Ministry of Attorney General

Ministries of Energy & Infrastructure
Legal Services Branch

777 Bay Street, 4th Floor
Toronto, ON M5G 2E5
Ph : (416) 325-6676
Fax: (416) 325-1781

Ministère du Procureur Général

Ministères de l'Énergie et de l' Infrastructure
Direction des services juridiques

777, rue Bay 4e étage
Toronto (Ontario) M5G 2E5
Tél. : 416-325-6676
Téléc. : 416-325-1781

Ontario

February 13, 2013

Kirsten Walli, Board Secretary
Ontario Energy Board
P.O. Box 2319, 26th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms Walli:

IN THE MATTER OF the *Electricity Act, 1998,* S.O. 1998, c. 15, Schedule A;

AND IN THE MATTER OF an Application made collectively by entities that have renewable energy supply procurement contracts with the Ontario Power Authority in respect of wind generation facilities for an Order revoking amendments to the market rules and referring the amendments back to the Independent Electricity System Operator for further consideration.

Board File No: EB-2013-0029

Please find attached the Ministry of Energy's Supplementary Submissions on Confidentiality regarding the document entitled *Managing Surplus Generation* dated May 14, 2012.

Yours very truly,

James Rehob
Senior Counsel -- Legal Services Branch, Ministry of Energy & Ministry of Infrastructure

c.c. All EB-2013-0029 Parties and Intervenors

Enclosure

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Electricity Act, 1998,* S.O. 1998, c. 15, Schedule A, s.33;

AND IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Schedule B, s.21;

AND IN THE MATTER OF an Application made collectively by entities that have renewable energy supply procurement contracts with the Ontario Power Authority in respect of wind generation facilities for an Order revoking amendments to the market rules and referring the amendments back to the Independent Electricity System Operator for further consideration.

SUPPLEMENTARY SUBMISSIONS OF THE MINISTRY OF ENERGY – CONFIDENTIALITY CLAIM

1. Pursuant to Procedural Order No. 2, on February 4, 2013, the Ministry of Energy ("Ministry") provided initial submissions ("Original Submissions") of the claim for confidentiality associated with the document listed in Schedule C to the February 1st, 2013 letter (the "Document") filed by the Independent Electricity System Operator (IESO) in response to the Applicants' letter dated January 31, 2013. The within submissions are intended to supplement the Ministry's arguments in respect of the claims for confidentiality which the Ministry wishes to assert over the Document.

Background and Context

2. The Document was originally authored by the Electricity Supply, Transmission and Distribution Division of the Ministry of Energy and came into the possession of the IESO through an email that Ministry staff sent on May 18, 2012. This covering email is attached as Exhibit "A" to these submissions. The email and its attachment reference the specific use that the Ministry wished to make of the Document in this instance: namely, as a policy development tool in order to inform a technical discussion, related to the development of data sets that the Ministry wished to have with the IESO in relation to the ongoing development of policy options. It was the intention of the Ministry to provide the Document in confidence to the IESO in order to assist the Ministry in certain technical aspects of its policy development. On the Document itself, the term "confidential" appears on each page and clearly signifies the Ministry's intention that the Document be treated as confidential.

Ministry's Position and Supplementary Argument

3. The Ministry's request for the continuation of confidential treatment of the Document is based on four main arguments: (i) that the maintenance of confidentiality over advice from Ministry staff to the Government and the Minister is critical to the policy development process; (ii) that the Document contains third-party confidential information; (iii) that disclosure of the Document would undermine the economic and other interests of Ontario; and (iv) that the balance of interests does not favour disclosure.

i. Confidential Advice to Government and Minister

4. As set out in our Original Submissions, the Document comprises advice to government, and in particular, advice to executive decision-makers on sensitive and developing policy matters.

5. The Document is a policy development tool which was intended to inform key government decision-makers, in confidence, about options and recommendations in relation the challenge posed by surplus baseload generation. This is an area of ongoing policy development and involves a delicate balancing of competing interests against critical constraints. The Ministry submits that the Government should be permitted to undertake policy analysis free from public scrutiny at early junctures in the policy development process.

6. The Ministry further submits that the Board should consider the potential detrimental effect on the deliberative process of public policy making should disclosure be ordered. The chilling effect of such disclosure is of particular concern in circumstances such as this case, where policy development is still ongoing, where information from sector entities like the IESO are critical to policy development, and where sensitive commercial concerns and other interests must be balanced. Public scrutiny throughout the policy development and decision making process would impede the ability of policy developers and key decision makers to thoroughly analyse options to address difficult issues and would hinder the development of recommendations to address those issues.

7. Instances where the Board has required the disclosure of Government briefing materials are rare. The only proceedings within the past ten years that Ministry counsel are aware of where the Board has ordered disclosure of briefing materials prepared for Government decision-makers involved EB-2010-0184[1]. In that case, disclosure occurred after the policy development process had run its course and direction had been taken by the Government. Such is not the case here.

Confidentiality supported by Section 13 FIPPA

8. The importance of confidentiality in the policy development process is supported by the freedom of information regime. Under section 13 of the *Freedom of*

[1] See Decision and Order (dated June 8, 2011).

Information and Protection of Privacy Act (Ontario), records may be withheld from disclosure on the basis that they 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".[2] The Information and Privacy Commissioner has held that the purpose of this exemption from disclosure is "to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure."[3] The Document in question contains such information, including options for consideration and specific recommendations by Ministry staff intended for key decision makers, the disclosure of which would undermine the very purpose that this exemption seeks to protect.

9. The Ministry submits that when considering whether or not to disclose all or part of the Document, the Board is not bound to strict definitions of the terms "advice" and "recommendation". Given the Board's unique supervisory role in the electricity sector, it is entitled to take a broad approach to the interpretations of the terms "advice" and "recommendations". The Board is in the position of being able to balance competing interests during a proceeding related to an important market rule amendment. The Ministry further submits that the Board has the jurisdiction, pursuant to the *Ontario Energy Board Act, 1998* (the "Act"), to broadly interpret the terms "advice" and "recommendations" in the context of these proceedings.

10. The interpretation which the Ministry submits is appropriate in this instance is one which includes background information, options and analysis leading to the development of recommendations for key senior decision-makers within "advice" and "recommendations".

11. A different approach that favours disclosure may be appropriate for settled policy decisions. In this instance, where the policy considerations are integral to ongoing policy development in the areas of renewable integration, energy pricing and Government's approach to surplus baseload generation, the Board should guard from disclosure a document which represents a nascent set of policy considerations and recommendations in order to preserve the integrity of Government's decision-making processes.

ii. Third-Party Confidential and Commercially-Sensitive Information would be prejudiced

12. The disclosure of the information contained in the Document has the potential to interfere with the ongoing negotiations of the OPA with its counterparties, could be prejudicial to the OPA's interests and may have broader implications for other

[2] As indicated in the Board's *Practice Direction on Confidential Filings*, under Appendix A subsection (g), in making a determination on a request for confidentiality, the Board may consider "any other matters relating to FIPPA and FIPPA exemptions".
[3] Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

entities involved in current and sensitive negotiations with Government or any of its agencies. These implications are either negative or not fully understood at this time. The interests of ratepayers and other stakeholders may also be affected since the Document reveals information about developing options which necessarily includes ratepayer impact.

iii. Disclosure Could Undermine the Economic and Other Interests of Ontario

13. Disclosure of this Document is requested while negotiations between the OPA and various counterparties with vested interests in the outcome of this proceeding are ongoing. The outcome of negotiations between the OPA and its various counterparties may have material economic impacts for ratepayers which Government, in its overall energy policy supervisory role, must weigh and consider when identifying and developing its energy policy options. Disclosure of the Document may therefore significantly prejudice the economic interests of Ontario.

14. Further, the OPA's ongoing negotiations with contract counterparties represents only one of a number of considerations involving competing economic interests which Government is currently in the midst of balancing. Other considerations include Ontario's strategic position with other electricity-exporting jurisdictions as well as its evolving approach to load development as a means of managing the challenges posed by surplus baseload generation. The information in this Document could provide counterparties and competing jurisdictions with unintended insight, economic and strategic advantages. Such insight and advantage could be provided to the detriment of the Province's or its agencies negotiating positions with commercial counter parties or its interactions with neighbouring jurisdictions in relation to electricity imports and exports, all of whom are seeking to maximize their economic positions.

iv. Balance of Interests

15. In light of the potential unknown and unintended harm to ongoing policy development which could result from such disclosure of the Document, the Board should only disclose the Document to the other parties and intervenors in response to a focused inquiry in relation to specific information, and not in response to a general inquiry for information, as in the present case.

16. The benefits of disclosure of this Document are at this stage purely speculative in nature, while the disclosure of this Document has the potential to undermine the free and frank development of energy policy within Government going forward. As the present proceedings demonstrate, the integration of renewable resources is an area of evolving electricity policy. The Ministry submits that to expose these kinds of documents to public scrutiny during these proceedings would leave Government vulnerable in its attempt to more fully develop cogent policy options and recommendations, without providing any clear benefit to the Applicants.

17. Public release of the Document in these proceedings may have unintended and negative consequences for other policy development processes which Government is currently in the midst of undertaking. Due to the potential impact

on Government's decision-making processes, the Board should only order the disclosure of such documents where there is a compelling public interest militating in favour of disclosure and where the good sought to be obtained clearly outweighs the harm. Neither compelling public interest nor public good have been demonstrated in this case.

Request of the Board

18. For the foregoing reasons, the Ministry requests that the Board preserves the confidentiality of the Document and does not order its production to the Parties. In the alternative, if the Board does order the disclosure of this Document, the Ministry respectfully submits that it would be more appropriate to disclose a version of the Document which was redacted in a manner consistent with the redactions sought by the OPA.

All of which is respectfully submitted.

Dated: February 13, 2013

Exhibit "A"

From: Louw, Brennan (ENERGY)
Sent: May-18-12 3:28 PM
To: Darren.Byers@powerauthority.on.ca; George Pessione; Rivard, Brian; Matsugu, Darren
Cc: Chander, Sunita (ENERGY); Tasca, Leo (ENERGY); Christie, Tim (ENERGY); Lolos, Katerina (ENERGY); McKeever, Garry (ENERGY); Chapman, Tom (ENERGY)
Subject: RE: Surplus Generation

Hello,

Together with the DMO – and based on the IESO/OPA presentation on surplus generation - we have identified a series of options for managing surplus generation that we would like to assess. The options are outlined on the attached slide ("Data Request"). Ideally, we would like to develop a dataset that can display how surplus generation would be met on an annual basis for each option through 2018 (e.g. total surplus generation and the volume of surplus mitigation by tool). We would also like to analyze the annual costs and benefits of each option through 2018 (relative to what is currently in the LTEP).

With this in mind, I'm wondering if there might be an opportunity for us to work together before the meeting next week to begin to put some numbers together. Barring that, perhaps we could at least begin the discussion of what may or may not be possible.

To demonstrate where we are heading, I have also attached the deck that was used to begin this process with DMO.

Thanks for your consideration and I look forward to hearing from you,
Brennan

From: Chapman, Tom (ENERGY)
Sent: May-17-12 3:37 PM
To: Darren.Byers@powerauthority.on.ca; George Pessione; Rivard, Brian; Matsugu, Darren
Cc: Chander, Sunita (ENERGY); Tasca, Leo (ENERGY); Christie, Tim (ENERGY); Louw, Brennan (ENERGY); Lolos, Katerina (ENERGY); McKeever, Garry (ENERGY)
Subject: Surplus Generation

Afternoon,

We've been working on the issue of surplus generation and are at the point where we are starting to assess all the possible options. We've been building on the work previously provided by the IESO I understand that work is also underway at the OPA. To ensure we are all heading in the right direction can we aim to meet next week to go over the data and key assumptions and next steps.

If you are okay with this approach could you let Katerina know your availability and we'll try and arrange a suitable time,

Many thanks
Tom

Information and Privacy
Commissioner/Ontario

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

ORDER P-1398

Appeal P_9600439

Ministry of Finance

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

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

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

NATURE OF THE APPEAL:

The appellant, a journalist, submitted a request to the Ministry of Finance (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to "all documents on the economic, social & Ontario budget impacts of Quebec independence compiled since January 1, 1995."

The Ministry identified 11 responsive records. In its decision letter to the appellant, the Ministry denied access to these records in their entirety, relying on the following exemptions in the Act:

- advice or recommendations - section 13(1)
- relations with other governments - section 15(a)
- economic and other interests - section 18(1)(d).

The appellant appealed this denial of access. In his letter of appeal, the appellant also raised the possible application of the "public interest override" in section 23.

This office sent a Notice of Inquiry to the appellant and the Ministry, inviting them to submit representations on the exemptions claimed, as well as the possible application of section 23. In response to this notice, both parties submitted representations. The appellant's representations referred me to the comments in his letter of appeal, which I have considered in reaching my decision in this order.

The appellant's representations also requested access to the Ministry's representations. The Ministry, in its own representations, made it clear that it would object to such a disclosure. Section 52(13) of the Act indicates that "... no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person". In certain circumstances, the Commissioner or his delegates may authorize disclosure of one party's representations to the other. In this case, however, I decided not to authorize such a disclosure because of the references to the records in the Ministry's representations, and the other sensitive information they contain about Ontario's intended bargaining positions in the event of a "Yes" vote in a future Quebec referendum on independence.

The Ministry's representations indicate that it has decided to disclose Record 8 (using the Ministry's numbering system), entitled "Survey of predictions regarding economic impact of a Yes victory in the Quebec referendum". Accordingly, I will order the Ministry to disclose this record to the appellant.

Records 1 through 7, inclusive, and Records 9 through 11, inclusive (again using the Ministry's numbering system), are at issue in this appeal. They consist of analytical summaries of agreements and other relations between the governments of Ontario and Quebec and their respective business communities, a paper on the possible economic consequences of Quebec independence, a summary of possible models for division of Canada's national debt, and a paper setting out strategies for relations with Ontario's creditors in the event of Quebec independence.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

This exemption is found in section 13(1) of the Act, which states:

> 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.

This exemption is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders 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. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act. In addition, the information must relate to the **giving** of advice as opposed to seeking advice (Orders P-848 and P-872).

In Order 94, former Commissioner Sidney B. Linden commented on the 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".

The Ministry claims that this exemption applies to the following:

- the portions of Record 1 under the headings "Message" or "Possible Ontario Response";
- the portions of Records 6 and 7 under the heading "Message" wherever it appears;
- Record 10 in its entirety.

The Ministry submits that these records were prepared by public servants to advise the Minister of Finance on suggested courses of action which may be taken in respect of a wide range of issues relating to the possible independence of Quebec.

I agree that the portions of Records 1, 6 and 7 identified by the Ministry, and Record 10 in its entirety, set out suggested courses of action to be accepted or rejected by their recipient during the deliberative process, and therefore qualify for exemption under section 13(1).

In most orders, when an exemption has been found to apply to particular information, it is not necessary to consider whether other exemptions claimed with regard to that information also apply. However, in this appeal, I must also consider the possible application of the "public interest override" in section 23, which will require me to weigh any compelling public interest in disclosure against the purpose of any exemption that is applicable. Therefore, in this order, I will

consider each exemption claimed by the Ministry for all parts of the records to which the Ministry has sought to apply it.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry relies on the part of this exemption found in section 15(a) of the Act, which states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

The Ministry claims that this exemption applies to all the records at issue in this appeal, in their entirety. Order P-908 includes an analysis of the language of section 15(a) and indicates that, for a record to qualify for exemption under this section, the Ministry must establish that:

1. the relations must be intergovernmental, that is relations between an institution and another government or its agencies; **and**

2. disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

Records 1-7 and Record 9 all analyse aspects of the relationship between the governments of Ontario and Quebec and their respective business communities, as well as the possible effects of Quebec independence on these relations and on the government of Ontario. Therefore, I find that the first requirement has been met with respect to these records.

Record 10 is about the relations between Ontario and its investors. It is possible that Ontario's relations with its creditors could affect relations between the Ontario and Quebec governments in the event of Quebec independence, but I am not satisfied that Record 10 is sufficiently linked to relations between the governments of Ontario and Quebec to meet the first requirement. (Nor, in my view, is the link sufficient to establish that disclosure of the record "could reasonably be expected to prejudice" relations with another government under the second requirement.) I find that Record 10 is not exempt under section 15(a).

Record 11 deals with possible relations between the governments of Quebec and Canada. Since section 15(a) refers to relations between Ontario (or an institution under the Act) and another government, I find that Record 11 does not meet the first requirement. Also, given the contents of the record and the fact that they have, to some extent, already been published elsewhere, I find that the possibility that disclosure of Record 11 could affect Ontario's relations with Quebec or the federal government is not sufficient to justify a conclusion that disclosure "could reasonably be expected to prejudice" relations with another government under the second requirement. I find that Record 11 is not exempt under section 15(a).

The next question to address is whether Records 1-7 and Record 9 meet the second requirement. The Ministry has made detailed submissions concerning the impact of disclosure on its relations with Quebec in the event of a "Yes" victory in a referendum on Quebec independence. The Ministry submits that disclosure would compromise its ability to successfully conduct the negotiations with Quebec which would be a necessary result of a "Yes" victory.

The appellant submits that research conducted by civil servants does not bind the government, nor does it represent the views of the government, and that therefore, a reasonable expectation of prejudice has not been established. However, in this case, the records set out detailed analyses of contracts and other relations with the government of Quebec, with suggested Ontario positions in the event of a "Yes" victory in a referendum on Quebec independence. This is standard practice in the development of government policy, and analyses of this kind are frequently the basis of such policies.

I am satisfied that, in the event of a "Yes" victory, disclosure of Records 1-7 and Record 9 would be prejudicial to the Ontario government's position in negotiations between Ontario and Quebec which would undoubtedly occur as a result of this development. Could it be said, in turn, that this could reasonably be expected to prejudice the relationship between the governments of Ontario and Quebec? In my view, the following comments by Inquiry Officer Anita Fineberg in Order P-961 are relevant to this question:

> In many instances, each party to such negotiations will have different interests in the relationship which it seeks to protect. One party may wish the negotiations to proceed in a certain manner, with specific issues as priorities. The other party may well have its own negotiating agenda and strategy. Thus, while disclosure of certain information may be beneficial or not affect the position of one of the parties, it could negatively affect that of the other which, in turn, could prejudice the relationship between the two parties.
>
> Moreover, it is not only the interests in the negotiating relationship which may differ between the parties, but also the policy considerations which each brings to the negotiating table. Again, because the policy agendas of the negotiating parties may not coincide, disclosure of certain information could negatively impact on one party and not on the other. This, in turn, could result in prejudice to the relationship between the parties.

I agree with this reasoning and adopt it for the purposes of this order. In a way similar to that explained by Inquiry Officer Fineberg in Order P-961, I find that, in the event of Quebec independence, or a "Yes" victory in a referendum on that subject, harm to Ontario's negotiating position could reasonably be expected to prejudice the relationship between the governments of Ontario and Quebec.

A remaining question is whether there is a reasonable expectation that such negotiations will ever occur; if they do not, the harm envisaged by the Ministry as a result of disclosure will not take place. It is not possible to predict, with certainty, whether or not Quebec will ever vote "Yes", or become independent, and thus trigger the negotiations to which the Ministry has

referred. However, in the circumstances, my assessment is that if the records were disclosed, there would be a reasonable expectation of prejudice to intergovernmental relations between Ontario and Quebec. Therefore, since Records 1-7 and Record 9 meet both requirements for exemption under section 15(a), they qualify for exemption under this section.

ECONOMIC OR OTHER INTERESTS

The Ministry relies on the part of this exemption found in section 18(1)(d) of the Act, which states:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

The Ministry claims that this section applies to all the records at issue. Its submissions in support of this claim are similar to those advanced under section 15(a). Briefly stated, the Ministry takes the position that a "Yes" vote in any future referendum on Quebec independence would lead to considerable economic upheaval, requiring action by the Ontario government, and that disclosure of the records would make it more difficult for the government to avoid negative economic consequences for Ontario. The Ministry's representations in this regard are detailed. I have decided not to include any further information about them in order to avoid disclosing the contents of the records.

I am satisfied that disclosure of any of the records at issue could reasonably be expected to be injurious to the ability of the government to manage the economy of Ontario, in the event of Quebec independence or a "Yes" victory in a referendum on that subject. As noted previously, it is not possible to predict with certainty whether these events will ever occur. Nevertheless, in the circumstances, my assessment is that if the records were disclosed, there would be a reasonable expectation of injury to the ability of the Government of Ontario to manage the economy of Ontario. Therefore, I find that all the records at issue are exempt under section 18(1)(d).

PUBLIC INTEREST IN DISCLOSURE

As noted earlier, the appellant claims that the "public interest override" in section 23 of the Act applies in this case. This section states:

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

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

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

I agree with these comments and I have followed the procedure advocated by Commissioner Wright by conducting an independent review of the exempted records. Later in this discussion, I will set out the findings which resulted from this review.

An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. 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.

The Ministry submits that:

> ... it is not enough to establish a public interest in regard to a general issue. To fall within the parameters of section 23, the compelling public interest must be present with respect to the specific records at issue in the appeal.

The Ministry cites Order P-1210, issued by former Assistant Commissioner Tom Mitchinson, as authority for this interpretation. The Ministry appears to be arguing that members of the public must have identified and expressed a specific interest in a record or records at issue before section 23 can apply. I do not agree with this interpretation, nor do I find that it is supported by Order P-1210. Although the Ministry does not identify which passages in Order P-1210 it relies on in this regard, I surmise that the following is the basis for the Ministry's submission:

> However, I find that the appellant has failed to establish that this interest is present with respect to the disclosure of the specific records at issue in this appeal.

In my view, this statement means that a record or records at issue would have to be related to a compelling public interest or section 23 does not apply. I will follow this approach in this order.

Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

As the Ministry points out in its representations:

> The break up of a country like Canada would be an unprecedented event and there is no historical example for predicting the economic consequences of same.

The possible consequences of Quebec independence, or a "Yes" victory in a referendum on that subject, have been a prominent feature of discussion and debate in the Canadian media and among members of the public for much of the past two decades. This debate has been characterized by strongly held views, often expressed in an impassioned way. Much of the discussion has focussed on the economic and legal difficulties which could result from Quebec independence, or a "Yes" vote, the potential for a diminished international presence for Canada, and a host of other significant consequences, many of which would clearly affect Ontario and its residents.

In my view, this indicates "strong interest or attention" by the public, and I am therefore satisfied that there is a compelling public interest in disclosure of information about this subject. This compelling public interest relates to the need for informed public discussion.

I am also satisfied that the records at issue **are** related to the compelling public interest I have just identified. I have reached this conclusion because, in the circumstances of this appeal, I believe that disclosure of the records would introduce information into the public domain which would enhance the ability of the public to formulate and express opinions about the possibility of Quebec independence, and to make political choices in that regard.

Accordingly, I am satisfied that there is a compelling public interest in disclosure of the records at issue.

The next question to address is whether this compelling public interest outweighs the purposes of the exemptions which have been found to apply. This requires an analysis of the purposes of each of the exemptions claimed by the Ministry, since I have found that certain records (or parts) qualify for exemption under each.

Section 13(1)

I have found that portions of Records 1, 6 and 7, and Record 10 in its entirety, qualify for exemption under section 13(1).

In Order 24, former Commissioner Sidney B. Linden indicated that the purpose of section 13(1) was 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.

As previously discussed, the former Commissioner discussed this exemption further in Order 94, stating that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

I have weighed the compelling public interest I have identified above against the purpose of this exemption. In my view, the real potential for very serious consequences for the Ontario public if Quebec votes "Yes" or becomes independent indicates that the need for informed public discussion is a very important consideration. On this basis, I have concluded that the public interest in disclosure of the information which I have found to qualify under section 13(1) is very compelling. While I recognize that the formulation of government policy in a confidential environment is also an important public policy concern, I have decided that this case represents an instance where this objective must yield to the public interest in disclosure. Moreover, it is clear that the formulation of government policy on this subject will proceed, as necessary, even if the records at issue are disclosed. For these reasons, in the circumstances of this appeal, I find that the compelling public interest in disclosure clearly outweighs the purpose of the section 13(1) exemption, which therefore does not apply.

Section 15(a)

I have found that Records 1 - 7 and Record 9 are exempt under this section. I have also found that there is a compelling public interest in disclosure of the records.

In this discussion, I must weigh this compelling public interest against the purpose of the section 15 exemption.

In Order P-1202, in the context of a consideration of the possible application of section 23, former Assistant Commissioner Tom Mitchinson commented on the purpose of the section 15 exemption, including a specific reference to section 15(a). He stated:

> Section 15 of the Act recognizes that the Ontario government will create and receive records in the course of its relations with other governments, and that individual institutions should have discretion to refuse to disclose records where it is expected that disclosure would result in any of the consequences enumerated in this section. **In my view, section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.** (emphasis added)

I agree with this conclusion and adopt it for the purposes of this order.

I have weighed the compelling public interest identified above against the purpose of this exemption. The possibility of a "Yes" vote, or the independence of Quebec, is a political issue of virtually unprecedented importance in the history of the Canadian nation, and has a significant potential impact on the people of Ontario. In my view, the need for informed public discussion of this issue is a very important consideration, and for this reason, the public interest in disclosure is very compelling. I recognize that protecting intergovernmental working relationships is also an important public policy concern. However, I have decided that this case

represents an instance where this objective must yield to the public interest in disclosure. It is also clear that contacts between the governments of Quebec and Ontario will continue, of necessity, even if the records are disclosed. In the circumstances of this appeal, I find that the compelling public interest in disclosure clearly outweighs the purpose of the section 15(a) exemption, which therefore does not apply.

Section 18(1)(d)

I have found that all of the records at issue are exempt under this section. I have also found that there is a compelling public interest in disclosure of the records.

In this discussion, I must weigh this compelling public interest against the purpose of the section 18(1)(d) exemption.

Generally speaking, section 18 is intended to protect certain interests, economic and otherwise, of the Government of Ontario and other government institutions. Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", I find that section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.

In my view, the inclusion of this reference to the government's ability to manage the economy has important implications relating to the purpose of this exemption. No democratic government has full control of the economy it supervises, but one can expect that such a government will "manage" the economy using the tools normally available (i.e. legislation, tax measures, grants, agreements, etc.). In considering scenarios which might "be injurious to" the government's ability to "manage the economy", I have concluded that many of these would likely be related to some kind of serious threat to Ontario's economic security. It follows, therefore, that the inclusion of the reference to the government's ability to "manage the economy" means that this exemption is, among other things, aimed at avoiding or minimizing serious threats to Ontario's economic security.

The potential economic difficulties for Ontario associated with a "Yes" victory, or Quebec independence, would in my view represent a serious threat to Ontario's economic security. Minimization of any potential negative effects on Ontario's economy would therefore represent an important public interest for Ontarians.

In my view, disclosure of the parts of the records which outline Ontario's strategic plans for dealing with a "Yes" victory, or with Quebec independence, would interfere with the government's ability to minimize any potential negative effects on the Ontario economy. I find this to be the case despite the fact that the records relate to the referendum held in October 1995, because I am satisfied that similar strategies would be used in relation to a future referendum. In my view, the public interest in minimizing negative economic effects is more important than the importance of informed public discussion, and for this reason, I find that the compelling public interest in disclosure of the information I have just described above does **not** clearly outweigh the purpose of this exemption and section 23 does not apply to it.

Similarly, disclosure of detailed information in the records about the impact of a "Yes" victory, or Quebec independence, on particular sectors of the Ontario economy, would interfere with the government's ability to avoid negative economic effects, possibly even in advance of any referendum being held. Again, therefore, I find that the compelling public interest in disclosure of this information does **not** outweigh the purpose of this exemption and section 23 does not apply to it.

I have reached a different conclusion about those portions of the records which do not reveal such strategies or detailed information about affected sectors of the Ontario economy, but simply provide information about agreements and other economic relations between Ontario and Quebec and the impact of a "Yes" victory, or Quebec independence, on these relations. In weighing the compelling public interest in disclosure against the purpose of section 18(1)(d) with respect to such information, I have considered the Ministry's view, expressed in its representations on this exemption, that disclosure of any of the information at issue would compromise the government's ability to maintain confidence in the Ontario economy. However, in my view, there is a distinction to be drawn between the information described in the last two paragraphs, to which I have not applied section 23, and the remaining information in the records.

In my view, confidentiality of information about the government's negotiating strategies or detailed information about the affected sectors of the Ontario economy is vital to the government's ability to protect the Ontario economy, and I have not applied section 23 to it for this reason. However, I have concluded that confidentiality of the remaining information is not as closely linked to achieving this important public interest. Therefore, in the circumstances of this appeal, and in view of the great importance of informed public discussion of this issue, I find that the compelling public interest in disclosure of the remaining information clearly outweighs the purpose of the section 18(1)(d) exemption.

To summarize, I have concluded that section 18(1)(d) applies to portions of the records which reveal strategic plans for dealing with a "Yes" victory or Quebec independence, or detailed information about affected sectors of the Ontario economy, but not to the remainder of the records at issue. Accordingly, I will order the Ministry to disclose the remainder of the records, which provide information about agreements and other economic relations between Ontario and Quebec, and the impact of a "Yes" victory, or Quebec independence, on these relations.

The information which remains exempt under section 18(1)(d) includes parts of Records 1, 2, 3, 4, 5, 6 and 7, and Record 10 in its entirety. This means that the remaining parts of Records 1, 2, 3, 4, 5, 6 and 7 are not exempt under any provision claimed by the Ministry. Section 10(2) of the Act provides for disclosure of those parts of a record which are not exempt, and accordingly, in my view, the non_exempt parts of Records 1, 2, 3, 4, 5, 6 and 7 should be disclosed.

I have also concluded that as a result of section 23, the exemptions claimed by the Ministry do not apply to Records 9 and 11 in their entirety. Accordingly, these records should be disclosed. I have highlighted the information in Records 1, 2, 3, 4, 5, 6 and 7 which remains exempt on the copies of these records which are being forwarded to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

ORDER:

1. I uphold the Ministry's decision to deny access to Record 10 in its entirety, and to the parts of Records 1, 2, 3, 4, 5, 6 and 7 which are highlighted on the copies of these records which are being forwarded to the Ministry's Freedom of Information and Privacy Co_ordinator with a copy of this order.

2. I order the Ministry to disclose Records 8, 9 and 11 in their entirety, and the parts of Records 1, 2, 3, 4, 5, 6 and 7 which are **not** highlighted on the copies of these records which are being forwarded to the Ministry's Freedom of Information and Privacy Co_ordinator with a copy of this order, to the appellant by sending copies of the records to the appellant by **June 17, 1997**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed pursuant to Provision 2.

Original signed by: May 27, 1997
John Higgins
Inquiry Officer

Indexed as:

Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)

Between
Ministry of Finance, (applicant/responding party), and
John Higgins, Inquiry Officer, (respondent/appellant) and
John Doe, Requester, (respondent/responding party)
And between
Ministry of Finance, (applicant/responding party), and
John Higgins, Inquiry Officer (respondent/responding party)
and John Doe, Requester (respondent/appellant)

[1999] O.J. No. 484

118 O.A.C. 108

13 Admin. L.R. (3d) 1

86 A.C.W.S. (3d) 3

Docket Nos. C29916 and C29917

Ontario Court of Appeal
Toronto, Ontario

Austin, Feldman JJ.A. and Sharpe J. (ad hoc)

Heard: January 27, 1999.
Judgment: February 11, 1999.

(3 pp.)

Crown -- Examination of public documents -- Freedom of information, judicial review -- Standard of review -- Freedom of information, bars -- Disclosure where public interest outweighs risk of harm -- Freedom of information, legislation -- Decisions made pursuant to -- Application of.

Appeal by an inquiry officer and a requester from a decision of the Divisional Court which quashed

the decision of an inquiry officer regarding a request for disclosure of documents made under section 23 of Ontario's Freedom of Information and Protection of Privacy Act. In 1996, a journalist requested access to documents on the economic, social, and Ontario budget impacts of Quebec independence from the Ministry of Finance. The Ministry denied access to documents based on exemptions contained in the Act. An inquiry officer considered the matter and determined that even though the records fit under the various exemptions, there was a compelling public interest, pursuant to section 23, that justified disclosure of some of the records in their entirety or in part. The Minister of Finance applied to quash the inquiry officer's order. In quashing the inquiry officer's decision to allow disclosure, the Divisional Court majority held that the standard of review of an inquiry officer's decision was correctness.

HELD: Appeal allowed. The Divisional Court order was set aside and the officer's order was reinstated. The inquiry officer's conclusions were reasonable. The standard of review of the inquiry officer's decision was one of reasonableness, not correctness. Both the interpretation of and the application of section 23 to the issue of disclosure of records were within the inquiry officer's expertise and courts should give deference to the inquiry officer's decision. The inquiry officer considered relevant factors, including the Quebec referendum and the impact of a "yes" vote. He addressed the compelling nature of the public interest in the disclosure of the documents. He also considered whether the public interest clearly outweighed the prejudice and injury which formed the basis for the original exemption of the documents from disclosure.

Counsel:

William S. Challis, for the appellant, John Higgins.
Peter M. Jacobsen and Alec Scott, for the appellant, John Doe.
Sara Blake and Priscilla Platt, for the respondent, Ministry of Finance.

The following judgment was delivered by

1 THE COURT (endorsement):-- This is an appeal from the judgment of the Divisional Court of February 6, 1998 wherein that court quashed the order of the inquiry officer of May 27, 1997. In their reasons for judgment, the majority held that the standard of review of a decision of the inquiry officer under s. 23 of the Freedom of Information and Protection of Privacy Act R.S.O. 1990 c. F.31 is correctness. We disagree. We are in substantial agreement with the reasons set out in the dissenting judgment of MacDougall J., in particular on the issue of the standard of review.

2 The legislature has entrusted the application of s. 23 to the issue of disclosure of any particular record first to the head, and then to the inquiry officer. Both the application of the section and therefore its interpretation are within the expertise of the inquiry officer under the Act whose

decision must be accorded deference by the courts. The standard of review is therefore reasonableness.

3 In our view both the interpretation of the section and its application in this case by the inquiry officer to the documents sought by the requester were reasonable and therefore his decision ought not to be set aside. Contrary to the submission of the respondent, in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section. In fact he noted that the issue of the Quebec referendum and the potential impacts of a "yes" vote were of "virtually unprecedented importance" and went on to describe the public interest in the disclosure of the documents in question to therefore be "very compelling". Furthermore, as found by MacDougall J., the inquiry officer turned his mind to the second issue of whether that interest "clearly outweighed" the prejudice and injury which forms the basis for the original exemption of the documents from disclosure. His conclusion on this issue was reasonable.

4 The appeal is therefore allowed, the order of the Divisional Court is set aside and the order of the inquiry officer of May 27, 1997 is reinstated. Costs of the appeal to the requester fixed at $4000.

AUSTIN J.A.
FELDMAN J.A.
SHARPE J. (ad hoc)

cp/d/ln/aaa/DRS