



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

ORDER P_1497

Appeal P_9600463

Ministry of Health



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

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

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

NATURE OF THE APPEAL:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The requester, a pharmaceutical company, sought access to information pertaining to the following subjects:

- internal and external Ministry correspondence relating to the purchase of the drug AZT
- legal opinions/decisions on the purchase of AZT
- the purchase contract for AZT entered into between the Ministry and a named company (the affected party)
- all Ministry documentation relating to the purchase of AZT

The requester agreed to limit the scope of his request to those records pertaining to the purchase contract and any extensions to it from 1993 to the date of the request. The Ministry conducted searches for responsive records in its Legal Services Branch, Drug Programs Branch, AIDS Bureau and the Supply and Services Branch. A large number of responsive records were identified. The Ministry determined that the interests of two third parties (the affected party and a hospital) could be affected by the disclosure of the information contained in the records. Pursuant to section 28 of the Act, the Ministry notified the third parties, seeking their views on the disclosure of those records in which these parties appeared to have an interest.

Following receipt of the third parties' submissions, the Ministry decided to disclose some of the records, in whole or in part. The Ministry denied access to the majority of the records, claiming the application of the following exemptions to them:

- advice or recommendations - section 13(1)
- third party information - section 17(1)
- economic and other interests - sections 18(1)(c), (d) and (f)
- proposed plans of an institution - section 18(1)(g)
- solicitor-client privilege - section 19
- invasion of privacy - section 21(1)
- information published or available - section 22(a)

The Ministry also advised the requester that some of the information contained in the records fell outside the scope of the request.

The requester, now the appellant, appealed the Ministry's decision to deny access to the records.

During the mediation of the appeal, the appellant agreed that he was no longer seeking access to the information for which the Ministry had claimed sections 21(1) and 22(a). I will not address the possible application of these exemptions to the records further.

This office provided a Notice of Inquiry to the appellant, the Ministry and to the two affected parties. Representations were received from all of the parties. The hospital advised that it does not object to the disclosure of any information relating to it which may be contained in the records.

THE RECORDS

There are approximately 130 sets of records, in whole or in part, remaining at issue in this appeal. The Ministry has categorized them as Record Groups A to D. For the sake of clarity, I will continue to refer to them in the same fashion.

Group A consists of 11 sets of records from the Legal Services Branch of the Ministry and include the requested contract, handwritten notes, correspondence (in final and draft form) and internal memoranda (also in final and draft form).

Group B consists of 100 records, also originating from the Ministry's Legal Services Branch. These documents include the requested extension agreement and various draft versions of it, along with notes, memoranda and correspondence.

Groups C and D consist of 19 records from the Ministry's Drug Programs Branch and AIDS Bureau program areas. These records are comprised of a number of briefing notes, internal memoranda and correspondence (in final and draft form).

THE TESTS

The Commissioner's office has developed a number of tests to assist in the application of certain exemptions in the Act to various types of records and information. The Ministry has submitted that the records are exempt from disclosure under sections 13(1), 17(1), 18(1)(c) and 19. The affected party also maintains that some of the records are exempt under section 17(1). The following tests have been articulated in previous orders with respect to some of these exemptions. Where no test has been expressed in previous orders for an exemption, I have set out the exemption itself as it appears in the Act.

Section 13(1)

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 [Order 118].

Section 17(1)

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the Ministry and/or the affected party who is resisting disclosure 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.

[Order 36]

Sections 18(1)(c) and (d)

These provisions state that:

A head may refuse to disclose a record that contains,

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18(1)(f)

In order to qualify for exemption under section 18(1)(f) of the Act, the Ministry must establish that a record satisfies each element of a three-part test:

1. the record must contain a plan or plans, **and**
2. the plan or plans must relate to:
 - (i) the management of personnel or
 - (ii) the administration of an institution, **and**
3. the plan or plans must not yet have been put into operation **or** made public.

[Order P-229]

Section 18(1)(g)

In order to qualify for exemption under section 18(1)(g) of the Act, the Ministry must establish that a record:

1. contains information including proposed plans, policies or projects; and

2. that disclosure of the information could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied.

[Order P-229]

Section 19

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
 - (b) the communication must be of a confidential nature, **and**
 - (c) the communication must be between a client (or his agent) and a legal advisor, **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice;
- OR
2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

DISCUSSION:

RECORD GROUP A

Record A1

This set of records is comprised of ten pages consisting of two facsimile cover pages, a draft letter dated December 22, 1994 from the Assistant Deputy Minister to a representative of the affected party and Pages 1-5, 38 and 39 of an Agreement dated December 1992 between the affected party, the Minister of Health and the hospital. The Ministry has claimed the application of section 19 to the draft letter and sections 17(1)m and 18(1)(c) and (d) to the excerpts from the Agreement. The affected party also objects to the disclosure of the excerpts from the Agreement on the basis that they qualify for exemption under section 17(1).

As no exemptions have been claimed for the facsimile cover pages, and no mandatory exemptions apply to them, I order that they be disclosed to the appellant.

The draft letter contains a series of handwritten notes made by counsel employed by the Ministry. In my view, these comments represent the legal advice of counsel to her client on the proposed wording of the letter. As such, I find it to be confidential communication between a solicitor and client which relates to the giving of legal advice. The draft letter is, accordingly, exempt under Branch 1 of the section 19 exemption. This document is also included in Record A2.

Because the entire 44-page Agreement is contained in Record A2, I find that it is more appropriate for me to address the application of the exemptions claimed for the entire document, as opposed to the seven pages which are included in Record A1.

Record A2

Record A2 is comprised of two pages of handwritten notes dated March 13, 1995, the 44-page Agreement dated December 11, 1992 and the draft letter which I found to be exempt under section 19 in my discussion of the A1 category of records.

The Ministry submits that the handwritten notes are exempt under Branch 2 of section 19 as they represent notes prepared by Crown counsel for use in obtaining or providing legal advice. Following my review of the notes, I find that they qualify for exemption under Branch 2 of section 19 as they were prepared by Crown counsel for use in providing legal advice to her client, officials with the Ministry.

The Application of Section 17(1) to the Agreement

The Ministry and the affected party object to the disclosure of much of the Agreement on the basis that it is exempt under section 17(1) and each have made extensive submissions on this aspect of the appeal.

1. Types of Information

The Ministry and the affected party submit that portions of the Agreement contain both “commercial information” and “trade secrets” within the meaning of section 17(1). Obviously, I am unable to describe in detail the nature of the commercial information contained in the Agreement without disclosing the very information sought by the appellant. However, I have reviewed those portions of the Agreement whose disclosure is being resisted by the affected party and the Ministry. I find that, because the Agreement deals with the sale of a commercial product and that portions of it describe in detail the terms and conditions surrounding that sale, that information qualifies as “commercial information” for the purposes of section 17(1). I need not consider, therefore, whether the information qualifies as a “trade secret” for the purposes of section 17(1). The first part of the section 17(1) test has, accordingly, been met with respect to portions of this document.

2. Supplied in Confidence

The Ministry submits that the proprietary financial/commercial/trade secrets information in the Agreement was supplied by the affected party as its component of the Agreement and in expectation of full confidentiality. The Ministry argues that these portions of the Agreement were “supplied” it as they were “brought to the table” by the affected party. It further submits that section 6.0 of the Agreement sets out in detail its confidentiality provisions which preclude the disclosure of the contents of the Agreement, or even its existence, to anyone other than the parties to it. By including such explicit terms, the Ministry argues that the affected party had a reasonably held expectation that the information which it supplied to the Ministry would be treated confidentially.

The affected party states that the key elements of the Agreement and the concept behind its unique nature were supplied by it to the Ministry. The affected party also relies on the wording in section 6.0 of the Agreement itself to demonstrate its concern with respect to the confidentiality of the information contained therein. It further argues that because of patent litigation involving AZT in which it was involved at the time of the negotiation of the Agreement, the Ministry was aware of the need for secrecy and confidentiality in regards to all aspects of the contract for the supply of this drug.

I have reviewed the Agreement, particularly section 6.0, and find that the affected party had a reasonably-held, explicitly-stated expectation that the information which it supplied to the Ministry would be treated in a confidential manner. The second part of the section 17(1) test has, accordingly, been satisfied with respect to those portions of the Agreement.

3. Reasonable Expectation of Harm

The affected party submits that in order to establish this part of the section 17(1) test, it and the Ministry, as the parties who are resisting disclosure need only provide evidence of a “reasonable expectation of probable harm which of necessity involves some speculation.” The affected party

argues that the disclosure of the information contained in the Agreement would give its competitors "direct insight" into its plans and strategies, which have been developed over a long period of time at its own expense. In addition, the affected party states that if its other customers were to learn of the terms and conditions contained in this Agreement, they would demand similar advantageous terms in their dealings with it. This would result in an undue loss to the affected party. Finally, the affected party submits that it would be unlikely to supply similar information to the Government of Ontario in the future should this Agreement be disclosed, and that this would be contrary to the public interest.

The Ministry submits that harm to the competitive position of the affected party would occur if the Agreement was ordered disclosed. In addition, the Ministry submits that, in previous orders, the Commissioner's office has upheld the application of section 17(1) to "unit price information" which is included in this Agreement. It also agrees with the position taken by the affected party that the disclosure of certain contractual provisions may result in such terms not being made available to the Government of Ontario in the future, and that this would not be in the public interest. Further, the Ministry submits that the affected party will suffer undue loss should its competitors be able to use the information contained in the Agreement to their advantage.

I have carefully reviewed the Agreement and find that the disclosure of portions of it to the appellant could reasonably be expected to result in harm to the competitive position of the affected party and cause it undue loss, as contemplated by sections 17(1)(a) and (c). I am not, however, satisfied that it is reasonably likely that the harm contemplated by section 17(1)(b) would occur should the record be disclosed. In my view, it is in the interests of the affected party to continue to foster contractual relations with the Government of Ontario for the provision of drugs and that this relationship is unlikely to be affected by the disclosure of this Agreement.

I have highlighted those portions of the copy of the Agreement which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator which are exempt from disclosure under section 17(1).

The Ministry has also claimed the application of sections 18(1)(c) and (d) to portions of the Agreement. As I have found above that these parts of the Agreement are exempt under section 17(1), it is unnecessary for me to address the possible application of other exemptions to them. Portions of Pages 1-5 and 38 and 39 from the Agreement which are included in Record A1 are similarly exempt under section 17(1).

Records A3 and A4

Record A3 is an undated letter from the Ministry's Assistant Deputy Minister to an official with the affected party to which Ministry counsel has made a number of corrections and notes. Record A4 is a note made by a Ministry legal counsel on March 6, 1995.

I find that Record A3 is exempt under Part 1 of the section 19 test as it represents a written communication between solicitor and client and it relates to the giving of legal advice. Because the notes and corrections represent the majority of Record A3, and cannot reasonably be severed, I find that the entire document qualifies for exemption under Part 1 of section 19. Record A3 is

exempt from disclosure under Part 2 of the section 19 test as it is a note prepared by legal counsel for use in giving legal advice.

The Undisclosed Portion of Record A5

The undisclosed portion of Record A5 contains information which relates directly to several of the terms and conditions of the 1992 Agreement which I have found to be exempt under section 17(1). For the reasons articulated in my discussion of the application of section 17(1) to the Agreement, I find that the disclosure of the severed information in Record A5 would similarly result in harm to the competitive position of the affected party. This portion of the record is, accordingly, exempt under section 17(1).

Record A7

The Ministry submits that pages one and two of Record A7, a one-page memorandum from an Assistant Deputy Minister to legal counsel dated April 28, 1994 and a handwritten note over a memorandum dated April 22, 1994, are exempt under Part 2 of Branch 1 of the section 19 exemption. It argues that these records are confidential written communications between a solicitor and her client which are directly related to the seeking of legal advice. Based on my review of the records and the submissions of the Ministry, I agree that these records are properly exempt under Part 2 of Branch 1 of section 19.

Page 3 of Record A7 is a letter dated April 18, 1994 from the Ministry's outside counsel to a Ministry lawyer with respect to litigation which involved the Ministry and the affected party. Clearly, this document is exempt from disclosure under Branch 1 of section 19, as a confidential communication between a solicitor and his client for the purposes of providing legal advice.

Page 4 is a letter from the Ministry's outside counsel to the solicitor for the affected party. The remaining two documents which comprise Record A7 are letters from the Ministry's outside counsel to counsel for the appellant, who was also a party to the litigation involving the Ministry and the affected party. In my view, no solicitor-client privilege can be said to have attached to these communications. They do not represent confidential communications between a solicitor and client, nor do they fall within Branch 2 of the section 19 exemption. For this reason, I find that they should be disclosed to the appellant.

Record A52

Record A52 consists of two documents, both of which contain handwritten comments made by Ministry legal counsel. Page 1 is a memorandum dated July 13, 1993 from a Ministry employee to Ministry counsel, seeking her opinion on an attached six-page briefing document dated July 5, 1993 (Pages 2 to 7). In my view, Page 1 is exempt from disclosure under Branch 1 of the section 19 exemption. The handwritten notes on Pages 2 to 7 are exempt under Branch 2 of the section 19 exemption as they were prepared by legal counsel for use in giving legal advice on the contents of the briefing note.

The Ministry has claimed that portions of the six-page briefing note are exempt from disclosure under sections 13(1), 17(1), 18(1)(c) and (d) and 19 and that other parts of this document are not responsive to the appellant's request. I find that all of the briefing note falls within the purview

of the appellant's request. The facts recited in the note describe events which took place before the time frame addressed by the appellant's request but are, nevertheless, reasonably related to the broadly drafted scope of the request (Order P-880).

The Ministry claimed that the information on Page 6 of the briefing note is exempt under section 13(1). While this page is entitled "Confidential Advice to the Minister", I find that it does not contain a suggested course of action which may or may not be acted upon by the recipient of the note. For this reason, I find that section 13(1) has no application to the information on Page 6.

I agree with the Ministry's submission that certain portions of Pages 1, 1a, 2, 3 and 4 are exempt under section 17(1). These excerpts contain information from the Agreement which I have found to be exempt under section 17(1) in my discussion of Record A2. I also find that parts of Pages 1a and 6 of Record A52 contain legal advice which had been provided by counsel to the Ministry in confidence. This information is, accordingly, exempt under Branch 1 of section 19. I have highlighted on the copy of Record A52 which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator those portions of the note which are exempt under sections 17(1) and 19.

The information to which the Ministry has applied sections 18(1)(c) and (d) is the same as that which I found to be exempt under section 17(1). It is not necessary, therefore, for me to address the application of these exemptions to it.

Records A53, A54 and A55

Each of these records contain a covering e-mail memorandum and a draft of the briefing note referred to in my discussion of Record A52. I find that as the Ministry has not claimed the application of any exemptions to the covering memoranda, and no mandatory exemptions apply to them, they should be disclosed to the appellant. Similarly, because the briefing note is identical to that which is discussed above, I find that those portions which I found were exempt in my discussion of the note in Record A52 are also exempt in these records.

Record A56

The remaining portions of Record A56 at issue consist of a handwritten note and a one-page memorandum from a Ministry counsel to the Deputy Minister. I find that the handwritten note is exempt under Branch 2 of section 19 because it was prepared by counsel for use in giving legal advice. The memorandum qualifies for exemption under Branch 1 of section 19 as it represents a confidential, written communication between a legal advisor and a client and contains legal advice.

RECORD GROUP B

Records B1, B2, B3 and B8

These records are notes prepared by a Ministry counsel in January 1996. They were prepared by a Ministry solicitor prior to her giving legal advice to the Ministry. In my view, this type of record is exempt from disclosure under Branch 2 of section 19.

Record B4

This record is an e-mail message from Ministry counsel to a Ministry official which contains confidential legal advice. As such, I find that it qualifies for exemption under Branch 1 of section 19 because it represents a confidential communication between a legal advisor and her client which relates directly to the giving of legal advice.

Record B7

Record B7 consists of a handwritten covering memorandum and a three-page "Extension Agreement" dated August 31, 1995. The Ministry submits that the Extension Agreement is exempt from disclosure under section 17(1). I have reviewed its contents and find that it contains commercial information, within the meaning of section 17(1).

The affected party submits that it provided the critical commercial information contained in the Extension Agreement to the Ministry in various correspondence which is addressed later in this order. I have examined each of these documents and agree that the commercial information contained in the Extension Agreement, which was intended to modify the original Agreement, originated with the affected party. I find, therefore, that this information was supplied to the Ministry, as contemplated by section 17(1).

The Extension Agreement also states that, with several modifications, the terms and conditions of the original Agreement are extended. Included in the original Agreement was Article 6.0 which provided for the confidentiality of the commercial information contained therein. An amendment to Article 6.0 was agreed to by the parties, clearly demonstrating, in my view, their intention to treat the information in the Extension Agreement with the same level of confidentiality as had been the case with the original Agreement. I find that this expectation of confidentiality was reasonably held.

Following my review of the Extension Agreement and the submissions of the parties, I find that, for the reasons articulated in my discussion of Record A2, the disclosure of Record B7 could reasonably be expected to result in harm to the affected party's competitive position. As all three parts of the section 17(1) test have been satisfied with respect to this document, I find that it is exempt, in its entirety, under section 17(1).

Record B11

Record B11 is a one-page facsimile cover page attached to a two-page letter from a trade association to the Minister of Health dated December 21, 1995. The cover page is requesting

that counsel for the Ministry review the attached letter. The letter includes a large number of handwritten comments by counsel. I find that the cover page is exempt from disclosure under Branch 1 of section 19 as it represents a confidential communication between a solicitor and client for the purposes of obtaining legal advice. I further find that the handwritten comments by counsel on the December 21 letter are exempt under Branch 2 of section 19. However, I find that the letter itself does not qualify for exemption under section 19 and, as no other exemptions apply, it should be disclosed to the appellant.

Records B12, B13, B14, B15, B19 and B20

Each of these records are handwritten notes made by Ministry counsel which are directly related to the formulating or giving of legal advice. As such, they are exempt from disclosure under Branch 2 of section 19.

Record B16

This document is a letter dated December 19, 1995 from Ministry counsel to the Ministry's outside counsel. I find this document to be exempt from disclosure under Branch 1 of section 19 as it is a confidential written communication between a client and solicitor and is directly related to the seeking of legal advice.

Record B17

Record B17 is a letter dated December 19, 1995 from Ministry counsel to the solicitor for the affected party. I find that this record is not subject to the section 19 exemption and should, accordingly, be disclosed.

Record B22

This is a draft version of page 3 of the Extension Agreement and contains a number of handwritten comments from Ministry counsel. As I have found that the Extension Agreement is exempt under section 17(1), it follows that a draft version of this record is also exempt. In addition, I find that the handwritten notes on the record are exempt under Branch 2 of section 19 as they were prepared by Crown counsel for use in giving legal advice.

Record B24

Record B24 is a one-page facsimile cover page from Ministry counsel to a Ministry official to which is attached an unsigned version of the Extension Agreement. As noted above, I have found the Extension Agreement and its earlier drafts to be exempt from disclosure under section 17(1). The facsimile cover page is exempt from disclosure under Branch 1 of section 19 as it represents a confidential communication between counsel and client which is directly related to the formulating of legal advice.

Record B25

Record B25 is a letter dated December 11, 1995 from the solicitors for the affected party to the Ministry's counsel. I find that this record is not subject to the section 19 exemption and should, accordingly, be disclosed.

Record B26

Record B26 is a handwritten note dated December 14, 1995. I find that it is exempt under Branch 2 of section 19 as it was prepared by Crown counsel for the purposes of giving legal advice.

Record B27

This record is a copy of the Extension Agreement, which I have found to be exempt under section 17(1).

Record B28

This document is a one-page e-mail between two Ministry counsel. I find that it qualifies for exemption under Branch 2 of section 19 as it was prepared by Crown counsel for use in giving legal advice.

Record B30

Record B30 is a letter dated December 13, 1995 from the solicitors for the affected party to the Ministry's counsel. I find that this record is not subject to the section 19 exemption and should, accordingly, be disclosed.

Record B31

This is a facsimile transmission page and a draft version of the Extension Agreement. The facsimile cover page does not contain any information which is subject to any of the exemptions contained in the Act. It should, therefore be disclosed. I have found that the Extension Agreement, along with its earlier drafts, are exempt under section 17(1).

Record B33

This is also a facsimile transmission page to which is attached a draft version of the Extension Agreement. The cover page, addressed to a Ministry official from Ministry counsel, is soliciting the views and instructions of the official. As such, I find that it represents a confidential communication between solicitor and client and is directly related to the formulation of legal advice. It is, accordingly, exempt under Branch 1 of section 19. The draft of the Extension Agreement is exempt under section 17(1).

Record B34

Record B34 is a briefing note dated December 11, 1995. The Ministry has applied sections 13(1), 17(1), 18(1)(c), (d), (f) and (g) and 19 to various portions of this document.

The Ministry claimed that the information in the last page of the briefing note is exempt under section 13(1). While this page is entitled "Confidential Advice to the Minister", I find that it does not contain a suggested course of action which may or may not be acted upon by the recipient of the note. For this reason, I find that section 13(1) has no application to the information on the last page of the briefing note.

I have reviewed the contents of the briefing note and the submissions of the affected party and the Ministry with respect to the application of sections 17(1) and 18(1)(c) and (d) to portions of this record. I find that paragraphs 2 and 3 under the title "Message", the entire section entitled "The Facts of the Issue Are:" and "Legal Issues" are properly exempt under section 17(1). I find that they contain information which was included in either the original Agreement or the Extension Agreement which I found to be exempt under this mandatory exemption. These portions of Record B34 are, accordingly, exempt from disclosure.

In addition, I find that the handwritten notes made to the briefing note by counsel qualify for exemption under Branch 2 of section 19 as they were prepared for use in giving legal advice.

Records B38 and B39

These records are handwritten notes prepared by counsel in December 1995. I find that they are exempt under Branch 2 of section 19 as they were prepared by counsel for the purposes of giving legal advice.

Record B40

Record B40 is a facsimile cover page and letter dated November 30, 1995 from counsel for the affected party to the Ministry's counsel. I find that this record is not subject to exemption under section 19 and that it should be disclosed.

Record B41

Record B41 is a draft version of the Extension Agreement which includes notes made by Ministry counsel. I find that the draft is exempt under section 17(1) and the notes are exempt under Branch 2 of section 19.

Records B42, B43, B45, B48, B57, B68, B77 and B79

These records are notes prepared by Ministry counsel in the course of her giving legal advice to Ministry program areas. They are, therefore, exempt under Branch 2 of section 19.

Records B46 and B47

Record B46 is a facsimile communication from the Ministry's Manager, Purchasing Services to a Ministry solicitor, enclosing a facsimile received from the affected party and a draft version of Page 3 of the Extension Agreement. An additional copy of Page 3 comprises Record B47. I find that the first facsimile page is exempt under section 19 as it is a confidential communication

between a solicitor and her client which pertains to the seeking of legal advice. The remaining pages are exempt under section 17(1).

Record B49

This document is a facsimile communication from Ministry counsel to counsel for the affected party, a facsimile from the same Ministry counsel to the Ministry's Manager, Purchasing Services and a draft version of Page 3 of the Extension Agreement with counsel's notes. I find that the first facsimile message is exempt from disclosure under Branch 2 of section 19 as it was prepared by Crown counsel for use in giving legal advice. The second facsimile and draft of Page 3 represent a confidential communication between a solicitor and her client which is directly related to the giving of legal advice.

Records B50, B52, B56 and B73

These records consist of facsimile cover pages from a Ministry counsel to four Ministry officials, along with a draft version of the Extension Agreement which includes notes made by that Ministry counsel. I find that the draft is exempt under section 17(1) and the cover pages and the notes are exempt under Branches 1 and 2 of section 19 respectively.

Record B53

Record B53 is a facsimile cover page, a one-page letter dated November 23, 1995 from Ministry counsel to an outside counsel retained by the Ministry, a three-page draft of the Extension Agreement and eight pages taken from the original 1992 Agreement. I find that the cover page and the letter are exempt from disclosure under Branch 1 of section 19 as they represent confidential communications between a solicitor and client which are directly related to the seeking and the giving of legal advice. In addition, consistent with my findings above, I find that the draft Extension Agreement and the excerpts from the 1992 Agreement are exempt under section 17(1).

Record B55

This document consists of six pages of contract language which appeared in the 1992 Agreement. Again, consistent with my findings with respect to the Agreement, I find that it is exempt under section 17(1).

Records B60 and B61

Records B60 and B61 are draft contract language to which have been appended notes by Ministry counsel. I find that the contractual provisions are exempt under section 17(1) and the notes are exempt under Branch 2 of section 19.

Records B62 and B65

Record B62 is a facsimile cover page and a memorandum from Ministry counsel to a Ministry employee. Record B65 is an e-mail message from Ministry counsel to a number of Ministry

employees. I find that these records are exempt under Branch 1 of section 19 as they are confidential communications between a legal advisor and her client and contains information which is directly related to the giving of legal advice.

Record B69

This is a facsimile cover page from the Ministry's outside counsel to the Ministry's solicitor, along with a one-page document containing contract language and handwritten notes made by Ministry counsel. I find that all of this record is exempt from disclosure under section 19 as it is a confidential communication between a client and legal advisor, relating to the giving of legal advice.

Undisclosed Portion of Record B70, Records B97, B99 and B154

The remaining, undisclosed portion of Record B70, and Records B97, B99 and B154 in their entirety are draft versions of the Extension Agreement with notes made by Ministry counsel attached. I find that the draft is exempt under section 17(1) and the notes are exempt under Branch 2 of section 19.

Record B71

Record B71 is a facsimile communication from Ministry counsel to the outside counsel retained by the Ministry and four pages of draft contract language. I find that the cover page is exempt from disclosure under Branch 1 of section 19 as it represents a confidential communication between a solicitor and client which is directly related to the seeking and the giving of legal advice. In addition, consistent with my findings above, I find that the draft contract language is exempt under section 17(1).

Record B78

This is a memorandum describing a telephone conversation between the Ministry's outside legal counsel and a Ministry solicitor. I find that Record B78 is exempt from disclosure under Branch 1 of section 19 as it represents a confidential communication between a solicitor and client which is directly related to the seeking and the giving of legal advice.

Record B80

Record B80 is a facsimile cover page from a Ministry employee to Ministry counsel to which is appended a one-page memorandum from an employee of the hospital. The memorandum also contains notes made by counsel. I find that both of these documents are exempt under Branches 1 and 2 of section 19 respectively.

Record B83

This set of documents consists of three e-mail messages to and from Ministry counsel. I find that they are exempt from disclosure under Branch 1 of section 19 as they represent confidential

communications to and from a legal advisor and her client which are directly related to the giving, formulating or seeking of legal advice.

Records B84, B85, B86, B87, B89, B90, B92, B93, B94, B95, B101, B102, B107, B108, B129, B130, B136, B137, B138, B139, B140, B142, B143, B144, B146, B147, B150, B151, B153 and B155

These records are notes prepared by Ministry counsel in the course of her giving legal advice to Ministry program areas. They are, therefore, exempt under Branch 2 of section 19.

Record B88

Record B88 is a letter dated September 14, 1995 from the Ministry's outside counsel to the Ministry's solicitor. I find that this document is exempt from disclosure under Branch 1 of section 19 as it represents a confidential communication between a legal advisor and his client which is directly related to the giving of legal advice.

Record B91

Record B91 consists of an e-mail from a Ministry counsel to seven Ministry officials. I find that the e-mail is exempt under Branch 1 of section 19 as it is a confidential communication between a solicitor and her clients and relates directly to the giving of legal advice.

Record B96

Record B96 is a memorandum dated August 28, 1995 from Ministry counsel to a Ministry official to which is appended a draft version of the Extension Agreement. I find that the memorandum is exempt under Branch 1 of section 19 and, consistent with my previous findings, the draft is exempt from disclosure under section 17(1).

Records B97, B105 and B106

Record B97 is a draft version of Page 3 of the Extension Agreement and includes a number of notes made by Ministry counsel. Record B105 is a note and two copies of the complete Extension Agreement, also with appended notes. Record B106 is yet another draft version of the Extension Agreement. I find that the drafts are exempt under section 17(1) and the notes are exempt under Branch 2 of section 19.

Record B104

This series of documents consists of six pages of draft contract language to which a Ministry solicitor has added a number of handwritten comments. I find that the entire record is exempt from disclosure under Branch 2 of section 19 as it was prepared by Crown counsel for her use in giving legal advice.

Record B109

This series of records consist of a number of e-mail messages to and from a Ministry Solicitor. I find that these records qualify for exemption from disclosure under Branch 1 of section 19 as they represent confidential communications between a legal advisor and his client which are directly related to the seeking and giving of legal advice.

Record B110

Record B110 is a three-page e-mail message dated July 7, 1995 from a Ministry counsel to an official with a Ministry program area in which several legal issues, including the AZT Agreement, were addressed. I find that this record qualifies for exemption from disclosure under Branch 1 of section 19 as it is a confidential communication between a legal advisor and his client which is directly related to the giving of legal advice.

Records B121 and B127

Records B121 and B127 are comprised of three drafts of a letter from the Assistant Deputy Minister of Health to an official with the affected party. The second and third drafts contain handwritten comments made by the Ministry's legal counsel. I find that these notes are exempt from disclosure under Branch 1 of section 19 as they were prepared by Crown counsel for use in giving legal advice. The letters themselves contain information which was later incorporated into the Extension Agreement. As I have found above that this information is exempt under section 17(1), the information is similarly exempt in the context of this record.

Record B133

Record B133 contains a number of different types of documents. Page 1 is an e-mail from a Ministry official to a number of other Ministry employees, including legal counsel. I find that this page is exempt from disclosure under Branch 1 of section 19 as the document is a confidential communication between a client and her counsel in which she is seeking information with respect to the instructions which counsel has received.

Page 2 of Record B133 is a note made by Ministry counsel. I find that it is exempt under Branch 2 of section 19 as it was prepared by Crown counsel for her use in giving legal advice.

The Ministry has claimed the application of section 19 to Page 3 of Record B133. This document is an e-mail between Ministry employees. I find that because it does not contain any information to which solicitor-client privilege may attach, it should be disclosed to the appellant.

Pages 4 to 8 of Record B133 appear to be transcribed notes of comments made by various Ministry employees about the proposed negotiation of the Extension Agreement. Much of the information contained therein also forms part of the original Agreement, which I have found to be exempt under section 17(1). In addition, handwritten notes made by Ministry counsel on Pages 4 and 5 are clearly exempt from disclosure under Branch 2 of section 19. I have highlighted on the copy of Pages 4 to 8 of Record B133 which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator those portions of these pages which are exempt under sections 17(1) and 19.

I have not, however, been provided with any further submissions which would enable me to find that the other information in this record may be subject to the mandatory exemption in section 17(1). The information which is not highlighted on Pages 4 to 8 of Record B133 should be disclosed to the appellant.

Records B135 and B152

These records are e-mails from a Ministry official to Crown counsel. I find that they represent confidential written communications between a solicitor and client which are directly related to the seeking and providing of legal advice. They are, accordingly, exempt from disclosure under Branch 1 of section 19.

Record B149

Record B149 is a letter dated March 7, 1995 from an official with the affected party and the Assistant Deputy Minister of Health. I find that this record contains commercial information within the meaning of section 17(1). I further find that this document was supplied with a reasonably-held expectation of confidentiality by the affected party to the Ministry. In addition, and in accordance with my reasons in the discussion above with respect to the Extension Agreement, I find that the disclosure of this information could reasonably be expected to result in harm to the competitive position of the affected party. As all three parts of the section 17(1) test have been satisfied with respect to Record B149, I find that it is properly exempt under that exemption.

RECORD GROUP C

Record C1

Record C1 is a briefing note dated December 19, 1995. Record B34 is a later version of the same briefing note which I addressed above. The findings which I made in my discussion of Record B34 are equally applicable to Record C1. I find that the entire section entitled "The Facts of the Issue Are:" and "Legal Issues" are properly exempt under section 17(1). I find that they contain information which was included in either the original Agreement or the Extension Agreement which I found to be exempt under this mandatory exemption. These portions of Record C1 are, as I held above in my consideration of Record B34, exempt from disclosure.

In addition, I find that the handwritten notes made to the briefing note by counsel qualify for exemption under Branch 2 of section 19 as they were prepared by Crown counsel for use in giving legal advice.

The remaining portions of Record C1 do not, however, qualify for exemption under sections 13(1), 17(1), 18(1)(c), (d), (f) and (g) or 19.

Record C2

Record C2 consists of a covering memorandum and a two-page summary entitled "[Name of the Appellant Company] Litigation" dated October 17, 1995 from a Ministry counsel to several

others who are employed as Crown counsel by the Government of Ontario. I find that this record is exempt from disclosure under the second part of Branch 1 of section 19 as it is material created especially for the lawyer's brief for existing litigation.

Record C3

Record C3 is a two-page "Issue Sheet". The Ministry has applied sections 17(1), 18(1)(c) and (d) to paragraphs 2 and 3 of the Background section and section 19 to paragraph 3 of the Current Status portion of the record. I find that the information severed from the Background section is identical to that contained in the Agreement. This portion of Record C3 is, accordingly, exempt under section 17(1). Paragraph 3 of the Current Status section describes certain legal advice which was provided to the Ministry. I find that this information does not qualify for exemption under either Branch 1 or 2 of section 19. The information is neither a confidential communication between a solicitor and client nor was it prepared by or for Crown counsel. This portion of Record C3 should, therefore, be disclosed to the appellant.

Record C4

Record C4 is a four-page "Issue Sheet". The Ministry submits that portions of this record are not responsive to the request. I disagree and find that, because all of the information in this document are reasonably related to the request, it is responsive. The Ministry submits that parts of Record C4 are exempt under sections 13, 17(1) and 18(1)(c), (d) and (g). I have reviewed these excerpts from Record C4 and agree that the paragraphs entitled "Issue" and "Decision Required" contain advice which is related to a specific course of action to be taken by a Ministry official. These portions of Record C4 are, therefore, exempt under section 13(1).

The remaining severed portions of this document contain references to the Agreement and proposed Extension Agreement which I have found to be exempt under section 17(1). I find that this information is similarly exempt under section 17(1).

Record C5

The Ministry submits that Record C5 is not responsive to the appellant's request. I have reviewed Record C5 and agree that it contains information which is not reasonably related to the request as originally framed.

Record C7

Record C7 consists of a one-page "Issue Sheet" and a three-page memorandum. The Ministry has applied sections 17(1) and 18(1)(c) and (d) to portions of these documents. I find that the disclosure of the severed information could reasonably be expected to result in harm to the economic interests of the Ministry. For this reason, the excerpted information in Record C7 is exempt from disclosure under section 18(1)(c).

Records C11, C12 and C13

The severed portions of Records C11, C12 and C13 contain information whose disclosure could reasonably be expected to harm the economic interests of the Ministry. This information is, therefore, exempt from disclosure under section 18(1)(c).

Record C14

Record C14 is a letter dated December 5, 1994 from the affected party to the Ministry. The letter includes information which is contained in the Agreement and which later was included in the Extension Agreement. In my view, this information is properly exempt from disclosure under section 17(1).

Record C15

The severed portion of Record C15 contains information from the Agreement between the Ministry and the affected party which I have previously found to be exempt from disclosure under section 17(1). This information similarly qualifies for exemption under this section.

Record C16

Record C16 is a memorandum dated December 22, 1994 from one Assistant Deputy Minister to another. The Ministry has claimed the application of sections 17(1) and 18(1)(c), (d) and (g) to the severed portion of this document. Based on my review of the record, I find that the release of the undisclosed portions of the memorandum could reasonably be expected to result in harm to the economic interests of the Ministry. The severed portions of Record C16 are, accordingly, exempt from disclosure under section 18(1)(c).

Record C20

Record C20 is a memorandum from a Ministry solicitor to a Ministry official dated January 6, 1993. I find that this document qualifies for exemption under Branch 1 of section 19 as it is a confidential communication between solicitor and client which relates directly to the giving of legal advice.

RECORD GROUP D

Record D2

Record D2 is a letter dated June 9, 1995 from an official with the Ministry to the President of a pharmaceutical company. The Ministry submits that the undisclosed portion of this letter contains information which is exempt from disclosure under section 17(1) as it is included in the Agreement. In my view, the disclosure of this portion of Record D2 is not reasonably likely to result in harm to the competitive position of the affected party. I find that this information is not, therefore, exempt under section 17(1).

Record D5

Record D5 is a two-page letter with a two-page draft of the Extension Agreement from the affected party to the Assistant Deputy Minister, dated March 7, 1995. I find that these documents clearly qualify for exemption under section 17(1). Each contains commercial information which was supplied with a reasonably-held expectation of confidentiality. Finally, I agree that their disclosure could reasonably be expected to cause harm to the competitive position of the affected party.

Record D6

Record D6 consists of three pages of e-mails and a two-page "Issue Sheet". The severed information on the first page is not, as claimed by the Ministry, exempt under section 17(1). The information is not "commercial information" as contemplated by section 17(1) and was not "supplied" to the Ministry by the affected party. The severed information in the third e-mail is identical to certain information in the Agreement, which I have found above to be exempt under section 17(1). Similarly, the information in the Issue Sheet is identical to that contained in the Agreement and the Extension Agreement. It too is, accordingly, exempt from disclosure under section 17(1).

Records D7 and D8

Record D7 is an e-mail dated January 31, 1995 from a Ministry official to a number of other Ministry employees. Record D8 is a memorandum between two Assistant Deputy Ministers. The severed information contained in these records is identical to that which is contained in the Agreement and Extension Agreement. I find, therefore, that it is exempt from disclosure under section 17(1).

The Undisclosed Portions of Record D9

Record D9 consists of a letter dated December 5, 1994 from the affected party to the Assistant Deputy Minister. Portions of this document have been disclosed to the appellant. I find that the remaining parts of this document are exempt under section 17(1) as the information is identical to that which is contained in the Agreement. The remaining undisclosed part of Record D9 is a draft version of the Extension Agreement. Consistent with my findings above, this document is exempt from disclosure under section 17(1).

PUBLIC INTEREST IN DISCLOSURE

While not specifically referring to section 23 of the Act, the appellant submits that it is in the public interest that the undisclosed information in the records, particularly the Agreement, be disclosed. It argues that the Agreement was entered into without tenders being called and that because tax dollars are being spent, the public ought to have a right to know the terms and conditions agreed to by the parties to the Agreement.

I note that the appellant is currently involved in litigation with the Ministry and the affected party over certain questions about the patent held by the affected party on the drug AZT. The appellant is a competitor of the affected party for the supply of drugs such as AZT to the Ministry.

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

In my view, any public interest in the disclosure of the records at issue in this appeal cannot reasonably be described as "compelling", as contemplated by section 23. In addition, I find that the interest expressed by the appellant is essentially a private one, intended to assist it in the pursuit of its legal actions with the Ministry and the affected party. For these reasons, I find that the public interest override in section 23 has no application to the present circumstances.

ORDER:

1. I order the Ministry to disclose to the appellant by **January 9, 1998**, but not before **January 5, 1998** the following records or parts of records:
 - (a) the FAX cover pages from Record A1;
 - (b) those portions of the Agreement in Record A2 which are **not** highlighted;
 - (c) the three letters in Record A7;
 - (d) those portions of the briefing note in Record A52 which are **not** highlighted;
 - (e) the covering memoranda and those portions of the briefing notes in Records A53, A54 and A55 which are **not** highlighted in Record A52;
 - (f) the letter in Record B11 (not including the notes);
 - (g) Records B17, B25 and B30;
 - (h) the FAX cover page of Record B31;
 - (i) those portions of Record B34 (and Record C1) which are not highlighted;
 - (j) Record B40;
 - (k) Page 3 and those portions of Record B133 which are not highlighted;
 - (l) all of Record C3 with the exception of paragraphs 2 and 3 of the Background section;
 - (m) the undisclosed portions of Record D2;
 - (n) the undisclosed information on Page 1 of Record D6.

2. I uphold the Ministry's decision to deny access to the remaining records or parts of records.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____

Donald Hale
Inquiry Officer

December 5, 1997