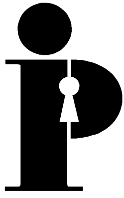

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1663

Appeal PA-980204-1

Pension Commission of Ontario

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BACKGROUND:

The Pension Benefits Act (the PBA) regulates pension plans provided for employees in Ontario. Regulation 909 contains various requirements for the funding of pension plans registered under the PBA. Regulation 909 originally specified that where a plan contained a solvency deficiency, the employer was required to make special payments to achieve an appropriate level of funding. On November 26, 1992, Ontario Regulation 712/92 (the Regulation) amended Regulation 909. The effect of the amendment was to exempt employers with pension plans valued at more than $500 million from the special payment obligations.

In the period leading up to the amendment, the (then) Ministry of Financial Institutions (the Ministry) (now the Ministry of Finance) and the Pension Commission of Ontario (the Commission) (now part of the Financial Services Commission of Ontario) assembled a team of individuals to draft the amending Regulation. This drafting team included the Ministry's Actuarial Consultant and the Commission's Actuary and Senior Legal Counsel. This group prepared drafts of the Regulation and related technical documents, and received and analysed input from selected organizations within the pension industry who were consulted on the Regulation. The drafting team took direction from senior officials within the Ministry, including its Senior Policy Advisor. Once the drafting team completed its draft of the Regulation, it was taken to Legislative Counsel, which provided advice and finalized the document. Finally, the draft Regulation was recommended by the Minister, approved by Executive Council (Cabinet) and ordered into force by the Lieutenant Governor in Council.

NATURE OF THE APPEAL:

The Commission received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to (i) submissions from "unions and other labour organizations", and notes and responses relating to those submissions, up to the date the Regulation came into effect; and (ii) records identifying individuals or organizations who had access to "the Stelco bargaining unit pension plan for members of the United Steelworkers of America Registration No. 0354878 between June 14, 1996 and July 27, 1997", and the dates and times of such access.

Within 30 days of receiving the request, the Commission advised the requester that it estimated the fees for access to be $1515. The Commission also advised the requester of its preliminary view that the exemptions in sections 12 (cabinet records), 13 (advice or recommendations), 17 (third party information) and 19 (solicitor-client privilege) applied to the records. The Commission stated that a final decision would be rendered upon receipt of a deposit of 50% of the fee estimate.

Approximately three weeks after receiving the interim decision, the requester paid the deposit amount, but the Commission neither provided the records nor provided a final decision on access. The requester appealed the Commission's deemed refusal to this office pursuant to sections 29(4) and 50(1) of the Act, and Appeal Number PA-980159-1 was opened.

Approximately five months after the fee was received, the Commission issued its decision letter. It advised that the Commission had located 19 responsive records, and that it had agreed to grant access in whole to

Record 11, and in part to Records 1, 10 and 12. The Commission stated that it was denying access to the balance of the records under sections 12, 13, 17, 19 and 21 (personal information) of the Act, except for the withheld portion of Record 1 which it said was not responsive to the request. The Commission further indicated that the final fee was $1,686.80, and that upon receipt of the balance of $929.30, the non-exempt information would be sent to the requester. The Commission included a detailed index of records with its second decision, setting out the nature of each record and, where relevant, the basis on which it was claimed to be exempt. On the basis of the Commission's final decision, this office closed Appeal Number PA-980159-1.

The requester (now the appellant) appealed the Commission's decision to this office and Appeal Number PA-980204-1 was opened.

During the mediation stage of the appeal, the Commission specified on which particular subsections under section 12 it was relying for each relevant record.

The 17 records at issue responsive to the first part of the request consist of letters, draft letters, memoranda and notes, mainly concerning submissions made by members of the consultation group. Record 10, the only record responsive to the second part of the request, is entitled "Plan Viewing Appointment" form. The Commission withheld from this record the name of the individual on the form, and the name, address and telephone number of the individual's organization.

A Notice of Inquiry setting out the issues in the appeal was sent to the appellant, the Commission and 14 affected persons. Representations were received from the appellant, the Commission and three affected persons.

The Commission's representations relied extensively on a previous decision (Order P-771) involving the Ministry and a request for the same or similar records, as well as a decision of the Ontario Court (General Division) Divisional Court on judicial review quashing that order [Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (1997), 102 O.A.C. 71]. Since this case is highly relevant to the issues in this appeal, but was not referred to in the Notice of Inquiry, I contacted the appellant's counsel to notify her of the fact that the Commission was relying on these two decisions. I further indicated to her which records were common to both cases (Records 2, 6, 7, 15, 17 and 19 in the current appeal, referred to as Records 38, 38, 39, 50, 22, 24 in the earlier case). Finally, since the Commission submitted for the first time in its representations that the consultation submissions from non-labour organizations attached to Record 19 were not responsive, I advised the appellant's counsel of this fact. The appellant's counsel made supplementary representations on these matters.

DISCUSSION:

FEES

Under section 57(1) of the Act an institution is required to charge a requester fees for (among other things) time spent locating responsive records and preparing records for disclosure, and the costs of copying records [paragraphs (a), (b) and (c) respectively]. Section 6 of Regulation 460 provides that time spent locating and preparing records should be charged at $7.50 per quarter hour, and photocopies should be charged at $0.20 per page.

The Commission states that its fee of $1,686.80 is based on 53 hours of search time, 3 hours of preparation time and 34 pages of photocopies.

In support of its fee decision, the Commission states that it was required to search through a very large volume of records located at various branches of the Commission in order to locate the specific records responsive to the request. The Commission further explained:

> Each of the above Branches [Pension Plans, Policy & Research, Legal Services, Archived files of each of these Branches] maintained their own separate filing systems and electronic tracking systems. These filing systems are organized by pension plan, in the case of Pension Plans Branch; by policy initiative, in the case of the Policy & Research Branch; and by subject, in the case of the Legal Services Branch. All files are assigned alpha-numeric identifiers and are tracked electronically. Since September 1994, Legal Services Branch has had a document management system which electronically tracks individual internal documents as well as files. The records at issue pre-date Legal Services Branch's document management system, necessitating a manual search of its files.
>
> [] The [Commission] identified about 4.5 feet of potentially responsive records, all of which had to be carefully reviewed. In addition, during the course of the second-stage review, an additional 2 feet of potentially responsive records were identified, which also required careful review. Many of the 6.5 feet of potentially responsive records were highly complex and technical. The review of records was time-intensive, particularly to determine if a record was responsive to the Requester's request for records with "responses" or "notes" relating to submissions made by unions and labour organizations.
>
> The actual time spent searching for responsive records was as follows:
>
> | | | |
> |---|---|---|
> | (a) | Pension Plans Branch: | 0.25 hours |
> | (b) | Policy & Research Branch: | 5.25 hours |
> | (c) | Legal Services Branch: | |
> | | - initial records | 35.5 hours |
> | | - additional records | 12.0 hours |
> | | **Total** | **53.0 hours** |
>
> The actual time spent preparing the records was **3.0 hours** [emphasis in original].

The appellant made no representations on the fee issue.

The Commission has provided a detailed and reasoned explanation as to how it arrived at its fee. In the circumstances, I see no reason to vary its fee decision.

SCOPE OF THE REQUEST

The Commission submits that portions of Records 1 and 19 are not responsive to the request. The Commission raised this issue with respect to Record 1 in its decision letter, but raised this issue with respect to Record 19 for the first time in its representations.

Record 1 is a memorandum from the Ministry's Senior Economist to other members of the drafting team, attaching a "preliminary list of contacts" to notify once the new Regulation was in effect. The attachment lists a number of actuarial firms, employers, unions and other organizations, some of which were involved in the draft Regulation consultation process. The Commission argues that, based on the wording of the request, which specified information concerning "unions and other labour relations organizations", a record containing the names of "non-labour organizations" is not within the scope of the request.

Record 19 is a covering memorandum and list of 12 organizations from which submissions were received, attaching these submissions. The Commission argues that the submissions from non-labour organizations are not responsive to the request in that they are "not reasonably related to" the request. The Commission does not indicate specifically which submissions it believes fall outside the request.

The appellant submits that the request encompasses "any documents which indicate the positions of unions or other labour organizations in respect of the Regulation" and that the request is "broad enough to include submissions by other parties that may recognize, express, refer to or in any way reflect the opinions and positions of unions or other organizations."

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request:

> 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 a request. It is an integral part of any decision by a head. The record 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 [Order P-880; see also Order P-1051].

In my view, while the opening words of the first part of the request refer to "submissions from unions and other labour organizations", the appellant broadens the request by stipulating that the request also should include "any documents indicating the position of such unions or organizations." I accept the appellant's characterization of the scope of the request.

Applying this definition of the request to the attachment to Record 1 and to Record 19, I find that only attachments 4 and 12 to Record 19 are submissions from unions or other labour organizations. Further, I find that none of the remaining records "indicates the position of such unions or organizations" or "recognize, express, refer to or in any way reflect the opinions and positions of unions or other organizations". Although the list attached to Record 1 includes union as well as non-union organizations, the mere fact that they are named does not bring the record within the scope of the request as phrased by the appellant. Only attachments 4 and 12 to Record 19 are "reasonably related" to the request and I will not consider the attachment to Record 1 and attachments 1 to 3 and 4 to 11 of Record 19 in this appeal.

Since attachment 4 to Record 19 is identical to Record 3, I will not consider this record either.

As a result, only Records 2-10, 12 to 18 and attachment 4 to Record 19 remain at issue in this appeal.

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act 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.

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

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

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

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

1. (a) there is a written or oral communication;

   (b) the communication must be of a confidential nature;

(c) the communication must be between a client (or his agent) and a legal advisor; and

(d) the communication must be directly related to seeking, formulating or giving legal advice.

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

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

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

[Order 210]

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. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. 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.)]

The Commission has claimed the application of both solicitor-client communication privilege and litigation privilege under section 19 for Records 2, 5 to 9, and 12 to 18. I will first consider the application of solicitor-client communication privilege to these records and then, if necessary, the application of litigation privilege.

Solicitor-client communication privilege

General principles

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]. The 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].

Divisional Court judgment

In 1993, the Ministry received a request for access to information similar to the request in this case, involving many of the same records. The Ministry granted partial access, relying on section 19, in part, to deny access to the remaining records. On appeal, in Order P-771, former Assistant Commissioner Irwin Glasberg reversed the Ministry's decision on section 19, in part.

On judicial review, in Minister of Finance, the former Assistant Commissioner's decision was quashed. The court (at pages 74-77) said with respect to the application of section 19 to the same or similar records:

> All of the records for which solicitor-client privilege was claimed came from the file of the Senior Legal Counsel at the Pension Commission. It is not disputed that the documents in question are communications between the client and legal counsel and that legal counsel gave legal advice relating to the preparation of the regulation in question.
>
> For obvious reasons, this Court, like the Commissioner, can only describe the records at issue in general terms without reference to their specific contents. The disputed portions of the records at issue consist of factual information which passed between legal counsel and the client. Two of the records, 8 and 20, were prepared by the Senior Counsel and sent to a client in the course of seeking instructions and giving advice. Records 23 and 50 are essentially the same document and were prepared within the Ministry. They outline certain points raised in the process of consultation with various parties and recommend that certain action to be taken. These documents were sent to the Senior Counsel by the client to assist her when drafting the regulation and giving legal advice. Record 27 was prepared by the Ministry Policy and Planning Branch and forwarded to Crown Counsel as part of her instructions in the drafting process and to be used in giving legal advice on the proposed regulation. Record 49 was prepared by a actuarial consultant and was forwarded by the Ministry to counsel for use in giving advice on drafting the regulation.
>
> The Commissioner's order required disclosure of portions of all of these records. The reasons for this part of the order are as follows:
>
>> In the case of Records 8 and 20, the information which I have ordered to be disclosed is factual in nature and does not relate to the provision of legal services. While the Ministry characterizes Records 23, 27 and 50 as containing "drafting instructions", there is nothing on the face of these records to support this assertion. Based on their titles and content, Records 23 and 50 are more accurately described as consultation summary documents whereas Record 27 is a status report. Neither of these documents is subject to protection under s. 19 of the Act.

> Finally, with respect to Record 49, the Ministry asserts that this document was prepared by Senior Legal Counsel for use in advising her client and Legislative Counsel on how to draft the new regulation. Since the document was, in fact, authored by the Ministry's actuarial consultant and only copied to the Senior Legal Counsel, I find that the solicitor-client exemption has no application to this record.

It is apparent that the Commissioner has interpreted s. 19 narrowly, effectively limiting its application to those portions of records which contain actual instructions to the legal counsel or legal advice rendered by her to the client.

. . . . .

. . . [I]t is my view that the Commissioner interpreted the scope of solicitor-client privilege in a manner that is fundamentally wrong in law. I accept the Ministry's submission that the exemption protecting solicitor-client privilege should be seen as "class-based". A "class-based" privilege is one that protects the entire communication and not merely those specific items which involve actual advice. This approach has been adopted with respect to a similar provision in the British Columbia Freedom of Information and Privacy Act . . . s. 14: see British Columbia (Minister of Environment, Lands & Parks) v. British Columbia Information and Privacy Commissioner) (1995), 16 B.C.L.R. (3d) 64 at 74.

Solicitor-client privilege is a substantive right and not merely an evidentiary rule: Solosky v. The Queen . . . ; Descôteaux v. Mierzwinski . . . The rationale for solicitor-client privilege was expressed in the following often quoted passage from the judgment of Jackett P. in Susan Hosiery Limited v. Minister of National Revenue:

> Insofar as the solicitor-client communications are concerned, the reason for the rule, as I understand it, is that if a member of the public is to receive the real benefit of legal assistance that the law contemplates that he should, he and his legal advisor must be able to communicate quite freely without inhibiting influence that would exist in what they said could be used in evidence against him so that bits and pieces of their communications could be taken out of context and used unfairly to his detriment unless their communications were at all times framed so as not only to convey their thoughts to each other but so as not to be capable of being misconstrued by others. The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself. It is immaterial whether they are verbal or in writing. (Emphasis added).

In Solosky v. The Queen . . . Dickson J. stated "the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right founded upon the unique

> relationship of solicitor and client." The rationale for the privilege is the need to ensure that one can make full disclosure of all the facts to one's counsel without fear of prejudice. Without the assurance of confidentiality, the client may be afraid to make full disclosure to the legal advisor and as a consequence will not have access to legal advice based upon all the facts.
>
> While solicitor-client privilege is usually thought of as a protection for the individual against the power of the State, I can see no basis for interpreting claims of privilege more narrowly when they are advanced by the state, particularly as the right is expressly preserved by s. 19. In carrying out their important mandate, public servants must be able to freely and openly communicate with legal counsel to gain appropriate access to legal advice. There is nothing in the language of s. 19 to suggest that public institutions are entitled to anything less than the full protection of solicitor-client privilege.

Representations

The Commission relies on the reasons for judgment in the above referenced Minister of Finance case in support of its decision to withhold Records 2, 5 to 9, and 12 to 18 on the basis of section 19. In particular, the Commission submits that in Order P-771, the former Assistant Commissioner upheld the section 19 claim with respect to records identical to Records 7 and 17 (referred to in that case as Records 39 and 22 respectively). In addition, the Commission states that the court in Minister of Finance quashed the decision that portions of Record 15 (referred to as Record 50 in that case) were not exempt under section 19, and that I too should find section 19 to apply. This same reasoning also applies to Record 16, which is identical to Record 15. For the remaining records (Records 2, 5-6, 8-14 and 18), the Commission makes specific submissions which I will refer to below.

The appellant submitted the following with respect to the Commission's section 19 solicitor-client communication privilege claims:

> [Records] 2, 5, 6, 7, 12, 16, 17, 18 all fall outside of the common law solicitor client privilege because none of these records is a communication between a solicitor and his or her client. [Records] 8, 9, 13, 14, 15 may also fall outside of the common law solicitor client privilege because they may also not consist of a communication between a solicitor and his or her client. Even if any of these records is a communication between a solicitor and his or her client (which the institution must prove), it will only be subject to solicitor and client privilege if it also meets the following tests: it is of a confidential nature; it is directly related to seeking, formulating or giving legal advice. A memo merely summarizing comments made concerning draft regulations ([Records] 8, 9 and 15), even if it could be shown that [the author of Records 8, 9 and 15] was the solicitor of [the recipient of those records], does not fall within the tests either of confidentiality or the seeking, formulating or giving of legal advice. Legal advice is not based upon popular opinion concerning a particular government action. It is based upon the application of the facts to law. The

> memos which the [Commission] is attempting to withhold from disclosure do not set out facts and issues and legal principles, they summarize comments made concerning the regulations. The same comment applies to [Record] 13.
>
> . . . . .
>
> None of the refused records was prepared for Crown counsel. Such a record would be in the nature of a memorandum of law or a chronology of facts relating to litigation or prepared for the purposes of giving a legal opinion. What was the specific advice or opinion given? What was the specific litigation? A memo summarizing comments made by interested parties concerning draft regulations is not a record prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

Records 2, 5, 6, 8, 9, 13-18

These records consist of communications among various members of the drafting team and senior officials providing instructions on the draft Regulation. It is clear on the face of Records 2, 6, 8, 9, 15 and 17, and on the basis of the Commission's representations, that the Commission's Senior Legal Counsel received each of these records in the course of the drafting process, either as an addressee (Records 15, 17) or as a person who was "carbon copied" (Records 2, 6, 8, 9).

Record 5 is a draft letter prepared to respond to the comments of a labour organization in the consultation process. The Commission submits that its Senior Legal Counsel was involved in drafting this letter. Records 13 and 14 are communications to the Commission's Legal Services Branch from the Ministry's Policy and Planning Branch and outside counsel retained by the Ministry respectively. Record 16 is a later draft version of Record 15, containing what the Commission submits are the handwritten notes of Senior Legal Counsel. Record 18 is a communication to the Commission's Actuary, from the Ministry's Actuarial Consultant, which the Ministry submits was provided to Senior Legal Counsel. Although it is not clear solely on the face of these records that Senior Legal Counsel received them, I am satisfied in the circumstances that she did so, given the Commission's representations and the fact that she was clearly kept apprised of relevant information during the drafting process. The appellant argues that these records are not communications between a solicitor and his or her client. For the reasons outlined above, I do not accept this submission.

The Commission submits that each of these communications was made on a confidential basis for the dominant purpose of giving or receiving legal advice from the Commission's Senior Legal Counsel. The appellant submits that these communications were not made for this purpose. More specifically, in the case of Records 8, 9 and 15, the appellant states that "[a] memo merely summarizing comments made concerning draft regulations" does not meet the test of "seeking, formulating or giving of legal advice".

In my view, the appellant's characterization of solicitor-client communication is overly restrictive and not consistent with the common law, which indicates that the privilege applies to a "continuum of communications" between a lawyer and client (see Balabel above). The fact that the communication does not set out "facts and issues and legal principles" does not remove it from the scope of solicitor-client

privilege, as long as the communication was made for the dominant purpose of obtaining legal advice (see Minister of Finance and Descôteaux above).

In the circumstances, given what was clearly Senior Legal Counsel's key role in providing advice in the Regulation drafting process, I accept the Commission's argument that these communications were made for the dominant purpose of obtaining legal advice. Further, I accept the Commission's submission that these communications were made with an intention to keep them confidential among the members of the drafting team.

Based on the above, I find that Records 2, 5, 6, 8, 9 and 13 to 18 are subject to solicitor-client communication privilege. This finding is consistent with the Divisional Court's judgment in Minister of Finance respecting either the same (Record 15) or similar records, and with the former Assistant Commissioner's finding in Order P-771 with respect to a record identical to Record 17.

Records 7, 12

The Commission submits that Record 7 consists of handwritten notes of Senior Legal Counsel used by her for the purpose of giving legal advice. I am satisfied that the Commission has accurately described this record.

Record 12 is identical to Record 11, which was disclosed to the appellant in full. This record consists of submissions made by a union in the context of a request for an adjournment of a hearing before the Commission on an issue related to the subject matter of the Regulation. The Commission withheld Record 12 because it contained what it submits are the handwritten notes of Senior Legal Counsel. The Commission submits, and I am satisfied, that these notes were used by Senior Legal Counsel for the purpose of giving legal advice.
In essence, both sets of notes in Records 7 and 12 formed part of Senior Legal Counsel's working papers. Further, I am satisfied that these notes were treated confidentially. Based on the Susan Hosiery case referred to above, I find that solicitor-client communication privilege applies to these notes [see also Order M-729, Order M-796, Supercom of California Ltd. v. Sovereign General Insurance Co. (1998), 37 O.R. (3d) 597 (Gen. Div.) and Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General), [1988] O.J. No. 1090 (H.C.)].

Waiver

The appellant submits that the Commission has waived privilege with respect to all of the records claimed to be exempt under section 19. The appellant argues that "privilege cannot be asserted over documents that have been disclosed to third parties (which may include internal as well as external distributions)."

Inquiry Officer Holly Big Canoe discussed principles of waiver in Order P-1342 [upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]:

> ... [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, the record was disclosed to another outside party (Order P-1342).

In this case, the records at issue were circulated only among members of the "drafting team", a limited group of individuals employed or retained by the Ministry or the Commission. There is nothing in the material before me to indicate that these records were provided to others outside this group. In my view, the degree of disclosure and the conduct of the parties here does not evince either express or implied waiver.

Severance

Section 10(2) reads:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

In Minister of Finance, the court (at page 77) stated the following with respect to the application of section 10(2) in the context of the section 19 solicitor-client communication privilege exemption:

> It is apparent that the effect of the order under review is to compel the Ministry to disclose what it told its legal advisor to obtain legal advice. In my view, that constitutes a derogation of solicitor-client privilege and cannot be supported as a acceptable interpretation of s. 19.

> Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.
>
> I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel. If facts communicated to legal counsel are to be found in some other form in the records of the Ministry, those records are not sheltered from disclosure simply because those same facts were disclosed to legal counsel. Similarly, documents authored by third parties and communicated to counsel for the purpose of obtaining legal advice do not gain immunity from disclosure unless the dominant purpose for their preparation was obtaining legal advice: Ontario (Attorney General) v. Hale (1995), 85 O.A.C. 229 (Div. Ct.).

In my view, none of the records claimed to be exempt under section 19 combines communications to or from counsel for the purpose of obtaining legal advice with communications "for other purposes which are clearly unrelated to legal advice". In addition, neither of the other limitations referred to by the court in Minister of Finance is applicable here. Therefore, I find that the section 10(2) severance provision has no application with respect to Records 2, 5 to 9, and 12 to 18.

Conclusion

Records 2, 5 to 9, and 12 to 18 are exempt under solicitor-client communication privilege.

Litigation Privilege

Because I found that all records for which section 19 was claimed are exempt in their entirety pursuant to solicitor-client communication privilege, it is not necessary for me to consider the application of litigation privilege to these documents.

CABINET RECORDS

General

The Commission claimed that Records 2, 5, 6 to 9, 13 to 18 were exempt under the cabinet records exemption in section 12 of the Act. Since I found all of these records to be exempt under section 19, I will not consider the application of section 12 to them. However, since section 12 is mandatory, I will consider its possible application to Records 3, 4 and the responsive portion of Record 19, attachment 12.

Section 12(1) of the Act reads:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an 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;
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
>
> (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; and
>
> (f) draft legislation or regulations.

In Order 22, former Commissioner Sidney B. Linden stated:

> In my opinion, the use of the word including in subsection 12(1) of the Act should be interpreted as providing an expanded definition of the types of records which are deemed to qualify as subject to the Cabinet records exemption, regardless of whether they meet the definition found in the introductory text of subsection 12(1). At the same time, the types of documents listed in subparagraphs (a) through (f) are not the only ones eligible for exemption; any record where disclosure would reveal the substance of deliberations of an Executive Council or its committees qualifies for exemption under subsection 12(1).

In Order P-331, Assistant Commissioner Tom Mitchinson stated:

> . . . [I]n order for a record to qualify for exemption under section 12(1) it must "reveal the substance of deliberations of an Executive Council or its committees". In my view,

> disclosure of a record would reveal the substance of deliberations if the disclosure of information contained in the record would permit the drawing of accurate inferences with respect to the actual deliberations (Order P-226).

Records 3, 4 and attachment 12 to Record 19 each consist of submissions from labour organizations in response to the circulation of a draft of the Regulation. I do not have sufficient information to conclude that any of these records actually was placed before cabinet. However, in making submissions, the authors of these records reveal the content of the draft Regulation, either expressly or by implication. Accordingly, major portions of these records would "permit the drawing of accurate inferences with respect to the actual deliberations" of cabinet and, therefore, are exempt either on the basis of the opening words of section 12(1) or on the basis of section 12(1)(f) respecting "draft legislation or regulations". The portions I find exempt under this section are highlighted on the copies of the records enclosed with the Commission's copy of this order. The balance of these records are not exempt under section 12(1) of the Act.

Severance

In Minister of Finance, the court (at pages 78-80) stated the following with respect to the application of the severance provision at section 10(2) in the context of the section 12 cabinet records exemption:

> There is a fundamental difference between the parties with respect to the application of the severance provision of the Act . . .
>
> The Ministry took the position that s. 10(2) could not be applied to any of the records. In its submission to the Commissioner, the Ministry contended that severance was not possible on the ground that severed material would not be responsive to the request, and that "in light of cabinet confidentiality being so interwoven with the facts, recommendations, options and opinions contained in the records at issue a reasonable severance is not possible and the records must be exempt in their entirety." The Commissioner rejected that contention for the following reasons:
>
>> In this order, I have directed that [16] of the records at issue be disclosed in part which means that I have applied the severance principle to these documents. While admittedly the records which I have reviewed are technical in nature and form part of a complex policy development process, I have not found it especially difficult to separate out that information which is subject to the exemptions and that which must be released to the appellant. I would suggest that experienced Ministry staff could equally have undertaken this task when the original decision letter was issued to the appellant.

The Ministry had requested the opportunity to consider severance if the Commissioner rejected its submission but the Commissioner refused to give the Ministry a second chance and proceeded to conduct the severance exercise himself.

While I am constrained by the fact that I cannot at this stage disclose the records themselves, I will attempt to describe in general terms the results of the Commissioner's severance exercise. It is apparent from the treatment accorded to the records at issue, that the Commissioner interpreted the severance provision as requiring a painstaking word-[by]-word review of the records and to require disclosure of every single word that is not subject to a exemption. In several cases (ie. records 6, 8, 25, 47, 55), the result is that little is left of a letter or memorandum other [than] the letterhead, date, salutation and concluding paragraph. In the case of at least one record (27), words or names are excised in one place, but undeleted in others. In several instances, while specific words, names or phrases are deleted, it would appear to be a relatively simple matter for a sophisticated reader of the document to deduce the content of some of the severed portions (ie. records 23, 27, 50).

I would accept that this is an area where deference is to be paid to the specialized expertise of the Commissioner in relation to the interpretation of the Act, and that this court should intervene only if the Commissioner's decision is patently unreasonable. I find, however, on the record before this Court that the Commissioner's interpretation and application of the severance provision is patently unreasonable. It is impossible to discern the reasoning which led the Commissioner to decide what to delete and what to leave from the reasons given for the order or from a examination of the records themselves. Counsel for the Commissioner was unable to offer more than the submission that we should accept that the Commissioner had made these distinctions after careful consideration of all the relevant documents. Where the order is inexplicable on its face, we cannot uphold it on blind faith. More important, the result cannot, in my view, be justified on the basis of s. 10(2) which requires disclosure of "as much of the record as can be reasonably severed without disclosing the information that falls under one of the exemptions." In my view, the Commissioner has ignored the word "reasonably" and has taken a literal and mechanical word-by-word approach. His interpretation appears to ignore the injunction not to apply the severance provision where the result would be to disclose exempted information. While it is apparent that a enormous amount of time and attention has been devoted to the word-by-word review, that painstaking effort has, in my view, produced a result which is, on its face, impossible to understand, and the reasons offered shed no her light on the matter. I can only conclude that the decision is patently unreasonable.

I would note, however, that while the Commissioner has taken an excessively aggressive approach with respect to s. 10(2), the Ministry's position that 49 of the 50 documents were subject to Cabinet privilege and that s. 10(2) has no application whatsoever to the records at issue plainly went too far. The Act requires the institution head to disclose what can be

severed and it is contemplated that the severance exercise will be conducted by those most familiar with the records. Had the Ministry made a effort to disclose what is severable, it is possible that the request could have been dealt with much more efficiently and much more expeditiously. While the Commissioner's order is, in my view, patently unreasonable, it should not go unmentioned that the situation before this Court was to some extent produced by the unreasonably hard line taken by the Ministry in its response.

In my view, it would not be appropriate to this Court's function on judicial review to engage in a detailed record-by-record review of what should and should not be disclosed. That task should be left to the Commissioner in light of the legal principles enunciated here. Accordingly, I will say no more about precisely what, if anything, must be disclosed from the records at issue here.

I would, however, adopt as a helpful guide to the interpretation of s. 10(2) the following passage from the judgment of Jerome A.C.J. in Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551 at 558 interpreting the analogous provision in the Access to Information Act, S.C. 1980-81-82-83, c. 111, sch. I, s. 25:

> One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete a entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt portions or words.
>
> Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfilment of the purposes of these statutes. Section 25 of the Access to Information Act, which provides for severance, reads:
>
> > Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of an institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part

> > that contains any such information or material. [Emphasis added]
>
> Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.

Similarly, in Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs) (1988), 51 D.L.R. (4th) 306 at 320, Jerome A.C.J. stated:

> To attempt to comply with s. 25 would result in the release of a entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the department is not proportionate to the quality of access it would provide.

In making severances to Records 3, 4 and attachment 12 to Record 19, I was mindful of the principles enunciated by the court in Minister of Finance. In my view, the information I found not to be exempt under section 12 cannot be characterized as "disconnected snippets", or as "worthless", "meaningless" or "misleading". Further, this information cannot reasonably be used to ascertain the content of the withheld passages.

THIRD PARTY INFORMATION

The Commission has claimed that Records 3, 4 and 19 are exempt under section 17(1). Since most of Record 19 is not at issue (except for attachment 12), and since I have found that substantial portions of Records 3, 4 and attachment 12 to Record 19 are exempt under section 12, I will consider the application of this exemption only to the remaining portions of those records.

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), each part of the following three-part test must be satisfied:

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

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

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur [Orders 36, P-373].

The Court of Appeal for Ontario recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the court 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.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)].

Part One: Type of Information

Previous orders of this office have defined "technical information" in section 17 as follows:

> . . . The Concise Oxford Dictionary (8th ed.) defines "technical", in part, as follows:
>
> > of or involving or concerned with the mechanical arts and applied sciences.
>
> In my view, 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).

This office has defined "financial information" in section 17 as follows:

> . . . financial information refers to specific data on the use and distribution of money, suchas information on pricing practices, profit and loss data, overhead and operating costs [emphasis in original] (Order 80).

The Commission submits that Records 3, 4 and 19 contain "technical actuarial data and reveal financial information". The affected persons who authored Records 3 and 4 make no specific representations onthis part of the three-part test. The affected person who authored attachment 12 did not make any representations to this office. In my view, while much of the information found exempt under section 12 may have qualified as technical or financial information, the remaining information cannot be so described. This information consists of background information about the consultation process and general statements of the author's views of the issues. The specific information which might be described as "technical" or "financial" has been removed from consideration under this exemption.

Accordingly, the section 17 exemption cannot apply to the portions of Records 3, 4 and 19 at issue. Based on this finding, it is not necessary for me to proceed to consider parts two and three of the test.

INVASION OF PRIVACY

Introduction

Section 30 of the PBA entitles certain individuals, on written request, to view documents that comprise a pension plan and pension fund, and other documents listed in Regulation 909 that are filed in respect of the pension plan and pension fund at the offices of the Commission (now the Superintendent of Financial Services). These individuals include beneficiaries, their agents and "a representative of a trade union that represents members of the pension plan". Section 29 similarly provides a right to inspect pension plan and pension fund documents at the premises of the employer.

Record 10 is a Commission form entitled "Plan Viewing Appointment", and represents a written request under the PBA to inspect pension plan and pension fund documents. The Commission withheld from this record the name of the individual on the form, and the name, address and telephone number of the individual's organization. The form contains a section entitled "Affiliation" below the name, address and telephone portion, which lists nine categories of individuals, including "Plan Member", "Lawyer", "Company Official" and "Union Representative" to be "checked" as appropriate. None of these categories was "checked" on Record 10.

Definition of Personal Information

The Commission submits that the withheld information in Record 10 qualifies as "personal information" within the meaning of paragraphs (c), (d) and (h) of the definition of that term in section 2(1) of the Act. The affected person who provided the information in question in Record 10 submits that paragraphs (b) and (h) apply. Those sections read:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual;
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

In Reconsideration Order R-980015, former Adjudicator Donald Hale reviewed the jurisprudence relating to the definition of the term "personal information" as it relates to individuals associated with organizations:

> . . . the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. Individuals expressing the position of an organization act simply as a conduit between the intended recipient of the message and the organization. The voice is that of the organization rather than that of the individual delivering the message. In the usual case, the views expressed are those of the organization, as opposed to the personal opinions or views of the individual within the meaning of section 2(1)(e) of the Act. Further, this information will not be considered to be "about" the individual, for the reasons set out above [emphasis in original].

The Commission provides detailed submissions on why a pension plan beneficiary or representative may wish to inspect documents at the Commission, rather than through the employer or plan administrator. The Commission also explains that its pension plan viewings are strictly controlled, and that its Plan Viewing Appointment forms are supplied and treated confidentially. Further, the Commission submits that disclosure of the withheld information from Record 10 would have an adverse effect on its ability to regulate pension plans.

The affected person submits that the withheld information "necessarily reveals the person's employment history and the disclosure of the name reveals the person's name, organization, and the fact that the person sought access to the pension plan", as well as the date of such access.

In my view, the individual who provided the information at issue in Record 10 did so in his capacity as a "representative of a trade union that represents members of the pension plan" under section 30 of the PBA, not in his personal capacity. My conclusion is supported by the fact that the individual, below his name, provided the name, address and telephone of his organization, not his residential address and telephone number, or the address and telephone number of the employer providing the pension plan.

I also find support for this conclusion in the case of Robertson v. Canada (Minister of Employment and Immigration) (1987), 42 D.L.R. (4th) 552 (Fed. T.D.), in which portions of a letter written by an individual in his capacity as a union representative were held not to constitute personal information under the federal Access to Information Act:

> I have examined the letter in question, including the excised portions, and have concluded that, in the context of making a required submission on behalf of the Union, the author has responded by making general comments that are quite appropriate under the circumstances and should be made public. He has signed the letter as a union official and has directed further inquiries on the union position to another union official whose name and telephone number he has provided [p. 58].

I note that Record 10 contains notices of the "legal authority for this collection of personal information" and of the "principal purpose for which the personal information is intended to be used". These notices are not determinative of the "personal information" issue where an individual has filled out a form in a representative capacity; they are included to ensure compliance with the provisions of Part III of the Act concerning the collection and use of personal information, in circumstances where an individual pension plan beneficiary has filled out a form in his or her personal capacity.

Both the affected person and the Commission have made extensive representations on the adverse effects which may result from disclosure of the information at issue in Record 10, namely a "chilling effect" on the willingness of individuals to inspect plan files and bring complaints to the Commission, as well as possible harassment and reprisals from employers. These concerns would be relevant considerations under the section 21 "unjustified invasion of personal privacy" analysis, in the event that I found the information to be personal information. In the circumstances, however, I am unable to consider them. I also note that the

Labour Relations Act, 1995 contains a number of provisions designed in part to prevent concerns of this nature from arising, including sections 3 (freedom to join a trade union and to participate in its lawful activities), 70 (employers not to interfere with unions) and 76 (no person by intimidation or coercion to compel a person from exercising rights under the legislation).

To conclude, the withheld information in Record 10 is “about” the labour organization the affected person represents, not about him in his personal capacity. This information is not “personal information” as that term is defined and the personal privacy exemption at section 21 of the Act does not apply.

PROCESS AT THE REQUEST STAGE

Section 26 of the Act requires an institution to respond to a request within 30 days, subject to a time extension. Section 27(1) permits an institution to extend the 30 day time limit for a reasonable period of time in certain circumstances, including where the request necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution. Section 27(2) requires the institution to give notice to the requester of a time extension. The time extension decision may be the subject of an appeal to this office under section 50(1).

As noted above, the institution issued an interim access decision and fee estimate within 30 days of receiving the request, and approximately three weeks later the appellant paid the deposit amount. However, approximately five months passed between the date the deposit was received and the date the Commission issued its final access decision.

I understand that the request necessitated a search through a large number of records, and that this fact may have caused the delay in issuing the final decision. However, the Act contemplates that in such circumstances an institution may extend the 30 day time limit and, if so, must notify the requester of this decision. In the absence of a time extension under section 27, the passage of five months prior to the final decision constitutes an unacceptable delay on the part of the Commission, and serves to frustrate one of the fundamental purposes of the Act, which is to provide timely access to information [see Order P-883, upheld on judicial review in Ontario (Minister of Consumer and Commercial Relations) v. Fineberg (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

ORDER:

1. I order the Commission to disclose to the appellant the withheld portions of Record 10, and the non-highlighted portions of Records 3, 4 and attachment 12 to Record 19 in accordance with the highlighted copies of these records enclosed with the Commission's copy of this order, by **May 3, 1999**, but not earlier than **April 28, 1999**.

2. In order to verify compliance with the terms of this order, I reserve the right to require the Commission to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

3. I uphold the balance of the Commission's decision.

Original signed by: March 30, 1999
David Goodis
Senior Adjudicator