the disclosure of all of the records at issue in this appeal. Accordingly, I will consider whether the section 21(3) presumption can be rebutted in my discussion of section 23 of the Act which follows.

PUBLIC INTEREST IN DISCLOSURE

In this order I have found that certain records in their entirety and portions of other records are exempt under sections 13(1), 15, 17(1) and 21 of the Act. I must now consider the appellant's argument that there exists a compelling public interest in the release of these records under section 23 of the Act (the so-called public interest override).

The "public interest override" as set out in section 23 of the Act states:

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

In order for section 23 of the Act to apply to a record, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption which otherwise applies to the record.

In his submissions, the appellant sets out his position on the public interest issues concerning his request:

Forty cents of every retail dollar in Ontario passes through a franchise. Thousands of business people make their living running franchises. It is likened to the "Wild West" because there are almost no controls over this multi-billion dollar industry. At [his place of employment], we have been deluged with complaints from franchisees, everything from kickbacks to theft by franchisors. Yet the government of Ontario has virtually turned a blind eye to these problems for decades. I require access to the entire government file so that I can

properly review the government's response and fully investigate the government's inactions.

Both the Ministry and counsel for the principals of the Franchisor assert that there is no compelling public interest in disclosure of the records at issue. The Franchisor states that it provided much of the information at issue to the government for the purpose of assisting it in carrying out its legislative duties and responsibilities. It claims that it did so with the belief that such materials would assist the Ministry in understanding the franchise industry. It further submits that greater harm would be done to the public interest if individuals and corporations could not provide legislators with their frank views on matters of legislative importance in the industry.

The Ministry echoes this position in its representations in that it maintains that the government should be able to conduct a thorough and frank assessment of its legislative options without fear of disclosure. Moreover, the Ministry states that if the public is dissatisfied with the decisions made by government, it may have recourse to lobbying MPP's as well as to voicing such concerns in an election.

I have carefully considered the position of all the parties in conjunction with the documents I have found to be exempt. I agree that there is a public interest in this matter but I am not satisfied that it is a compelling public interest which clearly overrides the need to protect the interests that the Ministry and counsel for the Franchisor have identified as being supported by the exemptions applied. As a result of this order, the appellant will be receiving access to a number of additional documents which, in conjunction with the materials he has already received, should provide him with some additional insights as to why the Ministry adopted the approach it did to the issue of the franchising industry generally, the Franchisor in particular and legislation.

For these reasons, I find that the public interest override does not apply to the records I have withheld pursuant to the exemptions in sections 13(1), 15, 17(1) and 21 of the Act.

ORDER:

1. I uphold the decision of the Ministry to deny access to the following records in their entirety:

- (1): 23
- (2): 1, 7, 10, 13, 14, 37, 39 and 41
- (3): 2

and the highlighted portions of the following records:

- (1): 15, 19 and 20
- (2): 11, 12, 17, 18, 32, 33, 34 and 36
- (3): 3, 5, 8 and 15.

2. I order the Ministry to disclose to the appellant the following records in their entirety:

- (1): 6, 11, 16 and 21
- (2): 5, 6, 16, 21, 23, 27, 31, 35 and 38
- (3): 9, 11 and 13.

3. I order the Ministry to disclose to the appellant the non-highlighted portions of the following records:

- (1): 15, 19 and 20
- (2): 11, 12, 17, 18, 32, 33, 34 and 36
- (3): 3, 5, 8 and 15.

4. I order the Ministry to disclose the records and portions of records listed in Provisions 2 and 3 to the appellant within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

5. Unless an appeal is commenced within 30 days after the date of this order, I order the Ministry to disclose Records (1)4 and (2)22 to the appellant.

6. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provisions 2, 3 and 5.

7. I order the Ministry to make a final decision on access to Record (2)24 in accordance with the provisions of sections 26 and 29 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 27.

8. I order the Ministry to notify, within thirty (30) days of the date of this order, the parties which may be affected by the disclosure of Records (2)29 and (3)7 of its decision to no longer rely on the application of section 17(1) of the Act to deny access to these documents and thus release these records. These parties will then have the opportunity to appeal the Ministry's decision to this office should they so choose.

Should these parties not file an appeal with thirty (30) days of the date of the Ministry's notification, the Ministry is ordered to release Records (2)29 and (3)7 to the appellant. This office will contact the Freedom of Information and Privacy Co-ordinator of the Ministry **only** in the event that an appeal is filed.

9. I order the Ministry to provide me with a copy of the correspondence referred to in Provisions 7 and 8 (and any associated documentation, such as third party notices under section 28), within thirty-five (35) days after the date of this order. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

I remain seized of the outstanding matters in this appeal.

Original signed by:
Anita Fineberg
Inquiry Officer

June 30, 1995

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
INDEX #1-FRANCHISING 2	March 29/93 Facsimile copy of letter to Ministry from Franchise re: franchise laws to protect franchisees, attaching newspaper article	21(1)	Not at issue
4	April 20/93 Letter from Franchisor to Business Division of Ministry	17(1)	Disclose subject to Appeal
6	No date: Paper on Franchise Regulation	17(1)	Disclose in full
11	Jan. 12/90 Letter from Ministry re: franchise legislation	21(1)	Disclose in full
14	Feb. 26/91 Response letter from Ministry re: relating to the rights and responsibilities of franchise owners - January 25, 1991 letter to Peter Kormos from Elinor Caplin - January 15, 1991 letter to Mike Giles	21(1)	Not at issue
15	Oct. 5/93 Letter to Ministry from Federation re: Discussion on Fair Franchising	17(1)	Disclose in part
16	Nov./93 Report on the Need for Franchise Legislation in Ontario - Executive Summary from the Federation	17(1)	Disclose in full
19	Jan. 31/94 Letter to Ministry from the Federation re: feedback as to the intentions of Ministry with regard to franchise legislation	17(1)	Disclose in part
20	Feb. 7/94 Letter to Ministry Policy Branch from the Federation enclosing copy of document prepared by the Federation	17(1)	Disclose in part
21	Sept. 13, 1991 Letter to N. A. Clark, Motor Vehicle Manufacturers' Association (MVMA) from Alberta Securities Commission board; October 28, 1991 letter MVMA from Alberta Securities Commission Board	17(1)	Disclose in full
23	Oct. 29/93 Correspondence from the Franchisor	17(1)	Decision upheld

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
INDEX #2-FRANCHISING 1	Oct. 27/93 Letter to Ministry Business Division from outside law firm with Franchise agreement attached	17 (1)	Decision upheld
5	May 4/93 Minister's Briefing note re: Franchisor and the Franchiser	12(1)(e), 13(1)	Disclose in full
6	Sept. 20/93 Minister's Briefing note re: Franchising	12(1)(e), 13(1)	Disclose in full
7	Sept. 30/93 Letter to Ministry Business Division from Franchisor with Version X Franchise Agreement attached	17(1)	Decision upheld
10	Cabinet Submission Ontario Retail Sector Strategy Workplan	12(1)(e)	Decision upheld
11	Dec. 14/93 Minister's Briefing note Resolving Difference in the Franchising Industry	12(1)(e), 13(1)	Disclose in part
12	No date: Strategy Paper on Resolving Difference in the Franchising Industry	13(1)	Disclose in part
13	March 14/94 Letter to Ministry Business Division from Franchisor	17(1)	Decision upheld
14	May 4/94 Letter to Ministry from Franchisor	17(1)	Decision upheld
16	May 10/94 Issue Sheet update re: Franchisor Dispute Settled	12(1)(e), 13(1)	Disclose in full
17	May 5/93 Issue Sheet re: Franchisees update to April 21	12(1)(e), 13(1)	Disclose in part
18	July 6/93 Issue Sheet re: Franchisor update	12(1)(e), 13(1)	Disclose in part
21	June 27/94 Briefing memo re: Franchising Issue - the Ministry & a Franchise Association	12(1)(e), 13(1)	Disclose in full
22	Dec. 15/93 Letter from Ministry to Franchisor	17(1)	Disclose subject to Appeal
23	June 3/94 Briefing memo re: Franchising, the Ministry, and a Franchise Association	12(1)(e), 13(1)	Disclose in full
24	Dec. 15/93 Letter from the Ministry to franchisee's group		Ministry to make an Access Decision
27	May 12/93 Issue Sheet re: franchise study and Toronto Star continuing Franchising Series	12(1)(e), 13(1)	Disclose in full
29	Oct. 25/93 Letter from the Ministry to	17(1)	Ministry to notify

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
	Franchisee's group.		
31	April 21/93 Issue Sheet re: Franchisees	12(1), 13(1)	Disclose in full
32	April 15/93 Issue Sheet re: Franchising and Franchisees	12(1)(e), 13(1)	Disclose in part
33	March 26/93 Issue Sheet re: Franchising and Franchisees	12(1), 13(1)	Disclose in part
34	Jan. 28/93 Issue Sheet re: Franchisees Organize	12(1)(e), 13(1)	Disclose in part
35	July 7/93 Issue Sheet re: Franchisor update to July 6	12(1)(e), 13(1)	Disclose in full
36	Aug. 4/93 Issue Sheet re: Franchisor's executive & another company - Update to July 2/93	12(1)(e), 13(1) 21(1), 14(1)	Disclose in part
37	Oct. 4/93 Letter to Ministry from Franchisee's group	17(1)	Decision upheld
38	Sept. 30/93 Issue Sheet re: Franchising Dispute - revised	12(1)(e), 13(1)	Disclose in full
39	Sept. 29/93 Letter from Franchisee's group to Ministry	17(1)	Decision upheld
40	Telephone message re: Franchisor	21(1)	Not at issue
41	Oct. 15/93 Letter from Franchisee's group. to Ministry	17(1)	Decision upheld

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
INDEX #3-FRANCHISING 1	Oct. 1/93 Letter to Minister M. Churley from Elinor Caplan, with response letter dated October 25, 1993	21(1)	Not at issue
2	Apr. 4/90 Facsimile letter to Ministry from Alberta Securities Commission board re: Co-operative Research Study with the Ontario Consumer Relations Department on the need for franchise legislation	15	Decision Upheld
3	July 11/89 Internal memo attaching revised copy of slides for the franchising presentation for Management Committee	13(1)	Disclose in part
4	June 6/89 Letter to Ministry from Laurentian University enclosing research proposal on perceptions of franchisers and franchisees, including resumes	21(1)	Not at issue
5	May 25/89 Internal memo re: Franchising with Ministry Issues Management Process form attached	13(1)	Disclose in part
6	Oct. 25/93 Letter from Minister M. Churley to Elinor Caplan	21(1)	Not at issue
7	Oct. 7/93 Letter from Franchise Association to Ministry	17(1)	Ministry to Notify
8	Nov. 13/87 Internal memo attaching discussion paper on Franchising with chart attached	12(1)(e), 13(1)	Disclose in part
9	Dec. 10/93 Briefing note from meeting with Franchise Association	13(1)	Disclose in full
11	April 5/89 Internal memo explaining slide presentation to Policy Committee	13(1)	Disclose in full
13	March 31/89 Issue Sheet re: Franchising and the protection of Franchisees	13(1)	Disclose in full
15	Oct. 23/91 Internal memo re: Franchise Study - Laurentian University	13(1)	Disclose in part