



CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY

L'INSTITUT CANADIEN DU DROIT ET DE LA POLITIQUE DE L'ENVIRONNEMENT

Est. 1970

February 12, 1999

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Winfield, Mark S.; Canadian Institute for Environmental
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Submission by The Canadian Institute for
Environmental Law and Policy with regard to Appeal

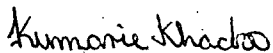
RN 27255

Ms. Norma Thorney,
Tribunal Administration Co-ordinator
Office of the Information and Privacy Commissioner
Suite 1700
80 Bloor St. W.
Toronto, Ontario
M5S 2V1

Dear Ms. Thorney,

Please find attached the submission of the Canadian Institute for Environmental Law and Policy regarding Appeal PA-980213-1. Please contact the Institute's Director of Research, Dr. Mark Winfield, should you have any questions regarding this submission.

Yours sincerely,


per Anne Mitchell,
Executive Director.





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**Submission by
The Canadian Institute for Environmental Law and Policy
with regard to
Appeal PA-980213-1**

Prepared by

**Mark S. Winfield, Ph.D.
Director of Research**

**Canadian Institute for Environmental Law and Policy
February 16, 1999**

**Submission by
The Canadian Institute for Environmental Law and Policy
With Regard to
Appeal PA-980213-1**

PART I BACKGROUND

The Appellant, the Canadian Institute for Environmental Law and Policy (CIELAP) is an independent environmental law and policy research and education organization. The Institute was founded in 1970 as the Canadian Environmental Law Research Foundation (CELRF), and is incorporated as a not-for-profit corporation under the laws of Ontario, and registered as a charitable organization with Revenue Canada.

The CIELAP and its predecessor, CELRF have a long history of research and publication of books, monographs and articles on environmental law and policy in the Province of Ontario. Its publications include three editions (1974, 1978 and 1993) of *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, which is widely employed as a university level text. The Institute's complete publication list is attached to this submission.

Over the past four years, the Institute has been monitoring the rapid changes to the province's laws, regulations, policies and institutions related to the environment and natural resources management which have been taking place. The Institute has developed numerous briefs and submissions to Committees of the Legislative Assembly of Ontario and various agencies of the government of Ontario, regarding proposed changes to the province's environmental laws.

In addition, in each of the past three years, the Institute has published a report entitled *Ontario's Environment and the 'Common Sense Revolution.'* These reports have documented the changes to environmental laws, regulations, policies and institutions that have taken place in each year, described the processes by which these changes have occurred, and their implications for the environment, health and safety of Ontario residents. Copies of each of these three reports are attached to this submission.

PART II - THE APPELLANT'S REQUEST UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

On April 14, 1998, the Appellant, represented by its Director of Research, Dr. Mark Winfield, filed a request under the *Freedom of Information and Protection of Privacy Act*, requesting access to:

"all correspondence, documents, reports, briefs, statements, inquiries or requests for information from the 'Red Tape Commission,' chaired by Mr.

Frank Sheehan, M.P.P., to the Minister or Ministry of Environment and Energy, or the Minister or Ministry of the Environment."

A parallel request was filed with the Ministry of the Environment on the same date, requesting access to all correspondence etc. from the Ministry of the Environment to the 'Red Tape Commission.'¹

The two requests for Access to these records were made as part of the research process for the development of the Institute's annual reports on changes to environmental laws, regulations, policies and institutions in the province of Ontario, the processes by which these changes have taken place and their implications for the protection of environment, health and safety of Ontario residents.

Specifically, the Institute had noted the creation and mandate of the 'Red Tape Commission' in its 'First Year Report' and the tabling of the 'Red Tape Commission's January 1997 report *Cutting Red Tape Barriers to Jobs and Better Government: Final Report of the Red Tape Commission*, in its 'Second Year Report.' The report included extensive recommendations for changes to laws, regulations and policies administered by the Ministry of Environment and Energy, particularly with respect to waste management. Relevant excerpts from the 'Red Tape Commission's' report are attached to this submission.

In addition, the Institute had become aware of anecdotal reports that the 'Red Tape Commission' was requesting information and briefings from the Ministry of the Environment, and corresponding with the Ministry and Minister on various matters on an ongoing basis. The Institute determined it was appropriate to seek a more detailed understanding of the role that the 'Red Tape Commission' was playing in the development, administration and enforcement of the laws, regulations, and policies administered by the Ministry of Environment and Energy, and its successor, the Ministry of the Environment. It is the Appellant's submission that if the 'Red Tape Commission' were engaged in such activities, it would have the potential to have significant implications for the protection of the environment, health and safety of Ontario residents.

It is important to note that the records and Indexes of Records to which access was provided in response to both requests under the Act indicated that the 'Red Tape Commission' was, indeed, making such interventions with the Ministry of Environment and Energy, and its successor, the Ministry of the Environment. More recently, such activities have been described in advertisements by the government of Ontario in major newspapers. A copy of such an advertisement is attached to this submission.

A response to the Appellant's request was received from the Cabinet Office dated

¹. This request is also subject to an appeal (PA-980281-1).

May 19, 1998, advising the Appellant that in accordance with s.27(1)(b) of the Act, the time for a response was extended for an additional 12 days to May 29, 1998.

A further response was received from the Cabinet Office, dated May 29, 1998 indicating that access fees in relation to the request would be in the amount of \$142. A cheque in the amount of \$142 was sent to the Cabinet Office on June 1, 1998, by the Appellant.

A response was received from the Cabinet Office dated July 21, 1998, providing access to seven of the requested records, but denying access to others, on the basis of sections 12(1) and 13(1) of the Act.

On August 12 1998, the Appellant filed an appeal with the Information and Privacy Commissioner, stating that he had reason to believe that some of the records to which he was denied access may not fall under these exemptions, or may contain elements which do not fall under these exemptions which may be severed from the original documents.

The Appellant also asked that the application of the public interest override consideration provided by section 23 of the Act be considered in relation to the records to which access was denied under Section 13(1) of the Act.

An Index of Records responsive to the Appellant's request was received by the Appellant from the Cabinet Office on December 1, 1998, in response to a request by the Information and Privacy Commissioner's Office's Mediator assigned to this Appeal.

The Index of Records indicates that a total of 23 records were identified in response to the Appellants request, and that access had been denied to 13 records on the basis of section 12(1), two records on the basis of section 13(1) and one record on the basis of both sections 12(1) and 13(1). A copy of the Index of Records is attached to this submission.

A Mediator's report was completed in relation to the Appeal on December 22, 1998, agreeing that the first 4 pages of record 23 and record 18, would be eliminated from the scope of the Appeal. The Appeal then proceeded to the Inquiry stage on January 26, 1999.

PART II - THE ISSUES

Records Denied Under S.12(1) of the Act.

Access was denied to 14 records on the basis of section 12(1) of the Act. This section requires an agency head to refuse to disclose access to a report where the

disclosure would reveal the substance of deliberations of an Executive Council or its Committees.

Issue #1: *Is the 'Red Tape Commission' part of the "normal cabinet decision-making process?"*

The Information and Privacy Commissioner has concluded that the exemption is only applicable to records associated with the normal cabinet decision-making process. The Commission has ruled, for example, that a funding request sent from outside of the Executive Council directly to a Cabinet Committee was not the type of record intended to qualify for exemption.² The Information and Privacy Commissioner has also found that minutes of meetings held by an advisory body formed to propose amendments to a statute are not exempt under the provision.³

It is the submission of the Appellant that the 'Red Tape Commission' is not part of the "normal cabinet decision-making process." Since its formation in November 1995, the 'Red Tape Commission' has consisted of approximately eight Progressive Conservative Members of the Legislative Assembly of Ontario.

None of the members of the 'Red Tape Commission' are Ministers of the Crown or members of the Executive Council, and the 'Red Tape Commission' is not a committee of the Executive Council in either a formal or conventional sense. It is not composed of Ministers and there is no evidence some tradition of collective ministerial responsibility and Cabinet prerogative may be invoked in relation to it.⁴

The only public record of the 'Red Tape Commission's' mandate which could be identified by the Appellant is the following passage from the 'Red Tape Commissions' *Final Report*:⁵

"The Commission's mandate was to review existing regulatory measures especially as they affect business and institutions, and to make recommendations to Cabinet on:

².IPC Order No. P-80.

³.IPC Order No. P-812.

⁴.IPC Order No. P-604.

⁵.Red Tape Commission, *Cutting the Red Tape Barriers to Jobs and Better Government: Final Report of the Red Tape Review Commission* (Toronto: Cabinet Office, January 1997) pg. xii.

- * changing or getting rid of inappropriate regulatory measures, without endangering health and safety or environmental quality;
- * an ongoing evaluation or impact test and review process for proposed regulatory measures that have an impact on business and institutions."

No legislation or regulations, or notices of appointments or Orders in Council published in the *Ontario Gazette*, regarding the 'Red Tape Commission' could be identified by the Appellant. A Press Release issued by the 'Red Tape Commission' on December 2, 1997, stated that the "Premier" had renewed the mandate of the 'Red Tape Commission.'

On the basis of these findings it is the Appellant's submission that the 'Red Tape Commission' is an ad hoc advisory body, external to the Executive Council and the executive and administrative structures of the Government of Ontario. The Appellant therefore submits that materials generated by the 'Red Tape Commission' should not be subject to the exemption provided by s.12(1) of the Act.

Issue #2: *Were the records in question actually used for consultation among Ministers, and do they reflect the substance of deliberations of the Executive Council or its Committees, or contain policy options or recommendations?*

In the event that it is the Information and Privacy Commissioner's finding that the 'Red Tape Commission is part of the "normal cabinet decision-making machinery," this does not necessarily mean that access to all records should be denied.

In the past, the Information and Privacy Commissioner has found that records have to have been used for consultation among Ministers, not civil servants,⁶ have actually gone before the Cabinet or its Committees, or been incorporated into a cabinet submission,⁷ and contain policy options or recommendations⁸ in order to qualify for the section 12 exemption. Records that reflect consultations among Ministers⁹ may also qualify.

⁶. IPC Order No. P-920.

⁷. IPC Order No. P-167.

⁸. IPC Order Nos. 73, 323, 424, 503 and 654.

⁹. IPC Order Nos. P-206, 304 and 604.

The Information and Privacy Commissioner has also determined that records prepared to update members of the executive Council on the status of matters are not exempt under the provision.¹⁰ It is the Appellant's submission that this requirement would exclude records which were simply "cc'd" the Executive Council or its Committees, as opposed to being provided as formal submissions to the Executive Council or its Committees.

In addition, the Information and Privacy Commission has determined that in order to qualify for the exemption, the records must reflect deliberations or decisions of the executive council or its committees, as opposed to individual Ministers.¹¹ Records 2, 4, 8, 12, 13, 14, 15, 17, 19, 20, and 22 appear have been directed to individual Ministers, as opposed to the Executive Council or its Committees. It is the submission of the Appellant that the section 12(1) exemption may not apply to these records.

Determinations regarding the remaining matters regarding the status, contents and use records can only be made upon examination of the records in question. The Appellant notes that the Information and Privacy Commissioner has requested submissions from Cabinet Office regarding these matters, and will accept the Information and Privacy Commissioner's determinations regarding the applicability of the section 12 exemption.

Records Denied Under s.13(1) of the Act.

Access to three records has been denied to the Appellant under section 13(1) of the Act. Under section 13(1) of the Act, a head may refuse to disclose a record whose disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution, or a consultant retained by an Institution.

Issue #1. *Is the 'Red Tape Commission' a valid source of "advice or recommendations" to qualify for the section 13(1) exemption?*

The Information and Privacy Commissioner has found that in order to qualify for exemption, the record must have been prepared by a public servant or a person employed in the services of an institution, or a consultant retained by the Institution.¹²

Consistent with the Appellant's submission regarding the applicability of section

¹⁰.IPC Order Nos. P-323, 47, 206, 323, 604, 726 and 772.

¹¹.IPC Order No. P-131.

¹².IPC Order No. P-1117.

12(1) to records generated by the 'Red Tape Commission,' it is the Appellant's submission that the 'Red Tape Commission' does not qualify as one of the valid sources of "advice or recommendations" identified in section 13(1).

As noted above, the members of the 'Red Tape Commission' are members of the Legislative Assembly of Ontario. They are not Ministers, or members of the Executive Council or its Committees. As such they are not public servants employed by the Ontario Public Service Commission.

Nor can members of the Legislative Assembly be considered to be employed in the services of an institution, as the Legislative Assembly and its offices are not designated as an institution for the purposes of the Act. The Information and Privacy Commissioner has determined that the Section 13 exemption is limited to Institutions covered by the Act.¹³

Finally, members of the Legislative Assembly cannot be considered to be 'consultants' retained by an institution, as to the best of the knowledge of the Appellant, they receive no fee beyond their regular pay as members of the Assembly as members of the 'Red Tape Commission'.¹⁴ In addition, as noted in the foregoing paragraph, the Legislative Assembly is not designated as an institution for the purposes of the Act.

Issue #2: *Do the records to which access was denied under section 13(1) contain "advice and recommendations."*

In the event that the Information and Privacy Commissioner determines that the 'Red Tape Commission' is a valid source of "advice or recommendations" for the purposes of section 13(1) of the Act, the question arises as to whether the contents of the specific records contain information that was intended to be covered by the exemption.

The Information and Privacy Commissioner has found on numerous occasions that records must contain more than information or even expressions of "concerns"¹⁵ in order to qualify for the exemption. Rather, to qualify for the exemption the records must contain suggested courses of action, which will ultimately be accepted or rejected during the deliberative process.¹⁶

¹³.IPC Order Nos. P-56 and P-170.

¹⁴.IPC Order No. P-278.

¹⁵.IPC Order No. P-160.

¹⁶.Various orders, including P-118.

Determinations regarding the contents of records can only be made upon examination of the records in question. The Appellant notes that the Information and Privacy Commissioner has requested submissions from Cabinet Office regarding these matters, and will accept the Commissioner's determinations regarding the applicability of the section 13 exemption.

Section 23 Public Interest Override

Issue #1: *Should the 'Public Interest Override' regarding records to which access has been denied under s.13(1) of the Act, be applied in relation to such records in this case?*

The Appellant has requested that the Information and Privacy Commissioner consider the applicability of section 23 of the Act to the records to which access has been denied under section 13(1). Section 23 of the Act states that an exemption from disclosure of the record under the section does not apply where a compelling public interest in disclosure of the record clearly outweighs the purpose of the exemption.

In the past the Information and Privacy Commissioner has found that the public interest in nuclear safety outweighed the fact that inspection reports qualified for exemption under s.18(1)(c).¹⁷

The Information and Privacy Commissioner has defined a "compelling" interest as rousing strong interest or attention. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has available to it to make effective use of the means of expressing public opinion or making political choices.¹⁸

It is the submission of the Applicant that the section 23 exemption should apply to the records to which access has been denied under section 13 for a number of reasons.

The 'Red Tape Commission's' January 1997 *Final Report* made recommendations for extensive changes to the province's regulatory framework for the protection of the environment, including the protection of air and water quality, and the management of wastes, including wastes which are defined as hazardous, and the regulation of pesticides. Many of the Commission's recommendations were reflected in the Ministry of the Environment's November 1997 policy statement *Better, Stronger, Clearer:*

¹⁷. IPC Order No. P-1190.

¹⁸. IPC Order No. P-1363.

Environmental Regulations for Ontario. A copy of this policy statement is attached to this submission.

Furthermore, the records, and Indexes of Records provided in response to the Appellant's initial requests for access under the Act to the Ministry of the Environment and the Cabinet Office indicated a continuing flow of information and communications between the Ministry and the 'Red Tape Commission' on these matters.

In addition to being crucial to the protection of environmental quality, these aspects of the Ministry of the Environment's functions have significant implications for the health and safety of Ontario residents. In May 1998, for example, the Ontario Medical Association, a body representing the provinces Medical Practitioners, released a report stating that "at current levels of exposure, pollutants such as ground-level ozone, inhalable particulates, and total sulphur compounds are responsible for adverse health effects in Ontarians."¹⁹ A copy of this report is attached to this submission.

The Association's report cited estimates that poor air quality results in 1,800 premature deaths, and 1,400 hospital admissions each year,²⁰ and made recommendations for the significant strengthening of the province's regulatory framework with respect to air quality. Other estimates have placed the annual death toll in Ontario due to air pollution at 6,000²¹ and the health care costs to the Ontario economy by the year 2015 if pollution stays at its current levels to be between \$398 million and \$1.2 billion.²²

Furthermore, the release of 47,574 tonnes of pollutants, including 4,693 tonnes of 'toxic'²³ or carcinogenic pollutants, to Ontario's air was reported by industrial facilities under the National Pollutant Release Inventory in 1996, the most recent year for which

¹⁹.J.McPhail et. al., *Ontario Medical Association Position Paper on Health Effects of Ground-Level Ozone, Acid Aerosols and Particulate Matter* (Toronto: Ontario Medical Association, May 1998) pg.6.

²⁰.*Ibid.*, pg.23.

²¹.David Suzuki, and Dr. John Last, Dr. Konia Trouton, and Dr. David Pengelly, *Climate of Change: Taking Our Breath Away* (Vancouver, B.C.: David Suzuki Foundation, 1998).

²².Dr. John Gray, *Ontario Medical Association's Testimony to the Standing Committee on Resource Development, Re: Bill 35 The Energy Competition Act* (August 19, 1998), p. 2.

²³.As defined for purposes of Section 11 of the *Canadian Environmental Protection Act, 1988*.

data is available.²⁴ In October 1996 the Provincial Auditor recommended the province's standards for hazardous air pollutants be revised and modernized to ensure that they safeguard the environment and human health.²⁵

Similarly, in the area of waste management, following the July 1997 fire at the Plastimet plastic recycling facility in Hamilton, Ontario, in August 1997 the Office of the Fire Marshal issued a report stating that "it is evident there is a potential for other fires, similar to the Plastimet, to occur in Ontario."²⁶ The fire required the evacuation of 650 residents around the plant, and generated a range of highly toxic pollutants, including dioxins, furans, benzene, hydrogen chloride, and toluene.²⁷ A copy of the Ministry of Environment and Energy's Report on environmental concerns and adverse effects with respect to the fire is attached to this submission.

The Fire Marshal's report, a copy of which is also attached to this submission, recommended that in order to safeguard public safety and the environment, the Ministry of the Environment significantly strengthen its regulatory oversight of recycling and waste handling facilities.

A report published by the Canadian Institute for Environmental Law and Policy in February 1998, also raised significant concerns related to environmental protection, public safety and public health with respect to the Ministry of the Environment's regulatory and policy framework regarding the management of hazardous wastes in the province. A copy of this report is attached to this submission.

The activities of the 'Red Tape Commission' have raised other issues which it is the submission of the Appellant are of a compelling public interest. A record provided by the Cabinet Office in response to the request under appeal indicated that the Chair of the 'Red Tape Commission' Mr. Frank Sheehan, M.P.P. attempted to intervene in the Ministry

²⁴. *National Pollutant Release Inventory: Summary Report 1996* (Ottawa: Environment Canada, 1998), Tables 60 and 61.

²⁵. *Office of the Provincial Auditor, 1996 Annual Report* (Toronto: Queen's Printer for Ontario, 1996), pg.116.

²⁶. *Office of the Fire Marshal, Protecting the Public and the Environment by Improving Fire Safety at Ontario's Recycling and Waste Handling Facilities* (Toronto: Ministry of the Solicitor-General, August 1997), pg.54.

²⁷. *M. Gardner, Ontario Ministry of Environment and Energy/Report of a Provincial Officer/Plastimet Inc. Fire Site, Hamilton Ontario/Environmental Concerns and Adverse Effects* (Toronto: Ministry of the Environment, August 1997), Table 1: Plastimet Fire Air Contaminants.

of the Environment's conduct of a prosecution under the *Environmental Protection Act*.²⁸

An attempted intervention by a member of the Legislative Assembly into the conduct of a prosecution by the Crown raises serious questions related to the fair administration of justice. Other records, access to which is the subject matter of this appeal, may reveal instances of similar behaviour by members of the 'Red Tape Commission.' The Commission has determined that records which inform the public about the propriety of its elected officials. The Commission has found that regardless of whether or not allegations of improper conduct are confirmed, there exists a compelling public interest in the disclosure of records.²⁹

In summary, it is the submission of the Appellant that several compelling public interests exists with respect to the disclosure records under appeal. These include the protection of the environment, public health and public safety, the fair administration of justice in the province, and the propriety of the behaviour of elected officials.

PART IV - ORDER SOUGHT

Its is respectfully requested that the records to which access is sought through this appeal be ordered disclosed.

²⁸.Cabinet Office Record 16; See also Ministry of the Environment Record 21.

²⁹.IPC Order No. M-710.

Attachments

1. Index of Records
2. Publication List - Canadian Institute for Environmental Law and Policy
3. Canadian Institute for Environmental Law and Policy - *Ontario's Environment and the 'Common Sense Revolution: A First Year Report*, June 1996.
4. Canadian Institute for Environmental Law and Policy - *Ontario's Environment and the 'Common Sense Revolution: A Second Year Report*, July 1997.
5. Canadian Institute for Environmental Law and Policy - *Ontario's Environment and the 'Common Sense Revolution: A Third Year Report*, June 1998.
6. Red Tape Review Commission - *Cutting the Red Tape Barriers to Jobs and Better Government: Final Report of the Red Tape Review Commission* - excerpts, January 1997.
7. Ontario Ministry of the Environment, *Better, Stronger, Clearer: Environmental Regulations for Ontario*, November 1997.
8. The Globe and Mail - Advertising Supplement, November 23, 1998 - "Untangling the knots that strangle business."
9. Red Tape Commission, Press Release "Premier Renews Mandate of Red Tape Commission," December 2, 1997.
10. Ontario Medical Association, *Ontario Medical Association Position Paper on Health Effects of Ground Level-Ozone, Acid Aerosols and Particulate Matter*, May 1998.
11. Ontario Ministry of Environment and Energy, *Report of a Provincial Officer/Plastimet Inc. Fire Site, Hamilton Ontario/Environmental Concerns and Adverse Effects*, August 1997.
12. Office of the Fire Marshal, *Protecting the Public and the Environment by Improving Fire Safety at Ontario's Recycling and Waste Handling Facilities*, August 1997.
13. Canadian Institute for Environmental Law and Policy, *Hazardous Waste Management in Ontario: A Report and Recommendations*, February 1998.