



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

FINAL ORDER PO-1848-F

Appeal PA-990433-1

Ministry of Energy, Science and Technology



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Energy, Science and Technology (the Ministry) for access to all records pertaining to the exemption of Ontario Hydro's successor companies from the *Act*. The request was clarified with the requester to exclude legislation, public hearings and any documents of a public nature.

Following consultation, the Ministry granted partial access to the records. Access was denied or partially denied to the remaining records on the basis of the following sections of the *Act*:

- cabinet records - sections 12(1) and 12(1)(a), (b), (d) and (e);
- advice or recommendations - section 13(1);
- solicitor-client privilege - section 19; and
- invasion of privacy - section 21(1).

The decision letter was accompanied by an index which set out the specific exemptions applied to each record as well as those parts of the records which were considered not responsive to the request.

The appellant appealed the denial of access to the records.

During mediation, the Mediator reviewed all portions of the records which the Ministry claimed were not responsive to the request and advised the appellant that she concurred with the Ministry's position. The appellant agreed that the portions of records considered non-responsive could be eliminated from the scope of the appeal. In addition, portions of Records 21, 23, 24 and 25, consisting of the names and addresses of individuals were withheld under section 21(1). The appellant advised that he is not seeking access to this personal information.

As a result of the discussions held during mediation, the following aspects of the appeal were resolved:

- Record 6 is no longer at issue in this appeal as part of this document was disclosed and the remaining parts are not responsive to the request;
- Sections I, II and IV of Records 10 and 11 are not responsive to the request and these sections have been eliminated from the appeal. The remaining parts of these records are still at issue;
- Sections 1 and 2 of Record 16 are not responsive to the request and these sections have been eliminated from the appeal. The remaining parts of this record are still at issue;
- Part of Record 25 is not responsive to the request and the remaining severances contain personal information. Therefore, this record is no longer at issue;
- Records 21, 23 and 24 contain personal information and are no longer at issue in this appeal.

As a result of mediation, the mandatory exemption in section 21(1) is no longer at issue.

During the course of the appeal, the appellant raised section 23, the so-called public interest override.

I sent a Notice of Inquiry setting out the issues in the appeal to the Ministry, initially.

The appellant submitted a similar request to (the former) Ontario Hydro, which is now represented for the purposes of dealing with the access request by Ontario Hydro Services Company pursuant to a Transfer Order made by the Lieutenant Governor in Council under the *Electricity Act, 1998*. Ontario Hydro issued a decision which the appellant also appealed and Appeal PA-990434-1 was opened. One record at issue in the current appeal (Record 12), is the same as Record 1 in Appeal PA-990434-1. The Ministry was requested to address the issues arising with respect to this record in its submissions in the current appeal. I sent a Notice of Inquiry for Appeal PA-990434-1 to Ontario Hydro concurrently with the Notice I sent to the Ministry. For the sake of consistency, I also sent Ontario Hydro a copy of the Notice of Inquiry for the current appeal and provided it with an opportunity to address the issues arising in this appeal with respect to Record 12.

Both the Ministry and Ontario Hydro submitted representations in response. I sent the non-confidential portions of these representations to the appellant along with the Notice of Inquiry. The appellant did not submit representations.

I have dealt with the issues in Appeal PA-990434-1 in Order PO-1846. However, the representations submitted by Ontario Hydro pertaining to Appeal PA-990434-1 address the duplicated record in both appeals and I will, therefore, also consider them in this order.

RECORDS:

The records remaining at issue in this appeal consist of e-mails, notes and issues papers. The Ministry claims the application of section 12 for Records 7, 8, 9, 10 and 11; section 13(1) for Records 4, 5, 7, 8, 9, 10, 11, 15, 16 and 19; and section 19 for Records 1, 2, 3, 4, 5 and 12.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the *Act* reads:

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.

This section consists of two branches, which provide an institution with discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is... In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.

(Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.). This case dealt with section 19 of the provincial *Freedom of Information and Protection of Privacy Act*, the equivalent provision to section 12 of the municipal *Act*.)

Thus, section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the Ministry must demonstrate that one or the other, or both, of these heads of privilege applies to the records at issue.

The Ministry submits that Records 1, 2, 3, 4, 5 and 12 qualify for exemption under solicitor-client communication privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining 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 or legal assistance [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Records 1, 2 and 3

Records 1, 2 and 3 are e-mails between Ministry staff and Crown counsel employed by the Ministry. The Ministry states that Records 1 and 2 were sent from Crown counsel to a policy advisor with the Ministry for the purpose of confirming the scope of the legal advice being sought and to prepare a response. The Ministry states further that Record 3 was sent to the Executive Director of the Ministry's Electricity Restructuring Office for the purpose of providing legal advice to the Executive Director and the Director of the Energy Policy Branch relating to the issue of whether Ontario Hydro's successor companies would or would not be subject to the *Act*. The Ministry notes that Record 3 was copied to a number of individuals and indicates that one individual is counsel at the Ministry of Finance (Finance), another is counsel at Management Board of Cabinet (MBC) and that the others are counsel employed by the Ministry.

Based on my review of Records 1, 2 and 3 and the Ministry's submissions with respect to them, I am satisfied that they are confidential written communications between a client (the Ministry, as represented by its various staff) and Crown counsel employed by the Ministry. I am also satisfied that the Ministry sought and obtained the legal advice of Crown counsel employed by Finance and MBC within this confidential solicitor-client framework. Accordingly, I find that Records 1, 2 and 3 qualify for exemption under the solicitor-client communication privilege component of section 19.

Records 4 and 5

The Ministry states that these are e-mails from a policy advisor employed by the Ministry and the Executive Director of the Ministry's Electricity Restructuring Office in which the policy advisor relays the results of discussions he had with Crown counsel employed by MBC relating to the issue of Freedom of Information

and Ontario Hydro successor companies. The Ministry notes that a portion of both records contains Crown counsel's legal advice received in relation to the next steps that the Ministry is to follow.

I am satisfied that these two records contain information that would reveal the confidential legal advice of Crown counsel or are part of the continuum of confidential communications between a client and its legal advisor as contemplated in *Balabel*. Accordingly, I find that Records 4 and 5 also qualify for exemption under the solicitor-client communications privilege aspect of section 19.

Record 12

This record is a note from legal counsel employed by Ontario Hydro to Crown counsel employed by the Ministry. The Ministry submits that this record also falls within solicitor-client communication privilege as it is a confidential communication between a client and its legal advisor and that it was used for the purpose of giving legal advice.

With respect to the first argument, the Ministry states that Ontario Hydro was a Schedule II agency reporting to the Ministry and as such is able to provide legal advice to the Ministry within a confidential solicitor-client relationship based on the principle enunciated in Order P-965 relating to the "indivisibility of the Crown."

In the Notice of Inquiry that I sent to the Ministry and Ontario Hydro, I canvassed this issue in considerable detail and asked a number of specific questions relating to the status of Ontario Hydro and its relationship with the Ministry as well as specific questions relating to the solicitor-client relationship. In Order PO-1846, I found that Ontario Hydro had not established that this record was a confidential communication between a solicitor and client insofar as Ontario Hydro's claim for privilege was concerned. After considering the Ministry's submissions regarding this record, however, I find that it is not necessary for me to address this issue in this order.

In this regard, I turn to the Ministry's second argument. The Ministry states that the information in Record 12 was received by Crown counsel employed by it and was then used by her to share with the policy advisor. I am satisfied that, although it was received from a source outside of the Ministry, this record was used by Crown counsel as part of her working papers in relation to the provision of legal advice as part of the confidential solicitor-client relationship as contemplated by *Susan Hosiery*, and thus qualifies for privilege on this basis.

The actions by or on behalf of the institution and/or another party may constitute waiver of solicitor-client communication privilege or litigation privilege. As stated in Order P-1342:

... [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.)].

As I noted above, in Order PO-1846, I found that Ontario Hydro had not established that this record was a confidential communication between a solicitor and client. I also noted that even if it was, Ontario Hydro had waived privilege in this record by sending it to the Ministry. Therefore, in the hands of Ontario Hydro, this document is not privileged. However, in the hands of the Ministry, this document was used as part of its legal counsel's working papers, and the Ministry is, therefore, the possessor of the privilege. The Ministry states that it has not waived privilege as it "has not disclosed this record to others outside of the Ministry and has no intention of doing so."

The appellant has not provided any evidence indicating that the Ministry has waived privilege in this record and there is no evidence otherwise before me to establish this. Rather, the only evidence is to the contrary. Accordingly, I find that Record 12 qualifies for privilege under the solicitor-client communication privilege aspect of section 19.

CABINET RECORDS

The Ministry has relied on section 12(1), and particularly paragraphs (a), (b), (d) and (e) to withhold Records 7, 8, 9, 10 and 11. These sections read:

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

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- ...
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy.

The Ministry states that the issue of the application of the *Act* to the successor companies of Ontario Hydro was discussed at the Ad-Hoc Subcommittee of Policy and Priorities Board on Electricity Restructuring (a committee of Cabinet) on May 13, 1998, and by Cabinet on May 27, 1998.

Records 7, 8 and 11

The Ministry indicates that Record 7 is a policy note on the issue of the application of the *Act* to Ontario Hydro's successor companies prepared on May 12, 1998 by a policy advisor for the Director of the Electricity Restructuring office and the Assistant Deputy Minister. Record 11 is a document prepared by staff of Finance which was subsequently incorporated into Record 7. The Ministry states that Record 7 was prepared for the purpose of obtaining additional policy direction on this issue.

The Ministry indicates further that Record 8 is the actual briefing document prepared for the Minister and is based on the information contained in Record 7. The Ministry states that Record 8 was prepared by the Project Co-ordinator of the Electricity Restructuring office on May 13, 1998 and was signed by the Assistant Deputy Minister. The Ministry indicates that an unsigned copy of the record was provided to the Minister on May 13, and that a signed copy was then provided to him on May 14.

Record 9

This record contains a series of slides prepared by the Project Co-ordinator which the Ministry indicates was used for a presentation to the Ad-Hoc Subcommittee of Policy and Priorities Board on Electricity Restructuring. The Ministry points out that the content of the slides reflects the same information as was provided to the Minister in Record 8. The Ministry notes further that the Cabinet Minute for the meeting of Cabinet on May 27, 1998 which reflects the substance of the deliberations at that meeting outlines the issues which form the subject matter of Records 8 and 9.

Record 10

The Ministry indicates that this record was prepared in response to a briefing of the Minister on the issues relating to the establishment of the successor corporations of Ontario Hydro. Although Record 10 was prepared by the policy advisor for the Director of the Electricity Restructuring office, the Ministry notes that the content is very similar to Records 7 and 8 which are the subsequent briefings of the Minister prior to going to Cabinet.

The Ministry takes the position that Records 7, 8, 10 and 11 reveal the course of action the Ministry prepared for the Minister for discussion at the meeting of the Ad-Hoc Subcommittee of Policy and Priorities Board on Electricity Restructuring and at the meeting of Cabinet. The Ministry submits that disclosure of these four records would reveal the substance of the deliberations of these meetings.

The Ministry submits further that Record 9 was the actual document presented to the Cabinet Subcommittee and would clearly reveal the substance of the deliberations of the Subcommittee. In order for a record to qualify under section 12(1)(b), the Ministry must satisfy two criteria:

1. the record must contain policy options or recommendations; **and**
2. the record must have been submitted or prepared for submission to the Executive council or its committees.

[Order 73]

On reviewing Record 9, I am satisfied that it contains policy options and recommendations that were prepared for and submitted to the Ad-Hoc Subcommittee of Cabinet. Accordingly, I find that this record qualifies for exemption under section 12(1)(b).

It has been determined in a number of previous orders that the use of the term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) (for example, Orders P-11, P-22 and P-331).

It is also possible that a record which has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1). This could occur where a ministry establishes that disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations (Orders P-226, P-293, P-331, P-361 and P-506).

None of the remaining records were submitted to Cabinet or its Subcommittee. However, they clearly contain the same or similar information to that contained in Record 9. I am satisfied that disclosure of these records would reveal substance of Record 9 including the options recommended which would have been discussed at the Cabinet Subcommittee meeting. Therefore, in my view, disclosure of Records 7, 8, 10 and 11 would reveal the substance of deliberations of an Executive Council or its committees. Accordingly, these records qualify for exemption under the introductory wording of section 12(1) of the *Act*.

ADVICE OR RECOMMENDATIONS

The Ministry claims that the exemption in section 13(1) applies to portions of Records 15 and 19 and to the responsive portion of Record 16.

Section 13(1) reads as follows:

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.

Section 13(1) is subject to the exceptions listed in section 13(2).

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 [Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (march 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)]. 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* (Order P-233).

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."

Records 15 and 19

Record 15 is an Issue Note on Electricity Restructuring, dated February 17, 1999. The Ministry has withheld the portion of this record under the heading "Suggested Response." Record 19 is a House Note dated September 30, 1999. The Ministry has withheld the portions of this record under the headings "Message" and "Supplemental Issue."

The Ministry states that both of these records were authored by a manager at the Electricity Restructuring Office in conjunction with the Director of Communications. In particular, the Ministry states that Record 15 was written for the benefit of senior staff and Record 19 was an elaboration of Record 15 and was written for the Minister. The Ministry indicates that the suggested response portions of these two records reveal what the Minister could say if asked about this issue.

In Order PO-1678, Assistant Commissioner Mitchinson commented on the availability of the exemption claim in section 13(1) to this type of information:

Record 39 and the remaining portions of Record 22 are "House Book notes." Record 22 appears to have been prepared for the Attorney General. Although MBS does not explain who prepared Record 39, it seems most likely that it was prepared by MBS staff in order to assist the Chair of MBC in responding if asked particular questions in the Legislature on the issue of justice of the peace remuneration. I accept that the "Response" sections of these records contain information provided by staff as to the manner in which the Ministers should respond to questions on this issue. However, in my view, these records do not contain "advice" or "recommendations" in the sense contemplated by section 13(1). The information is provided to the Ministers for the specific purpose of making it available to the public if called upon to do so as part of open legislative debate. For this reason, I find that the "Response" portion of Records 22 and 39 would not reveal advice or recommendations of a public servant and, accordingly, it does not qualify for exemption under section 13(1) of the *Act*.

In my view, this reasoning is similarly applicable in the current appeal. It is apparent, from the records themselves and the Ministry's representations, that the information that has been withheld from Records 15 and 19 was intended to be used by the Minister or senior management in responding to public queries on this issue or as part of open legislative debate. Accordingly, I find that the withheld portions of Records 15

and 19 would not reveal the advice or recommendations of a public servant within the meaning of section 13(1), and they are not exempt under this section. As no other exemptions have been claimed for these two records, they should be disclosed to the appellant.

Record 16

This record is an Electricity Restructuring Meeting Note dated July 28, 1998. The Ministry states that this record was prepared by a policy advisor for the Manager and Executive Co-ordinator of the Electricity Restructuring Office prior to their meeting with the Information and Privacy Commissioner's office (the IPC) regarding the issue of Freedom of Information coverage. The Ministry states further that the purpose of the information in this record was to advise the recipients of the rationale for the advice presented to the Ministry and Cabinet Subcommittee.

In reviewing this record in conjunction with the other records at issue in this appeal, I am satisfied that disclosure of the information in it would reveal the advice or recommendations provided to the Minister by his staff regarding the issue of Freedom of Information coverage. Further, I find that disclosure of this information would also reveal the policy advisor's advice to the Manager and Executive Co-ordinator in that this record provides suggested approaches to issues raised by the IPC which the senior staff could accept or reject in addressing this issue. On this basis, I find that Record 16 qualifies for exemption under section 13(1) of the *Act*.

PUBLIC INTEREST IN DISCLOSURE

As I indicated above, the appellant believes that there is a compelling public interest in disclosure of the records. Section 23 of the *Act* reads:

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.

I have found that Records 7, 8, 9, 10 and 11 qualify for exemption under section 12(1) and that Records 1, 2, 3, 4, 5 and 12 qualify for exemption under section 19. As sections 12 and 19 are not subject to the "public interest override," section 23 has no application to these records.

With respect to Record 16, which I found to be exempt under section 13 of the *Act*, it has been established in a number of orders that in order 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), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 13(1). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in

access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

The purpose of section 13(1) 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. (Order P-1398)

As I noted above, the appellant did not submit representations. The Ministry's representations do not address this issue. In considering the circumstances regarding the issue of the application of the *Act* to Ontario Hydro's successor companies, I note the response of the IPC to this issue.

In her 1998 Annual Report, Commissioner Ann Cavoukian made the following comments under the heading "Key Issues":

Privatization and Alternate Service Delivery

The transfer of government enterprises to the private sector or to other independent bodies is another way that access and privacy rights can be lost or reduced. For example, under the Energy Competition Act, 1998, Ontario Hydro has been divided into five separate corporations. Two of these, the Ontario Electricity Generation Corporation and the Ontario Electric Services Corporation, have not been scheduled as institutions under either of the Acts, despite the fact that, in the past, all of Ontario Hydro has been covered. IPC Order P-1190, upheld by the Ontario Court of Appeal, illustrates why continued access to information in Ontario Hydro's possession remains important. Based on a provision of the legislation that permits the IPC to do so where it is in the public interest, the IPC ordered disclosure of records which assessed the safety of several nuclear power plants in Ontario.

The IPC met with representatives of Ontario Hydro and the Ministry of Energy, Science and Technology to discuss our concerns. The government has not agreed to make these new corporations subject to the Acts.

The Commissioner made the following recommendation relating to this issue:

(5) Closing doors

Access and privacy rights can be lost when government enterprises are transferred to the private sector or to other independent bodies. Ontario Hydro is a prime example. Under the Energy Competition Act, 1998, Ontario Hydro has been divided into five separate corporations, and the two largest segments - the Ontario Electricity Generation Corporation and the Ontario Electric Services Corporation - are not covered under either of the Acts. I understand the concerns about creating a level playing field in a competitive energy sector, but Ontarians are losing access and privacy rights to the key segments of the

successors to the largest utility in Canada - including the corporation that will be running all of Ontario's nuclear power plants. As Paul Webster astutely noted in a recent article in one of our leading newspapers, "By stating that commercial secrecy outweighs the public's crucial interest in transparency and accountability, the government denies an important public need." I recommend that:

- the government review its decision to leave Hydro's successor corporations outside the scope of the Acts;
- that the government formally implement a process involving ongoing consultation with the IPC on access and privacy matters, prior to finalizing privatization or alternative delivery initiatives.

Record 16 pertains to the discussion held between the IPC and the Ministry regarding this issue. As noted by Commissioner Cavoukian in her 1998 Annual Report:

Freedom of information refers to public access to general records relating to the activities of government, ranging from administration and operations to legislation and policy. The underlying objective is open government and holding elected and appointed officials accountable to the people they serve.

In my view, a decision by government relating to the application of the *Act* to Ontario Hydro's Successor companies is of considerable public interest. However, the parties have provided no evidence to assist me in determining whether this public interest is "compelling." That being said, it is important to note that the Commissioner, in her oversight role, has been involved with the Ministry regarding this issue and has, to a large degree, addressed the public's interest in this issue. The only record at issue in this discussion pertains to those discussions. On the basis of the Commissioner's role and her involvement in this issue, I do not find the public interest in the disclosure of Record 16 to be so compelling that it overrides the purpose of the section 13(1) exemption in the circumstances. Therefore, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I order the Ministry to disclose Records 15 and 19 to the appellant by providing him with a copy of these records on or before January 17, 2001.
2. I uphold the Ministry's decision to withhold the remaining records from disclosure.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____ December 21, 2000
Laurel Cropley
Adjudicator