

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 187-1997
August 21, 1997**

INQUIRY RE: A request by Domaine Combret Ltd. to the Ministry of Agriculture, Fisheries and Food, for access to Treasury Board submissions concerning government assistance to the wine and grape industry

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on July 16, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by Domaine Combret Limited (the applicant) to the Ministry of Agriculture, Fisheries and Food (the Ministry), for access to certain Treasury Board submissions dealing with proposals and options for government assistance to the British Columbia wine and grape industry.

2. Documentation of the inquiry process

On August 16, 1996 the applicant requested from the Cabinet Office a copy of Treasury Board submission 79/95 and the Treasury Board submission(s) supplemental to it, or to which it was supplemental. The applicant also requested a copy of the pre-existing "assistance package" from the Government of British Columbia to the British Columbia wine and grape industry, plus all documents which provided "background explanation" or "analysis" regarding the decision made by the Government of British Columbia in response to Treasury Board submission 79/95.

On August 20, 1996 the applicant's request was transferred to the Ministry of Agriculture, Fisheries and Food. By letter dated January 8, 1997 the Manager of Information and Privacy for the Ministry replied to the applicant's request. The applicant received Treasury Board submissions 79/95 and 73/95A with severances made under sections 12, 13, and 16 of the Act. Treasury Board submission 73/95 was initially withheld in its entirety since it "was never signed off or acted upon."

On January 28, 1997 counsel for the applicant wrote to my Office to request a review of the decision by the Ministry to withhold the severed information. My Office opened this request for review on January 29, 1997.

Previously-severed records were disclosed to the applicant late in the mediation process; Treasury Board submission 73/95--in essence the draft for submission 73/95A--was also released to the applicant with severances made under sections 12, 16, and 17 of the Act. The applicant, after reviewing the scope of the information disclosed, elected to request an inquiry by the Information and Privacy Commissioner.

The ninety-day review period expired on April 29, 1997. However, on April 28, 1997 both parties gave consent to extend the original deadline to May 30, 1997. This deadline was further extended by consent of the parties to July 16, 1997.

3. Issues under review and the burden of proof

The issues under review consist of the Ministry's application of sections 12, 13, 16, and 17 of the Act to the records requested by the applicant. The Ministry in this inquiry has also informed me of its late intention to apply section 21 to one particular severance. The relevant portions of the sections being applied are:

Cabinet and local public confidences

- 12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
- (2) Subsection (1) does not apply to
- ...
- (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
- (i) the decision has been made public,
 - (ii) the decision has been implemented, or
 - (iii) 5 or more years have passed since the decision was made or considered.

Policy advice, recommendations or draft regulations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- (2) The head of a public body must not refuse to disclose under subsection (1)
- (a) any factual material,
 - (b) a public opinion poll,
 - (c) a statistical survey,
 - (d) an appraisal,
 - (e) an economic forecast,
 - ...
 - (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
 - (j) a report on the results of field research undertaken before a policy proposal is formulated,
 - (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
 - (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
 - (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
 -
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

Disclosure harmful to intergovernmental relations or negotiations

- 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

- (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
 - (i) the government of Canada or a province of Canada;
 - ...
 - (iv) the government of a foreign state;
 - (v) an international organization of states,
- (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or
-

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

- (a) trade secrets of a public body or the government of British Columbia;
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
- (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
- (e) information about negotiations carried on by or for a public body or the government of British Columbia.

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

- (a) that would reveal
 - (i) trade secrets of a third party, or
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party,
- (b) that is supplied, implicitly or explicitly, in confidence, and
- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

4. The records in dispute

The records in dispute consist of several submissions by the Ministry to the Treasury Board, which is a Committee of Cabinet. They are numbered as Treasury Board submissions 73/95, 73/95A, and 79/95. The records contain background information, options, and recommendations relating to a program of assistance by the Government of British Columbia to the wine and grape industry of this province.

5. Domaine Combret Ltd.'s case

The applicant states that the subject matter of this inquiry concerns the Government of British Columbia's support program for certain aspects of the provincial wine industry.

I have presented below, as I deemed it appropriate to do so, aspects of the applicant's submissions on both various sections of the Act and the appropriateness of the severing of each of the three Treasury Board records in dispute.

6. The Ministry of Agriculture, Fisheries and Food's case

The records in dispute are parts of submissions to the Treasury Board about a wine and grape development fund designed to promote the B.C. wine industry. The

applicant is an estate winery located in Oliver, B.C. (Submission of the Ministry, paragraphs 1.02, 1.03)

7. Procedural objections

On July 7, 1997, the day before initial submissions were due from the parties in this inquiry, the applicant received further disclosure of records from the Ministry. The Ministry also notified the applicant that it was applying additional exceptions to some of the records that remained severed.

The applicant objected, stating that it had no time to respond with last minute revisions to its own submission, and urged me to ignore the changes made by the Ministry. The applicant believed that the disclosure of records happened after the mediation period and characterized the last minute changes as being cavalier and serving to denigrate the Act. The Ministry responded by correctly pointing out that mediation, in this case resulting in the additional release of records, can continue up to the time that I issue an order. (Order No. 111-1996, June 6, 1996, page 3)

The Ministry's position regarding the addition of the application of section 17 of the Act to severed records was that it should be allowed to do so, unless it would cause prejudice to the applicant. The Ministry also offered its consent to extend the deadline for submissions from the applicant and took a similar position concerning its late application of section 21. In its reply submission, the applicant came to the conclusion that it did not want to extend the process and would therefore adhere to the original inquiry schedule.

With regard to last minute changes before inquiries, I wish to make it clear that I do not encourage or condone the habit of public bodies revising the exceptions applied to severed records at the last minute. However, I find that in these particular circumstances, the applicant has not been prejudiced by the lateness of the Ministry's last decision letter. I have therefore reviewed the records at issue in this inquiry with regard to the revised exceptions contained in the Ministry's letter to the applicant of July 7, 1997.

The applicant also objected to what it perceived as the role of the Portfolio Officer concerning "alterations in the release of information." The applicant concluded that the Ministry relied on correspondence from a Portfolio Officer to perform a function that was the responsibility of the Ministry. The applicant refers to a letter dated July 3, 1997 from the Portfolio Officer to the applicant. In that letter he informed the applicant of the fact that the Ministry concluded it should apply section 21 of the Act, a mandatory exception, to certain records. In its July 7, 1997 letter, the Ministry advised the applicant of its decision to apply section 21 and pointed out that the applicant was made aware of this by the Portfolio Officer's letter of July 3, 1997.

I find that the Ministry performed its statutory obligation in dealing with the applicant's request. The Ministry determined that section 21 applied to the records at

issue and informed the applicant of its decision, irrespective of the fact that the applicant was also informed by the Portfolio Officer.

8. Discussion

Section 12: Cabinet and local public body confidences

The applicant states that it has relied on my decisions in Order No. 33-1995, February 2, 1995; Order No. 48-1995, July 7, 1995; and Order No. 158-1997, April 10, 1997. (Submission of the Applicant, p. 2) The Ministry suggests that the applicant may in fact be relying on Order No. 165-1997, May 20, 1997, rather than Order No. 158-1997, which does not deal with section 12. (Reply Submission of the Ministry, paragraph 1)

The Ministry has sought to protect the substance of Treasury Board deliberations; it has not withheld information in the record the purpose of which was to present background explanations or analysis. It states that the decisions of Cabinet which flowed from these documents have been made public, that is announced or have been implemented, which means that section 12(2)(c) of the Act applies. (Submission of the Ministry, paragraphs 5.01, 5.02; Reply Submission of the Ministry, paragraph 2)

I have previously accepted that the intent of this section is to protect from disclosure information in submissions to Cabinet that would reveal advice, recommendations, or policy considerations. (Order No. 33-1995, p. 5; see also Reply Submission of the Ministry, paragraph 3) In the present inquiry, the Ministry submits that the severed information consists of “advice, proposals, policy considerations & financing options, recommendations, proposed time frames, communication strategy, and issues from the communications plan.” (Submission of the Ministry, paragraph 5.10)

The Ministry further states that it has disclosed to the applicant all information in the records “the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision.” (Reply Submission of the Ministry, paragraph 3)

Section 13(1): Policy advice, recommendations or draft regulations

The Ministry has applied this exception to approximately two lines in Treasury Board submission 73/95A, which, it submits, “implicitly discloses advice being provided to Treasury Board on the appropriate action to be taken.” (Submission of the Ministry, paragraph 5.29) The applicant contests the application of this section (Reply Submission of the Applicant, pp. 3, 4)

Section 16(1): Disclosure harmful to intergovernmental relations or negotiations

The Ministry submits that it is “required only to show a reasonable expectation of some harm to intergovernmental relations or the supply of intergovernmental

information.” (Submission of the Ministry, paragraph 5.12; and Reply Submission of the Ministry, paragraph 17) I have reviewed its specific submissions and affidavits in this regard on an *in camera* basis.

Section 17(1): Disclosure harmful to the financial or economic interests of a public body

The Ministry states that it has protected the same information under sections 12, 16, and 17. (Submission of the Ministry, paragraph 5.21) It submits that it need only show a reasonable expectation of some harm to its financial interests. The Ministry is protecting information about negotiations that it has carried on and its negotiating position (section 17(1)(e)). (Submission of the Ministry, paragraphs 5.22, 5.23, 5.25; see Order No. 91-1996, March 11, 1996, p. 14; Order No. 159-1997, April 17, 1997, p. 8)

The Ministry submits that:

...there is likely to be widespread business failures in the B.C. grape and wine industry if government financial support is withdrawn completely. The very purpose of the Treasury Board submissions was to present Treasury Board with options on how to manage this very important sector of the economy. (Submission of the Ministry, paragraph 5.25)

The applicant contests the Ministry’s attempts to rely on this section. (Reply Submission of the Applicant, pp. 6, 7)

Section 21: Disclosure harmful to business interests of a third party

The Ministry is applying the three-part test in section 21 to the same small amount of information withheld on the basis of section 13(1). (Submission of the Ministry, paragraph 5.30) In its view, this is “financial” information about the largest and most successful estate wineries based on a viewing, in confidence, of their financial statements. Further, the Ministry submits that disclosure of this information could adversely affect the interests protected under section 21(1)(c)(i), (ii), and (iii), because the applicant is a competitor of the named wineries. (Submission of the Ministry, paragraphs 5.32-5.35)

The applicant contests the application of this section. (Reply Submission of the Applicant, pp. 3, 4)

Review of the records in dispute

The three records in dispute are a total of 84 pages in length; 34 pages have been severed on the basis of various sections of the Act. (Submission of the Ministry, paragraph 4.01)

The applicant has furnished me with specific arguments about the appropriateness of each severance made by the Ministry. Although I am taking account of these specific

points in reviewing the records myself, I see no need to rehearse them in the body of this Order. I have treated similarly the detailed comments made by the Ministry on the applicant's arguments. (Reply Submission of the Ministry, paragraphs 4-17)

I have reviewed each of the severances in Treasury Board Submission 73/95, most of which apply section 12 of the Act. I find that each of these severances is appropriate. I also find the total of fifteen lines of exceptions from disclosure in four places under sections 12, 16, and 17 to be appropriate in meeting the requirements of these sections of the Act.

I have reviewed each of the severances in Treasury Board Submission 73/95A, most of which apply section 12 of the Act. I find that each of these, as well as the severance of approximately two lines under sections 13 and 21, are appropriate in meeting the requirements of the Act. I also find several paragraphs of exceptions from disclosure under sections 12, 16, and 17 to be appropriate. They parallel the severing in Treasury Board Submission 73/95.

I have reviewed each of the severances in Treasury Board Submission 79/95, which is only five pages. All of the exceptions on the basis of section 12 of the Act are appropriate; in addition, I accept the severance of five lines on the basis of sections 12, 16, and 17.

9. Order

I find that the Ministry of Agriculture, Fisheries and Food was authorized to refuse to give the applicant information in the records in dispute under sections 13, 16, and 17 of the Act. Under section 58(2)(b), I confirm the decision of the Ministry to refuse access to the applicant.

I also find that the Ministry of Agriculture, Fisheries and Food was required to refuse to give the applicant information in the records in dispute under sections 12 and 21 of the Act. Under section 58(2)(c), I require the Ministry to refuse access to the applicant.

David H. Flaherty
Commissioner

August 21, 1997