ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-009

October 28, 1997

ALBERTA ENVIRONMENTAL PROTECTION

Review Numbers 1177, 1178, and 1179

BACKGROUND

[1.] The Applicant lawyer represented clients whose properties allegedly had been contaminated by leaks from underground gasoline storage tanks at three service stations. On June 5, 1996, the Applicant submitted three applications to Alberta Environmental Protection (the "Public Body"). Each application requested access to a copy of the records relating to the legal description of land on which one of the service stations was located. Each application asked for "all reports, memorandum [sic], correspondence, notes or recordings as same relate to the hydrocarbon contamination" of the particular property. Third party A ("A") owned two of the service stations (Review 1177 and Review 1179). Third party B ("B") owned the other service station (Review 1178). As to the applications relating to Review 1178 and Review 1179, the Applicant also said that "This property is currently subject to an environmental remediation program and full particulars of any soil analysis, water analysis and air testing analysis is to be included."

[2.] The Public Body released some of the records, but refused to release others on the grounds that the following exceptions in the *Freedom of Information and Protection of Privacy Act* (the "Act") applied: section 15(1) (disclosure harmful to the business interests of a third party), section 16 (personal information), section 19 (law enforcement), section 23(1) (advice), and section 26 (privilege).

[3.] Mediation was authorized but was not successful. The matter was set down for inquiry on April 15 and 16, 1997.

[4.] The written Notice of Inquiry was dated March 13, 1997 and sent to the Public Body and the Applicant as parties to the inquiry. The Notice of Inquiry was sent to the third parties on March 24, 1997. The Notice of Inquiry set a deadline of April 1, 1997 for filing written submissions.

[5.] The Public Body requested and was granted an extension, until April 4, 1997, to file its submission. I received A's submission on April 1, 1997, and the Public Body's submission and B's submission on April 4, 1997. My Office distributed these submissions to all the parties. I received the Applicant's submission on April 14, 1997, one day before the inquiry. My Office distributed that submission by fax to the other parties on April 14, 1997. The Applicant's submission raised a new issue not included in the Notice of Inquiry, namely, section 31 of the Act (information to be disclosed in the public interest).

[6.] At the beginning of the inquiry, the Public Body and the third parties made the following complaints:

> (i) The written Notice of Inquiry was not timely (third parties' complaint).
>
> (ii) The Applicant filed a submission later than the date the Commissioner set for filing submissions in advance of the inquiry, leaving the parties insufficient time to prepare their arguments to meet the Applicant's arguments (Public Body's and third parties' complaint).
>
> (iii) The Applicant's late submission raised an issue that was not raised in the Commissioner's Notice of Inquiry (Public Body's and third parties' complaint).

[7.] Consequently, the Public Body and the third parties said that they had suffered prejudice, and asked that I refuse to accept the Applicant's written submission as part of the record. I told the parties I would allow the Public Body and the third parties to give a further written submission to answer the new issue raised in the Applicant's submission and to deal with anything resulting from the timeliness of the notice. As to refusing to accept the Applicant's written submission as part of the record, I asked for submissions on three questions:

(1) What prejudice will your party suffer if the Applicant's submission is heard today?

(2) Does it make a difference that the burden of proof is not on the Applicant but is on the Public Body in this case?

(3) Does it make a difference that the Applicant can make oral arguments today, from the standpoint of prejudice to your party?

[8.] I then adjourned the inquiry to allow the parties time to consider the questions.

[9.] When the inquiry resumed, the Public Body and the third parties agreed to allow the Applicant's submission to form part of the record, and to allow the Applicant to make oral arguments, provided that they had sufficient time to make further written submissions on all the points raised, and not just with respect to section 31. I accepted this proposal and allowed 21 days for the further written submissions by the Public Body and third parties. I also permitted the Applicant an additional 10 days to send me a further written submission on the section 31 issue and to give that submission to my Office for distribution to the other parties. I informed the parties that under section 66(3) of the Act, I would not be distributing the Public Body's or the third parties' further written submissions.

[10.] I received the Applicant's further written submission on April 28, 1997, and provided that submission to the Public Body and the third parties. I received the Public Body's and third parties' further written submissions on May 7, 1997.

[11.] As a point of clarification, in this Order, "Applicant" refers to the person who originally applied for the requests for review, rather than the persons later identified as being the Applicant's clients.

RECORDS AT ISSUE

[12.] In addition to its own records, the Public Body said it had in its custody or under its control the third parties' records relating to the service station properties, including the following information prepared by independent consultants for the third parties and submitted to the Public Body:

(i) environmental site and off-site investigation reports and assessments

(ii) chemical analysis reports and various test results

[13.] The Public Body provided four indexes of records for the inquiry. Three of the indexes contain the Public Body's and the third parties' records relating separately to each of the three properties in question. One combined index contains the Public Body's records as they relate to both of the third parties. The following table summarizes these records:

Public Body's index	**Review number**	**Total number of documents**	**Total number of pages**
96-A-00046 (Public Body's and A's records)	1177	23	365
96-A-00047 (Public Body's and B's records)	1178	22	210
96-A-00046 and 96-A-00047 (Combined index - Public Body's records relating to A and B)	1177 and 1178	111	374
96-A-00048 (Public Body's and A's records)	1179	26	202

[14.] The records consist of 182 documents, containing approximately 1151 pages in total. I will refer to these records individually by index and document number. Collectively, I will refer to them as "the Records".

[15.] There were ongoing negotiations between the Applicant and the Public Body regarding the Records at issue. Consequently, at the beginning of the inquiry, I found it necessary to establish which of the Records were still in issue. The parties informed me that all 26 documents in Index 96-A-00048 were no longer at issue for the following reasons:

> (i) most of those documents had already been released in the ongoing litigation between the Applicant's clients and A,
>
> (ii) the personal information of the Applicant's clients, which had been severed from the documents under section 16 of the Act, would now be released to the Applicant, on the Applicant's undertaking, and

(iii) the Applicant agreed not to pursue the identity of an individual third party informant that the Public Body severed under section 19(1)(d) in Document Number 17.

[16.] Consequently, I do not find it necessary to issue an Order concerning any of the documents in Index 96-A-00048. This Order will concern only the documents in Index 96-A-00046, Index 96-A-00047, and Combined Index 96-A-00046 and 96-A-00047.

ISSUES

[17.] There are six issues in this inquiry:

A. What standard of procedural fairness applies to an inquiry under the Act?

B. Did the Public Body correctly apply section 26 of the Act (privilege)?

C. Did the Public Body correctly apply section 15(1) of the Act (disclosure harmful to the business interests of a third party)?

D. Did the Public Body correctly apply section 23(1) of the Act (advice)?

E. Does section 31 of the Act (information to be disclosed in the public interest) apply to the Records?

F. At the time of this inquiry, did section 5(2) of the Act (paramountcy) apply to the Records?

[18.] Prior to the inquiry, the Applicant and the Public Body attempted to narrow the issues for the inquiry. The Public Body had initially provided the Applicant with a number of documents that had been severed under section 16 (personal information) because those documents contained personal information of certain individual third parties. It later became apparent that the Applicant was representing some of those third parties whose personal information was contained in the Records. Therefore, the Public Body said it would be able to release that personal information to the Applicant, subject to the Applicant's undertaking. Consequently, the Public Body and the Applicant agreed that there were no further issues regarding section 16.

[19.] Furthermore, the Public Body and the Applicant agreed that there were no further issues relating to any of the documents to which the Public Body applied section 19 (law enforcement), for the following reasons:

> (i) the Applicant agreed not to pursue the identity of third party informants under section 19(1)(d),
>
> (ii) the Public Body said it incorrectly applied section 19(2)(a), was withdrawing that exception, and releasing that information to the Applicant, and
>
> (iii) the Public Body said it was no longer claiming that section 19(1)(c) applied, and that information would be released to the Applicant.

[20.] Finally, the Public Body had applied section 26(1)(a) (solicitor-client privilege) and section 26(1)(b) (legal services) to Document Numbers 84, 85, 92, 95 and 98 in Combined Index 96-A-00046 and 96-A-00047. The Public Body and the Applicant informed me that the Applicant would not challenge the solicitor-client exception claimed for these documents, as the documents related solely to solicitor-client privilege claimed on behalf of the Public Body.

[21.] Consequently, I do not find it necessary to issue an Order concerning any issues relating to section 16, section 19, section 26(1)(a) (solicitor-client privilege) and section 26(1)(b) (legal services).

DISCUSSION OF ISSUES

Issue A: What standard of procedural fairness applies to an inquiry under the Act?

1. General

[22.] Because of the Public Body's and third parties' complaints (Applicant's late submission, Applicant's late raising of a new issue, and timeliness of the Notice of Inquiry), I must consider my Office's procedures. Consideration of these procedures involves a determination of what standard of procedural fairness applies to an inquiry under the Act. The issue of procedural fairness takes me into the realm of administrative law, and to consideration of "natural justice" and the "duty to be fair".

[23.] Consequently, I have reviewed a number of Supreme Court of Canada cases dealing with "natural justice" and the "duty to be fair", as well as the following: David P. Jones and Anne S. de Villars, *Principles of Administrative Law* (Scarborough, Ontario: Carswell, 1994) (the "Jones' text"); Robert W.

MacAulay and James L.H. Sprague, *Hearings Before Administrative Tribunals* (Scarborough, Ontario: Carswell, 1995) (the "MacAulay text"); and James L.H. Sprague, "Natural Justice and Fairness in a Nutshell", (1997), 3 Administrative Agency Practice 15 (the "Sprague article").

[24.] "Natural justice" and "fairness" (the "duty to be fair") refer to the procedures that must be followed in any process in order for that process to be considered "fair" (Sprague article, p. 15). The principles apply to any person who, acting under the authority of a statute, makes a decision affecting the rights, privileges or interests of an individual. The Sprague article says that a decision having a substantial impact on an individual attracts the higher procedural standard called natural justice, while a decision having a lesser impact attracts the lesser procedural standard called fairness (the "duty to be fair").

[25.] One of the main rules of natural justice is that a person must be given an adequate opportunity to be heard. In other words, the person must know the case being made against him or her and be given an opportunity to answer it (also known as the *audi alteram partem* rule: see Jones' text, p. 180). At the very least, this rule requires that a person be given adequate notice of the case to be met, the right to bring evidence, and the right to make argument (Jones' text, p. 230).

[26.] Adequate notice includes two things: procedural information related to the hearing, and information about the substance of the matter (MacAulay text, p. 12-16). Under the strict rules of natural justice, notice of the substance of the matter includes pre-hearing disclosure of the arguments to be met, and pre-hearing disclosure of the evidence and policies before the decision-maker. Other rights under the strict rules of natural justice, similar to those rights in a court of law, include the right to call witnesses and to cross-examine witnesses, and the right to be represented by counsel.

[27.] If the courts find that the rules of natural justice do not apply, they will nevertheless find a "duty to be fair" (Jones' text, p. 194). The "duty to be fair" requires that a person be given an adequate opportunity to be heard in the context of the circumstances of the case, including the nature of the decision, the relationship existing between the decision-maker and the person, and the effect of the decision on the person's rights (Jones' text, p. 207). Thus, both the decision-maker's mandate and the circumstances are considered.

[28.] In *Kane v. Board of Governors of the University of British Columbia,* [1980] 1 S.C.R. 1105, the Supreme Court of Canada said that to abolish the rules of natural justice, express language or necessary implication must be found in the particular statute.

[29.] Later, in *I.W.A. v. Consolidated-Bathhurst Packaging Ltd.*, [1990] 1 S.C.R. 282, the Supreme Court of Canada said that the rules of natural justice must take into account the institutional constraints faced by administrative tribunals which are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. The Court was of the view that it is unrealistic to expect such administrative tribunals to abide strictly by the rules applicable to courts of law. In fact, the Court said it has long been recognized that the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces.

[30.] Subsequently, in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, the Supreme Court of Canada discussed the duty to be fair. Reviewing *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, the Court said that the existence of a general duty of a public decision-making body to act fairly depends on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. Further, if there exists a general right to procedural fairness, the statutory framework must be examined to see if it modifies this right.

[31.] Finally, in *2747-3174 Quebec Inc. v. Quebec (Regie des permis d'alcool),* [1996] 3 S.C.R. 919, the Supreme Court of Canada succinctly summarized the historical development of "natural justice" and the "duty to be fair". The Court said that the distinction between the two arose because, at one time, judicial review of a decision was not available when a decision-maker was exercising an administrative function, but was available when a decision-maker was exercising a quasi-judicial ("judge-like") function. If exercising a quasi-judicial function, then the decision-maker was required to follow the strict rules of natural justice in making its decision.

[32.] The Supreme Court of Canada said it gradually abandoned characterization of the decision-maker's functions when determining whether the rules of natural justice applied, and established that the content of the rules that a decision-maker must follow depends on the circumstances in which the decision-maker operates. Discussing *Nicholson v. Haldimand-Norfolk Regional Board of Commissioner of Police,* [1979] 1 S.C.R. 311, and *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, the Court quoted, with approval, the following from *Syndicat des employes de production du Quebec et de l'Acadie v. Canada (Canadian Human Rights Commission),* [1989] 2 S.C.R. 879, at pp. 895-896:

> *Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case,*

the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

[33.] Accordingly, to determine the standard of procedural fairness for an inquiry under the Act, I intend to consider three things: (a) the statutory provisions under the *Freedom of Information and Protection of Privacy Act*, (b) the nature of the matter to be decided, and (c) the circumstances of the case.

(a) Statutory provisions

[34.] The *Freedom of Information and Protection of Privacy Act* provides:

64 On receiving a request for a review, the Commissioner must as soon as practicable

(a) give a copy of the request

(i) to the head of the public body concerned, and

(ii) to any other person who in the opinion of the Commissioner is affected by the request,

and

(b) provide a summary of the review procedures and an anticipated date for a decision on the review

(i) to the person who asked for the review

(ii) to the head of the public body concerned, and

(iii) to any other person who in the opinion of the Commissioner is affected by the request.

66(1) If a matter is not settled under section 65, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.

66(2) An inquiry under subsection (1) may be conducted in private.

66(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.

66(4) The Commissioner may decide whether the representations are to be made orally or in writing.

66(5) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for review may be represented at the inquiry by counsel or an agent.

[35.] As the issue of procedural fairness has not, until now, come directly before me in an inquiry, I have also looked at provisions similar to section 66(3), in particular, in the British Columbia and Ontario legislation, and at how those provinces have dealt with procedural fairness (see section 56(4) of the British Columbia *Freedom of Information and Protection of Privacy Act*, section 52(13) of the Ontario provincial *Freedom of Information and Protection of Privacy Act,* and section 41(13) of the Ontario *Municipal Freedom of Information and Protection of Privacy Act*).

[36.] In Ontario Order 164, the Ontario Information and Privacy Commissioner discussed his jurisdiction to order the exchange of representations under the equivalent of section 66(3) of the Act. The Commissioner looked at that section in the context of the legislation as a whole, and found that because the normal trappings of a hearing were not present, such as the right to hear the evidence of the other side, and the right to cross-examine witnesses, those rights were not in the Act as a matter of law and could not be insisted upon. Furthermore, the legislation included the following: an inquiry could be conducted in private; the Commissioner could not retain any information obtained from the records, unlike a normal court of record; there was a wide privilege, in that anything said, any information supplied or any documents produced in the course of an

inquiry were privileged; and statements and answers given in the course of an inquiry were not admissible as evidence in any court or other proceedings (with certain exceptions). Therefore, the Commissioner concluded that the legislation contemplated an inquiry like no other.

[37.] The Commissioner said that the words "no person is entitled" to see and comment upon another person's representations meant that no person has the right to do so. The word "entitled", while not providing a right to access to the representations of another party, did not prohibit the Commissioner from ordering such an exchange in a proper case. The section merely provides that no party may insist upon access to the representations.

[38.] The Commissioner indicated that, in fact, it would be an extremely unusual case in which he would order the exchange of representations. This is because, in the vast majority of cases, an institution cannot make adequate representations as to why a statutory exemption applies to a record, and why the head's discretion was exercised as it was, without alluding to the contents of the record.

[39.] Ontario Order M-687 dealt with an appellant who wanted access to another party's representations made to the Commissioner, and who claimed he was "procedurally disadvantaged" because he did not have that access. The appellant said that without those representations, he was not able to address the arguments raised by that party, which were not contained in the Notice of Inquiry. The Inquiry Officer cited the decision in Ontario Order 164, and reiterated that while the statutory provision did not prohibit him from ordering access in a proper case, it would be an extremely unusual case where such an order would be issued. In this case, the appellant had not provided any evidence of prejudice nor shown how his case could be construed as an extremely unusual case. The Inquiry Officer concluded that the procedures established by the Office of the Information and Privacy Commissioner allowed for adequate disclosure to the parties to ensure procedural fairness.

[40.] I note, in passing, that the Ontario Office of the Information and Privacy Commissioner has issued *IPC Practices, Appeals 5: Providing Representations to the IPC*. That practice guide does not provide for the exchange of written representations for written inquiries. Although British Columbia's policies and procedures do provide for the exchange of written representations in a written inquiry, the parties do not exchange written representations before an oral inquiry.

[41.] I conclude that the *Freedom of Information and Protection of Privacy Act* maintains certain rights related to natural justice or the duty to be fair, such as:

(i) the requirement for an inquiry (section 66(1))

(ii) an opportunity to make representations to the Commissioner during the inquiry (section 66(3))

(iii) the right to be represented by counsel or an agent (section 66(5))

(iv) the right to notice of the procedural information related to the inquiry (section 64)

[42.] However, the *Freedom of Information and Protection of Privacy Act* specifically abolishes certain other rights related to natural justice or the duty to be fair. In summary, there is no right:

(i) to have an inquiry open to the public (section 66(2))

(ii) to have an oral inquiry (section 66(4))

(iii) to be present during an inquiry (section 66(3))

(iv) to have access to another person's representations made to the Commissioner (section 66(3))

(v) to comment on another person's representations made to the Commissioner (section 66(3))

[43.] Similar provisions in British Columbia and Ontario, and the Ontario decisions, support my conclusions in this regard.

[44.] Furthermore, the Act includes the following: I must return any record or any copy of any record produced by a public body (section 54(5)); with certain exceptions, statements made or answers given during an inquiry are inadmissible in evidence in court or in any other proceeding (section 55(1)); and anything said, any information supplied or any record produced to me is privileged (section 56). I agree with the former Ontario Commissioner that the Act contemplates an inquiry like no other.

[45.] While I acknowledge that some degree of procedural fairness is required under the Act, the standard is considerably less than that required of other decision-makers.

(b) Nature of the matter to be decided

[46.] Under this heading, I intend to discuss the nature of the task I perform under the Act and the type of decision I am required to make.

[47.] The Act gives an applicant a right of access to any record under the custody or control of a public body. In that regard, the applicant drives the process that occurs under the Act.

[48.] However, if the public body refuses to disclose information to an applicant, the public body must answer to me if an applicant asks me to review that decision. One of my mandates under the Act is to conduct an independent review of a public body's decision to refuse disclosure of information (and in some cases to review a public body's decision to allow access to information): section 2(e). I also have the power to conduct an independent review of the records in question: section 54(2). In summary, I have to decide whether the public body correctly applied the Act.

[49.] My decision affects an applicant's rights to access insofar as I support or do not support a public body's decision to disclose or to refuse to disclose information. Equally important, my decision affects a third party's rights to have that person's information withheld under the Act, whether it is personal information of an individual, for example, or a third party's confidential business information. The Act requires that I review a public body's decision in light of balancing the access and privacy provisions of the Act.

[50.] Furthermore, I must also be concerned with maintaining confidentiality throughout the process, including confidentiality of the records. In *Board of Education of Lincoln County v. Information and Privacy Commissioner (Ont.)* (1995), 85 O.A.C. 21 (Div. Ct.), the Divisional Court of Ontario commented on the difficult task faced by Ontario's Information and Privacy Commissioner:

> *The process under the Act [Ontario Municipal Freedom of Information and Protection of Privacy Act] requires the maintenance of confidentiality throughout. This puts considerable administrative and other burdens on the Commissioner. His task is not an enviable one. He cannot hold a hearing with all interested parties present. He cannot provide each party with the representations of the others. The language of his decision must be restricted to preserve confidentiality.*

[51.] In Ontario Order 164, the Ontario Information and Privacy Commissioner said that the only statutory procedural guidelines that govern inquiries under the Act were those appearing in the legislation. While the legislation did contain certain specific procedural rules, it did not address all the circumstances which arise in the conduct of inquiries under the legislation. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, the Commissioner said he must have the power to control the process.

[52.] I agree with the Ontario Commissioner. Considering the kind of decision I must make, the persons whose rights are affected and the necessity for maintaining confidentiality throughout the process, including confidentiality of the records, I believe that the Act gives me an implied power to develop and implement rules and procedures for the parties to an inquiry.

(c) Circumstances of the case

[53.] The Sprague article says that when the courts make inferences about what is "fair", they balance what is necessary for the effective and efficient performance of duties under the legislation with what is necessary for the protection of the individual's interests. Because the courts determine "fairness" by balancing government purpose with individual interest, "fairness" may differ according to the circumstances of each particular case. According to Sprague, this means that a process must be "fair" within its own context.

[54.] I have considered this balance when discussing the following circumstances of the case.

(i) Timeliness of the written Notice of Inquiry

[55.] The third parties complained that they received the written Notice of Inquiry later than did the Public Body and the Applicant, so they did not have the same time in which to prepare an advance submission.

[56.] The written Notice of Inquiry was dated March 13, 1997 and sent to the Public Body and the Applicant as parties to the inquiry. The Notice of Inquiry asked the parties to identify any third parties, affected parties or intervenors. My Office telephoned the third parties on March 14, 1997 to tell them that they would receive a written Notice of Inquiry because they were "affected parties" under section 64 of the Act. The third parties were told at that time they could make representations to the inquiry if they wished. Subsequently, the Applicant requested that the inquiry be held in a city other than where my Office is located. Consequently, my Office did not send the written Notice of Inquiry to the third parties until March 24, 1997, when the change of location for the inquiry had been confirmed. The third parties also requested and received a copy of the Applicant's request for review, as required by section 64 of the Act. That copy was sent by fax to the third parties on April 1, 1997.

[57.] The issue here concerns the notice of the inquiry procedures. Section 64 of the Act is relevant. Section 64 is a mandatory ("must") section. However, I note that "must" is also tempered by the words "as soon as practicable".

[58.] The MacAulay text, at page 12-57, says that the trend today is to treat all mandatory or imperative statutory procedural commands as being directory

unless it would be seriously inconvenient to do so. Therefore, if an imperative statutory notice provision is treated as being directory, the failure to give notice will not invalidate the hearing if it is clear that no prejudice or harm results from that failure. Because the principles of natural justice and fairness exist to ensure a fair hearing, a technically flawed process which in no way impairs the individual's right to a fair hearing does not amount to a denial of natural justice (MacAulay text, p. 12-59).

[59.] Furthermore, a failure to give notice may be waived by the individual affected (MacAulay text, p. 12-60).

[60.] The third parties said they were prejudiced by the late notice. Consequently, this is not an issue of no notice, but the timing of the notice.

[61.] While it is true that the process for giving notice was technically flawed in this case, and that the third parties did not have as much time to prepare their advance submissions, I do not find that the third parties suffered harm or prejudice because of receiving the Notice of Inquiry later than did the Public Body and the Applicant. In any event, I find that the notice was waived by the third parties' agreement to proceed with the inquiry, on condition of being permitted to make a further written submission.

(ii) Late filing of submission

[62.] The Notice of Inquiry sent by my Office stated that each party must submit a written submission by noon on April 1, 1997. The Public Body requested and was granted an extension, until April 4, 1997, to file its submission. I received A's submission on April 1, 1997, and the Public Body's submission and B's submission on April 4, 1997. My Office distributed these submissions to all the parties. I received the Applicant's submission on April 14, 1997, one day before the inquiry. My Office distributed that submission by fax to the other parties on April 14, 1997.

[63.] The third parties and the Public Body said they were prejudiced by receiving the Applicant's submission one day before the inquiry. Further, A said that there was prejudice because the information supplementing the Applicant's submission was received the morning of the inquiry. A was of the view that both the late submission and late supplementary information affected A's ability to properly respond and present arguments in a logical and coherent fashion.

[64.] As I previously stated, under the strict rules of natural justice, the requirement that a person be given adequate notice of the case to be met includes notice of the substance of the matter, including pre-hearing disclosure of the arguments to be met, and pre-hearing disclosure of the evidence and

policies before the decision-maker (MacAulay test, p. 12-16). If the failure to give notice goes to a party being surprised by evidence or policy which he or she was not made aware of earlier, an adjournment may compensate for the defective notice (MacAulay text, p. 12-56).

[65.] The issue here concerns the late notice relating to the substance of the inquiry in general, and the Applicant's arguments in particular.

[66.] As to notice of the substance of the inquiry in general, I find that the Public Body and the third parties were aware of the issues, for two reasons.

[67.] First, under section 29 of the Act, the Public Body gave notice to the third parties when the Applicant requested access to the Records. Section 29 concerns notice to third parties when there is an access request for confidential third party business information or personal information under the Act. The Public Body was aware of the section of the Act under which it was excepting the information, and would have informed the third parties of the basis on which the Public Body was refusing to disclose information. Furthermore, the third parties would have informed the Public Body of the section 26(1) issue at the time of being contacted. So both the Public Body and the third parties would have known the issues to be met at that time, well before the inquiry.

[68.] Second, the Notice of Inquiry sent by my Office set out, among other things, the details regarding the inquiry (date, time and place), the parties (the Applicant and the Public Body), the issues under the Act, a statement about who bore the burden of proof, and information on the submission of briefs. At the very least, the Public Body and the third parties would have been aware of the issues to be met at that time.

[69.] As to notice of the Applicant's arguments in particular, the starting point is section 66(3) of the Act. I repeat that there is no right under the Act to have access to or to comment on representations made to the Commissioner by another person. Nevertheless, recognizing that there should be some procedural fairness, I set up the procedure that advance written submissions would be exchanged in this case, and thereby raised the legitimate expectations of the parties that written submissions would be exchanged before the date set for the inquiry. Those submissions were exchanged, but in the Applicant's case, only one day before the inquiry.

[70.] The Public Body says the late filing of the Applicant's submission has resulted in delays in the conclusion of this matter, additional time needed to respond and additional submissions, to the prejudice of itself, and especially to the prejudice of the third parties who are collateral parties drawn into this process through legislation intended to provide access to government information.

[71.] However plausible the Public Body's argument may be, I think that if procedural fairness, in its strictest sense, concerns knowing the issues, arguments and evidence to be met, prejudice has to go to the inability to make full answer in general in an inquiry, as opposed to the inability to make full answer all at one time.

[72.] B alludes to "trial by ambush" by receiving the Applicant's submission late. B says that a hearing is procedurally unfair where all relevant evidence is not adduced and all pertinent arguments and issues are not raised. However, proceedings before me are not trials. For the reasons stated under the subheading *(a) Statutory provisions* above, I do not think that procedures under the Act and trial procedures are comparable. I retain the power to decide my own procedures.

[73.] The Public Body said that the burden of proof is irrelevant to the issue of procedural fairness, because court procedures require all parties to adhere to time limits for filing and responding to filed documents, regardless of which party has the burden of proof in the proceeding.

[74.] My answer to this argument is that because natural justice and the duty to be fair take into consideration the legislation and the decision-maker's mandate, the fact that an applicant does not bear the burden of proof has to have some role to play when procedural fairness is considered in the context of the *Freedom of Information and Protection of Privacy Act*, as follows.

[75.] In any application for access to records under the Act and in a subsequent request for review, it is the public body who must answer to me by saying why it refused to disclose records. My role is to review the public body's decision. The applicant does not have to make any case at all if the applicant chooses not to do so. As an independent reviewer, I then decide if the public body correctly applied the Act. The applicant can decide to be merely an observer in the process, and await my decision. The only time the applicant need say anything to me is when information, personal or otherwise, of a third party is involved. Then, under section 67(2) and section 67(3)(a), it is up to the applicant to prove why disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. However, the applicant can still sit back and choose to say nothing. The public body still has to prove to me that it correctly applied the Act. If the public body refuses to disclose third party information, the public body, of necessity, has to rely on the evidence of the third parties to prove that it correctly refused to disclose that information. And I still have to make my decision about whether the public body correctly applied the Act. I believe that all this can occur without the applicant's involvement in the inquiry and without prejudicing any of the other parties.

[76.] The Public Body says that the ability of the Applicant to make oral arguments is also not relevant to the issue of procedural fairness because an applicant must still comply with time limits. Furthermore, the Public Body is of the view that the Applicant, who is familiar with court procedures, should be held to a higher standard of complying with procedural rules than an applicant unfamiliar with court procedures.

[77.] For some time now, I have been considering the necessity of requiring an applicant to file a written submission before an oral inquiry, as opposed to simply permitting an applicant to make oral argument. Again, I am thinking about the role of an applicant in the process under the Act, as previously discussed. Because I have the power to determine my own procedures under the Act, I take the view that the circumstances of the case will determine whether an applicant should file a written submission before being permitted to make arguments orally at an oral inquiry. I believe that I have the jurisdiction under the Act to determine the procedure as to advance submissions.

[78.] As a general rule, I do not think it is necessary that an applicant submit a written submission in advance of an oral inquiry. However, in deciding whether an applicant should submit an advance written submission, some factors that will affect my decision are the applicant's level of sophistication, whether the applicant bears the burden of proof, as discussed, and the legitimate expectations of the parties.

[79.] In this case, the burden of proof as to the exceptions applied under the Act was entirely on the Public Body, and the Applicant did not have to say, or prove, anything in that regard. However, the parties legitimately expected that they would receive each other's submissions, and the Applicant was sophisticated about procedures before tribunals, so that the Applicant should have given an advance submission on time.

[80.] In this case, I find that allowing the parties to submit a further written submission, by agreement of the parties, compensated for any procedural unfairness that may have occurred because the Applicant was late filing an advance written submission.

(iii) New issues not previously raised

[81.] The Applicant's submission raised a new issue not included in the Notice of Inquiry, namely, section 31 of the Act (information to be disclosed in the public interest).

[82.] Since the Applicant raised the section 31 issue, the burden of proof is on the Applicant: see Order 96-014.

[83.] Normally, I do not permit late raising of issues. However, I have allowed it in this case because section 31 is a mandatory ("must") exception to disclosure, and because the parties agreed to allow this submission to be made, provided that I give the parties an opportunity to respond in a further written submission.

[84.] The same considerations as to knowing the case to be met, discussed above, apply to this issue. Similarly, because the parties agreed, I find that allowing the parties to submit a further written submission compensated for any procedural unfairness that may have occurred because the Applicant made the section 31 argument late in the process.

2. Conclusion as to the standard of procedural fairness

[85.] I find that the standard of procedural fairness that applies under the Act varies according to the statutory provisions contained in the Act, the nature of the matter to be decided, and the circumstances of the case.

[86.] In this case, because the parties have agreed, I have allowed further written submissions to compensate for the late notice relating to the inquiry procedures, the Applicant's arguments and the further issues raised late by the Applicant. Consequently, I find that the requirement for some procedural fairness has been met in the circumstances of this case, and that the Public Body and the third parties are not prejudiced.

[87.] I find that the standard of procedural fairness was met in the circumstances of this case.

Issue B: Did the Public Body correctly apply section 26 of the Act (privilege)?

1. General

[88.] The Public Body applied section 26(1)(a) (litigation privilege) and section 26(2) (privilege relating to a person other than a public body) to the following:

> *Index 96-A-00046*
> Document Numbers 5-8, 10-18, 20, 22 (A said that Document Number 2, originally on this list, was disclosed to the Applicant in A's affidavit of production in the ongoing litigation.)
>
> *Index 96-A-00047*

1-6, 8, 11, 15-17, 20-22 (B said that Document Number 7, originally on this list, was provided to the Applicant.)

Combined Index 96-A-00046 and 96-A-00047
Document Numbers 22, 27, 30, 34, 39, 45, 47, 61, 74, 81, 90, 99, 103, 110, 111

[89.] Section 26(1)(a) and section 26(2) read:

> *26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege.*
>
> *26(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*

2. Preliminary issue

[90.] The third parties raised a preliminary issue which, in effect, questioned my jurisdiction to decide the issue of litigation privilege relating to documents when that issue was now before the court, and also questioned whether the Applicant had the right to proceed under the Act when the Applicant had already chosen the court to decide the issue. According to the third parties, only the court has jurisdiction to decide the issue of litigation privilege. During the inquiry, I asked the third parties to answer these questions: If I were to accept your interpretation that only the court has jurisdiction to determine legal professional privilege, what would be my role under section 26(1)(a)? Furthermore, do the Rules of Court as to production of documents override the *Freedom of Information and Protection of Privacy Act*?

[91.] In its submission, A sets out the history of the litigation between the Applicant's clients and A. A then discusses the Rules of Court relating to the production of documents in litigation between the parties (Rules of Court, Rules 186 and 188). A says that one ground for objecting to produce documents in litigation is privilege, but a party can challenge that claim to privilege under Rule 194(1). If there is a challenge to a party's claim to privilege for a document, the court may inspect the document and decide the issue of the claim for privilege (Rule 194(2)).

[92.] In this case, A says that the Applicant has required A to produce the documents, has received A's affidavit claiming privilege, but has not taken the next step to challenge the privilege in court. Instead, the Applicant has requested those same documents under the *Freedom of Information and Protection of Privacy Act*.

[93.] A says that the proper forum for resolution of claims of litigation privilege is the court in which the litigation has been commenced. In order to resolve disputes involving claims of privilege, the court is required to consider the issues in the litigation and all facts surrounding the creation of the documents in question (A's submission, paragraph 15). A also says that I should not allow the Applicant to circumvent the proper procedures prescribed by the Rules of Court, that the Applicant is, in effect, attempting to do indirectly what the Applicant is unwilling to do directly, and that the Act should not be used as a tool to allow the Applicant to achieve this objective (A's submission, paragraph 16).

[94.] B concurs with A's position. B says that the question of the existence of privilege is a legal issue that should be determined in the proper forum having jurisdiction, being the Court of Queen's Bench. Furthermore, the *Freedom of Information and Protection of Privacy Act* should not be used as a means to obtain information by a party that would not otherwise be entitled to that information. B claims that the release of the information provided by B will prejudice B's ability to a fair trial and may deprive the court of its jurisdiction on this legal issue (B's submission, paragraph 11).

[95.] A concludes that the question of privilege should be left to the forum chosen by the Applicant. Although A is of the view that the Commissioner is not bound by the Rules of Court and therefore is able to exercise his mandate under section 26(1)(a) if an applicant is not a party to litigation, the Applicant is nevertheless bound by the Rules of Court after having chosen the court as the Applicant's forum.

[96.] The Applicant says that the *Freedom of Information and Protection of Privacy Act* is not restricted to non-litigated matters, and the Act does not restrict an applicant who is also pursuing a matter through litigation.

[97.] The Act provides in section 3(a) that "This Act is *in addition to* [my emphasis] and does not replace existing procedures for access to information or records." I was not referred to any authority, either in the Rules of Court or elsewhere, that would restrict an applicant to obtaining information only in the discovery process under the Rules of Court when the applicant has commenced that process in the court.

[98.] In my view, the *Freedom of Information and Protection of Privacy Act*, which is a substantive body of legislation, operates independently of the Rules of Court, which is a regulation. The Rules of Court do not prevent an applicant from making an application for information under the Act, nor does the Act prevent an applicant from making an application for information when the applicant has used the discovery process under the Rules of Court to get that

same information. Furthermore, the Rules of Court do not affect my jurisdiction to apply the Act where there is an issue of whether information in the custody or control of a public body is subject to a privilege to which the Rules of Court may also apply.

[99.] Moreover, the court has not yet decided the issue of litigation privilege in this case. As I find nothing limiting the Applicant to the discovery process under the Rules of Court, and no court has yet decided the issue of litigation privilege as between the parties, I intend to determine the issue of whether litigation privilege applies to the Records under section 26(1)(a) (although a court decision that litigation privilege applies might have affected my decision).

[100.] I am supported in my decision to proceed, by a recent endorsement of the Ontario Court (General Division) in the case of *Jane Doe v. The Metropolitan Toronto Police Services*, Toronto Court File No. 21670/87Q. In that case, the court had issued an order prohibiting the parties from disclosing records exchanged in discovery, and prohibiting publication of a record disclosed to the Toronto Sun. On a notice of motion by Sun Media Corporation, the police service argued that a request for records under the Ontario *Municipal Freedom of Information and Protection of Privacy Act* could not be made when the records were subject to the discovery undertaking of confidentiality. Mr. Justice Lane had this to say on the endorsement:

> *The Act [Municipal Freedom of Information and Protection of Privacy Act] contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same...this Order does not restrict the jurisdiction of the Information and Privacy Commissioner...to direct the production of documents or information even though such documents or information may have been the subject of discovery in this action.*

3. Litigation privilege

[101.] In Order 96-015, I said that litigation privilege and solicitor-client privilege are separate heads of privilege under section 26(1)(a). Each of these privileges has its own criteria that must be met for the privilege to apply. In this case, I must consider only the criteria for litigation privilege, which are different from the criteria for solicitor-client privilege.

[102.] Litigation privilege applies to papers and materials created or obtained by the client for the lawyer's use in existing or contemplated litigation, or

created by a third party or obtained from a third party on behalf of the client for the lawyer's use in existing or contemplated litigation: *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.).

[103.] To correctly apply litigation privilege, the Public Body must show that:

(1) There is a third party communication: see Ronald D. Manes and Michael P. Silver in *Solicitor-Client Privilege in Canadian Law* (Toronto, Ontario: Butterworths, 1993), at pp. 89-90. Third party communications may include:

(i) communications between the client (or the client's agents) and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice;

(ii) communications between the solicitor (or the solicitor's agents) and third parties to assist with the giving of legal advice; or

(iii) communications which are created at their inception by the client, including reports, schedules, briefs, documentation, etc.

(2) The maker of the document or the person under whose authority the document was made intended the document to be confidential: *Opron Construction Co. v. Alberta* (1989), 71 Alta. L.R. (2d) 28 (C.A.). The one exception to the requirement for confidentiality is the "work product" or "lawyer's brief" rule, in which case it is the lawyer's intention which is relevant when the lawyer assembles material for the brief for litigation: Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, at p. 107; *Hodgkinson v. Simms* (1989), 55 D.L.R. (4th) 577 (B.C. C.A.).

(3) The "dominant purpose" for which the documents were prepared was to submit them to a legal advisor for advice and use in the litigation, whether existing or contemplated: *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta. L.R. (2d) 183 (C.A.); *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.). The "dominant purpose" test is discussed by Manes and Silver in *Solicitor-Client Privilege in Canadian Law*, at p. 93, and consists of three requirements:

(i) the documents must have been *produced* with existing or contemplated litigation in mind,

(ii) the documents must have been produced for the *dominant purpose* of existing or contemplated litigation, and

(iii) if litigation is contemplated, the prospect of litigation must be *reasonable*.

[104.] Of necessity, the Public Body must rely on the third parties' evidence in proving that litigation privilege applies to the Records.

4. Do the third parties' documents meet the criteria for litigation privilege?

[105.] The third parties say that the documents for which they claim litigation privilege were prepared by their consultants, who were retained by the third parties and were proceeding on the instructions of the third parties. The consultants prepared reports and sent them to the third parties, but also sent those reports to the Public Body on the third parties' instructions. The third parties also say that in all cases, they provided the documents to the Public Body on a confidential basis, they claimed privilege when the documents were sent to the Public Body, and they never intended to waive the privilege.

[106.] The third parties submit that the documents were prepared for the dominant purpose of litigation that was reasonably contemplated or in progress. The third parties are of the view that their situation is analogous to that in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*,(1989), 61 Alta. L.R. (2d) 319 (Alta. C.A.). In that case, the court held that litigation was anticipated and, indeed, in progress, when the director under the *Combines Investigation Act* focused on companies to determine whether they were guilty of offences under that legislation. The court said that litigation was then in actual progress because the director's inquiry had the potential for the gravest consequences, both civil and criminal. In addition, the inquiry was the first step in a procedure which could ultimately lead to huge fines, to jail sentences for individuals, and to civil liability if the facts established showed breaches of the statute. Furthermore, the conclusion of the director's inquiry did not mean that the litigation was ended, because the civil rights of action remained despite the legislation.

[107.] A argues that litigation was reasonably contemplated or in progress in three ways.

[108.] First, A says that litigation with the Public Body was reasonably contemplated or in progress in December 1992 when the Public Body informed A of the Applicant's clients' complaint about contamination, and requested that A do a preliminary site assessment of one of A's service stations. That request was evident in Document 1, dated January 19, 1993, which was provided to the Applicant. A submits that the documents prepared after the December request were prepared for the dominant purpose of litigation, and such litigation was either reasonably contemplated or was in actual progress

because A was then under investigation by the Public Body under the *Clean Water Act*, R.S.A. 1980, c. C-13, and then under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 when it came into force on September 1, 1993.

[109.] In support of A's position, the Public Body argues that *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* is applicable to this situation because an investigation under the *Environmental Protection and Enhancement Act* is similar to an inquiry under the *Combines Investigation Act* with respect to the civil and quasi-criminal penalties. The Public Body points to the penalties and sanctions under sections 213, 214, 217 and 218 of *the Environmental Protection and Enhancement Act,* as examples. The Public Body says that similar penalties and sanctions existed under the *Clean Water Act*, but asks that I decide the issue on the present legislation.

[110.] The Public Body says that an investigation is in progress when, after receiving a complaint, the Public Body goes out to a site to follow up on the complaint, and decides there is justification to proceed with further action. The Public Body gave evidence that its December 1992 letter to A noted that the investigation was continuing. The Public Body also gave evidence that its Groundwater Protection Branch has the authority to coordinate the site investigations, several hundred of which are conducted each year.

[111.] Second, A says that litigation with the Applicant's clients was also in reasonable contemplation when the Public Body began its investigation. Furthermore, litigation with the Applicant's clients became imminent on April 21, 1993 when A received a letter notifying it of that litigation. The Statement of Claim in that action was issued on October 1, 1993. A also relies on *Opron Construction Co. Ltd. v. R. in Right of Alberta*, (1989), 71 Alta. L.R. (2d) 28 (C.A.), in which the court said that litigation privilege extends to the earliest stages when the litigation is contemplated.

[112.] Third, A says that litigation was reasonably contemplated not only with other third parties, but also with B for any contamination B may have contributed to A's property. However, A and B subsequently agreed to proceed on a joint basis to resolve the contamination issues concerning both their sites.

[113.] B says that litigation with the Public Body was reasonably contemplated when B received a phone call from the Public Body on March 16, 1993, concerning B's service station site; at the very least, litigation was reasonably contemplated or in progress no later than May 25, 1993, when B received a letter from the Public Body concerning investigation of B's site. Furthermore, litigation with the Applicant's clients was in progress on December 23, 1993 when the Statement of Claim was issued against B. B also relies on *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* to support B's position that the

documents were prepared for the dominant purpose of reasonably contemplated litigation or litigation in progress.

[114.] At page 11 of the Applicant's submission, the Applicant says:

> *The dominant purpose in Reviews 1177 and 1178 was an Environmental review being conducted on the sites of [A, B and the Applicant's clients'] property to determine the extent and content of the contamination in the soil and groundwater at each site, and then develop a remediation plan for the sites.*

[115.] The Applicant therefore concludes that the third parties have not shown that the dominant purpose for preparing the documents was for existing or reasonably contemplated litigation, as required by *Nova, An Alberta Corporation v. Guelph Engineering Company*.

[116.] I have carefully reviewed all of the third parties' documents, and find that they are all third party communications. When reviewing these documents, I have properly considered the third parties' intention as to confidentiality and purpose for preparing the documents, as the third parties were the persons under whose authority the documents were produced: *Opron Construction Co. v. Alberta* (1989), 71 Alta. L.R. (2d) 28 (C.A.).

[117.] In determining the dominant purpose for preparation of the documents, I have reviewed the contents of the documents and the third parties' evidence as to the purpose for preparing the documents, and have made an objective evaluation of the third parties' circumstances at the time the documents were prepared. Relying on the law as stated in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, I find that the documents were prepared for the dominant purpose of reasonably contemplated litigation or for the dominant purpose of litigation in progress. My finding includes Document Number 16 in Index 96-A-00046, which is the minutes of a meeting: see *Solicitor Client Privilege in Canadian Law*, pp. 183-184.

[118.] In Order 96-015, I said that I would apply the test for solicitor-client privilege to the entire document to determine whether or not the document could be disclosed. However, I said that if I found that a document was privileged, I would not apply the rules of discovery to determine what part of the document was factual and must nevertheless be disclosed: see *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)*, [1997] O.J. No. 1465 (Div. Ct.). Similarly, once I have found that litigation privilege applies to a document, I do not intend to apply the rules of discovery to determine what part of the document is factual and must nevertheless be disclosed. That is the role of the court.

[119.] Moreover, I believe that section 26(1) of the Act imports the common law privilege into the Act. In *British Columbia (Minister of Environment, Lands & Parks) v. British Columbia (Information & Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.), the court said that severing is not a concept applicable to solicitor-client privilege. I find that section 6(2) of the Act does not apply to allow severing of documents to which solicitor-client privilege or litigation privilege applies.

[120.] The Applicant says that even if litigation privilege applies to the documents, the third parties have nevertheless waived the privilege because they have voluntarily provided the documents to the Public Body and to each other. The Applicant believes that an exchange of information between adverse parties waives privilege if, in fact, privilege existed.

[121.] The third parties said that when they provided the documents to the Public Body, they expressly claimed privilege, and had no intention of waiving the privilege. The third parties say that waiver depends on intention, and rely on *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* as being the law relating to waiver of privilege, and directly on point with their circumstances. In that case, the court said that the director's inquiry under the *Combines Investigation Act* was not a public proceeding at which documents would be disclosed. Moreover, the court was of the view that disclosing a privileged document to one party to the litigation did not show any intention to waive the privilege as to other parties in the same or related litigation. The court held that waiver depends on intention.

[122.] In support of A's position, the Public Body says that the Public Body's investigation is also not a public proceeding, just like an inquiry under the *Combines Investigation Act*. The Public Body points to section 33(9) of the *Environmental Protection and Enhancement Act,* which requires confidentiality of information when an investigation is in progress. The Public Body interprets *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* as standing for the proposition that a party can waive privilege with respect to one party in a group of litigants, without waiving the privilege as against any other party.

[123.] B says that although it gave information voluntarily, it knew there was a statutory compulsion to provide the information. B also relies on *Interprovincial Pipeline Inc. v. Canada (Minister of National Revenue)* (October 13, 1995), Doc. No. T-1229-95 (Fed. T.D.). That case cited *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, and held that waiver depends on intention, there can be a "limited waiver" of privilege, and that a waiver of the privilege for a limited purpose does not extend to a waiver for other purposes.

[124.] Relying on *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, I find that the third parties did not intend to waive litigation privilege when they

provided documents to the Public Body and to each other, and when they directed their consultants to provide documents to the Public Body. In coming to this decision, I have also checked to determine to whom the documents were "cc'd".

[125.] Because waiver depends on intention, I find that providing documents voluntarily to the Public Body, of itself, does not determine the issue of waiver, as the third parties gave evidence that they had no intention to waive privilege by providing the documents.

[126.] Furthermore, the third parties say there was a "common interest" privilege between them, such that in providing the documents to each other, the third parties did not waive privilege as against other parties or the world at large. This privilege is discussed by John Sopinka, Sidney N. Lederman and Alan W. Bryant in *The Law of Evidence in Canada* (Markham, Ontario: Butterworths Canada Ltd., 1992), at pp. 669-670. As to "common interest privilege", at pp. 483-484, the authors quote Lord Denning in *Buttes Gas and Oil Co. v. Hammar* (No. 3), [1980] 3 All E.R. 475 (C.A.), varied on other grounds [1981] 3 All E. R. 616 (H.L.):

> *That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others....*
>
> *In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.*

[127.] Although I have already found that the third parties did not intend to waive litigation privilege, I also agree that there is a "common interest privilege"

that applies to the third parties, such that the third parties did not waive the privilege as against other parties or the world at large. In this case, the third parties have a common interest in the contemplated litigation between the Public Body and the third parties, and in the actual litigation between the Applicant's clients and the third parties. While there is waiver as between the third parties, and as between the third parties and the Public Body, there is no waiver as between the third parties and other parties or the world at large.

[128.] The Applicant is of the view that because the Public Body did not apply litigation privilege to the entirety of some of the third parties' documents, and has released those partially severed documents to the Applicant, privilege has been waived for those documents. I have identified those documents as Document Numbers 11, 12, 15-18, 20 and 22 in Index 96-A-00046 and Document Number 3 in Index 96-A-00046. I note that in those documents, the Public Body has severed and withheld the content of each document, but has released such information as the logo, address line, name of addressee, part of the subject line, the closing, and signature. The Public Body said that when it released this information, it was still grappling with the nature of litigation privilege, while at the same time trying to release as much information as possible to the Applicant.

[129.] Again, the third parties argue that when they provided the documents to the Public Body, they expressly claimed privilege, and had no intention of waiving the privilege. The third parties are of the view that I must look at their intention not to waive the privilege, even if the Public Body did not apply the privilege to the entirety of the third parties' documents.

[130.] In *Great Atlantic Insurance Co. v. Home Insurance Co.*, [1981] 2 All E.R. 485 (C.A.), the court said there was a deemed waiver of privilege when part of a document has been released. However, in *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (April 11, 1997), Doc. Nos. 9201-20817, 9301-02968, 9301-12425, 9301-14055 (Alta. Q.B.), the court discussed the situation in which partial release of a document constitutes waiver of the entire document. The court said that the principle goes to the issue of fairness, since it is unfair to permit a party to rely on part of a privileged document that has been disclosed, while claiming privilege and refusing to disclose the rest of the document to another party.

[131.] In this case, it was the Public Body who released parts of the third parties' documents to the Applicant. The third parties gave evidence that they never intended to waive the privilege, and did not release the information themselves. Consequently, because there is no intention to waive the privilege, and because this is not a case in which the third parties are relying on part of a privileged document that they have disclosed, I find that litigation privilege has not been waived for the third parties' partially disclosed documents.

[132.] Having found that litigation privilege has not been waived, I conclude that the Public Body correctly applied section 26(1)(a) (litigation privilege) to the following documents of the third parties:

Index 96-A-00046
Document Numbers 5, 6, 8, 10-18, 20, 22

Index 96-A-00047
Document Numbers 2, 3, 6, 8, 11, 15, 17, 20-22

5. Application of section 26(2)

[133.] For section 26(2) to apply, there must first be a finding that section 26(1)(a) applies. I have already found that section 26(1)(a) (litigation privilege) applies to the foregoing documents, which are the third parties' documents in the custody or control of the Public Body. The information in those documents relates to a person other than the Public Body. I find that because section 26(1)(a) (litigation privilege) applies to those documents, the Public Body has met the test in section 26(1)(a); consequently, the Public Body correctly applied section 26(2) when it refused to disclose the information in those documents.

[134.] However, the Public Body has said section 26(2) also applies to its own documents in which it has discussed or otherwise reproduced the third parties' privileged information. The following documents are in that category:

Index 96-A-00046
Document Number 7

Index 96-A-00047
Document Numbers 1, 4, 5, 16

Combined Index 96-A-00046 and 96-A-00047
Document Numbers 22, 27, 30, 34, 39, 45, 47, 61, 74, 81, 90, 99, 103, 110, 111 (Document Number 44 was originally on this list, but the Public Body said it provided Document Number 44 to the Applicant).

[135.] Therefore, I must now consider whether section 26(2) applies to the information severed in those documents, and in what way section 26(2) applies.

[136.] Section 26(2) of the Act speaks of "information" described in section 26(1)(a) that relates to a person other than a public body. Section 26(2) does not use the word "record" or "document". Consequently, I conclude that

section 26(2) was meant to encompass not only another person's records or documents to which a privilege under section 26(1)(a) might apply, but also information, in any form, to which a privilege applies.

[137.] I have carefully reviewed the documents in question to determine whether the information excepted by the Public Body is, in fact, the information for which the third parties claim litigation privilege. I find this to be the case for the information in all the documents. Consequently, I find that the Public Body correctly applied section 26(2) to the information excepted in the following:

Index 96-A-00046
Document Number 7

Index 96-A-00047
Document Numbers 1, 4, 5, 16

Combined Index 96-A-00046 and 96-A-00047
Document Numbers 22, 27, 30, 34, 39, 45, 47, 61, 74, 81, 90, 99, 103, 110, 111

[138.] There is one further issue concerning Document Number 111 specifically. An unsevered version of Document Number 111 was contained in materials supporting the Applicant's submission. When I compared the Public Body's copy of Document Number 111 with the Applicant's copy, I noticed that although the content appeared to be the same, there were a number of small differences: the typeface differed, the Applicant's copy did not have an internal cover page, and the name of the person who prepared the document was not in the same place on each copy.

[139.] I checked through the Records to determine how an unsevered version of Document Number 111 might have come to be in the Applicant's hands. It would appear that the Applicant's clients obtained this document before the *Freedom of Information and Protection of Privacy Act* came into force.

[140.] Nevertheless, the Public Body was correct to sever information in Document Number 111 because the Act is now in force, and the Public Body is obliged to apply the mandatory sections of the Act. Furthermore, I do not consider that privilege has been waived because of the release of this information, which likely occurred before the Act came into force. For my reasoning, see my discussion of waiver in this Order.

6. Conclusion under section 26(1)(a) (litigation privilege) and section 26(2)

[141.] I find that the Public Body correctly applied section 26(1)(a) (litigation privilege) and section 26(2) to the following:

Index 96-A-00046
Document Numbers 5-8, 10-18, 20, 22

Index 96-A-00047
Document Numbers 1-6, 8, 11, 15-17, 20-22

Combined Index 96-A-00046 and 96-A-00047
Document Numbers 22, 27, 30, 34, 39, 45, 47, 61, 74, 81, 90, 99, 103, 110, 111

7. Exercise of discretion under section 26

[142.] Taken by itself, section 26(1) is a discretionary ("may") exception. In other words, even though the section applies to information, a public body may nevertheless decide to release that information.

[143.] However, section 26(2) is a mandatory ("must") section. If section 26(2) applies to information, a public body does not have the discretion to release the information; it must withhold that information.

[144.] I have found that section 26(1)(a) (litigation privilege) and section 26(2) both apply to the third parties' documents and to the information withheld in the Public Body's documents. Because of my finding, there is no discretion to be exercised by the Public Body. The Public Body must not release that information or those documents.

8. Other arguments

[145.] The Applicant argues that the "public interest" favours the production of the documents at issue. In making this argument, the Applicant relies on *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)* (December 13, 1993), Doc. No. Edmonton 9003-14825 (Alta. Q.B.). That case concerned the government's claim for "public interest immunity" or "public interest privilege" (as it is now called) on discovery of documents, and discussed the factors to be considered in deciding whether to permit the claim, as set out in *Carey v. Ontario*, [1986] 2 S.C.R. 637.

[146.] In my view, "public interest immunity" or "public interest privilege" would fall under section 26(1)(a) as a type of legal privilege.

[147.] In this case, the Public Body never claimed that "public interest immunity" or "public interest privilege" applied to prevent disclosure of the

documents under section 26(1)(a). Furthermore, because section 26(1)(a) is a discretionary ("may") exception to disclosure, I do not intend to consider it.

Issue C: Did the Public Body correctly apply section 15(1) of the Act (disclosure harmful to the business interests of a third party)?

[148.] The Public Body applied section 15(1) to the following:

> *Index 96-A-00046*
> Document Numbers 5, 6, 8, 10-14, 20 (A said that Document Number 2, originally on this list, was disclosed to the Applicant in A's affidavit of production in the ongoing litigation.)
>
> *Index 96-A-00047*
> Document Numbers 2, 8, 11, 15, 17, 20-22 (B said that Document Number 7, originally on this list, was provided to the Applicant.)

[149.] I have already found that the Public Body correctly applied section 26(1)(a) and section 26(2) to the information in these same documents. Consequently, I do not find it necessary to consider whether section 15(1) also applies to the information in these documents.

Issue D: Did the Public Body correctly apply section 23(1) of the Act (advice)?

1. General

[150.] The Public Body said that section 23(1)(a) of the Act applies to the following:

> *Combined Index 96-A-00046 and 96-A-00047*
> Document Numbers 47, 74, 90, 100, 103 (The Public Body said it was withdrawing Document Numbers 54, 61, and 81 from this list, and providing that information to the Applicant.)

[151.] During the inquiry, when the Public Body was verbally summarizing the documents still at issue under section 23(1)(a), the Public Body did not specifically mention that section 23(1)(a) was to be applied to Document Number 100. However, I understood both from the Public Body's list of documents and from an earlier comment made by the Public Body that section

23(1)(a) was to be applied to Document Number 100, and I have proceeded on that basis.

[152.] Section 23(1)(a) provides:

> *23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council.*

[153.] In Order 96-006, I said that to correctly apply section 23(1)(a), there must be advice, proposals, recommendations, analyses or policy options ("advice") developed by or for a public body or a member of the Executive Council, and the "advice" should:

> 1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
>
> 2. be directed toward taking an action,
>
> 3. be made to someone who can take or implement the action.

[154.] The Public Body said that in applying section 23(1)(a), it was awaiting my decision on briefing notes. That decision (Order 97-007) has been released, and I have applied it here.

[155.] In Order 97-007, I said that the same criteria set out in Order 96-006 apply to briefing notes. I also said that just because something is called a "briefing note", that does not automatically mean the information is excepted under section 23(1)(a). The information itself must be examined to see whether it meets the criteria under section 23(1)(a). Furthermore, I reiterated that a compilation of facts, without more, does not meet the criteria.

[156.] I have carefully reviewed the documents at issue in this case, and find that the only document in which the information severed meets the criteria under section 23(1)(a) is Document Number 47. The information severed is clearly recommendations which are sought or expected, or part of the responsibility of a person by virtue of that person's position, directed toward taking an action, and made to someone who can take or implement the action.

[157.] Document Numbers 74, 90, 100 and 103 are what the Public Body calls "briefing notes", and are listed in Combined Index 96-A-00046 and 96-A-00047 as "Ministerial briefing". The information severed in Document Numbers 74, 90, 100 and 103 does not meet the criteria under section 23(1)(a), for two reasons.

[158.] First, the information severed in these documents consists of statements of fact and factual summary of what has transpired. This merely factual information does not constitute advice, proposals, recommendations, analyses or policy options ("advice"). Second, even if I could find that the information is somehow "advice", the information is not directed toward taking any action, but is merely an update of the status of a situation.

[159.] Consequently, I find that the Public Body did not correctly apply section 23(1)(a) to Document Numbers 74, 90, 100 and 103 in Combined Index 96-A-00046 and 96-A-00047.

[160.] However, throughout the Records, I have been keeping track of the information to which section 26(1)(a) and section 26(2) applies. Some of the information to which the Public Body incorrectly applied section 23(1)(a) is nevertheless information to which section 26(1)(a) and section 26(2) applies. As previously discussed, section 26(1)(a) and section 26(2) together are a mandatory ("must") provision, requiring that a public body refuse to disclose that information. Consequently, I have applied section 26(1)(a) and section 26(2) to the following information:

> (i) Document Number 90, page 2, the fifth to seventh lines following "Key Messages"
>
> (ii) Document Number 103, page 2, the fifth to seventh lines following "Key Messages"

[161.] Under section 26(1)(a) and section 26(2), the Public Body must not disclose that information set out in (i) and (ii) above.

2. Exercise of discretion under section 23(1)(a)

[162.] Section 23(1)(a) is a discretionary ("may") exception. Consequently, even if section 23(1)(a) applies to information, the Public Body may nevertheless decide to release that information.

[163.] In Order 96-017, I said that to properly exercise its discretion under the Act, the Public Body must take into consideration the access provisions of the Act.

[164.] I have found that section 23(1)(a) applies to information in one document out of the five to which the Public Body applied section 23(1)(a). However, I observe that in all five of those documents, the Public Body applied section 23(1)(a) to information in only one part of each document, and released what information it could release in the remainder of each document. Based on the Public Body's evidence that it disclosed as much information as it could to the Applicant, I find that the Public Body exercised its discretion properly under section 23(1)(a).

Issue E: Does section 31 of the Act (information to be disclosed in the public interest) apply to the Records?

[165.] The Applicant says that the Records should nevertheless be disclosed because section 31 of the Act applies. The relevant parts of section 31 read:

> *31(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
>
> > *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*
> >
> > *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*
>
> *31(2) Subsection (1) applies despite any other provision of this Act.*

[166.] In Order 96-011, I discussed section 31 of the Act. I said that the obligation of the head of a public body to release information under section 31 arises when the head of the public body becomes aware of information about the risk of significant harm as defined in the section. Section 31 imposes a statutory obligation for the head of a public body to release information of certain risks under "emergency-like" circumstances (i.e., "without delay"). It also defines the circumstances where the obligation arises for the head of the public body. Because section 31 is an "override" provision in the Act, the definition of what is "caught" by the provision must be defined narrowly.

[167.] In any review of a section 31 decision, I must first consider whether one of the pre-conditions set out in section 31 has occurred. The Applicant has the

burden of proof in this regard, and it is a burden that will not easily be met. These pre-conditions are:

(i) risk of significant harm to the environment, or

(ii) risk of significant harm to the health or safety of the public, etc., or

(iii) release is clearly in the public interest

[168.] In Order 96-011, I also said that there must be some actual risk and there must be some evidence that the harm in question is significant.

[169.] As to what type of information might be "clearly in the public interest", Mr. Justice Cairns considered that issue in Order 96-014, where he made an important distinction between information that "may well be of interest to the public" and information that is "a matter of public interest". As I said in Order 96-011, the Legislature did not intend for section 31 to operate simply because a member of the public asserts "interest" in the information. The pre-condition that the information must be "clearly a matter of public interest" must refer to a matter of compelling public interest.

[170.] In the present case, the obligation on the Public Body to release information under section 31 could only have arisen, at the earliest, on October 1, 1995, because that is the date the Act came into force. According to the evidence, the Public Body's knowledge about the possible contamination arose two years earlier than that date. Consequently, the emergency-like circumstances contemplated by section 31 do not exist now. The evidence is that the Applicant's clients were, some time ago, made aware of any risk which may have existed and have received copies of records that disclose the contamination on their property.

[171.] I have not been presented with any evidence that there is a new risk that would require disclosure of additional information now. Therefore, I do not find that there is a present obligation on the Public Body to disclose information under section 31. I find that the Applicant has not met the burden of proof under section 31. Consequently, I find that section 31 of the Act does not apply to the Records.

[172.] In Order 96-007, I said that the head of a public body considering the release of information under section 31 must consider whether to release the actual record, a summary of the record, or a warning of the risk based on the contents of the record. In Order 96-011, I said that the determining factor with respect to how large or small the group to whom the information is released must be either the number of people who are reasonably considered to be at risk of the significant harm, or the extent of the public interest, whichever is

the applicable pre-condition for release under section 31. I also said that the outcome of an investigation of a section 31 decision is not necessarily the release of a "record" to an individual "applicant", which would be an unusual outcome, given the distinction between "information" and "record", and given that the member of the general public seeking an investigation is (by definition) requesting the head of a public body to release information "to the public, to an affected group of people, to any person or to an applicant".

[173.] In this case, even if I were to find that there is a present obligation on the Public Body to disclose information under section 31, that obligation has already been met. I found evidence both in the Records and in the Applicant's submission materials which indicated that the Public Body gave the Applicant's clients information regarding the contamination. That information was given on more than one occasion by meeting, letter or report. It was clear that the Public Body gave this information, even though under section 99 of the *Environmental Protection and Enhancement Act*, it is not required to do so. Under section 99, that obligation to inform falls on other persons. Because the Public Body has already disclosed this information, I would not find it necessary in this case to also disclose the Records themselves.

Issue F: At the time of this inquiry, did section 5(2) of the Act (paramountcy) apply to the Records?

[174.] In the Applicant's further written submission, the Applicant says that section 5(2) of the *Freedom of Information and Protection of Privacy Act* prevails over section 33(9) of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3.

[175.] That issue was not before the oral inquiry. The Applicant raised this issue in the further written submission given after the inquiry. However, in fairness to the Applicant, I found that this issue was initially raised indirectly in letters dated October 16, 1996, to the Public Body and to this Office.

[176.] Normally, I would not permit the late raising of issues in the inquiry process. However, because section 5 is a mandatory ("must") provision of the Act, I intend to consider it: see Order 96-008 in which I discuss my jurisdiction regarding mandatory exceptions.

[177.] Section 5 of the Act provides:

> *5(1) The head of a public body must refuse to disclose information to an applicant if the disclosure is prohibited or restricted by another enactment of Alberta.*

5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

(a) another Act, or

(b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

5(3) Two years after section 6 comes into force, subsection (1) of this section is repealed and subsection (2) of this section comes into force.

[178.] Section 33(9) of the *Environmental Protection and Enhancement Act* provides:

33(9) Information relating to a matter that is the subject of an investigation or proceeding under this Act may not be released under subsection (1) or (3).

[179.] If section 5(2) of the *Freedom of Information and Protection of Privacy Act* prevails over section 33(9) of the *Environment Protection and Enhancement Act*, as the Applicant claims, the effect is that the *Freedom of Information and Protection of Privacy Act* applies to the information in question; that is the basis on which this inquiry has proceeded and the information has been withheld.

[180.] However, section 5(3) of the Act says that section 5(2) is not in force until two years after section 6 has come into force. Section 6 came into force on October 1, 1995. Section 5(2) therefore came into force on October 1, 1997, at which time section 5(1) was repealed.

[181.] Until October 1, 1997, section 5(1) allowed Alberta enactments, which restrict or prohibit disclosure, to prevail over the *Freedom of Information and Protection of Privacy Act*. The Public Body says that because section 33(9) of the *Environmental Protection and Enhancement Act* is an enactment that prohibits or restricts disclosure, prior to October 1, 1997, the Public Body would have had to refuse disclosure to an applicant under section 5(1) of the Act.

[182.] On October 1, 1997, section 33(9) of *the Environmental Protection and Enhancement Act* was made paramount over *the Freedom of Information and Protection of Privacy Act*: see *Freedom of Information and Protection of Privacy Amendment Regulation*, Alta. Reg. 182/97 (September 24, 1997). So the Public

Body will still be required to refuse to disclose information as provided by section 33(9), in spite of the *Freedom of Information and Protection of Privacy Act*.

[183.] For the purposes of this inquiry, I do not find it necessary to decide whether section 33(9) applied before October 1, 1997 to prevent the release of information to the Applicant. That issue was not before me at the inquiry, nor was any evidence presented as to whether the "information related to a matter that is the subject of an investigation or proceeding" under the *Environmental Protection and Enhancement Act*. Even if the information could be so described, the result for the Applicant would be the same: the information could not be released under section 33(9), just as it cannot be released under the Act, as I have found in this case.

[184.] I do not find it necessary to decide whether section 5(2) of the *Freedom of Information and Protection of Privacy Act* applies now, after the inquiry. Even if section 5(2) did apply now, the Applicant would be in no better position, and possibly in a worse position, because the Public Body might well take the view that none of the Records are releasable under section 33(9) of the *Environmental Protection and Enhancement Act.*

[185.] I find that at the time of this inquiry, section 5(2) of the Act did not apply to the Records. I do not find it necessary to decide whether section 5(2) applies now.

ORDER

[186.] I make the following Order under section 68 of the Act.

[187.] **1.** I find that the standard of procedural fairness that applies under the Act varies according to the statutory provisions contained in the Act, the nature of the matter to be decided, and the circumstances of the case. I find that the standard of procedural fairness was met in the circumstances of this case.

[188.] **2.** The Public Body correctly applied section 26(1)(a) (litigation privilege) and section 26(2) (privilege relating to a person other than a public body) of the Act to the following:

Index 96-A-00046
Document Numbers 5-8, 10-18, 20, 22

Index 96-A-00047
Document Numbers 1-6, 8, 11, 15-17, 20-22

Combined Index 96-A-00046 and 96-A-00047
Document Numbers 22, 27, 30, 34, 39, 45, 47, 61, 74, 81, 90, 99, 103, 110, 111

[189.] **3.** As the Public Body correctly applied section 26(1)(a) and section 26(2) to the same records to which the Public Body applied section 15(1) (disclosure harmful to the business interests of a third party), I do not find it necessary to decide whether section 15(1) applies to those same Records.

[190.] **4.** The Public Body correctly applied section 23(1)(a) of the Act (advice) to the following:

Combined Index 96-A-00046 and 96-A-00047
Document Number 47

[191.] The Public Body did not correctly apply section 23(1)(a) of the Act (advice) to the following:

Combined Index 96-A-00046 and 96-A-00047
Document Numbers 74, 90, 100, 103

[192.] I order that Public Body disclose to the Applicant the information severed under section 23(1)(a) in Document Numbers 74, 90, 100, and 103 in Combined Index 96-A-00046 and 96-A-00047, except for the following information to which I have applied section 26(1)(a) and section 26(2):

(i) Document Number 90, page 2, the fifth to seventh lines following "Key Messages"

(ii) Document Number 103, page 2, the fifth to seventh lines following "Key Messages"

[193.] Under section 26(1)(a) and section 26(2), the Public Body must not disclose that information set out in (i) and (ii) above.

[194.] **5.** Section 31 of the Act (information to be disclosed in the public interest) does not apply to the Records.

[195.] **6.** At the time of this inquiry, section 5(2) of the Act (paramountcy) did not apply to the Records. I do not find it necessary to decide whether section 5(2) applies now.

[196.] I ask that the Public Body notify me with 30 days of receiving a copy of this Order that this Order has been complied with.

Robert C. Clark
Information and Privacy Commissioner