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

ORDER P-270

Appeal P-890202

Ontario Hydro

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O R D E R

INTRODUCTION:

This appeal was received pursuant to section 50(1) of the Freedom of Information and Protection of Privacy Act (the "Act"), which gives a person who has made a request for access to a record under section 24(1) or a request for access to personal information under section 48(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. A request was made to Ontario Hydro (the "institution") for access to:

> ...all the agendas and minutes (but not the submissions or presentations) of SOATIC (ie. the 'Senior Ontario Hydro/AECL Technical Information Committee'), from its beginnings in 1984 up to the present.

2. The institution's Freedom of Information and Privacy Co-ordinator wrote to the requester and advised that:

> Please be advised that these records are fully exempt from disclosure under sections 15(a) and (b) of the Freedom of Information and Protection of Privacy Act.
>
> These sections apply because the minutes are a record of confidential joint discussion between Ontario Hydro and AECL. Disclosure would reveal information received in confidence from AECL which is an agency of

the federal government. Furthermore, it is important that AECL and Ontario Hydro be able to communicate fully and frankly about matters of mutual concern. Disclosure of the minutes would prejudice relations between the two agencies and undermine the usefulness of future meetings.

In addition to sections 15(a) and (b), the following exemptions would apply to portions of the minutes:

Section 13(1) - the minutes contain advice and recommendations of employees of Ontario Hydro.

Section 14(1)(i) and section 16 - the records contain information which if disclosed, could jeopardize the security of certain systems or facilities.

Sections 17(1)(a), (b) and (c) - the minutes contain technical, commercial and scientific information provided in confidence by AECL and other third parties. Disclosure of this information would damage the commercial interests and competitive position of these parties and result in undue benefits or gain. Furthermore, disclosure would result in similar information no longer being shared with Ontario Hydro where it is in the public interest that the information continue to be supplied.

Section 18(1)(a) - the minutes contain commercial, scientific and technical information which is proprietary to Ontario Hydro and has monetary or potential monetary value.

Section 18(1)(c) - if disclosed, certain information could reasonably be expected to prejudice the economic interests or competitive position of Ontario Hydro.

Section 18(1)(f) - the minutes contain plans relating to the management of personnel or

> administration of Ontario Hydro which have not yet been implemented or made public.
>
> Section 18(1)(g) - the minutes reveal discussions concerning possible plans or courses of action. Disclosure of this information would be premature and could result in undue financial benefit or loss to other parties.

3. The requester appealed the decision of the head. Notice of the appeal was given to the institution and the appellant.

4. The Appeals Officer assigned to the case obtained and reviewed the records at issue in this appeal, which consist of the minutes of 15 meetings, including the agendas. The Appeals Officer undertook settlement discussions with the institution and the appellant. Settlement was not achieved and the parties indicated that they were content to proceed to inquiry.

5. The institution provided this office with a list of persons which the institution considered had interests that might be affected by the outcome of the appeal.

6. By letters dated January 18, 1990, and January 29, 1990, the institution, the appellant and persons (the "affected parties") whose interests might be affected by disclosure of the requested records were notified that an inquiry was being conducted to review the decision of the head. The Notice of Inquiry was accompanied by a report prepared by the Appeals Officer. This report is prepared in order to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets

out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

7. Written representations were received from the institution, the appellant and two of the affected parties.

8. In the institution's representations, section 21 was raised for the first time as an exemption applying to portions of the records at issue.

9. The institution and the affected parties did not make representations concerning the application of section 14(1)(i), section 16 and sections 18(1)(c) and (f) to the records. Accordingly, I have assumed that claims for exemption under these provisions of the Act have been abandoned.

10. In its representations, AECL, one of the affected parties, raised the issue of whether the application of the Freedom of Information and Protection of Privacy Act to the information of AECL was constitutionally valid. The institution, the appellant, the Attorney General of Canada, the Attorney General of Ontario, the Information Commissioner of Canada and the affected parties were notified of this issue, and afforded the opportunity to make representations respecting the constitutional issue.

11. Representations on the constitutional issue were received from the appellant, the Attorney General of Canada and the

Attorney General of Ontario. Representations were also received from AECL. The institution supported and adopted all of the representations made by AECL on the constitutional issue. The Information Commissioner of Canada and one affected party declined the invitation to make representations on this issue.

BURDEN OF PROOF:

Section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution. In the case where, as here, affected parties join with the head in resisting disclosure of the information, those affected parties share the burden of proof with the head.

ISSUES/DISCUSSIONS:

The issues arising in this appeal are as follows:

A. Whether all or any part of the requested records falls within the discretionary exemption provided by section 15 of the Act.

B. Whether any part of the requested records falls within the discretionary exemption provided by section 18 of the Act.

C. Whether any part of the requested records falls within the discretionary exemption provided by section 13(1) of the Act.

D. Whether any part of the requested records falls within the mandatory exemption provided by section 21 of the Act.

E. Whether any part of the requested records falls within the mandatory exemption provided by section 17 of the Act.

F. If the answer to Issues A, B, C, D or E is in the affirmative, whether all or any part of the requested records can reasonably be severed under section 10(2) of the Act without disclosing the information that falls under an exemption.

G. If the answer to Issues A, B, C, D or E is in the affirmative, whether there is a compelling public interest in the disclosure of all or any part of the requested records which clearly outweighs the purpose of the exemptions.

H. Whether the records in issue in this appeal are subject to the Act.

ISSUE A: Whether all or any part of the requested records falls within the discretionary exemption provided by section 15 of the Act.

The institution has claimed that sections 15(a) and (b) of the Act apply to the requested records in their entirety.

Sections 15(a) and (b) of the Act read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution; or
>
> ...
> and shall not disclose any such record without the prior approval of the Executive Council.

In Order 210, dated December 19, 1990, I stated at page 8 that in order to qualify for exemption under section 15(a), a record must meet the following test:

1. The institution must demonstrate that disclosure of the records could give rise to an expectation of prejudice to the conduct of intergovernmental relations; and

2. The relations which it is claimed would be prejudiced must be intergovernmental, that is relations between an institution and another government or its agencies; and

3. The expectation that prejudice could arise as a result of disclosure must be reasonable.

For a record to be exempt under section 15(a), each element of the three part test must be satisfied.

In Order 210, supra, I also stated at page 8 that in order to qualify for exemption under section 15(b), a record must meet the following test:

1. The records must reveal information received from another government or its agencies; and

2. The information must have been received by an institution; and

3. The information must have been received in confidence.

Again, for a record to qualify for exemption under section 15(b), all elements of the three part test must be satisfied.

As outlined above, in order to qualify for exemption under section 15(a) or (b), the information contained in the record, or the background to the creation of the record must in some way

relate to the relations between "governments". Atomic Energy of Canada Limited ("AECL") is a crown corporation which was incorporated under the Canada Corporations Act in 1952, pursuant to powers vested in the Atomic Energy Control Board and the Governor in Council under section 10(1)(a) of the Atomic Energy Control Act. AECL is included in the definition of "company" in the present version of the Atomic Energy Control Act, R.S.C. 1985 c. A-16. Pursuant to section 10(4) of the Atomic Energy Control Act, AECL "is for all its purposes an agent of Her Majesty in right of Canada." As a crown corporation, AECL has a duty to report to the Minister of Energy regarding its activities, and may exercise its powers only as an agent of the crown.

Ontario Hydro is an agent of the Government of Ontario. It is a crown corporation which is governed by the Power Corporation Act. Through the provisions of that Act, Ontario Hydro is controlled by the Legislature of Ontario and reports to the Legislature through the Minister of Energy. It is also an institution for purposes of the Act.

Although neither the institution nor AECL are themselves "governments", as agents of the provincial and federal governments they are capable of conducting "intergovernmental relations" on behalf of their respective governments. Intergovernmental relations can be understood as the ongoing formal and informal discussions and exchanges of information as the result of joint projects, planning and negotiations between various levels of government.

SOATIC is a joint committee of representatives from the institution and AECL. In its representations, AECL states that

the intention in forming SOATIC was to establish a joint technical committee at the senior executive level of both AECL and the institution, in order to conduct a "top down" review of the technical aspects of research and development, engineering and design and operations of the two entities.

In view of the above, I accept that the relations between the institution and AECL, when both bodies are conducting business through SOATIC, are intergovernmental for the purposes of section 15(a) of the Act, and that information received by the institution from AECL qualifies as information received from another government or its agencies, for the purposes of section 15(b).

The introductory portion of section 15 contains the words "could reasonably be expected to...". I have considered the meaning of the words "could reasonably be expected to" in the context of section 14(1) of the Act and found that the expectation must not be fanciful, imaginary or contrived, but rather one that is based on reason. [See Order 188 (Appeal Number 890265), dated July 19, 1990] In my view, section 15 similarly requires that the expectation that disclosure of a record could prejudice the conduct of intergovernmental relations or reveal information received in confidence by the institution from another government or its agencies, must not be fanciful, imaginary or contrived, but rather one that is based on reason.

In its representations, the institution submitted that SOATIC can only operate effectively if all information contained in the minutes of its meetings is withheld from the public. The institution submitted that:

> Given the nature of the topic, namely the use of nuclear power, it can be said that the information is highly sensitive and controversial.
>
> If the Minutes were to be disclosed, intergovernmental relations between Ontario Hydro and AECL would be prejudiced as the free flow of information would, by necessity, be curtailed at future meetings of SOATIC. The assistance and technical resources which each party provides to the other through SOATIC would thus diminish reducing the ability of both AECL and Ontario Hydro to fulfil their legislated mandates.

I expect that some institutions would feel more comfortable in participating in such committees and in exchanging the type of information to be found in the records, if all public access to the records were restricted. On this topic, the institution submitted that:

> It has at all times been assumed by the SOATIC members and participants that their discussions would be kept confidential and all information exchanged would be treated in a like fashion. For example, Ontario Hydro employees are obligated to maintain a high level of confidentiality in respect of their business dealings pursuant to the Employees Code of Conduct, other corporate policies, and provisions contained in the Atomic Energy Control Act. AECL employees are required to swear an Oath of Fidelity and Secrecy under section 18(2) of the Atomic Energy Control Act. Clearly, confidentiality and secrecy play a fundamental role in the effective operations of AECL and Ontario Hydro.

However, it must be borne in mind that the introduction of the Freedom of Information and Protection of Privacy Act was intended to change the climate in which institutions operate, and Ontario Hydro is an institution for the purposes of the Act. The Act provides a right of access to all records in the custody or under the control of an institution, with the exception of information which legitimately falls within one or more of the exemptions from disclosure contained in the Act. Section 1(a)(ii) of the Act

provides that "necessary exemptions from the right of access should be limited and specific." In addition, section 10(2) requires the head to disclose as much of a record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Accordingly, it is my view that institutions must be prepared to operate more openly , and it is in this context that I exercise my responsibility to independently review decisions regarding requests for access to records. Each record must be considered with a view to establishing whether the record, or part thereof, falls within the exemptions claimed.

In this appeal, I am of the view that sections 15(a) and (b) apply to only parts of the requested records.

With respect to the application of section 15(a) to all of the records, much of the content of the requested records consists of administrative detail, and I am not convinced that disclosure of this information could reasonably be expected to prejudice intergovernmental relations.

AECL submitted that:

> The full and frank exchange of information between Ontario Hydro and AECL is essential to AECL fulfilling its mandate from the federal government. Ontario Hydro must convey operations information to AECL and AECL and Ontario Hydro must exchange research and development and design information in order to continually refine the development of the CANDU reactor. Ontario Hydro and AECL could be viewed as the "castle keeps" of Canada's nuclear reactor technology.

I agree that it is important for each of the partners in SOATIC to exchange this type of information. However, in my view, it is not reasonable to expect that the institution and AECL will cease to

exchange information important to the execution of their respective mandates simply because some of that information might not qualify for exemption from disclosure under the Act.

Further, with respect to section 15(b), it is clear that not all of the information contained in the records was received by the institution. Some of it was supplied by the institution, some of it was supplied by one or more affected parties and some of it arose in the course of discussions between the members of SOATIC.

As I am of the view that not all of the information contained in the records falls under sections 15(a) or 15(b), I will now consider the alternative submissions made by the institution, AECL and another affected party in relation to certain portions

of the records. These alternative submissions suggest that certain portions of the records are exempt under sections 15(a) and (b), as well as sections 13, 17, 18 and 21 of the Act. The portions in question have been identified by the institution as "items". For the purposes of this Order, I have relied upon the numbering system used by the institution to refer to specific items contained in the records. These items are identified in Appendix "A" to this Order.

The institution has claimed that section 15 of the Act applies to the following items:

8, 14, 16, 17, 19a, 19b, 20, 21a, 21b, 21c, and 22.

I have reviewed each item and I am of the view that disclosure of the following items satisfy all other parts of the section 15(a) test and therefore qualify for exemption from disclosure under section 15(a) of the Act:

8, 14, 16, 17, 19a, 19b, 21a, 21b, 21c and 22.

I will now consider whether any of the items fall under the section 15(b) exemption. After reviewing each item, I find that disclosure of the following items could reasonably be expected to reveal information that was received by the institution from the agency of another government:

14, 16, 17, 20 and 22

These items therefore fulfil the first two parts of the three part test under section 15(b). The third part of the test deals with whether the information was received in confidence. Since

I have already found that four of the items qualify for exemption under section 15(a), I will confine my discussion of whether the information was received in confidence to item 20.

Both the institution and AECL have made representations as to the general expectation of the parties regarding the confidentiality of the information. I have received affidavit evidence as to the practices and procedures respecting the exchange of information between the parties, and respecting the later dissemination of information received. I am satisfied that the information in item 20 was received by the institution from an agency of another government in confidence, and qualifies for exemption under section 15(b).

In summary, I find that the following items are exempt from disclosure under section 15 of the Act:

8, 14, 16, 17, 19a, 19b, 20, 21a, 21b, 21c and 22.

Section 15 of the Act is a discretionary exemption. After deciding that a record falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it now, in the

head's opinion, qualifies for exemption. I also note that section 15 indicates that a head shall not disclose a record which is otherwise exempt under this section without the prior approval of the Executive Council.

The institution has provided submissions regarding the exercise of discretion to refuse to disclose the above items. I am

satisfied that the discretion has been exercised in accordance with established legal principles, and should not be disturbed on appeal.

ISSUE B: Whether any part of the requested records falls within the discretionary exemption provided by section 18 of the Act.

The institution claims that section 18 of the Act applies to the following items:

1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 15, 16, 17, 18a and 18b.

Since I have found that items 16 and 17 qualify for exemption under section 15, I will confine my discussion under section 18 to items 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 15, 18a and 18b.

The institution claims that section 18(1)(a) applies to items 18a and 18b.

Section 18(1)(a) of the Act reads as follows:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

In Order 87, dated August 24, 1989, former Commissioner Sidney B. Linden set out the test which must be met in order for a record to qualify for exemption under section 18(1)(a):

> In order to qualify for exemption under subsection 18(1)(a), the head must establish that the information:
>
> 1. is a trade secret, or financial, commercial, scientific or technical information; and
>
> 2. belongs to the Government of Ontario or an institution; and
>
> 3. has monetary value or potential monetary value.

I concur with the test developed by Commissioner Linden and adopt it for the purposes of this appeal.

In Order 219, dated January 31, 1991, I stated at page 16:

> In my view, the use of the term "monetary value" in subsection 18(1)(a) requires that the information itself have an intrinsic value. As I see it the purpose of subsection 18(1)(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information.

The information contained in items 18a and 18b relates to a research project of the institution. This information is clearly technical information. The institution submits that it is also

scientific and commercial information, with monetary value, which it intends to sell. It further submits that disclosure of this
information would imperil its ability to sell the information, thus resulting in undue financial loss to the institution. I am of the view that the test for exemption under section 18(1)(a) has been satisfied for items 18a and 18b.

The institution claims that section 18(1)(g) applies to the following items:

1, 2, 3, 4, 5, 9, 10, 11, 12, 13 and 15

Section 18(1)(g) of the Act provides as follows:

> A head may refuse to disclose a record that contains,
>
> ...
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

In Order 229, dated May 6, 1991, I stated at page 11:

> This subsection also exempts classes or types of information "including the proposed plans, policies or projects of an institution." It combines an exemption for types or classes of records with a requirement that certain consequences could reasonably be expected to result from the disclosure of the record.

> In order to qualify for exemption under subsection 18(1)(g) of the Act,, an institution must establish that a record:
>
> 1. contains information including proposed plans, policies or projects; and
>
> 2. that disclosure of the information could reasonably be expected to result in:
>
> (i) premature disclosure of a pending policy decision, or
>
> (ii) undue financial benefit or loss to a person.
>
> Each element of this two part test must be satisfied.

I have reviewed items 1, 2, 3, 4, 5, 9, 10, 11, 12, 13 and 15, and am of the view that the information contained therein does not relate to a proposed plan, policy or project of an institution. There is no evidence that disclosure could lead to the premature disclosure of a pending policy decision. Further, I am not persuaded by the institution's submissions regarding the financial loss to a person to be expected from disclosure. Accordingly, I find that these items do not qualify for exemption under section 18(1)g).

Since no other exemption has been claimed for item 15, I order its disclosure to the appellant.

In summary, I find that only items 18a and 18b qualify for exemption under section 18. As is the case with section 15, section 18 of the Act is a discretionary exemption. The head has provided submissions regarding the exercise of discretion. I am satisfied that the discretion has been exercised in

accordance with established legal principles, and should not be disturbed on appeal.

ISSUE C: Whether any part of the requested records falls within the discretionary exemption provided by section 13(1) of the Act.

The institution claims that section 13(1) of the Act applies to the following items:

2, 19a, 19b and 20.

Since I have found that items 19a, 19b and 20 qualify for exemption under section 15, I will confine my discussion of the application of section 13(1) to item 2.

Section 13(1) of the Act provides as follows:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In Order 118, dated November 15, 1989, former Commissioner Linden stated that "advice", for the purposes of section 13(1) must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. I concur with Commissioner Linden's interpretation of the word "advice", and adopt it for the purposes of this appeal.

I have reviewed the information contained in item 2. While it is possible that advice may have been given at some point to the participants of the meeting, it is my view that the information contained in the item is mainly factual in nature, and also relates to a decision made by the group. It does not reveal any advice which may have been accepted or rejected by the group. Accordingly, I find that the information does not qualify for exemption under section 13(1).

ISSUE D: Whether any part of the requested records falls within the mandatory exemption provided by section 21 of the Act.

The institution claims that the following items are exempt from disclosure under section 21 of the Act:

6, 7, 12, 16, 17, 19a, 19b, 21a, 21b and 21c.

Since I have found that items 16, 17, 19a, 19b, 21a, 21b, and 21c qualify for exemption under section 15, I will confine my discussion under section 21 to items 6, 7 and 12.

In order to qualify for exemption under section 21 of the Act, the information must be "personal information", as defined in section 2(1) of the Act. Section 2(1) provides as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

In its representations, the institution submitted that each of the items contained personal information. Item 6 contains information about the health of a named individual. I find that this information qualifies as "personal information".

Item 7 contains only the title of a person making observations in his professional capacity. I find that the title alone does not qualify as "personal information", and thus section 21 cannot apply. Since no other exemption has been claimed for this information, I order its disclosure to the appellant.

Item 12 contains the names of persons making observations about technical processes, in their professional capacities, and the observations. In reviewing the item, I am not persuaded that the names and professional opinions of these persons fall within the definition of "personal information" as defined in the Act, and therefore, section 21 cannot apply.

As I have found that Item 6 contains personal information, I must consider whether the disclosure of this information would constitute an unjustified invasion of personal privacy. In reviewing the information contained in the item, I am of the view that its disclosure would constitute an unjustified invasion of the personal privacy of the person to whom the information relates. I uphold the decision of the head not to disclose it.

In summary, I find that only item 6 qualifies for exemption under section 21. I find that items 7 and 12 do not contain personal information, and I order the disclosure of item 7 to the appellant.

ISSUE E: Whether any part of the requested records falls within the mandatory exemption provided by section 17 of the Act.

The institution and two affected parties claim that sections 17(1)(a), (b) and (c) of the Act apply to the following items in the requested records:

1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 16, 17, and 22.

Since I have already found that items 14, 16, 17 and 22 are exempt under section 15 of the Act, I will confine my discussion under section 17 to items 1, 2, 3, 4, 5, 9, 10, 11, 12 and 13.

Sections 17(1)(a), (b) and (c) of the Act read as follows:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

In Order 36, dated December 28, 1988, former Commissioner Sidney B. Linden outlined the three part test which must be met in order for a record to qualify for exemption under sections 17(1)(a), (b) or (c):

> 1. The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information, and
>
> 2. The information must have been supplied to the institution in confidence, either implicitly or explicitly, and
>
> 3. The prospect of disclosure must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.
>
> Failure to satisfy the requirements of any part of this test will render the subsection 17(1) claim invalid.

I concur with Commissioner Linden's view of the section 17(1) test and adopt it for purposes of this appeal.

In determining whether the first part of the test has been satisfied, I must consider whether the disclosure of the items would "reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information."
A review of the items leads me to conclude that they all contain technical information, and thus the first part of the test is satisfied.

The second part of the test raises the question of whether the information contained in the items was "supplied in confidence

implicitly or explicitly". I have carefully considered the representations of the institution, AECL and the affected party on this question. I have also reviewed each individual item.

In my view item 13 must be dealt with separately under this part of the test. A review of this item indicates that it relates to a presentation by an employee of the institution to SOATIC. It would appear from the contents of this item that the employee described new inspection procedures. The item also contains a reference to comments made by the Chairman of SOATIC. Accordingly, I cannot see how the information contained in item 13 could be considered to have been supplied to the institution and therefore does not meet the second part of the test. Since no other exemption applies to this item, I order its disclosure to the appellant.

I have had some difficulty in trying to understand where the information contained in the balance of the items originated. One thing that does seem clear is that the information relates to one of the affected parties in the sense that the information appears to consist largely of observations and conclusions about a certain problem that the institution was experiencing, which problem was associated with work done and/or material supplied by this affected party.

In its representations one of the affected parties submits that the information contained in the items originally appeared in a report of a Technical Working Group prepared by AECL. As well, this affected party states that it was a "willing and voluntary participant in the technical working group."

In the particular circumstances of this appeal, I am of the view that the information contained in these items was "supplied" within the meaning of section 17(1). Given the nature of the information, and the practices and procedures of SOATIC regarding information supplied to it, I accept that the information was supplied in confidence. Thus the second part of the test is satisfied.

The third part of the test will be satisfied if it can be demonstrated that disclosure of the information contained in the items at issue in this appeal could reasonably be expected to result in one of the types of harms specified in (a),(b) or (c) of section 17(1). The onus is on the institution and the affected parties to provide detailed and convincing evidence of the facts and circumstances that would lead to a reasonable expectation that the type of harm could result from the disclosure of the items. In my view, there must be a direct connection between disclosure and the resultant harm.

With respect to section 17(1)(b) the affected parties submit that were I to order disclosure of the information, neither of them would be prepared to supply such information to the institution in the future. The institution submitted that "Disclosure of this information, which has been provided in confidence, could reasonably be expected to result in such information no longer being supplied to Ontario Hydro."

Simply stated, I do not accept this assertion. Given that the institution is AECL's premier customer for CANDU reactors and given the business relationship between the institution, AECL and the

other affected party, I do not accept that it could reasonably be expected that the kind of information at issue would no longer be supplied.

In their representations the institution and the affected parties submit that the disclosure of the information would significantly and adversely affect the competitive positions of the affected parties. As well, AECL and the other affected party submit that disclosure would interfere significantly with their respective contractual negotiations and result in undue loss.

I have carefully considered the representations of AECL as it relates to these harms and I am not convinced that it could reasonably be expected that they will result from disclosure of the items.

To a large extent the other affected party bases its submissions as it relates to significant prejudice to its competititive position on the fact that its reputation would be damaged within a "relatively closed industry with a very small and limited market."

The other affected party also submits that:

> It is reasonable to expect that potential and exisiting customers of [the other affected party], upon reading or hearing of these minutes, and not necessarily being able to learn of the larger context in which the information was provided, would turn to one of the other suppliers.

I have reviewed the items and do not agree that their disclosure could reasonably be expected to result in significant prejudice to the affected party's competitive position. In my view, the subject matter which is dealt with in the items at issue has already been the subject of a degree of public disclosure and discussion.

Accordingly, it is my opinion that disclosure of the items at issue, although perhaps providing more by way of detail, would not of itself, result in harm to the competititive position of the affected party.

This affected party also submits that disclosure of these items could reasonably be expected to result in "undue financial and business loss" in accordance with section 17(1)(c) of the Act. Once again the basis for this position seems to be the effect that disclosure would have on the reputation of the affected party. As I said under the discussion of harm to competitive position I am not persuaded that disclosure of the items at issue, in itself, could reasonably be expected to result in undue loss to the affected party.

As all three parts of the test have not been satisified I am of the view that items 1, 2, 3, 4, 5, 9, 10, 11, and 12 do not qualify for exemption under section 17(1).

ISSUE F: If the answer to Issues A, B, C, D or E is in the affirmative, whether all or any part of the requested records can reasonably be severed, under section 10(2) of the Act without disclosing the information that falls under an exemption.

Section 10(2) of the Act provides as follows:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

I have considered the severance requirement set out in section 10(2) and I am of the view that no reasonable severance to the items which I have found to be exempt, is possible.

ISSUE G: If the answer to Issues A, B, C, D or E is in the affirmative, whether there is a compelling public interest in the disclosure of all or any part of the requested records which clearly outweighs the purpose of the exemptions.

As I have found that portions of the records qualify for exemption, I will now consider the application of section 23 of the Act, which was raised by the appellant in his representations.

Section 23 of the Act reads as follows:

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

In Order 68, dated June 28, 1989, Commissioner Linden stated that in order for the so-called public interest override to apply, "there must be a compelling public interest in disclosure and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question."

I concur with Commissioner Linden's interpretation of section 23 and adopt it for the purposes of this appeal.

The Act is silent as to who bears the burden of proof in respect of section 23. Where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could

seldom, if ever, be met by an appellant. Accordingly, I have reviewed those portions of the requested records which I have found to be subject to exemption, with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

The appellant submitted that:

> My original request was based on my suspicion that the information contained in the SOATIC minutes and agendas related to several outstanding safety problems associated with Canadian nuclear reactors. I argued then that the public interest can best be served only

> when the public has access to the safety-related discussions between the publicly-funded Ontario Hydro and Atomic Energy of Canada Limited (AECL). Since then, I have continued to collect material which would provide further evidence that public disclosure in this case is vital to the enhancement of nuclear safety, and that a considerable public benefit is to be gained in the release of the requested SOATIC documents.

In my opinion, only items 1, 2, 3, 4, 5, 9, 10, 11, and 12 which were dealt with under section 17(1) relate to nuclear safety. Since these items were found not to qualify for exemption under section 17(1) it is not strictly necessary for me to consider the application of section 23. However, in my view, even if I had found that the third part of the section 17(1) test had been satisfied, section 23 would have applied. Accordingly, I felt that it would be useful to outline my reasons for this conclusion.

The appellant, who represents a group which is active in the area of nuclear energy issues, has stated that he would undertake to disseminate the information to other interested groups. I believe that the interest of this appellant in disclosure is a public, and not a private interest.

The appellant has stated that there is a public interest in having access to the safety related information in order to permit better informed public discussion. Again, I accept that there is a public interest in the discussion of these issues. However, the question is, whether or not this public interest is compelling.

Nuclear safety is a serious issue, and nuclear accidents have potentially disastrous effects on the community at large. The seriousness of the issue of nuclear safety is acknowledged by the institution and the affected parties. However, their position is that the public interest is better served by maintaining a free and frank method of communication between the partners in SOATIC. Again, the institution and the affected parties assume that such
frankness would not continue were certain information to become public. However, as previously stated, I do not accept the proposition that the partners in SOATIC would in future fail to carry out their respective mandates in the event of disclosure of certain information.

There is much public debate concerning the subject of nuclear energy, and in particular, on the question of the institution's future plans with respect to the use of nuclear power. I understand that a series of hearings respecting the latter issue is at present underway. The appellant contends that it is difficult for public interest groups to make meaningful submissions in the context of such hearings without having access to pertinent information relating to nuclear safety. It would appear from the representations of the institution and AECL regarding the policies
and practices of SOATIC in disseminating information which arises in the context of SOATIC meetings, that public access to that information is virtually non-existent.

To my mind there are larger issues involved in this matter, and the public need to know is not confined to the need to permit

full participation in the hearings referred to above. In my view, there

is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.

I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.

In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

The question which remains is whether that public interest is so compelling as to clearly outweigh the purposes of the section 17 exemption? In my view, the purpose of the section 17 exemption is the protection of third party information supplied to an institution in confidence, so that the third party's interests will not be harmed by disclosure.

I feel that, in view of the considerations which I have set out above, the public interest in the disclosure of the information would be sufficiently compelling as to clearly outweigh the purposes of section 17.

ISSUE H:

Whether the records in issue in this appeal are subject to the Act.

As noted, in its representations, in response to the Notice of Inquiry, AECL raised the issue of whether the application of the Act to the information of AECL was constitutionally valid.

In its further representations on the constitutional issue, AECL submitted that the issue raised was not the constitutional validity or invalidity of the Act. Rather, the issue was "the proper interpretation of the Act in light of applicable constitutional principles". AECL submitted that the Information and Privacy Commissioner/Ontario lacked jurisdiction over the substance of the appeal.

Specifically, AECL argued that the Act, if interpreted properly, did not apply to the records in issue for the following reasons:

a) the Parliament of Canada has the exclusive jurisdiction to make laws with respect to works and undertakings for the development of atomic energy by virtue of s. 18 of the Atomic Energy Control Act.. Section 18 applies to Ontario Hydro's nuclear generating facilities because CANDU reactors produce and use atomic energy and prescribed substances. The Ontario Court of Appeal in Ontario Hydro v. Ontario (Labour Relations Board), [1991] O.J. No. 99 (application

for leave to appeal filed in the Supreme Court of Canada) has held that exclusive federal jurisdiction over nuclear works and undertakings extends to labour relations at Ontario Hydro's nuclear generating sites. The provisions in the Atomic Energy Control Act and Regulations demonstrate that there is an even stronger case to be made for extending this exclusive federal jurisdiction to secrecy of information about atomic energy.

The secrecy of information about atomic energy and prescribed substances is vital to the operations of AECL and Ontario Hydro and to the entire statutory scheme regulating their nuclear works and undertakings. Therefore, Parliament's exclusive jurisdiction over AECL's and Ontario Hydro's nuclear works and undertakings extends to the SOATIC records, which include information in relation to nuclear research and development, engineering and design, and the operations of AECL and Ontario Hydro.

In addition, the control of atomic energy in Canada is an indivisible and distinctive matter of national concern which comes within the federal jurisdiction to make laws for the peace, order and good government of Canada, and therefore the Parliament of Canada has the exclusive jurisdiction to make laws with respect to secrecy of information about that matter;

b) In the alternative, the disclosure of SOATIC records would affect a vital or essential part of AECL's federal undertaking.

AECL's mandate is to implement Canada's atomic energy policy, and in particular, to research, develop and market the CANDU reactor. A vital part of that mandate is AECL's close cooperation and full and frank exchange of information with Ontario Hydro at the SOATIC meetings. AECL and Ontario Hydro conduct joint confidential discussions at these meetings in a continuous interplay of persons providing, receiving and discussing information, so that the information generated at the meetings is inextricably interwoven into a single body of information.

Therefore, all of the information contained in the SOATIC records forms part of AECL's mandate to operate federal works and undertakings and implement Canada's atomic energy policy.

Numerous provisions in the Atomic Energy Control Act and Regulations under that Act demonstrate, secrecy and confidentiality are intricately linked to AECL's federal works and undertakings.

c) In the further alternative, the disclosure of the SOATIC records would be inconsistent with federal legislation which applies to the secrecy of information about atomic energy. The Atomic Energy Control Act imposes fidelity and secrecy

requirements on AECL's directors, officers and employees. The Atomic Energy Control Board is given the power under the Atomic Energy Control Act to regulate the dissemination and secrecy of information about atomic energy both by AECL and the Board's licensees, including Ontario Hydro. Furthermore, AECL is not a "government institution" for the purposes of the federal Access to Information Act.

In his representations, the appellant took the position, in part, that the disclosure of the information regarding the affairs of SOATIC did not raise a constitutional issue. The appellant stated that he was not seeking information from AECL - a federal agency. He was seeking information from Ontario Hydro, which is clearly governed by the terms of the Act. According to the appellant, once information from AECL passed to Ontario Hydro it was subject to the provisions of the Act. The appellant further stated:

> The provincial Freedom of Information Act in section 15 provides an exception to the disclosure of certain information which is provided by another government in confidence. Clearly the Legislature, by providing for this possible exclusion, contemplated the application of the Act to a situation where a provincial crown agency such as Ontario Hydro receives confidential information from another government or agency.

The Attorney General of Canada also took the position that there were no threshold constitutional questions to be resolved. The Attorney General of Canada stated in part:

> The fact that confidential information flows between the federal and provincial agencies is specifically addressed by sections 15 and 17 of the Ontario Act. Given this sort of protection, the operation of "A.E.C.L." could only be adversely affected if the exemption were not applied pursuant to section 23 of the Ontario Act and if there were an "overwhelming public interest" in favour of disclosure. Absent such an application, if the decision not to disclose pursuant to s.15 or the other exemptions of the Ontario Freedom of Information Act is maintained, then there exists no constitutional conflict.

In his representations, the Attorney General of Ontario stated that, since he did not have access to the records in issue, he could not take a position as to how the constitutional questions raised by AECL should be answered. However, he was intervening in order to assist the Commissioner in applying the appropriate constitutional principles.

The Attorney General submitted that the Act purports to apply only to Ontario government institutions and only incidentally affects AECL. As a result, the disclosure of AECL information

under the Act would violate the constitution only if such disclosure would impair or paralyse the operations of AECL. Only in the rarest cases could the disclosure of information be said to impair or paralyse the operations of a company or undertaking.

Secondly, the Attorney General of Ontario submitted that the Atomic Energy Control Regulations were the only federal provisions that were capable of being inconsistent with the provisions of the Act. These secrecy regulations have been promulgated pursuant to the federal government's jurisdiction over matters relating to atomic energy, which is supported under both the federal declaratory power and the national concern branch of the peace, order and good government power. The Attorney General of Ontario noted that these regulations apply to "any person". As a result, disclosure pursuant to the Act will be inconsistent with federal law if the information contained in the documents in question falls under these provisions. In such a case, the federal regulations will prevail under the doctrine of federal paramountcy.

Having considered the representations on the constitutional issue raised by AECL, I am of the view that the application of the Act to the records in issue does not raise a constitutional issue. It is my view that the Act applies to the records in issue in this appeal and therefore I have an obligation to make an order disposing of the issues raised by the appeal, as I have done under Issues A to

G above. In coming to this conclusion, I have referred to the constitutional principles identified by AECL as an aid to interpretation.

The provincial Freedom of Information and Protection of Privacy Act is a provincial law of general application that applies to records in the custody or under the control of a ministry of the Government of Ontario, and any other provincial agency, board, commission, corporation or other body designated as an institution in the regulations. Ontario Hydro is designated as an "institution" in Ontario Regulation 516/90 under the Act.

The records in issue in this appeal - agendas and minutes of SOATIC (a joint technical committee at the senior executive level of AECL and Ontario Hydro) - are records that are in the custody of Ontario Hydro, an institution under the Act.

Section 10 of the Act provides every person with the right of access to a record or a part of a record in the custody or under the control of an "institution". That right is made subject to the specific exemptions set out in sections 12 to 22 of the Act. These exemptions are intended by the Legislature to protect certain defined interests.

The considerable overlap of provincial and federal jurisdiction in various areas inevitably leads to an exchange of information between both levels of government. The federal Access to Information Act contains specific exemptions, in sections 13 and 14, that address the relationship between the Government of Canada and the provinces. Similarly, the Act contains a number of exemptions that address the relationship between provincial and federal government agencies such as Ontario Hydro and AECL.

Section 15 of the Act provides a broad exemption with respect to records the disclosure of which could reasonably be expected to

"prejudice the conduct" of intergovernmental relations. Section 15 also exempts from disclosure records received by an institution in confidence from another government. This exemption recognizes that other governments, including the federal government and its agencies, may be unwilling to supply information that may be of assistance to Ontario or any of its agencies if the latter are unable to provide a degree of assurance that the information would not be disclosed to the public by their representatives.

As the section 15 exemption is discretionary, there is the additional requirement that a head cannot disclose a record to which the section 15 exemption applies without the prior approval of the Executive Council.

Section 16 permits an institution to withhold a record "where disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada ...".

Section 17 provides an exemption for certain types of information (trade secrets or scientific, technical, commercial, financial or labour relations) supplied in confidence by third parties where disclosure could reasonably be expected to result in injury to the interests of the third parties or in similar information no longer being supplied to the institution. Section 17 protects the scientific or commercially valuable information of a federal or other governmental agency to the same extent that similar information of non-governmental organizations is protected by this exemption.

The Act contains two exceptions which permit the disclosure of an otherwise exempt record and they are (i) where a head "has reasonable and probable grounds to believe that it is in the public

interest to do so and that the record reveals a grave environmental, health or safety hazard to the public" [section 11]; and, (ii) in the case of exemptions under sections 13, 15, 17, 18, 20 and 21, "where a compelling public interest in disclosure of the record clearly outweighs the purpose of the exemption"
[section 23].

The Act may incidentally affect the federal government or its agencies because it applies to records containing information of the federal government or its agencies that are in the custody or
under the control of the Ontario government or its agencies. However, in my view, it is evident that the Legislature contemplated the application of the Act to such records.

In this appeal, I have found that only portions of the records at issue qualify for exemption. In my opinion, the disclosure of the balance of the records will not immobilize or paralyse the operations of AECL.

I am also of the view that there is no inconsistency between federal legislation which applies to the secrecy of information about atomic energy and the Ontario Act in the circumstances of this appeal.

It is true that AECL is not itself subject to the federal Access to Information Act. However, in my view, information of AECL would be subject to the federal Access to Information Act where the information was under the control of a scheduled government institution (e.g. External Affairs) and, in appropriate circumstances, unless it could be determined that the information

fell under one or more of the exemptions contained in the federal Access to Information Act, for example section 20 or 24, disclosure by the scheduled government institution would be a possibility.

The federal Access to Information Act applies to records in the control of federal government institutions and does not apply to records in the custody or under the control of the Ontario government or its agencies. As a result, there is no inconsistency between the two Acts.

The confidentiality provision found in section 19(2) of the Atomic Energy Control Act applies to **AECL** directors, officers and employees and requires them not to "communicate or allow to be communicated to any person not legally entitled thereto any information relating to the affairs of (AECL)." The confidentiality provision does not apply to Ontario Hydro directors, officers and employees. As a result, there is no inconsistency between the confidentiality provision contained in s. 19(2) of the Atomic Energy Control Act and the Act.

With respect to the confidentiality provisions contained in the Atomic Energy Control Regulations, Uranium Information Security Regulations and the Physical Security Regulations, I am not

satisfied that they apply to any of the information that I have determined should be disclosed and that disclosure would be inconsistent with federal law. Therefore, no paramountcy issue arises.

For the reasons outlined above, it is my view that the Act applies to the records in issue in this appeal.

ORDER:

1. I uphold the head's decision not to disclose items 6, 8, 14, 16, 17, 18a, 18b, 19a, 19b, 20, 21a, 21b, 21c and 22.

2. I order the head to disclose items 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 13 and 15 to the appellant.

3. I order the head to disclose to the appellant the balance of the records which I have not found to be subject to exemption under the Act.

4. I order that the head not disclose items 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 15 and the balance of the records not exempt under the Act, until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that these records be disclosed within thirty_five (35) days of the date of this Order. The institution is further ordered to advise me in

writing within five (5) days of the date on which disclosure was made.

5. The notice concerning disclosure should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: February 11, 1992
Tom Wright Date
Commissioner

APPENDIX "A"

"Items" claimed as individual severances by the institution

Item 1.	Friday, May 30, 1986, page 2, Item 4b
Item 2.	Friday, May 30, page 3 Item 4(b) contd.
Item 3.	Wednesday, August 27, 1986, page 3, Item 6.2
Item 4.	Wednesday, August 27, 1986, Item 6.3
Item 5.	Wednesday, February 18, 1986, page 2 Item 5.2, pghs 2 & 3
Item 6.	Wednesday, February 18, 1986, page 3, Item 5.5, pgh 2
Item 7.	Wednesday, February 18, 1986, page 3, Item 5.5, point 1
Item 8.	Wednesday, February 18, 1986, page 5, Item 7.2, point 2
Item 9.	Wednesday, May 27, 1987, page 3, Item 5.2, pghs 2, 3, 4, 5
Item 10.	Friday, November 20, 1987, page 3 Item 5.3, pgh 3
Item 11.	Friday, November 20, 1987, page 4, Item 5.4
Item 12.	Wednesday, March 2, 1988, page 4, Item 5.2
Item 13.	Wednesday, March 2, 1988, page 4, Item 5.3
Item 14.	Wednesday, March 2, 1988, page 6, Item 5.6
Item 15.	Thursday, June 2, 1988, page 5, Item 6.2, pgh 1
Item 16.	same meeting as above, page 6, Item 7.1, pgh 1
Item 17.	same meeting as above - page 6, Item 7.1, pgh 2
Item 18a	same meeting as above, pages 6 & 7, Item 7.2

Item 18b	Wednesday, August 31, 1988, page 2 Item 3.2
Item 19a	Thursday, June 2, 1988, page 8, Item 9.3
Item 19b	Thursday, June 2, 1988, page 10, Item Action 12.7
Item 20.	Wednesday, August 31, 1988, page 4, Item 5.5
Item 21a	Tuesday, December 6, 1988, page 5 item 6.4
Item 21b	Same meeting as above, same item as above, last sentence
Item 21c	Same meeting as above, page 5, same item, end of pgh
Item 22.	Thursday, March 30, 1989, page 4 Item 5.2, pgh 5