Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 8-1994
May 26, 1994

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A Request for Access to Records of the Ministry of Employment and Investment and the Office of the Premier

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1. Description of the review

As Information and Privacy Commissioner, I conducted an oral Inquiry at the office of the Information and Privacy Commissioner in Victoria, B.C. on Tuesday, May 17, 1994 between the hours of 10 a.m. and 3:15 p.m. under section 56 of *the Freedom of Information and Protection of Privacy Act* (the Act) concerning a request for records received by the Ministry of Employment and Investment (the Ministry) and the Office of the Premier. The request was made by Mr. Colin Beach, President of Aquasource Ltd. (the applicant).

On December 10, 1993, the President of the applicant firm requested from the Office of the Premier of British Columbia

> copies of all information on record, the purpose of which was to present background explanations or analysis to the Executive Council of the Government (or Province) of British Columbia or any of its committees, for its consideration in making the decision to execute Order-in-Council 331 executed March 18, 1991 under the signatures of Lieutenant-Governor David Lam, then Minister of Environment Clifford Serwa and then President of the Executive Council William Vander Zalm, and by which all of the unrecorded water of each stream of our province was reserved from being taken or licensed for the purpose of bulk export by marine transport.

On January 20, 1994 the Ministry refused disclosure of part of a record to the applicant. The record at issue is a Cabinet Submission (the submission) relating to water issues, which was submitted to Cabinet on February 27, 1991. Although portions of this record were disclosed to the applicant, parts have been severed and withheld pursuant to both subsections 12(1) and 12(2) of the Act dealing with Cabinet confidences. This was communicated by way of a letter to the applicant from the Ministry, signed by Barbara Hibbins, Manager of Information and Privacy, January 20, 1994. This was attached as Exhibit 7 to the applicant's affidavit, which was tendered as Exhibit 1 in the hearing.

Section 12 of the Act states:

> 12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
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> (2) Subsection (1) does not apply to
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> (a) information in a record that has been in existence for 15 or more years,
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> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
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> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
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> (i) the decision has been made public,
> (ii) the decision has been implemented, or
> (iii) 5 or more years have passed since the decision was made or considered.

2. Documentation of the review process

The Office of the Information and Privacy Commissioner provided all parties involved in the Inquiry with a two-page statement of facts (the fact report), which, after some amendments, was accepted by all parties as accurate for purposes of conducting the Inquiry.

Under subsection 56(3) of the Act the Commissioner gave notice of the Inquiry, and thus intervenor status, to the B.C. Freedom of Information and Privacy Association (FIPA), the B.C. Civil Liberties Association (BCCLA), and the Vancouver Sun. The

BCCLA submission, prepared by John Westwood, its Executive Director, was provided to all of the parties and discussed at the Inquiry. The other two intervenors provided all parties with copies of their written submissions at the hearing.

The corporate applicant was represented by its President who was sworn to give evidence at the Inquiry. The Ministry's case was presented by Catherine L. Hunt, a barrister and solicitor with the Legal Services Branch, Ministry of Attorney General. With her was Livia Meret, a barrister and solicitor with the same branch. Robert L. Seeman appeared as counsel for FIPA. The Vancouver Sun was represented by Carolyn L. Berardino.

The applicant provided the Commissioner with a lengthy affidavit as part of his submission; this was marked as Exhibit 1. At the end of the Inquiry, the Ministry provided the Commissioner with a twenty-page "Outline of Argument."

Several days prior to the hearing, the government requested a three-day adjournment, as it desired more time in which to prepare its case. I denied the government's request for an adjournment because the applicant could not be available again within the 90-day decision-making period mandated by the Act (see subsection 56(6)).

3. Issues under review at the Inquiry

The focus of the Inquiry was the applicant's request to review the parts of the record that were withheld by the Ministry. The applicant held a water export license from the province. He states that he was in the process of bidding on an export contract with a locality in California when Order-in-Council No. 331/91, approved and ordered on March 18, 1991, effectively ended his business by establishing what the government called a "moratorium" on water exports until a specific date. This has been extended by Orders-in-Council Nos. 922/91, 1531/91, 1040/92 and remains in place at the present time. Order-in Council No. 331/91 and its extensions provided that the province will investigate "the suitability of each stream in the Province for the industrial purpose of commercial bulk export of water by marine transport vessel." The Order prohibited "all unrecorded water of each stream in the Province ... from being taken or used or acquired under the Water Act."

This decision was announced in a news release from the Minister's office of the Ministry of the Environment on March 20, 1991. The applicant, it should be noted, contested the government's use of the word "moratorium," (which I have therefore placed in quotation marks), because some of the water export licenses apparently remain in effect. Exhibit 2 at the Inquiry was a document tendered by government entitled, "Background on Water Policy Review," which stated that "[in] discussion it is often referred to as the moratorium on bulk water shipments from coastal streams".

The position of the Ministry is that it acted correctly in denying the applicant's request to obtain these records on the basis of section 12 of the Act. The Ministry's legal argument addressed the proper statutory interpretation of section 12 and what information in the record may be withheld under this section. In its submission, "the severed portions of the record at issue contain a discussion of alternative courses of action, a discussion of government policy and seek a decision from the Cabinet." (p. 12)

Among other things, the government argued that a Cabinet Submission falls within the statutory language of "information that would reveal the substance of deliberations." (p. 10)

4. Exhibits and the Record in Dispute

The hearing began with a presentation by the applicant who gave evidence about the history of his company and its activities with respect to negotiating a desired water export contract. While not directly relevant to the application of the Act, his presentation did establish the significance of the impact of Order-in-Council No. 331/91 to his company, and highlighted his motivation to request the material on which Cabinet relied in choosing to enact the Order-in-Council.

The applicant tendered in evidence a lengthy affidavit with 31 attached Exhibits, which was marked in the proceedings as Exhibit 1. It contained certain materials which were inappropriate for my review, insofar as they apparently pertained to correspondence or arguments advanced during the investigation / negotiation phase of my Office's involvement. Counsel for the public body were asked during the hearing whether they objected to any portions of the affidavit tendered. They requested at that time the removal of paragraphs 17 and 18, and Exhibits 17 and 18. On the advice of my counsel, I agreed. The removal was done immediately.

By way of a letter received on May 17 after the end of this Inquiry, counsel for the public body requested removal of paragraph 22 and Exhibit 22. That too has been done. In the same letter counsel also requested removal of paragraphs 13 and 14, and the corresponding Exhibits numbered 13 and 14, on the basis that the applicant was advancing a line of argument not presented at the Inquiry. In my view, outright severance of paragraphs 13 and 14, with their corresponding Exhibits, is unnecessary as those paragraphs and Exhibits do not contain evidence. It should suffice for me to simply state that I do not accept the applicant's argument as presented in paragraphs 13 and 14.

The government presented several witnesses from the public service for the purpose of establishing that the matters treated in the Cabinet Submission are still before the government. For this purpose, Exhibit 2, a two-page document entitled "Background on Water Policy Review," was submitted to the Inquiry.

The government presented a set of documents entitled, "Stewardship of the Water of British Columbia," produced by the Ministry of Environment, Lands and Parks, dated

July 23, 1993, as Exhibit 3; it is a glossy paper "document pouch" designed to hold a bundle of individual publications. It is sub-titled "A review of British Columbia's water management policy and legislation." The cover bears the name and logo of the Ministry of Environment, Lands and Parks. In the pouch were 10 individually bound and numbered documents:

(not numbered) - "A Vision for New Water Management Policy and Legislation"
1 - Groundwater management
2 - Water pricing
3 - Managing activities in and about streams
4 - Water management planning
5 - Water allocation
6 - Floodplain management
7 - Water quality management
8 - Water conservation
9 - Background report

Also provided by the government in the pouch marked as Exhibit 3 were the following documents:

- British Columbia's Environment - Planning for the Future - "Sustaining the Water Resource" (a discussion paper released in the summer of 1991 by BC Environment)
- BC Environment Backgrounder: Stewardship of the Water of British Columbia
- Discussion paper: The Export of Water from the British Columbia Coast (January 1992)
- Excerpt from Conference proceedings: "Water Export: Should Canada's water be for sale?" (May 1992)
- Stewardship of the Water Consultation Updates: Vol. 1, Issues 1 and 2, and Vol. 2, Issue 1
- BC Environment News Releases: March 20, 1991, June 21, 1991, and May 8, 1992.

Having perused these materials, I accept the government's assertion that the matter of water export, as a component of an overall water management strategy, is under continuing review. However, I do not accept that fact as necessarily being determinative of the issues raised by this particular applicant.

A witness from the Cabinet Office testified as to how the Cabinet Submission in the current Inquiry was located and severed. Although brief minutes of Cabinet now exist, there were no written minutes of Cabinet committees in 1991. There continues to be no record of actual discussions held by Cabinet, such as the words spoken by individual ministers and their votes on issues.

There was no package of materials found to be obviously associated with Order-in-Council No. 331/91 (which is not unusual). However, a related document, the Cabinet Submission, was located and identified as being related to the Order (which to my mind is self-evident, given the contents of the Submission that are described below). This Submission was not signed by the Minister of International Business and Immigration, which was apparently not unusual in 1991. Only one of the four appendices mentioned in the Cabinet Submission was located in the Cabinet Office. A second was found in Committee files held by the Ministry. Further searches of Cabinet records continue.

The Cabinet Submission is dated February 6, 1991; the sponsoring ministry was then known as the Ministry of International Business and Immigration. The basic text is entitled "Modification of Water Licence Policies and Regulations." This particular component of the Submission is eleven pages in length. By my estimate, the applicant received approximately 23 lines from a total of about 450 lines. The document includes a discussion of various options. Exhibit 2 states that this Cabinet Submission was "one of the documents prepared to brief Cabinet in respect of the water policy review."

Appendix 1 of the Cabinet Submission, dated February 14, 1991, is a ten-page document entitled "Report and Recommendations of the Interministry Task Force on Water Use and Exports." We know from the press release of March 20, 1991 mentioned above that this Interministry Task Force, operating under the leadership of the Ministry of International Business and Immigration, had met during the previous two months only, although it is apparently still in existence and meeting. The applicant received one-half page from this material. I note that parts of this report, which were severed and not disclosed, are titled "background," "problems related to trade policy," and "discussion." This Task Force evidently oversaw the preparation of the Cabinet Submission.

The Cabinet Submission also includes 13 pages of summary tables of the contents of the Cabinet Submission, marked as having been produced by the above-named Task Force. The applicant received the title page and another page.

The applicant received only the title heading from a two-page financial impact assessment seemingly prepared by the Ministry of Finance and Corporate Relations. I note again that more than one-half of this document is identified as "background." Finally, the applicant did not receive a one-page Appendix 3, which I cannot further identify without disclosing information that has been severed.

To summarize, the Cabinet Submission contains eleven pages of text, plus Appendix 1 (10 pages), 13 pages of summary tables, a two-page Financial Impact Assessment, and a one-page Appendix 2.

The Inquiry was informed that this Cabinet Submission was sent to a Cabinet Committee on February 21, 1991 and considered by Cabinet on February 27, 1991. There are apparently two further references on March 6 and 11, 1991 to deferral of

consideration of the matter at the full Cabinet before the press conference on March 20, 1991 noted above.

The senior policy analyst who prepared the Cabinet Submission testified at the Inquiry that the record in question was written generally and not with specific reference to the business activities of the applicant in the current Inquiry. He testified that the Cabinet Submission, including the report of the Task Force in Appendix 1, was prepared at the request of the Cabinet, although there is no documentary evidence of that fact. This witness further testified that he was present for brief periods at a Cabinet committee meeting at an unspecified date, where he was asked questions about the Cabinet Submission by Cabinet members, which implies that they had read the submission. I find on a balance of probabilities that the Cabinet Submission constituted at least part of the decision-making process on Order-in-Council No. 331/91.

5. Discussion

This case presents perhaps the most fundamental issue that has yet arisen in requests for review that have been brought to a formal inquiry before me. It presents in my view the issue of whether section 12 of the Act should be interpreted in a broad and expansive manner, in accordance with the Act's purposes of creating a more open society and greater accountability of government to the citizenry, or, as the government argues in this case, section 12 should be interpreted in a more narrow, somewhat legalistic manner that will reflect traditional ways of doing business by executive government in the British tradition.

To start with, I take seriously the oft-stated desire of the government and Legislature of British Columbia to produce the best and strongest freedom of information legislation in this country. This included producing an even better Act than its predecessor in Ontario. In a number of important ways, including the language of the Cabinet confidences provision in each act (both section 12), the B.C. law provides for even greater openness than the Ontario law. I take this as a result of conscious choice by the Cabinet-Caucus Committee that laboured long and hard on the development of this legislation.

In its submission, the government quoted a strong defense of an exemption for Cabinet records in Ontario by the Commission on Freedom of Information and Individual Privacy (Williams Commission, August 5, 1980) (pp. 8-9). It is my observation that the British Columbia government and Legislature clearly drew a different "bright line" in 1992 on the scope of Cabinet confidences than was possible for the Williams Commission and the drafters of the Ontario *Freedom of Information and Protection of Privacy Act*, who did their work in 1987. The desire for openness in this province reflects a very strong inclination to limit the scope of Cabinet confidence in order to promote accountability to the people.

Legislative history

The Cabinet-Caucus Committee in B.C. laboured in private. Thus we have very little legislative history to enlighten us on the intent of section 12. Fortunately, Attorney General C. Gabelmann, who was intimately involved in the development and shaping of the Act, made one of two clarifying statements on Cabinet confidences during second reading of Bill 50 in the legislature on June 19, 1992:

> The final area of exception relates to business before cabinet. Traditionally, governments have maintained secrecy with respect to any such information. This bill limits the government's right to cabinet secrecy by providing the actual material presented to cabinet or developed by ministries will be accessible once the decision has been implemented. (B.C. Debates, June 19, 1992, p. 2738)

Cliff Serwa, MLA, the Minister of the Environment who signed Order-in-Council No. 331/91, commented about section 12 of the Act during legislative proceedings several days later. Mr. Serwa's query merits extensive citation, because of its relevance to the issue before me:

> With respect to cabinet confidences, I certainly understand the necessity for the reasons that the head of a public body must refuse to disclose to an applicant information that would reveal the source or the substance of deliberations of cabinet, but I don't understand why the information that cabinet used to make the decision is not available... That would really provide not the substance for the deliberation but the substance for the specific type of information utilized. It may be recommendations or a report, that sort of thing, but objective information that surely should be available to the public. (B.C. Debates, June 22, 1992, p. 2875)

The Attorney General responded that:

> All background material and background explanations as described in [subsection 12](c) are made available publicly once the decision has been made public and has been implemented.... In other words, if cabinet makes a decision ... to do something, and the initiative is made public and implemented, then the background material is made public. (B.C. Debates, June 22, 1992, p. 2875)

I take very seriously the government's stated goal of making background information available to the public and regard the statements of the Attorney General as very persuasive on these points. It is also telling that the Attorney General made the second statement in response to a criticism by Mr. Serwa. After the Attorney General responded as cited above, section 12 was approved in its current language.

A plain language approach

As I have noted in previous orders, I intend to interpret the Act in a plain language manner that will not only make general government records available to the public but also produce a reading of the Act that will be meaningful to the general public without the need for layers of legal interpretation. I sympathize with the applicant in the present case. He does not understand the government's reasons for denying him access to the records that he is seeking. Without access to the records, he cannot know the reasons for what happened to his business as a result of government action in 1991.

So long as the intent and language of the Act are complied with, those involved in its implementation should not have to spend a considerable amount of time explaining to requesters why they cannot have access to information. In the same vein, those officials of public bodies who are charged with oversight of access to government records should receive guidance on the meaning of the Act (where needed) that is as clear as possible. This is particularly important with respect to the sensitive issue of Cabinet records and confidences.

"The substance of deliberations"

As I understand it, the government's position in the present case is that only subsection 12(1) of the Act applies to the records being sought and that the release of any more of the Cabinet Submission at issue would reveal "the substance of deliberations" of Cabinet, which is a prohibited disclosure (*Outline of Argument*, pp. 9ff.). The government submitted that "[a] broad interpretation of 'substance of deliberations' is in keeping with the intent of preserving the parliamentary convention of collective ministerial responsibility." (p. 11) The government further argued that subsection 12(2) does not apply to the present case because the general matter of water license policy and regulations is an ongoing issue before the Cabinet and a decision has not been made (p. 13).

I disagree with the government's interpretation of section 12 in the present case. In my view, the "substance of deliberations" includes records of what was said at Cabinet, what was discussed, and recorded opinions and votes of individual ministers, if taken. The "substance of deliberations" is what the B.C. Civil Liberties Association described as "the Cabinet thinking out loud," although its scope includes a range of records which would reveal what happened in Cabinet. The operative word is "deliberations." These are meant to remain confidential for stipulated periods of time in accordance with traditions of Cabinet confidentiality and solidarity that the government emphasized in its submission to this Inquiry (and which I have every desire to respect) (pp. 6-8).

However, the Act deals with information that is recorded, and as such I must look to the written record in this case. What is meant to be protected is the "substance" of Cabinet deliberations, meaning recorded information that reveals the oral arguments pro and con for a particular action or inaction or the policy considerations, whether written or

oral, that motivated a particular decision. I believe that the framers of the legislation would have included a reference to the substance of Cabinet deliberations *and records* if they had intended to mandate the complete non-disclosure of Cabinet Submissions. According to the government's line of argument, "substance" should be interpreted as the "subject" of deliberations, with any record withheld in its entirety if it so much as hints at the matter about which Cabinet was deliberating. I do not accept this line of reasoning in such an expansive form.

FIPA pointed out what it perceived to be the broad, public policy purposes of the Act and urged that "the narrowest reasonable interpretation of 'substance of deliberations' should be made." In its view, "information such as Cabinet minutes form the core of the 'substance of deliberations'. The more information differs in nature from such core documents, the less the information should be protected by subsec. 12(1)."

Applying the concept of "the substance of deliberations" to Cabinet Submissions is problematic because outsiders, including most government officials, remain unaware of just what went on inside the meetings of Cabinet and its committees. Assumptions about what Cabinet members did and did not read are just that, at least for the record at issue in this Inquiry. I do not automatically assume that Cabinet Submissions in all cases reflect the "substance of Cabinet deliberations" without some at least inferential evidence. I agree that disclosure of a record would "reveal" the substance of deliberations if it would permit the drawing of accurate inferences with respect to the substance of those deliberations (see Ontario Order P-226, a decision of T.A. Wright, then Assistant Commissioner, March 26, 1991).

I do accept the government's argument that the release of certain information would, in accordance with the explicit provisions of subsection 12(1), reveal the substance of deliberations. An admittedly non-exhaustive list in the subsection stipulates that this information may include: 1) advice, 2) recommendations, 3) policy considerations, and 4) draft legislation or regulations that, in each instance, were "submitted or prepared for submission to the Executive Council or any of its committees."

The problem of course is determining the meaning of each of these terms. Again, as needed, I favour a plain language approach, as used in the Freedom of Information and Protection of Privacy Act Policy and Procedures Manual (the Manual), which may also be reflected in the organization of Cabinet Submissions in future (as discussed further below). Thus I do not accept, without qualification, the government's blanket assertion in its submission to this Inquiry, that subsection 12(1) of the Act prohibits the disclosure of "documents prepared for submission to Cabinet or its committees; ..." (p. 9).

The four specific categories of records in subsection 12(1) are excepted from disclosure only to the extent that they actually reveal the substance of deliberations of the Cabinet. The first sentence in subsection 12(1) determines the scope of information covered by subsection 12(1): "information that would reveal the substance of

deliberations of the Executive Council or any of its committees." The four categories of records listed later in subsection 12(1) normally fall within the boundaries set by the opening words of subsection 12(1). These categories do not expand the coverage of subsection 12(1), but provide some examples of what falls within the "substance of deliberations."

Public bodies cannot automatically presume that subsection 12(1) prohibits the disclosure of all information described as "advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees." Public bodies must review each of these records on their own merits to determine if disclosure, or partial disclosure, would reveal the substance of deliberations. Simple labeling may not settle the actual contents of these categories.

Subsection 12(2)

The specific language of subsection 12(1) needs to be interpreted in light of subsection 12(2), which also requires independent consideration (as the Ministry did in conducting its severance and disclosure procedures, as noted above). In my understanding of the plain language of subsection 12(2), it is an exception, in no uncertain terms, to the mandatory language of subsection 12(1). This position is supported by the applicant, FIPA, and the Vancouver Sun. FIPA urged a broad interpretation of "background information," since "[t]he purpose of the Act was to remove from government the discretion to decide what information it may disclose." FIPA's counsel stated during oral argument that the "cabinet exemption is not meant to be a black hole."

In the language of subsection 12(2), subsection (1) "does not apply" to:

> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
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> (i) the decision has been made public,
> (ii) the decision has been implemented, or
> (iii) 5 or more years have passed since the decision was made or considered.

The thrust of subsection 12(2)(c) is that background explanations or background analysis shall be made public, upon request.

The government argued that "[t]he exceptions to the general rule in s. 12(2) must be interpreted such that they do not undermine or frustrate the general non-disclosure rule. To preserve the overriding general principle or rule set out in s. 12(1), s. 12(2) must be construed so as not to defeat its clear purpose" (*Outline of Argument*, p. 14). To the

contrary, I clearly view subsection 12(2) as a major exception to subsection 12(1) rather than a minor qualification. I accept the general argument on this point and the principles of statutory interpretation advanced for this purpose by both FIPA and the applicant. Thus FIPA argued that subsection 12(2) "should be interpreted as a broad limitation to a narrowly interpreted" subsection 12(1). In its further view, subsection 12(2) "limits the application of the exception, found in subsec. 12(1), to the general rule of disclosure. S. 12[(1)] is a limitation contemplated in s. 2 of the Act which provides for 'limited exceptions to the rights of access.'"

"Background Explanations or Analysis"

The government also argued that the "moratorium" announced in the relevant Order-in-Council is only referred to once in the Cabinet Submission and that it is thus the only part of the Cabinet Submission relevant to the applicant's request. Moreover, it is not "background explanations or analysis." (pp. 15, 16) This is too narrow a view. My reading is that the Cabinet of the day had the entire Cabinet Submission available to it and decided, in its wisdom, to study the matter further. This, in my opinion, is a decision, because action resulted from it.

It should not be difficult to distinguish background explanations or analysis from advice and recommendations that are prohibited from disclosure under subsection 12(1), since such categories seem to be isolated and identified as such in Cabinet Submissions (or they certainly ought to be in future, so as to facilitate severing. The government testified at the Inquiry that this was indeed its plan).

I accept the government's submission, based on the Manual, that the wording of subsection 12(2) requires that the purpose of the information must be to present background explanations and analysis. However, plain language and common sense suggest to me that only an examination of the specific context of a record like a Cabinet Submission can determine whether information is in fact background explanations or analysis within the meaning of subsection 12(2)(c). While specific labeling may be a helpful guide, as I have noted above, it is not finally determinative of the matter.

The much more problematic area is distinguishing background explanations or analysis from "policy considerations." In some cases, these categories may be interchangeable. I accept the BCCLA's argument (at page 5 of their submission) that "ambiguity [as to whether information should be considered as "policy considerations" or "background analysis"] should be resolved in favour of the citizen's right to access as set out in section 4 [of the Act] , not in favour of government's claim to a secrecy exemption." In such instances, subsection 12(2) clearly prevails, in my view, over subsection 12(1), given the former's clear language that "Subsection (1) does not apply to... ."

New rules on the presentation of Cabinet Submissions, dated December 1993, may facilitate the severance of these various categories, so long as there is no artificial

effort at categorization to avoid the disclosure requirements of subsection 12(2). These rules can be found in "The Cabinet Document System: Guidelines for Preparing Cabinet Submissions & Documentation", which was prepared as Part 4 of the *Guide to the Cabinet Committee System*. I intend to monitor such practices.

In interpreting subsection 12(1), it is my view that the language of section 13 of the Act dealing with "policy advice or recommendations" is instructive of legislative intent. This section determines that the head of a public body may refuse to disclose "information that would reveal advice or recommendations developed by or for a public body or a minister," but subsection 2 of section 13 then presents a listing of fourteen items that must be disclosed. These include: any factual material; a statistical survey; an appraisal; an economic forecast; a feasibility or technical study; "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body", and "a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body." Thus, for example, Appendix 1 of the Cabinet Submission, clearly identified as a report of a task force, may be an appropriate candidate for disclosure.

In my view, the listing of releasable information in section 13 should be considered in defining the meaning of "background explanations or analysis" in subsection 12(2). "Background explanations" include, at least, everything factual that Cabinet used to make a decision. "Analysis" includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet. It may not include advice, recommendations, or policy considerations. These kinds of things could reveal the substance of deliberations (as I have construed it above) in the way in which I believe the Legislature contemplated it. Records prepared for submission to Cabinet should not be presumed to automatically reveal the substance of deliberations and must be considered for release to an applicant under section 12(2)(c).

The government argues, and the Manual says, that

> The phrase "background explanations or analysis" does not include information that would reveal the substance of deliberations of Cabinet or its committees, referred to in subsection 12(1). (See Manual, Vol. 1, Section C.4.2, at p. 14)

This statement is too restrictive. Information in a record which presents background explanations or analysis would not *in itself* reveal the substance of deliberations, once we know what Cabinet decided. After Cabinet has made a decision, and it has been made public or implemented, some of the "substance of deliberations" may be disclosed by the publication or implementation of that decision, along with the release of background explanations or analysis. Where five or more years have passed since a decision was made or considered, the legislation assumes that the same considerations would apply.

In brief, it is my judgment that material that Cabinet used to make its decisions should be releasable to an applicant, short of "information" that would reveal the substance of Cabinet deliberations (as I have narrowly construed it above). I also acknowledge that other exceptions to the Act may apply. The list might also include the minutes of a Cabinet decision or a stenographic or taped record of an actual Cabinet meeting (were such a record to exist). With these qualifications in mind, it is my judgment that documents prepared for submission to Cabinet do not *automatically* reveal the substance of Cabinet deliberations and must be considered for release to an applicant on their individual merits under the language of subsection 12(2)(c).

Subsection 12(2)(c)(i) and (ii)

Finally, I am not persuaded by the government's argument that subsection 12(2) of the Act does not apply to the record at issue in the present Inquiry because a decision has not yet been implemented (*Outline of Argument*, pp. 13-14). In terms of plain language and elementary logic it seems apparent to me that Order-in-Council No. 331/91 was a "decision" of government that has been made public and has been implemented, especially with respect to the applicant in this case, and that the Cabinet Submission at issue, by the government's own admission in oral testimony, exists in close conjunction with this particular Order. See the related discussion by the Ontario Assistant Information and Privacy Commissioner T. Mitchinson in Ontario Order P-323, dated June 26, 1992, at p. 12.

6. Order

Under subsection 58(2)(b) of the Act, I order the Ministry of Employment and Investment to reconsider its decision not to release portions of the Cabinet Submission and its Appendices to the applicant. This reconsideration should be done with a view to the principles and examples provided herein and in Order 9-1994, which was prepared concurrently with this Order. The reconsideration must be made within 30 days from the date of this Order.

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David H. Flaherty May 26, 1994
Commissioner