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

ORDER PO-1852

Appeal PA-990445-1

Ministry of the Environment

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified draft report relating to a soil survey which was conducted by the Ministry in 1998. The survey concerned contamination levels in the City of Port Colborne (the City). The requester is a lawyer representing individuals who are involved in litigation with a corporation operating in the City.

The requester also asked for any previous drafts of the report, as well as copies of any memoranda, notes and e-mail messages relating to meetings which took place between representatives of the Ministry, the corporation and the City, and correspondence between these parties regarding matters discussed at the meetings. The request letter identified the dates of four such meetings, as well as the names of a number of Ministry employees who were present at some or all of these meetings.

After notifying the City and the corporation, the Ministry granted partial access to the responsive records. Access to the remaining records was denied, in whole or in part, pursuant to one or more of the following exemptions contained in the *Act*:

- section 13(1) - advice and recommendations;
- sections 17(1)(a), (b) and (c) - third party information;
- sections 18(1)(a), (c) and (e) - economic and other interests of the Ministry;
- section 19 - solicitor-client privilege; and
- section 21(1) - invasion of privacy.

The requester (now the appellant) appealed the Ministry's decision, and also raised the possible application of the "public interest override" in section 23 of the *Act*.

During mediation, the Ministry withdrew the section 18(1)(c) exemption claim, and the appellant confirmed that he is not interested in receiving any records or parts of records that were subject to the section 21(1) exemption claim.

Also during mediation, the final version of the soil survey report in question was made public. However, the appellant made it clear that he continued to want copies of all previous draft versions of this report. No draft reports were among the records identified by the Ministry as responsive to the request, despite the fact that drafts were specifically identified in the request letter. On this basis, the appellant maintained that additional responsive records should exist.

I sent a Notice of Inquiry to the Ministry, the City and the corporation, and received representations in response from the Ministry and the corporation only. I then sent the Notice, together with the non-confidential portions of both sets of representations to the appellant, who provided representations in reply.

RECORDS:

There are 40 records at issue in this appeal, as described in the index provided by the Ministry to both the appellant and this Office. The records are number A through V and 1 through 19. Record 17 does not exist and was listed in error by the Ministry. The records consist of e-mail messages (some with attachments), briefing notes, agendas and minutes of meetings, draft meeting minutes, memoranda, facsimiles, overheads, a risk assessment report and a record of verbal transaction.

REASONABLENESS OF SEARCH

The appellant maintains other responsive records should exist, including previous drafts of the 1998 soil survey report.

In appeals involving a claim that further responsive records exist, the issue to be decided is whether the Ministry has conducted a reasonable search for the records, as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, I may order further searches.

The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request. Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In response to my request for a summary of the steps taken in responding to the appellant's request, the Ministry provided representations on its searches for records located in three Ministry offices: Niagara District Office, Phytotoxicology Section, and Environmental Assessment and Approvals Branch.

Niagara District Office records

The Ministry included an affidavit of a Senior Environmental Officer in the Niagara District Office with its representations. This individual's name was mentioned by the appellant in his request letter as one of the individuals who was present at the meetings between the Ministry, the City and the corporation. The Ministry explains that this individual is the most qualified to conduct the search for records because he is responsible for the management of day-to-day issues relating to the corporation and the City and the impact of the soil contamination which is the subject of the survey report.

The Senior Environmental Officer swears in his affidavit that he worked on the file involving the corporation, so was aware of the location for responsive records. He points out that he conducted all required searches and forwarded all responsive records to the Ministry's Freedom of Information and Privacy Co-ordinator (the Co-ordinator) for processing.

Although not included in the affidavit, the Co-ordinator adds that he was advised by the Senior Environmental Officer that, to the best of his recollection, no responsive records that previously existed

were subsequently destroyed. The Co-ordinator also states that he contacted two other employees mentioned in the appellant's request letter. One of these employees maintains that no notes or minutes were taken at the meeting identified by the appellant in his request letter, and the other employee advises that any records he may have had would have been left at the Niagara District Office when he assumed new employment responsibilities at a different Ministry office.

Phytotoxicology Section records

The Co-ordinator states that one of the individuals from this Section identified by the appellant in his request letter has since left the Ministry. However, the person who co-ordinated the search for the records did contact all other Ministry employees identified by the appellant who still work with the Ministry. The Co-ordinator points out that employees who leave the Ministry are required to leave behind all records relating to the government's business.

The Co-ordinator identifies the Ministry employee responsible for undertaking the various searches, and includes the following quotes, presumably from correspondence received from this individual by the Co-ordinator which relate to the results of these searches:

> ... each of the remaining ministry staff and I have undertaken a second search of our files for pertinent materials as defined by the FOI request. This search also included the files of [the former employee], that remain, up to his departure from the ministry. The search included a review of paper filing systems for references to this activity as well as a search of individual computers and electronic files including email, memos and presentations by these staff.
> ...
>
> ... There are very likely files that have been eliminated since 1998 from both paper record and electronic systems, especially electronic records (e-mail) which are of necessity purged from computers as a part of normal maintenance activity. However, my previous response [to the Co-ordinator] provided you hard copy of any pertinent files from the other named staff up to that date. There is no mechanism to identify what files may have existed and prove they were destroyed, through these normal business practices.

In terms of the draft version of the 1998 survey, the employee conducting the searches states:

> ... we do not retain iterative hard copy or electronic files for our reports as they passed through drafting stages. Drafts are electronic files which are very short lived, transient, snap shots at various points of time which can change on a daily basis up to the point of closure and issue to the district manager who requested the investigation. These transient drafts are overwritten in the case of electronic files and discarded, in the case of hard copy, as newer versions are drafted. This is simply a standard document management approach to minimize paper and the chance of misunderstanding arising from people looking at different drafts. Our reports are "evergreen" reflecting each change as they are incorporated. I am not able to produce a draft copy of the 1998 report that has been requested. Within [the

> Ministry's Standards Development Branch], there is one version of the 1998 report - the version currently in the public domain and attached here.

Environmental Assessment and Approvals Branch records

The search for records in this branch was conducted by another individual identified by the appellant in his request. This individual advised the Co-ordinator that he attended two meetings in the Niagara District Office where the matter involving the City was discussed, and that employees of that office agreed to produce the meeting minutes. The employee recalls providing verbal feedback on the draft minutes, and may have corresponded with the Niagara District Office by e-mail, but he states that there are no records on his computer system or in his files regarding this matter.

Appellant's Submissions

The Ministry's representations on the search issue were provided to the appellant. In response, the appellant expresses the following concern regarding the apparent non-existence of draft versions of the 1998 soil survey report:

> [We] are disturbed that after receiving our request in August 1999 for a draft copy of its Report, [the Ministry] would have proceeded to effectively destroy its working draft copy by not preserving it as a document.

After considering the material before me and the representations of the Ministry, I am satisfied that the various searches undertaken by the Ministry at the Phytotoxicology Section and the Environmental Assessment and Approvals Branch were reasonable. Although I can appreciate the appellant's concern that prior drafts of the report were not maintained by the Phytotoxicology Section, I nonetheless feel that the explanation offered by the Co-ordinator is reasonable.

However, I feel differently about the searches conducted at the Niagara District Office. Although I have been provided with an affidavit of the Senior Environmental Officer who co-ordinated the searches, the evidence he provides is general in nature and does not include any specifics as to where responsive records of this nature would be located, what searches were conducted and, most importantly, why no previous drafts of the 1998 soil survey report were located in the Niagara District Office files. The Ministry is not required to prove to me with absolute certainty that no further records exist; however, based on the representations provided by the Ministry, I am not satisfied that the Ministry has made a reasonable effort to identify and locate all responsive records at the Niagara District Office, and I will include a provision in this order requiring additional searches in this regard.

SCOPE OF THE REQUEST

The appellant also alleges that the Ministry narrowed the scope of his request and, as a result, did not make a reasonable search for all responsive records. The appellant submits.

> Under the heading "Reasonableness of the Ministry's Search for Additional Records", at paragraph 10, [the Ministry] advises that no notes or minutes were taken of the January30, 1998 meeting that [a named Ministry employee] added to the file *related to [the corporation]* (our emphasis). This response may be taken to mean that although there were notes and minutes of this meeting, they did not relate to [the corporation] and have therefore not been provided.
>
> Our request for records included documents relating to this meeting regardless of whether or not [the corporation] was specifically identified at that meeting as the source of the soil contamination in Port Colborne. If any such records exist, they are properly the subject of this appeal.
> ...
>
> We are generally concerned that [the Ministry] may have unduly limited the scope of its search for records. We would have expected there to be more records relating to a matter of this importance. ...

The issue of responsiveness of records was canvassed in detail by former Adjudicator Anita Fineberg in Order P-880. That order dealt with a redetermination regarding this issue which resulted from the decision of the Divisional Court in *Ontario (Attorney General)* v. *Fineberg* (1994), 19 O.R. (3rd) 197.

In the *Fineberg* case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In her discussion of this issue in Order P-880, former Adjudicator Fineberg stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request . While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with these conclusions.

In the present appeal, the request was for the then-current draft and any other previous drafts of the 1998 soil survey, as well as copies of any memoranda, notes and e-mail messages relating to meetings between the Ministry, the corporation and the City in the context of issues relating to this survey. In addition, the

appellant asked for any correspondence between the three parties with respect to the meetings and the matters discussed at the meetings.

I agree with the appellant's submission that all records relating to the meetings between the Ministry, the City and the corporation would be relevant and responsive to the appellant's request. However, I am not persuaded that the Ministry has narrowed the scope of the request in the manner suggested by the appellant. The Ministry states in its representations:

> While other records exist with respect to [the corporation] in Port Colborne, Ontario, none pertain to the scope of the request; namely, a copy of (1) the draft report related to a 1998 soil survey and all previous drafts and (2) records related to meetings between the MOE, [the City] and [the corporation].

I am aware that the corporation has conducted business in the City for many years and, given the nature of its business, it is reasonable to assume that it would have had dealings with the Ministry and the City on issues that do not involve the appellant or the particular soil survey report at issue in this appeal.

Accordingly, I find that the scope of the appellant's request has been accurately defined by the Ministry.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims section 19 of the *Act* as the basis for exempting Records B through E, G through O, R, T and V. This section states:

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

Solicitor-client communication privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This

> confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> (*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409)

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> (*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409)

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (*Susan Hosiery Ltd., v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729).

Record B

Record B is an e-mail between two Ministry personnel. The Ministry points out that one of the individuals copied on the e-mail is a Crown Counsel employed by the Ministry. The Ministry claims that one paragraph of the e-mail reiterates legal advice previously provided to the Ministry by its in-house lawyer.

I accept the Ministry's position on the one identified paragraph of this record. It reflects legal advice provided by a legal advisor to her Ministry client. The distribution list for the e-mail was limited and the nature of the advice provided deals with matters that were being treated on a confidential basis by the Ministry. Therefore, I find that paragraph 7 on page one of Record B satisfies the requirements of solicitor-client communications privilege and qualifies for exemption under section 19

Record C

The Ministry states that Record C is an e-mail sent by in-house legal counsel to her Ministry clients for the purpose of clarifying legal advice previously provided. This is the same legal advice referred to in paragraph 7 of Record B.

I agree with the Ministry's submissions on this record. I find that the e-mail is a confidential written communication between the Ministry's solicitor and her client which relates directly to the provision of legal advice. Accordingly, Record B qualifies for exemption under the solicitor-client communications privilege component of section 19

Record D

Record D consists of two e-mails. The Ministry claims that the second one qualifies for exemption under section 19.

The Ministry states that this e-mail exchange between two Ministry employees contains a discussion and clarification of the legal advice received in Record C, and that its disclosure would reveal the confidential legal advice given.

I concur, and find that the second e-mail portion of Record D qualifies for exemption under section 19.

Record E

This record is an e-mail from one Ministry employee to another employee, with a number of other employees copied. The Ministry makes no submissions on the application of section 19 to this record. In the absence of representations, I am unable to determine whether the recipient or sender of this e-mail is a legal adviser and whether this is a confidential communication for the purposes of giving or receiving legal advice. Accordingly, I find that the requirements of solicitor-client communications privilege have not been established, and Record E does not qualify for exemption under section 19.

Record G

Record G is also an e-mail between Ministry staff. The Ministry submits that "Paragraph numbered 1 is the early framing of a legal question to be submitted to Legal Services Branch of the Ministry." As far as I can determine based on the representations provided by the Ministry, this e-mail was not being sent to or from the Ministry's legal counsel, and I find that it fails to satisfy the requirements of solicitor-client communications privilege for that reason. Therefore, the one paragraph of Record G identified by the Ministry does not qualify for exemption under section 19.

Record H

Record H is a two-page e-mail from a Ministry employee to in-house legal counsel asking for legal advice on an issue involving the corporation. I find that this record is a confidential written communication from a client to a lawyer relating to the seeking of legal advice, and falls squarely within the parameters of solicitor-client communications privilege. Accordingly, Record H qualifies for exemption under section 19.

Record I

Record I is the legal opinion provided in response to Record H. I agree with the Ministry's submission that this is a confidential written communication from the Ministry's legal counsel to his client which was prepared for the purposes of providing legal advice. Therefore, Record I is exempt from disclosure under the solicitor-client communications privilege component of section 19.

Record J

Record J is a further e-mail exchange between the Ministry staff person and legal counsel on the same topic as Records H and I. I find that this record is part of the continuum of communications referred to in *Balabel* case, and qualifies for exemption under section 19 for the same reasons as Records H and I.

Record K

Record K consists of an e-mail to and from Ministry staff, with a draft memorandum and briefing note attached. The Ministry claims section 19 as the basis for exempting one paragraph of the draft memorandum.

Although this paragraph refers to the existence of a legal opinion, based on the representations and my independent review of the record, I am unable to conclude that any part of Record K represents a confidential communication, nor that it is a communication between a solicitor and client. Accordingly, I find that the requirements of solicitor-client communications privilege have not been established, and the one paragraph of the memorandum included in Record K does not qualify for exemption under section 19.

Records L, M, N, O, R and V

The Ministry's index lists section 19 among the exemptions claimed for Records L, M, N, O, R and V, but makes no submissions on this exemption claim for these records in its representations.

Record M is an e-mail to and from Ministry staff; Records L, N, O and R are e-mails with other documents attached; and Record V is a briefing note. Without representations, I am unable to conclude that any of these records are confidential communications, between a solicitor and client, or that they are created for the purpose of obtaining or providing legal advice. Therefore, I find that Records L, M, N, O, R and V do not qualify for exemption under section 19.

Record T

Record T is a draft internal memorandum, with a copy of Record K attached. The Ministry claims that the same paragraph of Record K qualifies for exemption under section 19, and I find that it does not, for the same reasons as discussed above.

Loss of Privilege through Waiver

The appellant maintains that any claim the Ministry may have had for solicitor-client communication privilege has been waived. He submits.

> Although some of the information contained in the records at issue may have once been protected by solicitor and client privilege, it is respectfully submitted that such privilege may have been waived as a result of comments made by representatives of [the Ministry] to the local Port Colborne media regarding [the Ministry's] legal position with respect to [the corporation].

The appellant included a newspaper clipping with his representations in support of his position.

This Office's position on waiver of solicitor-client communications privilege is outlined in Order P-1342. In that order, former Adjudication Holly Big Canoe states:

> [C]ommon law solicitor-client privilege can also be lost through a waiver of the privilege by the client. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669. See also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].
>
> Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client's waiver of the privilege can be implied from the actions of the client's solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client's privilege. [J. Sopinka et. al., *The Law of Evidence in Canada* at p. 663. See also: *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211 (S.C.C.); *Derby & Co. Ltd. v. Weldon* (No. 8), [1991] 1 W.L.R. 73 at 87 (C.A.)].

Waiver has been found to apply where, for example:

1. the record was disclosed to the requester [Order P-341; upheld on judicial review in *General Accident Assurance Co. v. Ontario (Information and Privacy Commissioner)* (March 8, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)];

2. the record was disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)];

3. the communication was made to an opposing party in litigation [Order P-1551]; and

4. the document records a communication made in open court [Order P-1551].

The appellant argues that the Ministry has waived its ability to rely on solicitor-client privilege based on the fact the Ministry representatives have disclosed the Ministry's intention with respect to the affected party to the media. In Order P-1619, I dealt with a similar argument by an appellant regarding waiver of privilege. I stated:

> The appellant submits that government officials have waived their ability to rely on solicitor-client privilege. The appellant bases his position on the fact that these officials consistently indicated in legislative debates that they decided to seek an ex parte injunction to end the occupation of Ipperwash Provincial Park on an urgent basis based on legal advice.
>
> I agree that certain government officials, such as the Minister Responsible for Native Affairs, made public reference to a legal opinion which recommended that the government proceed to obtain an ex parte injunction. The records already disclosed to the appellant make reference to this opinion. However, in my view, this reference does not constitute waiver of privilege as it relates to the records I have found qualify for solicitor-client communications privilege. The records I have found to qualify under section 19 contain information which pertains to legal advice on several other issues relating to the Ipperwash incident and/or other issues regarding the injunction which are not the direct subject matter of the legal opinion. Information related directly to the legal opinion and advice regarding the injunction has been disclosed to the appellant. In my view, an objective consideration of the Ministry's conduct with respect to these exempt records does not demonstrate an intention to waive privilege, and I find that the solicitor-client privilege has not been waived in the circumstances.
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> (See also Order P-1632)

In this case, the appellant has provided me with a copy of a newspaper article reporting that Ministry representatives have publicly announced that they intend to proceed in a certain manner, based on legal advice. The records I determined qualify for solicitor-client privilege contain advice which goes far beyond that which is referenced in the newspaper article. The newspaper article is at best a general discussion of the Ministry's legal position and, in my view, the actions taken by the Ministry are not sufficient to constitute waiver of any solicitor-client privilege in the circumstances.

In summary, I find that Records C, H, I , J, the second e-mail contained in Record D, and paragraph 7 on page one of Record B qualify for exemption under section 19 of the *Act*. I further find that the remaining portions of Records B and D, as well as Records E, G, K, L, M, N, O, R, T and V do not qualify for exemption under this section.

ADVICE OR RECOMMENDATIONS

The Ministry claims section 13(1) of the *Act* as one basis for exempting Records D through F, K through V, 3, 7, 8, 12, 13 and 14. Section 13(1) of the *Act* reads:

> 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.

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

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

A number of previous orders have established that advice or 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 (Orders 118, P-348 and P-363, upheld on judicial review in *Ontario (Human Rights Commission)* v. *Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations)* v. *Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)).
In Order P-434 I made the following comments on the "deliberative process":

> In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this Office (Orders P-1147 and

P-1299).

Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act*. (Orders 94, P-233, M-847 and P-1709).

Record D

I have already found that the second e-mail in Record D is exempt under section 19.

As far as the first e-mail is concerned, it is an exchange between various Ministry staff regarding how to respond to the legal advice contained in Record C. The Ministry submits:

> The harm associated with disclosure would be the lack of communication between staff who are considering whether to follow the legal advice received. Staff would not be as forthright about committing their recommendations and reasons for those recommendations in writing.

I find that certain parts of the first e-mail contain the author's recommendations as to the appropriate action in response to the legal advice, and qualify for exemption under section 13(1). The rest of the e-mail does not. I will attach a highlighted version of the e-mail with the copy of this order sent to the Ministry, identifying the parts that qualify for exemption and should not be disclosed to the appellant.

Records E, F, L, M, N, O, P, S, U and V

Although section 13(1) is listed as one of the exemption claims for Records E, F, L, M, N, O, P, S, U and V, the Ministry makes no reference to this exemption claim for these records in its representations. Records E, F, M, S and U consist of e-mails between Ministry staff; Record L is an e-mail with a briefing note attached; Records N and O are e-mails transmitting attached draft documents reflecting discussions involving contamination issues in the City; Record P is a series of four e-mails dealing with administrative matters; and Record V is a briefing note.

The Ministry has failed to discharge its burden of providing the necessary evidence and argument to establish the section 13(1) exemption claim for these records. Without this evidence, I am unable to determine with any degree of certainty the relationship among the various individuals sending or receiving these records, and the role their content might play in the events surrounding the soil contamination issues involving the corporation and the City. None of these records contain and advice or recommendations on their face, and I find that none of them qualifies for exemption under section 13(1).

Records K and T

Record K is an e-mail with attached memorandum and briefing note. The Ministry claims that this entire package qualifies as advice and recommendations and should be exempt under section 13(1). Having carefully reviewed these documents, I find that certain portions of all three documents contain

recommendations of a public servant that could be accepted or rejected by senior Ministry officials during the process of determining how to deal with the situation involving soil contamination in the City. These portions qualify for exemption under section 13(1). The rest of these documents contain factual material (the section 13(2) exception) and/or the opinions of Ministry staff that does not constitute advice or recommendations. These portions can be severed without disclosing the portions which qualify for exemption under section 13(1).

Record T consists of a covering memorandum transmitting the memorandum contained in Record K. I find that the covering memorandum does not contain any advice or recommendations. I have already addressed the attached memorandum in my discussion of Record K.

Record Q

Record Q is a transmittal e-mail attaching a memorandum from one Ministry official to another. The Ministry submits:

> The primary purpose of this memorandum attached to the e-mail was to ask [the recipient employee] to revise the briefing note to reflect the missing elements in the note.

I do not accept the Ministry's position. I find that the covering e-mail is simply a transmittal note and clearly does not qualify for exemption under section 13(1). The attachment is a one-page memorandum that contains factual clarification provided by a Ministry official regarding the content of the memo and briefing note portions of Records K to T. None of this constitutes recommendations from a public servant that can be accepted or rejected by the recipient employee during the process of determining how to deal with the situation involving soil contamination in the City. As such, I find that the attached memorandum qualifies for exemption under section 13(1).

Record R

Record R is an e-mail with two briefing notes attached. The Ministry's representations do not address the section 13(1) exemption claim for Record R. Some portions of the briefing notes contain the same information I found qualifies for exemption in my discussion of Record K, and I find that this information also qualifies here for the same reasons. In the absence of any relevant evidence, I find that the e-mail and the rest of the briefing notes do not contain any advice or recommendations and do not qualify for exemption under this sections.

Records 3, 7, 8, 12, 13 and 14

Although section 13(1) is listed as one of the exemption claims for Records 3, 7, 8, 12, 13 and 14, the Ministry makes no reference to this exemption claim for these records in its representations.

Record 3 is a draft discussion paper prepared by Ministry staff concerning an approach to dealing with soil contamination in the City; Records 7, 12 (which is a duplicate of Record G), 13 and 14 are e-mails

exchanged between various Ministry staff; and Record 8 appears to be a draft itinerary of items for discussion at a meeting involving officials dealing with soil contamination in the City; Record 14 is an e-mail between Ministry staff.

The Ministry has failed to discharge its burden of providing the necessary evidence and argument to establish the section 13(1) exemption claim for these records. Without this evidence, I am unable to determine with any degree of certainty the relationship among the various individuals sending or receiving these records, and the role their content might play in the events surrounding the soil contamination issues involving the corporation and the City. None of these records contain and advice or recommendations on their face, and I find that none of them qualifies for exemption under section 13(1).

In summary, I find that the portions of Records D, K, R and T, as described above, qualify for exemption under section 13(1) of the *Act*. I further find that the remaining portions of Records D, K, R and T, as well as Records E, F, L, M, N, O, P, Q, S, U, V, 3, 7, 8, 12, 13 and 14 do not qualify for exemption under this section.

Section 13(2)

The appellant submits that even if some of the records contain advice or recommendations, these records are also subject to the requirements of section 13(2) of the *Act*. In particular, the appellant submits:

> It is respectfully submitted that the documents at issue would likely fall under at least two categories described in s. 13(2) of the *Act*; namely s. 13(2)(d) "an environmental impact statement or similar document" and s. 13(2)(l) "reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power ...".
>
> It is respectfully submitted that s. 13(2)(d) should be given a broad interpretation in a manner that is consistent with *Act's* objective of favouring the disclosure of information relating to environmental hazards. In our respectful submission, any information contained in the advice or recommendations of a public servant which relates to the probable or actual impact of the soil contamination in Port Colborne on people, plants and animals is an "environmental impact statement" and is accordingly exempted from s. 13(1). To the extent that such advice or recommendations disclose other general environmentally related concerns about the soil contamination, such information would also be caught by the language of s. 13(2)(d) of the *Act*.
>
> In deciding to allow [the corporation] to conduct a CBRA, instead of issuing a Control Order based on its Guideline, the MOE exercised a discretion not to avail itself of the provisions in s. 7 of the *Environmental Protection Act*. It is respectfully submitted that the reasons for that decision are exempted from s. 13(1) of the *Act* notwithstanding that those reasons may be contained in the form of advice or recommendations of a civil servant.

Sections 13(2)(d) and (l) read as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (d) an environmental impact statement or similar record;
>
> (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

The Dictionary of Environmental Law and Science, edited by William A. Tilleman, Chair of the Alberta Environmental Appeal Board defines the term "environmental impact statement" as follows:

> **1.** A document required of federal agencies by the National Environmental Policy act for major projects or legislative proposals significantly affecting the environment. A tool for decision making, it describes the positive and negative effects of the undertaking and cites alternative actions. **2.** A documented assessment of the environmental consequences and recommended mitigation actions of any proposal expected to have significant environmental consequences, that is prepared or procured by the proponent in accordance with guidelines established by a panel. **3.** An environmental impact assessment report required to be prepared under [Alberta's *Environmental Protection and Enhancement*] *Act*. **4.** A detailed written statement of environmental effects as required by law.

Although established in the context of another province's environmental protection legislation, I find that this in an appropriate definition to adopt for the purposes of interpreting the same term in section 13(2)(d) of the *Act*.

It is clear that none of the records I have found qualify for exemption under section 13(1) meet the definition of an "environmental impact statement", as outlined above. Record D is an e-mail exchange, and Records K (duplicated as part of T), Q and R are memoranda and/or briefing notes prepared by Ministry staff as part of the internal discussion process for addressing soil contamination issues in the City. I find that none of these documents is required to be produced by any law, policy or guidelines in place by an environmental regulatory body, nor can any of them accurately be characterized as "statements" as that term is ordinarily understood in common usage. Section 13(2)(d) also includes the phrase "or similar record" within the scope of this exception. It is clear to me that the records which I have found qualify for exemption under section 13(1) are not similar in nature to an "environmental impact statement" as I have defined the term.

As far as section 13(2)(l) is concerned, the e-mails, internal memoranda and/or briefing notes which I have found partially qualify for exemption under section 13(1) clearly do not constitute a "final decision, order or ruling of an office of the institution" in the exercise of a discretionary power. Rather, as I have stated earlier, they are documents produced as part of the internal discussion process for addressing soil contamination issues involving the City and the corporation.

Accordingly, I find that the exceptions provided by sections 13(2)(d) and (l) have no application in the circumstances of this appeal.

The only other exception in section 13(2) that is relevant in this appeal is section 13(2)(a), which covers "factual material" found in any of the records. In determining that only parts of Records D, K, R and T qualify for exemption under section 13(1), I have found that all factual material contained in these records should be severed and disclosed.

THIRD PARTY INFORMATION

The Ministry claims that Records A, B, C, G, H, K, M, N, O, and 1 through 19 qualify for exemption under sections 17(1)(a), (b) and (c) of the *Act*.

I have already determined that Records C, H and one page of Record B qualify for exemption under section 19, and that parts of Record K qualify for exemption under section 13(1). For that reason I will exclude these records from my discussion of section 17(1).

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the parties resisting disclosure (in this case the Ministry and the corporation) must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; **and**

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

(Orders 36, P-373, M-29 and M-37)

The Court of Appeal for Ontario, in upholding my Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the

> interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

(*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 at 476 (C.A.))

The Ministry's representations concerning Records A, B, G and K touch on other exemption claims, but do not address any of the requirements of section 17(1).

The only representations provided by the Ministry on this issue for Records M, N and O consist of the following statement:

> For these records, section 17(1)(a), (b), (c) of the *Act* were used as well as 18(1)(a) and (e). Since part of the negotiations are concluded, the Ministry suggests that the Office of the Information and Privacy Commissioner rely on the submissions of the two third parties ...

The Ministry has provided no representations on the application of section 17(1) to Records 1 through 19.

Part 1: Type of Information

The corporation submits that the records that it provided to the Ministry contain scientific and technical information. The corporation states:

> ... [The information provided to the Ministry] involves the identity of a specific type of plan, the applied practices necessary to get the plant to take up nickel from the soil, and the possible options to recover nickel from the plants biomass on a commercial scale....

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

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include

architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act* (Order P-454).

Record 1 is a "Record of Verbal Transaction" written by Ministry staff regarding a phone conversation with the corporation. Record 2 is a fax transmission from the corporation to the Ministry suggesting a delay in a proposed meeting date. Record 11 is a Ministry cover letter transmitting meeting minutes to the corporation. Clearly, none of these records contains any of the types of information listed in section 17(1).

Records A, B, G, M, 4, 5, 7, 12, 13, 14 and 19 are all e-mails between Ministry staff. These e-mails reflect discussions of the soil contamination situation in the City and various meetings where issues were or will be discussed concerning this matter. None of these e-mails contains any of the types of information listed in section 17(1).

Records N, O, 3, 6, 8, 9, 10 and 15 consist of meeting outlines, agendas and minutes dealing with the soil contamination issue. Record K is an e-mail, attaching a memorandum and briefing note, as described earlier in this order. Again, I find that none of these records contains scientific or technical information, nor any of the other types of information listed in section 17(1).

Record 16 is a set of overhead presentation slides used by a third party agricultural researcher at a meeting apparently held in July 1998. The record indicates that it was provided to the Ministry by the corporation. Record 18 is a detailed "Risk Assessment for Nickel in Soil", dated May 1998, that was apparently prepared by a number of experts, including a representative of the corporation and the individual who made the slide presentation using Record 16. The record indicates that it was provided to the Ministry by the corporation. Both of these records contain information belonging to the natural or logical sciences and appear to arise from studies which were conducted by or on behalf of the corporation.

I find that Records 16 and 18 both contain scientific information, thereby satisfying the first requirement for exemption under sections 17(1) of the *Act*. All other records for which section 17(1) was claimed do not satisfy the first part of the test and, therefore, do not qualify for exemption under section 17(1) of the *Act*.

Part 2: Supplied in Confidence

In order to establish part 2 of the section 17(1) test, the information must have been supplied to the Ministry in confidence, either implicitly or explicitly. Information is considered to have been "supplied" if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (See, for example, Orders 36, P-204, P-51 and P-1105).

I am satisfied that Records 16 and 18 were provided by the corporation to the City in the context of dealing with the soil contamination issue in the City, thereby satisfying the "supplied" component of part 2 of the test.

The corporation submits that it has signed a confidentiality agreement with a third party organization whose specific testing expertise was used in the soil testing process. The corporation states that it received permission from this third party to supply information to the Ministry and the City in this regard, as long as it was held in confidence. The corporation provided me with a copy of the "Agreement of Nondisclosure and for Protection of Confidential and Proprietary Information".

On the issue of confidentiality, the appellant submits:

> ...[The corporation] has failed to establish that this information was supplied to [the Ministry] in confidence. It is respectfully submitted that an allegation of the existence of a confidentiality agreement, as between [the corporation] and a third party, is not conclusive evidence that the information in question was likewise supplied to [the Ministry] in confidence.
>
> From [the corporation's] submissions, it would appear that none of this information was expressly supplied to [the Ministry] in confidence. Whether or not an expectation of confidentiality is reasonable is based on a number of considerations including whether or not the document or information was "prepared for a purpose that would entail disclosure".

I accept the corporation's position on this issue. In the case of Record 18, it includes an explicit reference to confidentiality expectations on each page of the document and, given the nature of the record and the issues under consideration by the Ministry and the corporation, in my view, it is reasonable to conclude that it would have been provided by the corporation to the Ministry with a corresponding expectation of confidentiality. As far as Record 16 is concerned, it was prepared by one of the authors of Record 18 and deals with the same issues, and I find that it is reasonable to conclude that it too was supplied by the corporation to the Ministry with an implicit expectation that it would be treated in a confidential manner.

Accordingly, I find that the second part of the section 17(1) test has been established for Records 16 and 18.

Part 3: Harms

To discharge the burden of proof under the third part of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Order P-373).

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" (see Order P-373, and two court decisions on judicial review of that order in *Ontario (Workers'*

Compensation Board) v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), as well as Orders PO-1745 and PO-1747.)

Neither the corporation nor the Ministry made any representation on the harm described in section 17(1)(b). Therefore, I find that the evidence necessary to establish this harm is not present in the circumstances of this appeal.

Section 17(1)(a): Prejudice to competitive position

The corporation argues that the third party who produced Record 18 would suffer prejudice to its competitive position if the contents of this record and Record 16 were disclosed. The corporation submits that there are other commercial entities in the same business as the third party organization, and that while some of the information contained in these two records is covered by patent, they also contain proprietary information that is not. The corporation provided me with a copy of the patent held by the third party organization for its testing process.

The appellant submits the following:

> In its submissions, [the corporation] advises that the information provided to [the Ministry] is about a plant and the applied practices necessary to get it to take up nickel. [The corporation] also advises that no source of this information is currently publicly available. Although [the corporation] has not publicly identified the particular plant species, it has provided a great deal of other information about it to the local media as indicated in the article titled, "Yellow flower to suck nickel from soil". Exhibit E to [appellant's affidavit] contains a number of newspaper articles relating to the soil contamination problem in Port Colborne, including this article.

I have reviewed the newspaper articles provided by the appellant, and I find that the level of discussion in them does not approach the detailed level of scientific information contained in Records 16 and 18. If these records are disclosed, a significant amount of third party proprietary information would be put in the public domain and, in my view, it is reasonable to conclude that this would result in significant prejudice to the competitive position of the third party organization.

Accordingly, I find that, based on the representations of the organization and my independent review of the documentation provided in support of this exemption, that the third part of the section 17(1)(a) exemption test has been established for Records 16 and 18.

Because all three parts of the test have been established with respect to Records 16 and 18, I find that they both qualify for exemption under section 17(1)(a) of the *Act*.

ECONOMIC AND OTHER INTERESTS

The Ministry claims sections 18(1)(a) and (e) as another basis for denying access to Records A, B, C, E, F, G, H, K through V, and 1 through 19.

In light of my decisions regarding other exemption claims, I will restrict my discussion here to Records A, B, E, F, G, H, K through V, 1 through 15, and 19, which otherwise do not qualify for exemption.

Sections 18(1)(a) and (e) read as follows:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (5) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

Section 18(1)(a): Information that belongs to an institution and has monetary value

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

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value.

[Orders 87 and P-581]

The Ministry did not provide representations as to the type of information which is found in the records. The appellant states in his representations:

> ... [the Ministry] does not make any submissions with respect to s. 18(1)(a) and does not assert that the records at issue contain "trade secrets or financial, commercial, scientific or technical information *that belongs to* the Government of Ontario..."(our emphasis). It is respectfully submitted that without evidence (or even representations) that such information belongs to the Government of Ontario, [the Ministry's] position that s. 18(1)(a) applies to these records should not be upheld.

I concur with the appellant on this issue. There is no evidence before me to support various requirements of the section 18(1)(a) exemption claim, and I am unable to determine, based on an independent review of the

records, that any of them contain the types of information listed in that section, or that any of this information "belongs to" the Ministry or has monetary or potential monetary value.

Therefore, I find that none of the records qualify for exemption under section 18(1)(a) of the *Act*.

Section 18(1)(e): Positions, plans, procedures, criteria or instructions to be applied to any negotiations

In order to qualify for exemption under section 18(1)(e), the Ministry must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**

3. the negotiations must be carried on currently, or will be carried on in the future; **and**

4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

(Order P-219)

The only representations provided by the Ministry for this exemption claim relate to Record A. The Ministry submits:

> While the Ministry has agreed to treat the contamination on a community basis, this record represents the ministry's thinking on the issue [of how to deal with the contamination clean up].
>
> The information reveals the position the Ministry planned to bring to the meeting in 1998 and is still an outstanding issue between the Ministry, [the City and the corporation].
>
> The Ministry does not want to reveal to the two third parties the internal discussions [on this issue]. Our negotiating position at the next discussions would be seriously hampered in that [the position of the Ministry would be disclosed].

The appellant responded to the Ministry's submissions as follows:

> With respect to s. 18(1)(e), the [the Ministry] has made no representations concerning documents e, f, l, m, n, o, p, r and s, and advises that, "as part of the negotiations are concluded, the Ministry suggests that the Office of the Information and Privacy Commissioner rely on the submissions of the two third parties..."...

> In order for [the Ministry] to rely on this exemption, the negotiations must be either on-going or expected to be carried out in the future. Once the negotiations are concluded, this exemption is no longer available because no harm could ensue to the Government's negotiating position by the disclosure of such information. [The Ministry] has already made a decision to allow [the corporation] to conduct a CBRA. It has already advised in its submissions that the negotiations are partly concluded. Therefore, it is respectfully submitted that any information relating to "negotiations" regarding the decision to allow [the corporation] to conduct a CBRA are no longer exempted by s. 18(1)(e) of the *Act*.

I also concur with the appellant on this issue. There is no evidence before me to support the various requirements of the section 18(1)(e) exemption claim for all records, with the exception of Record A, and I am unable to determine, based on an independent review of the records, that any of them contain positions, plans, procedures, criteria or instructions intended to be applied to current or future negotiations conducted on behalf of the Ministry.

As far as Record A is concerned, I accept the Ministry's submission that it contains an outline of one Ministry employee's view of the position that the Ministry would be taking in upcoming discussions with the corporation on the soil contamination issues in the City. However, as the appellant points out, the Ministry has completed its discussions in this regard and has made a decision as to how it will treat the corporation in the context of this soil remediation. Record A is dated July 7, 1998 and, based on the brief representations provided by the Ministry, I am not persuaded that the position outlined in Record A is one that would still be applied to any current or future negotiations involving this matter, as required by section 18(1)(e).

Therefore, I find that none of the records qualifies for exemption under section 18(1)(e) of the *Act*.

PUBLIC INTEREST IN DISCLOSURE

The appellant claims that the "public interest override" in section 23 applies in the context of this appeal. Section 23 states:

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

The public interest override provided by section 23 does not apply to records which qualify for exemption under section 19 of the *Act*. Therefore, the only records subject to consideration under section 23 in this appeal are Records 16 and 18, which I have found qualify for exemption under section 17(1)(a), and portions of Records D, K, R and T which meet the requirements for exemption under section 13(1).

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption

[Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-241, former Commissioner Tom Wright commented on the burden of establishing the application of section 23. He stated:

> The *Act* is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

The appellant's legal counsel provides the following submissions on the application of section 23:

> In Port Colborne, a great deal of media and political attention has been given to the soil contamination problem and the CBRA as seen by the numerous articles in Exhibit "E"...The CBRA involves a community remediation plan that is being promoted by the company responsible for the contamination. It is clear that [the corporation] intends to use the CBRA to challenge [the Ministry's] generic remediation guidelines. It also intends to use the CBRA as a response to litigation commenced by [the appellants] (and possibly others in Port Colborne) to require [the corporation] to clean up their properties.
>
> The residents of Port Colborne, including [the appellants], are understandably concerned about the CBRA. It has been held that there is a compelling public interest in the disclosure of safety information where the effect of disclosure would provide assurances that the institution that has the information in its records (and others) is aware of the safety related issues and that the proper actions are being taken (Order P-270, Brief of Authorities, Tab 7).
>
> In this appeal, requiring [the Ministry] to disclose the information provided to it by [the corporation] would allow the public to assess whether or not [the Ministry] is being provided with accurate and reliable information by [the corporation] regarding the safety risks associated with the contaminants. It would also assist the residents of Port Colborne to determine whether or not they should participate in the CBRA.

In Order P-984, former Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of

> the record to the *Act's* central purpose of shedding light on the operations of government.
> ...

I agree with this interpretation and adopt it for the purposes of this appeal.

In order P-270, which the appellant refers to in his submissions, former Commissioner Wright found that there was a compelling public interest in disclosure of the nuclear safety related information. He stated:

> To my mind there are larger issues involved in this matter, and the public need to know is not confined to the need to permit full participation in the hearings referred to above. In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.

I agree with the former Commissioner's position on the public interest in nuclear safety. However, this appeal involves records relating to a soil contamination remediation plan which has no nuclear safety component. Section 23 must be considered in the context of the specific fact situation in a particular appeal and, in my view, the narrowly focused discussion of nuclear safety related concerns in Order P-270 bears little resemblance to the fact situation in the current appeal.

The appellant is this case is involved in litigation with the corporation, and his primary concern appears to be determining why the Ministry decided not to issue a Control Order against the corporation, pursuant to section 7 of the *Environmental Protection Act*, in order to ensure adequate soil contamination remediation. As a result of the various findings made by me in this Order, a large number of records will be disclosed to the appellant and, in my view, this level of disclosure is sufficient to address any public interest in this matter that may exist.

The records which I have exempted from disclosure (other than those which qualify for exemption under section 19) are relatively small portions of records which contain specific advice and recommendations made by Ministry staff in determining how to address the contamination problem, and a scientific study and related presentation materials which contain proprietary information of a third party organization that is not directly involved in the soil contamination remediation matter in the City. I acknowledge that there is a public interest in the environmental cleanup by the corporation of properties located in the City, as evidenced in part by the various newspaper articles provided to me in the context of this appeal. However, I also find that the appellant's interest in this appeal is primarily a private one, relating to his current and ongoing litigation with the corporation on issues more narrowly focused to the property owned by his clients. For this reason, I find that the public interest that does exist is not "compelling" as defined above (Order P-984).

ORDER:

1. I order the Ministry to disclose Records A, E, F, G, L, M, N, O, P, Q, S, U, V, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 19, and all portions of Records B, D, K, R and T that are **not** highlighted on the copy of these records provided to the Ministry with this order. Disclosure is to be made by **February 5, 2001** but not before **January 29, 2001**.

2. I uphold the Ministry's decision not to disclosure Records C, H, I, J, 16 and 18, as well as those portions of Records B, D, K, R and T that **are** highlighted on the copy of these records provided to the Ministry with this order.

3. I order the Ministry to conduct further searches for responsive records located in the Niagara District Office, and to provide the appellant with a decision outlining the results of these searches by **January 15, 2001**.

4. I order the Ministry to communicate the results of this search to the appellant by sending him a letter summarizing the search results on or before **January 22, 2001**. If additional responsive records are located, I order the Ministry to issue an access decision concerning those records in accordance with sections 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request. I further order the Ministry to provide me with copies of any correspondence sent to the appellant.

5. 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, only upon request.

Original signed by: December 28, 2000
Tom Mitchinson
Assistant Commissioner