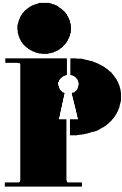

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER PO-1927-I

Appeal PA-990381-1

Ontario Hydro

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NATURE OF THE APPEAL:

Ontario Hydro (now Ontario Power Generation Inc.) (for simplicity, both referred to interchangeably as Hydro in this interim order), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "[a]ll documents from Jan. 1, 1995 to present on the use of plutonium/MOX as fuel at Ontario Hydro".

Hydro identified a large number of responsive records.

Pursuant to section 28 of the *Act*, Hydro notified 11 parties whose interests might be affected by disclosure of the records (the affected parties). Six affected parties consented to full disclosure of records relating to them, three consented to partial disclosure, and two objected. After considering the affected parties' responses, Hydro issued its decision to the requester. Hydro provided full access to 78 records totalling approximately 300 pages, and denied access to the remaining records, in whole or in part, on the basis of the following exemptions:

- sections 15(a) and (b) - relations with other governments
- sections 17(1)(a), (b) and (c) - third party information
- sections 18(1)(a), (c) and (d) - economic and other interests of Ontario

Hydro provided the requester with an Index of Documents describing the records and identifying the exemptions claimed for each record. Hydro also charged the requester a fee of $1,680 for searching, photocopying and preparing the records for disclosure.

The requester (now the appellant) appealed Hydro's decisions regarding access and fees, and also raised the possible application of the "public interest override" contained in section 23 of the *Act*.

During mediation of the appeal, several events occurred as follows:

- Records 12, 14, 27, 75 and 120 were identified as duplicates of Records 13, 15, 30, 77 and 121. The appellant agreed not to pursue access to any duplicates, so Records 13, 15, 30, 77 and 121 were removed from the scope of the appeal.

- Hydro's Index of Documents identified some other records as being duplicates. However, these records contain additional information, such as handwritten notations, and these records continue to be at issue in the appeal.

- The appellant indicated that he does not want access to any foreign language records, so any records not written in English are no longer at issue.

- Hydro reconsidered its position with respect to Records 89, 109, 193 and 194 and disclosed them to the appellant.

- Hydro clarified that Record 46 was inadvertently left off the Index of Documents, and advised that access to this record was denied on the basis of sections 15(a) and (b), 17(1)(a), (b) and (c), and sections 18(1)(a), (c) and (d) of the *Act*.

- Hydro explained how the fee for 53 hours of search time was calculated. The appellant was not satisfied with the explanation and Hydro's fee remains at issue.

- In responding to Hydro's section 28 notice, Atomic Energy of Canada Limited (AECL), one of the affected parties, took the position that the *Act* has no application to certain records. Specifically, AECL stated:

> ... As a constitutional matter, the Parliament of Canada has exclusive jurisdiction over matters relating to atomic energy, nuclear facilities, and nuclear substances, as declared in s. 18 of Canada's *Atomic Energy Control Act* and confirmed by the Supreme Court of Canada in *Ontario Hydro v. Ontario (Labour Relations Board)* (1993) 107 D.L.R. (4th) 457. The information contained in the records identified by [Hydro] as responsive to the above FOI request and forwarded to AECL for comment clearly relates to atomic energy, and accordingly the [*Act*] has no application to it and cannot be used to justify its release. The Government of Canada, not the Government of Ontario, has the exclusive jurisdiction to regulate and control the disclosure of such information.

The appeal proceeded to the adjudication stage. I sent a Notice of Inquiry to the appellant and Hydro , asking for representations on the constitutional issue raised by AECL, as well as most of the substantive issues that remained outstanding. I also sent the Notice to AECL, the Canadian Nuclear Safety Commission, the Canadian Department of Foreign Affairs and International Trade (CDFAIT), the Attorney General for Canada and the Attorney General for Ontario, asking these parties to provide representations on the constitutional issue. Because the *Ontario Hydro* case cited by AECL also refers to the "peace order and good government" clause of Canada's constitution as a source of Parliament's exclusive jurisdiction in matters relating to atomic energy, I also sought representations on this aspect of the constitutional issue. I attached a Notice of Constitutional Question to the Notice of Inquiry, pursuant to section 109 of the *Courts of Justice Act*. I decided not to seek representations on the section 17(1) exemption claim at that time, pending my determination on the constitutional issue.

The appellant submitted representations on all substantive and constitutional issues raised in the Notice. Hydro provided representations on most of the substantive issues, but not on the constitutional issues. Hydro also identified 15 records for which it specifically declined to make representations on the application of section 15. None of the other parties provided representations on the constitutional issue, including AECL, the party that initially raised it.

I then exchanged the non-confidential portions of the representations among the parties, and invited representations in response. One of the 15 records identified by Hydro in its representations (Record 135) was provided to the appellant as an attachment to the representations, and is no longer at issue in this appeal. The appellant was the only party to submit additional representations.

THE RECORDS:

There are approximately 200 records that remain at issue in this appeal, totalling almost 1300 pages. The records include letters, notes, e-mail messages, minutes, reports, briefing documents, agendas, memoranda, proposals, and other documents relating to the use of plutonium/MOX fuel in nuclear reactors.

Hydro explains the context in which these records were created or came into its custody or control.

In 1993-94, the U.S. National Academy of Sciences initiated a study to identify ways to dispose of Russian weapons-grade plutonium that would meet international standards. One identified option was the possible use of plutonium in CANDU reactors. In pursing this option, the U.S. Department of Energy commissioned AECL to undertake studies and tests to ascertain the feasibility of using MOX fuel containing weapons-grade plutonium in CANDU reactors. AECL established study groups to review and study various aspects of this option, and these bodies held meetings between 1995 and 1998. The Canadian Government, Hydro, other foreign countries, and a number of private companies were represented on these study groups. The records at issue in this appeal are various documents that were either created by Hydro or otherwise came into the custody or control of Hydro in the context of its participation in this multi-national project.

For ease of reference, the records can be broadly classified as follows:

CATEGORY A

Records specifically involving AECL (or an AECL subsidiary) in various study group activities over the period of time covered by the request. These records include meeting agendas, background documents, meeting minutes, and summaries of various actions taken by parties in relation to the matters discussed at study group meetings.

CATEGORY B

Records dated between 1995 and 1997 and received by Hydro from a U.S. - based company (affected party A). This company provided input to AECL and Hydro on a number of issues relating to the work of various study groups.

CATEGORY C

Records dated between 1995 and 1996 and received by Hydro from a Canadian-based company (affected party B). This company provided input to AECL and Hydro on issues relating to the work of one of the study groups.

CATEGORY D

Two records authored by the U.S. Department of Energy. Record 195 is a memorandum to AECL dated September 1996 and labelled "privileged and confidential". Record 196 is a faxed copy of a report submitted to AECL. Both records deal with certain aspects of AECL's work on the project.

CATEGORY E

The undisclosed portion of a letter (Record 197) received from a second Canadian-based company (affected party C), consists of a price quotation.

CATEGORY F

Records specifically identified by Hydro as involving foreign governments. The CDFAIT was notified by Hydro on behalf of these various foreign government interests. The records include correspondence to and from these foreign governments, as well as other documents referring to foreign government interests.

CATEGORY G

Documents created by Hydro. These records include correspondence with confidential attachments, a review of various international strategies, minutes of meetings, briefing materials prepared for meetings, and payment structure proposals.

Although I have divided the records into these seven categories for general reference purposes, that should not be interpreted as meaning that there is no overlap among the categories. For example, Category A consists of records involving AECL specifically, but a number of these records also refer to foreign governments, or refer to documents created by other parties. Similarly, records created by one member or advisor to a study group frequently refer to various other bodies and organizations participating in the study group, and to the interests of those parties, including AECL and Hydro.

DISCUSSION:

DOES THE ACT APPLY TO THE RECORDS?

The Notice of Constitutional Question I provided to the parties sets out the following questions to be addressed in this appeal:

1. Whether the *Freedom of Information and Protection of Privacy Act* is constitutionally inapplicable to some or all of the records at issue in this appeal, consisting of "all documents from January 1, 1995 to present on the use of plutonium/MOX as fuel at Ontario Hydro", which are in the custody or under the control of Ontario Hydro,

(i) by virtue of the exclusive authority of the Parliament of Canada under section 92(1)(c) of the *Constitution Act, 1867*, to make Laws governing Works declared by the Parliament of Canada to be for the General Advantage of Canada or the Advantage of Two or more Provinces, and specifically, governing matters relating to nuclear energy, nuclear facilities, and nuclear substances, as declared at section 18 of the *Nuclear Energy Act*, R.S.C. 1985, c. A-16, as amended by S.C. 1997, c. 9, c. 87, in force May 31, 2000 (formerly the *Atomic Energy Control Act*);

(ii) by virtue of the exclusive authority of the Parliament of Canada under section 91 of the *Constitution Act, 1867*, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not assigned exclusively to the Legislatures of the Provinces.

None of the parties takes issue with my jurisdiction to determine the constitutional applicability of the *Act*.

The appellant makes note of the fact that none of the other parties in this appeal has chosen to make representations on the constitutional issue. He relies on Order PO-1805 in support of his position that the *Act* does apply to the records at issue in this appeal.

The general subject matter of the records relates to a proposal for the conversion of Russian weapons-grade plutonium to fuel rods for use in nuclear reactors operated by Hydro. This activity would appear to be within the exclusive federal sphere of jurisdiction pursuant to section 92(1)(c) of the *Constitution Act, 1867* and, more specifically, Parliament's declaration in relation to atomic energy under section 18 of the federal *Nuclear Energy Act*.

Senior Adjudicator David Goodis considered a similar constitutional issue raised in Order PO-1805. He found in that case that provincial legislation of general application may properly apply to a federal undertaking as long as it does not affect a "vital and integral" or "vital and essential" part of the undertaking, including its operation and management. Senior Adjudicator Goodis found that where provincial legislation is not aimed as a whole at the management of a federal undertaking, but can be seen as merely regulating or circumscribing some aspect of the enterprise or a particular exercise of management decision-making, it is not constitutionally inapplicable for that reason alone. To be inapplicable, the effect of the provincial statute on the federal undertaking must relate to the "basic, minimum and unassailable content" of the federal head of power or the "vital and essential" management and operation of the undertaking.

Courts have determined that provincial workers' compensation and environmental protection laws, both in purpose and effect, may be said to have some limited impact on the management of a federal undertaking, in that they regulate or circumscribe certain kinds of decision making within the enterprise and/or prescribe consequences in relation to certain kinds of activities. However, neither type of law is directed at or affects vital aspects of the management of a federal undertaking or impinges on the core content of exclusive federal jurisdiction in any essential respect. (*Ontario v. Canadian Pacific Ltd.* (1993), 13 O.R. (3d) 389 (C.A.), affirmed [1995] 2

S.C.R. 1028 (without reasons); and *Canadian Pacific Railing Co. v Ontario (Workplace Safety and Insurance Appeals Tribunal)* [2000] O.J. No. 500). In Order PO-1805, Senior Adjudicator Goodis found that freedom of information laws fall into a similar category of legislation. While the *Act* contains some provisions which arguably could be said to regulate management of government institutions, the *Act* as a whole is not about the management of institutions. Like the *Environmental Protection Act*, it is a complex and multi-faceted scheme to ensure the public's right of access to information and the protection of individual privacy. The *Act* deals with all recorded information within the custody or under the control of government institutions in the province and sets up a delicately balanced regime of rights and obligations in relation to those information holdings.

Access to information laws do not on their face purport to affect how an institution or undertaking is operated or managed. Rather, they are designed to ensure that, irrespective of how the institution's mandate is discharged, there is an appropriate degree of responsibility and accountability within the statutory limits of the access to information regime. As Mr. Justice La Forest noted in *Dagg v. Canada (Minister of Finance)*, (1997), 148 D.L.R. (4th) 385 at 403: "Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable." While it is accurate to say that decisions concerning the disclosure or non-disclosure of the records of an undertaking are sometimes made by the management of the undertaking, it does not necessarily follow that making a particular decision regarding disclosure or non-disclosure itself constitutes an action that affects a vital or essential part of the undertaking in its management or operation.

It is clear that the subject matter of the records alone is not determinative of the constitutional outcome. The question is whether or not the regulation of the dissemination of the specific records at issue in an appeal under the *Act* is essential to the management and control of the facilities in the production of nuclear power.

In making his determination in Order PO-1805, Senior Adjudicator Goodis found: (1) that the *Act* does not purport to control how Hydro operates the facilities, or how it manages safety, health or security concerns in their operation; and (2) that the "safety" subject matter of peer review reports at Hydro's nuclear facilities was insufficient to establish that their disclosure would interfere with Hydro's objectives of ensuring the safe and secure operation of the facilities. In other words, he found that merely opening a window on a particular aspect of the management or operations of a federal undertaking cannot be presumed to interfere with a vital and essential component of its management and operations.

This is not to say that the disclosure of certain types of information could never interfere with a vital or essential component of the management or operations of a federal undertaking. Where, for example, disclosure would pre-empt the ability of management of a federal undertaking to make or implement a decision relating to a vital or essential part of the undertaking, provincial legislation may be inoperable to the extent that it would otherwise require such a disclosure. Where disclosure would not have such an effect, it is difficult to see how the exclusive federal sphere of jurisdiction would be impinged.

In the present appeal, I have no submissions before me in support of the constitutional inoperability of the *Act* in relation to the records identified by Hydro as responsive to the appellant's request. Hydro does not contest that the *Act* is constitutionally applicable to the records, and AECL has withdrawn its constitutional objection. Moreover, the provincial and federal Attorneys General have declined to make submissions on the issue, although properly notified by this Office pursuant to section 109 of the *Courts of Justice Act*.

This does not mean that a constitutional issue does not arise on the facts and law in this case, or that I am unable to consider and decide the constitutional question. Compliance with the notice requirements of the *Courts of Justice Act* permits me to dispose of the questions raised. However, it means that I must proceed cautiously in purporting to determine issues of the constitutional applicability of provincial legislation to a federal undertaking in the absence of a complete factual record and full (or indeed, any) argument from the parties on this issue.

The records, which Hydro states have not been used since early 1997, concern the general subject matter of a proposal for the conversion of Russian weapons-grade plutonium to fuel rods for use in nuclear reactors operated by Hydro. As set out above, this activity would appear to be within the exclusive federal sphere of jurisdiction. However, as Senior Adjudicator Goodis determined in Order PO-1805, the subject matter of the records is not determinative of the constitutional issue. The question is whether or not the regulation of the dissemination of the records is essential to the management and control of the facilities in the production of nuclear power.

In the circumstances of this appeal, no party has explained how or the extent to which a vital interest in nuclear power would be affected by the disclosure of the records at issue; nor does my independent review of the records, issues, or relevant factors support any such suggestion. Accordingly, in the absence of representations on this issue, and based on the analysis of the application of the *Act* set out in Order PO-1805, I find that Hydro's decision making responsibility under the *Act* as it relates to the records at issue in this appeal is not essential to the management and control of the production of nuclear power, and that the *Act* does not affect a "vital and integral" or "vital and essential" part of the operation and management of nuclear facilities or the production of nuclear power. Accordingly, I find that the *Act* applies to the records.

I have also not been referred to any federal statutes which might be in actual operational conflict with the provisions of the *Act* governing access to records of this nature. Consequently, I will not consider any issues based on a possible federal constitutional paramountcy argument.

ABILITY TO CHARGE A FEE

In the Notice of Inquiry sent to the parties, I asked for representations on the following issue:

> If it is determined that the records are outside the jurisdiction of the *Act*, should Hydro be allowed to charge a fee for the records to which Hydro has already granted access?

The appellant takes the position that, if the *Act* is found not to apply to the records covered by his request, the fees charged to him under the *Act* should be refunded. Hydro submits that it processed the request in good faith, and that the appellant has already received considerable documentation in response to his request.

As set out above, I have determined that the records at issue fall within the jurisdiction of the *Act*. Accordingly, Hydro is entitled to rely on the fee structure established by the *Act*.

FEES

Hydro charged the appellant a fee of $1,680, and identified that it consists of:

- 53 hours of search time @ $30 per hour;
- one hour of preparation time @ $30 per hour; and
- photocopying costs @ $0.20 per page.

Hydro provided the appellant with a letter explaining how the 53 hours of search time were calculated. The appellant was not satisfied with Hydro's explanation.

Hydro submits that it was correct in charging the fees that it did. Hydro explains the amount of time spent in searching for and preparing the records, and also identifies the work done by staff in reviewing the records and responding to the request. Hydro states in its representations:

> Most of the requested information - 16 feet of records - is kept in storage in filing cabinets within the control of Fuel Management section. Based on discussions with knowledgeable staff, the Manager of Nuclear Fuel Supply subsequently consulted a number of other individuals within OPG to determine whether other records potentially responsive to the request existed. He eventually determined that 4 OPG staff members, including himself and a staff person at [another site], had a total of 8 feet of additional records in their personal holdings that were potentially responsive to the request. Using an estimate of 250 pages per inch of files, this amounted to approximately 72,000 pages of documents potentially responsive to the request.
>
> ... The records had been in disuse for about 2 years when OPG received the access request.

Hydro also summarizes the considerable amount of work involved in processing the request, including its time to review records, notification of the 11 affected parties and reviewing their responses, and consultation with internal staff. Hydro estimates that it took two staff members approximately four eight-hour days to sort and review these documents for these purposes, but also acknowledges that the costs for these types of tasks are not chargeable to the appellant under the *Act*.

The appellant submits that, although the costs identified by Hydro may be permitted under the *Act*, the actual costs to Hydro were lower than the amount charged, because salaries of those employees responsible for processing the request would have been paid by Hydro in any event. The appellant also submits that actual photocopying costs would be much less than the $0.20 per page charged by Hydro.

The charging of fees is authorized in section 57(1) of the *Act*, and more specific provisions regarding fees are found in section 6 of R.R.O. 1990, Regulation 460. These provisions read as follows:

Section 57 of the *Act* states, in part:

> (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> > (a) the costs of every hour of manual search required to locate a record;
> >
> > (b) the costs of preparing the record for disclosure;
> >
> > (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
> >
> > (d) shipping costs; and
> >
> > (e) any other costs incurred in responding to a request for access to a record.
>
> (6) The fees provided in this section shall be paid and distributed in the manner and at the times prescribed in the regulations.

Section 6 of R.R.O. 1990, Regulation 460 states:

> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a record:
>
> > 1. For photocopies and computer printouts, 20 cents per page.
> >
> > 2. For floppy disks, $10 for each disk.
> >
> > 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Search fees

Hydro submits:

> [Hydro's] total search time is as follows: [Hydro] staff spent a total of 3 hours locating the staff knowledgeable about the subject area of the request and locating the records potentially responsive to the request. The key subject area expert spent a total of 45 hours searching the 16 feet of potentially responsive records described above, in order to find the records that were actually responsive to the request. Four other area experts spent a total of 8 hours searching a total of an additional 8 feet of potentially responsive records in order to find the records that were actually responsive to the request. The total search time described above was 56 hours. [Hydro] charged the appellant for 53 hours because it mistakenly believed at the time that it should provide 2 hours of search time for free and it chose not to charge the additional hour described above. [Hydro] has since learned that the provision allowing for 2 free hours of search was repealed in 1996 and therefore, search time charged to the appellant should have been correspondingly higher. [Hydro's emphasis]

It is not clear to me what proportion of the initial three hours of search time was spent by Hydro "to locate staff knowledgeable about the subject area", and what proportion of that time was spent locating potentially responsive records. Time spent locating staff is not chargeable under the *Act*.

Based on the broad nature of the request, and on the explanation provided by Hydro as to the nature and extent of the searches required to locate the responsive records, I find that the time incurred in conducting the necessary searches was reasonable in the circumstances, even after taking into account any time spent by Hydro in locating staff knowledgeable about the subject area. It is reasonable to assume that any time spent locating staff would be accommodated within the two additional hours of search time subject to fees in any event.

Reproduction/Copying Charges

Hydro charged the allowable $0.20 per page for the 300 pages of records disclosed to the appellant. I find that this amount has been calculated in accordance with section 6 of Regulation 460, and the actual costs to OPG in this regard are not relevant.

Preparation of the Records for Disclosure

Hydro submits:

> In order to prepare the records for disclosure, [Hydro] subject area experts and coordinators spent considerable time reading the documents to determine whether any of the exemptions in the Act applied to the records. This work is described in more detail below under the heading of costs not recoverable under the *Act*.
>
> Once [Hydro] had determined which information should be exempt under the *Act*, it estimated how much time it took to physically white-out information to be withheld. And to write on the records the sections of the *Act* which applied to the exemptions.
>
> [Hydro] staff took one hour to physically white-out information to be withheld and to write on the records the sections of the *Act* which applied to the exemptions.

In reviewing the actions taken to prepare the record for disclosure, I find that the one hour charged for this activity is reasonable in the circumstances.

In summary, I uphold the $1,680 fee charged by Hydro to the appellant.

Fee Waiver

The appellant did not request a fee waiver at the request stage, nor during the mediation stage of this appeal. In his representations, the appellant raises this issue for the first time, and includes a number of reasons which he feels support his request. Hydro was made aware of the fee waiver issue when provided with a copy of the appellant's representations during the course of this inquiry, but chose not to respond to this issue.

Because this is an Interim Order, I will be issuing a Supplementary Notice of Inquiry to the parties covering all remaining issues. I have decided it would be appropriate to include the fee waiver issue in this Supplementary Notice, and to defer my decision on this issue until Hydro has been provided with an opportunity to address it in its supplementary representations.

SECTION 15 - RELATIONS WITH OTHER GOVERNMENTS

Hydro claims sections 15(a) and (b) of the *Act* as one basis for denying access to a large number of records or parts of records, and provides detailed representations in support of its position.

Hydro specifically declines to make submissions with respect to 14 of these records, although it does not withdraw the section 15 claim for any of them. [A 15th record in this category was subsequently provided to the appellant, as discussed earlier.] Hydro points out that section 15 was claimed for these records because the requirements of the exemption are present, but also because foreign governments have yet to be consulted on these documents. It is clear that Hydro has not withdrawn its section 15 exemption claim for these 14 records; only that it has declined to provide representations in support of the claim. Accordingly, I will assess the application of section 15 to all records for which it was claimed, and will make my determination regarding the 14 records on the basis of the content of these records and their relationship to other records for which the Hydro has provided representations.

Sections 15(a) and (b) 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;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

The purpose of the section 15 exemption has been set out in previous orders as follows:

> Section 15 of the *Act* recognizes that the Ontario government will create and receive records in the course of its relations with other governments, and that individual institutions should have discretion to refuse to disclose records where it is expected that disclosure would result in any of the consequences enumerated in this section. In my view, section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of section 15(b) is to allow the Ontario government to assure other governments that it is able and prepared to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern. (see Orders P-1202 and P-1398 (upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.))

The words "could reasonably be expected to" appear in the preamble of section 15, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 15, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof (in this case Hydro) must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm". (See Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), as well as Order PO-1891-I).

The records for which the section 15 exemption has been claimed are records which are in the custody and under the control of Hydro largely due to its involvement on various study groups which included AECL and other parties. Previous orders of this Office have examined the application of section 15 in circumstances similar to various aspects of the present appeal.

Past jurisprudence

Records received from another government or its agencies

Order P-270 involved a request for records from Ontario Hydro. In that Order, the records had been created as a result of a joint technical committee comprised of representatives from Ontario Hydro and from AECL. Former Commissioner Tom Wright decided that the section 15 exemption applied to certain records in those circumstances. The relevant portions of that Order read as follows:

> 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.
>
> [Senior Ontario Hydro/AECL Technical Information Committee (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).

I accept and adopt this analysis for the purposes of the present appeal. To the extent that the information in the records was received from AECL, it is information received from another government or its agencies.

However, not all records were received from AECL. Several were received from other governments or agencies, others from private companies, and still others were created by Hydro itself. Other orders issued after Order P-270 have examined whether or not certain types of records would reveal information received from another government or its agencies. These orders, and the nature of the records which were considered in them, are briefly summarized below.

Records generated during intergovernmental discussions

Disclosure of records generated in the context of discussions among the federal government and/or its provincial and territorial counterparts have been found to qualify under section 15(a) because these discussions could reasonably be expected to prejudice the conduct of intergovernmental relations. For example, in Order P-1137, I determined that this exemption applied to records relating to a conference of provincial and territorial deputy ministers of health concerning the question of financial assistance to persons infected with HIV via the blood system. These records included communications exchanged directly between Ontario and the other provinces and/or territories, correspondence between these other parties which was copied to Ontario, and supporting documentation prepared for these meetings. Some of these records were created by the Ministry of Health for internal use, and incorporated the information received from the other provinces and/or territories. I made this decision based on my review of the context in which the Multi-Provincial and Territorial Assistance Plan discussions between the provinces and territories were conducted. The Ministry of Health convinced me that throughout these discussions, the provinces and territories were encouraged to discuss any issues in an open and candid manner, and that these discussions and supporting documentation were shared on an explicitly confidential basis.

Senior Adjudicator Goodis recently applied this reasoning in Order PO-1891.

Internally generated records

In Order P-1350, Adjudicator Laurel Cropley had to determine whether or not certain documents, including documents generated by an institution itself, qualified for exemption under section 15(b). She found that records created by another government, as well as records prepared by the Ministry of Community and Social Services officials, would reveal exempt information, and therefore qualified for exemption under section 15(b) of the *Act*.

Similarly, in Order P-1137, I found that internally generated records could qualify for exemption under section 15(a) of the *Act*.

Records generally related to intergovernmental communication

Order P-1629 involved a request for records relating to formal or informal provincial involvement in Industry Canada's $60-million investment in an identified company under the Technology Partnerships Canada Fund. I examined the application of section 15(b) to a number of records created by the Ministry of Economic Development, Trade and Tourism, including a briefing note and e-mail correspondence, which referred to information provided to that ministry in confidence from another government. I found that the records contained sensitive information about meetings and discussions held by the federal Minister of Industry with various parties in France concerning an affected party's vaccine project, and that the Ministry received this information in confidence from the federal government. Accordingly, I found that these records qualified for exemption under section 15(b) of the *Act*.

Supporting documentation

In Order P-1202, I reviewed the application of section 15(b) to records described as "supporting documentation" prepared for meetings involving other governments. The Ministry of Community and Social Services in that appeal had provided an overview of the context in which discussions between provinces and territories are conducted at Provincial/Territorial Ministers' Meetings, and had indicated that disclosure of the type of records that were at issue in that case would call into question long-standing practices and understandings reached among the provinces and territories concerning meetings, exchange of information, preparation of common briefing notes, and exchange of documents. The Ministry also stated that supporting documentation prepared for these meetings is always shared on a confidential basis. In the circumstances, I found that the requirements of section 15(b) of the *Act* had been established.

In that same order, I reviewed the application of section 15(b) to records prepared by ministry officials, including briefing notes which described and addressed issues raised in the common briefing notes provided by other provinces, and which were prepared for use by the Ontario Minister of Community and Social Services at the meeting. I found that disclosure of the portions of the briefing notes prepared by Ontario officials which discuss the contents of the other provinces' briefing notes would reveal exempt information, and that this information qualified for exemption under section 15(b) of the *Act*.

Records concerning involvement on a committee

Order P-1552 dealt with AECL records which were in the possession of the Ministry of the Environment as a result of its involvement on a joint committee. Ministry staff sat on a committee at the invitation of AECL to discuss matters that might affect the environment. As a consequence of its involvement on this committee, the Ministry was provided with most of the information which made up the records at issue in that appeal. Other records reflected the comments of Ministry staff to issues raised by AECL, the Atomic Energy Control Board (AECB) or Environment Canada. Former Adjudicator Marianne Miller found that records received from either AECL, AECB or Environment Canada, either directly or indirectly, were received from another government or its agencies for the purposes of section 15 of the *Act*.

Records which would reveal information

Also in Order P-1552, former Adjudicator Miller reviewed records which, though created by Ministry of the Environment staff, would also "reveal" information received in confidence. She found:

> In the context of sections 17 and 13 of the *Act*, a number of previous orders have established that information contained in a record would reveal information "supplied" within the meaning of section 17(1) or advice within the meaning of section 13, if its disclosure would permit the drawing of accurate inferences with respect to information actually supplied or advice given (e.g. Orders P-218, P-1000, P-1054 and P-1231). In my view, a similar approach is warranted by the wording of section 15(b) which permits the exemption of information where the disclosure could reasonably be expected to reveal information received in confidence from another government or its agencies. Therefore, if information contained in a record would permit the drawing of accurate inferences with respect to information received from another government or one of its agencies, this information can be said to reveal the information received.

She then applied this reasoning in upholding the section 15(b) exemption claim for records which would reveal information received from another government.

Records stemming from negotiations

In Order P-1038, former Assistant Commissioner Irwin Glasberg reviewed records requested from the Ministry of Health relating to the continuation of broader out-of-country provincial health coverage. Section 15(b) was claimed for records that reflected discussions which occurred between various governments, including a series of notes taken by a Ministry employee which documented a conference call involving officials from the Government of Ontario, the federal government and three other provincial governments. The purpose of this conference call was to prepare for a subsequent meeting of deputy ministers of health where the subject of out-of-country benefits was to be discussed. Another record at issue in that appeal was an inter-office memorandum prepared by the same individual which circulated information about the conference call to other Ministry staff.

The Ministry indicated that contentious matters were discussed during the conference call, and that information from the parties was both provided and received in confidence. The Ministry then argued that, unless there is an understanding that such discussions are confidential, government officials will be unable to share information and negotiate freely. Assistant Commissioner Glasberg accepted this argument, and found that, given the subject matter of the conference call, it could be inferred that each participant reasonably expected that any information which was communicated would be received in confidence both by the Ministry and the other government organizations. He concluded that, if disclosed, these portions of the records could reasonably be expected to reveal the information in question, and upheld the section 15(b) exemption claim.

Finally, in Order P-1406 (Reconsideration Order R-970003), I reviewed the application of the section 15(a) exemption to numerous records relating to negotiations between the Ontario Government (through the Ontario Native Affairs Secretariat (ONAS)), a First Nation, and the Canadian Government. Although the Canadian Government was only involved in the negotiations at a later stage of the process, I found that the section 15(a) exemption applied to a large majority of the records created throughout the negotiations. The relevant portion of the order reads as follows:

> Similarly, the First Nation submits that it was the understanding of all the parties, throughout the negotiations, that unless otherwise agreed or arranged, the information produced by any of the parties by their researchers or lawyers was to be treated as confidential. The ability to negotiate among the three parties in confidence is a crucial factor which enables land claim resolutions to be achieved. These negotiations can only be expected to achieve any concrete results if the negotiations amongst the three parties, and all of the documentation supporting the positions of each of the parties can be maintained in confidence.
>
> Given the sensitive and complex nature of land claim negotiations generally and the particular circumstances in this appeal, including the need for ongoing negotiations to implement the agreement which was reached, I am persuaded that disclosure of the bulk of the records at issue could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada, including the tripartite discussions between Ontario, Canada and the First Nation, as well as relations involving future land claim negotiations.

I will now apply the reasoning developed in this jurisprudence to the records at issue in the present appeal.

SECTION 15(a)

In order for a record to qualify for exemption under section 15(a), the Hydro must establish that:

1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and

2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

[Reconsideration Order R-970003]

In the Notice of Inquiry, Hydro was asked to provide representations and answer specific questions on the application of the section 15(a) exemption claim. In response, Hydro states:

> [Hydro] has claimed a section 15 exemption for all documents that appeared to include confidential information relating to the interests of foreign governments

> and for which [CDFAIT] provided no comment [to Hydro in response to the section 28 notification]. [Hydro] claimed section 15 partly because it submits that the records qualify for this exemption, but also because foreign governments have yet to be consulted on these documents.

Hydro goes on to state that it might also have claimed section 17 for some additional records, depending on the outcome of any consultation process with foreign governments, and attaches a letter from the CDFAIT which reads, in part:

> ... it is our view that any documents which originated from a foreign government or which convey their views and are not in the public domain should not be released without consulting the authorities involved.

Hydro attached Record 135 to its representations which, in its view, answered the various questions posed in the Notice. This record was disclosed to the appellant as part of the process for exchanging representations, with the agreement of Hydro.

Hydro sums up its position on section 15 with the following statement:

> [Hydro] submits that, given the above arguments, releasing these documents without consulting the foreign governments involved would harm [Hydro's] relations with those governments, with AECL and with the Government of Canada.

Record 135 consists of a series of questions and answers summarizing the background of the MOX initiative and addressing various general questions about the project. I find that the information in Record 135 is not sufficient to establish the requirements of section 15(a).

As far as the other submissions are concerned, Hydro appears to base its argument concerning the prejudice to the conduct of intergovernmental relations not so much on the disclosure of the records themselves, but on the impact of disclosing records without notifying the foreign governments. I do not accept this position. In order to establish the requirements of section 15(a), Hydro must provide detailed and convincing evidence that disclosure of the records themselves could reasonably be expected to result in the harm described in that section. Hydro chose to notify the CDFAIT on behalf of certain foreign governments whose interests might be affected by disclosure of the records and, based on the response received from CDFAIT, it decided to claim the sections 15(a) and (b) exemptions for a large number of records. On appeal, Hydro bears the onus of establishing the requirements of these exemption claims, and my decisions in that regard are based on a consideration of the evidence and arguments put forward by Hydro and my independent review of the records. Having reviewed the records and considered Hydro's representations, I find that I do not have the type of "detailed and convincing" evidence necessary to establish that disclosure of any of the records for which Hydro has claimed section 15(a) could reasonably be expected to prejudice the conduct of intergovernmental relations. Accordingly, I find that the section 15(a) exemption claim is not applicable in the circumstances of this appeal.

SECTION 15(b)

For a record to qualify for exemption under this section, Hydro must establish that:

1. the records reveal information received from another government or its agencies; **and**

2. the information was received by Hydro; **and**

3. the information was received in confidence.

[Order 210]

General Findings

Requirement 1: reveal information received from another government or its agencies

I must first determine whether the records reveal information received from another government or its agencies. To do so, I must review the context of the creation of the records and the substance of the information contained in them. The analysis applied in my reconsideration of Order P-1406 (Order R-970003), which reviews the context of the creation of records, is particularly relevant to the circumstances of this appeal.

Hydro states:

> [Hydro] submits that the documents at issue qualify for section 15(b) since the records either reveal information received from another government or, were received from a foreign government and these documents were received in confidence. [Hydro] has confidentiality agreements with various parties, including AECL, which has the lead. ... In turn, AECL has confidentiality agreements with the foreign parties involved. The documents relating to foreign parties that [Hydro] received were received through AECL.

The appellant submits:

> Although [Hydro] and AECL are agents of provincial and federal governments and capable of conducting "intergovernmental relations", I submit that disclosure of the Records could not "reasonably be expected to" give rise to an expectation of prejudice to the conduct of relations between [Hydro] and AECL and/or reveal information received in confidence between the agents.

The appellant points to Orders P-280 and P-293 in support of his position that Hydro has a "heavy burden" in establishing the requirements of the exemption claim, but does not provide any representations on the specific requirements of section 15(b).

Foreign governments - in this case the United States, Russia, France and agencies acting on their behalf - clearly fall within the classification of "another government" as set out in section 15(b). Accordingly, I find that any records received by Hydro from any of these foreign governments or their agencies in the context of its involvement on any of the various study groups meet the first requirement of the section 15(b) exemption claim.

Previous orders have established that AECL is an agency of the Canadian Government (eg. Orders P-270 and P-1552). The appellant appears to accept this characterization. I find that any records received by Hydro from AECL qualify as records received from "another government or its agencies", and thereby also satisfy Requirement 1.

Applying the reasoning in Orders P-1350, P-1137 and P-1552, I also find that records in the custody and under the control of Hydro that would reveal information received from any foreign government or agency, including AECL, also satisfy the requirements of Part 1 of the section 15(b) test.

Requirement 2: received by Hydro

I have summarized the manner in which the various records came into the custody or control of Hydro. I find that they were all "received by Hydro", thereby satisfying Requirement 2 of section 15(b).

Requirement 3: received in confidence

Hydro states:

> ... these documents were received in confidence. [Hydro] has confidentiality agreements with various parties, including AECL, which has the lead ... In turn, AECL has confidentiality agreements with the foreign parties involved. The documents relating to foreign parties that [Hydro] received were received through AECL ...

Hydro has provided me with copies of some confidentiality agreements.

The appellant's representations do not deal with this aspect of the section 15(b) exemption.

In Order P-1552, former Adjudicator Miller reviewed the issue of whether or not certain documents were received in confidence. She stated:

> I must now determine if the information was received in confidence.
>
> The appellant states:
>
> > In regard to the possible application of the exemption under section 15(b) of the *Act*, it is submitted that the records in question were

> not provided to the Ministry in confidence as they are part of the necessary documentation exchanged between the parties as part of the regulatory relationship between AECL and the Ministry as it pertains to waste disposal in the province.

> I disagree. Even if the information was supplied to the Ministry as part of its mandate, it does not follow that the information has not been received in confidence.
>
> The Ministry, AECB and AECL have made representations as to the general expectation of the parties regarding the confidentiality of the information received. The Ministry submits that its staff have always had the understanding from AECL that information shared with Ministry's would be kept confidential based on the nature of the material stored at the Chalk River site. The Ministry states that this is supported by the AECL classifications noted on the documents and the mark "Confidential" which appears on most of the correspondence. The Ministry is to return the records to AECL on request.
>
> Having reviewed the representations of the parties and the records at issue, I am satisfied that the information was received by the Ministry in confidence. I accept the evidence of the Ministry that it received the information from AECL and AECB on the understanding that it would be kept confidential. Given the nature of the fissionable material stored at the AECL Chalk River site, it is reasonable to assume that the parties would expect the information to be held in confidence.

In the present appeal, Hydro identifies that its staff sat on and were involved in various study groups, along with AECL, to examine various aspects of the use of plutonium/MOX fuel in CANDU reactors. Most of the information contained in the records at issue in this appeal was provided to Hydro as a result of its involvement. Given the nature of the information contained in the records, and with reference to the confidentiality agreements provided to me, I am satisfied that the information contained in the records was received by Hydro in confidence, thereby satisfying the third requirement of the section 15(b) exemption claim.

Specific Findings

I will now apply my findings on section 15(b) to each of the categories of records for which it was claimed.

Category A

Hydro submits that section 15(b) applies to all records in this category.

Records 20, 41, 92, 98, 118, 119, 120, 128, 129, 130, 131 and 132 relate to the AECL/Hydro Steering Committee and other study teams involving AECL and Hydro, as well as other parties.

These records are e-mail messages, agendas and minutes of meetings involving AECL and Hydro, some of which include attached discussion documents.

Records 4, 6, 11, 29, 32, 37, 58, 61, 67, 75, 93, 110, 122, 123, 124 and 126 are records received from or involving AECL which relate to or attach correspondence to or from the United States DOE, or refer to meetings with that foreign government agency.

Records 18, 19, 21, 45, 51, 54, 55, 56, 57, 66, 69, 70, 81, 94, 95, 97, 102, 104, 107, 108, 115, 116 and 117 are records which were provided to Hydro by AECL or involving AECL, and which relate to or summarize meetings held between representatives of AECL/OPG and Russia and/or a Russian company. These meetings were held either in Canada or Russia between 1995 to 1997.

Other records involving AECL were provided to Hydro in the context of Hydro's involvement on the various study groups. The records are Records 1, 5, 22, 23, 24, 27, 28, 31, 36, 38, 43, 46, 59, 60, 62, 63, 71, 72, 73, 85, 87, 111, 112, 113, 114, and the severed portion of Record 9. Other similar records include reports summarizing the work of the study groups, including initial feasibility and other studies (Records 3, 133 and 134).

Record 14 is a letter from AECL relating to a March 1997 meeting with French officials.

Record 64 is a memorandum and summary report on the outcome of the 1996 Moscow Nuclear Safety and Security Summit.

Records 24, 40 and 155 are virtually identical to Record 46 and, although section 15 was claimed for Record 46 and not the other three records, my findings regarding Record 46 should and will apply to Records 24, 40 and 155 as well.

As set out above, it is Hydro's involvement on a variety of study groups which resulted in this category of records coming into Hydro's custody and control. More specifically, Hydro was involved in:

- an initial "AECL/Ontario Hydro Steering Committee" initiated in 1995;
- a "MOX fuel supply study team" comprised of AECL, Hydro, and various corporations;
- a "Management Committee" and a number of "Task Teams";
- a "Russian/Canadian feasibility study" team, involving delegates from Russia and the Russian Ministry for Atomic Energy (MINATOM);
- a CANDU-MOX study team; and
- a DEMOX study team.

The majority of the records in Category A were provided to Hydro by AECL. I am satisfied that all of these records were provided to Hydro in the context and as a result of the participation of Hydro and AECL as joint members of various study groups, and I find that disclosure of these records would reveal information received by Hydro from AECL in confidence.

In some circumstances it is unclear who actually created the records. For example, Records 41, 45, 111, 118, 120, 128 and 132 are minutes of meetings involving AECL and Hydro, but the author of the minutes is not identified. Record 113 was authored by Hydro, but refers to input from the AECL/ Hydro team. It is also unclear who authored Records 51, 54, 58 and 108. Nevertheless, having reviewed the representations of Hydro and the records themselves, I am satisfied that all of these records reveal information received by Hydro from AECL in confidence.

Record 64 is a memo and summary report on the outcome of the Moscow Nuclear Safety and Security Summit held in April 1996. Although it appears to have been provided to Hydro because of its involvement with the issues under discussion at the Summit, it consists of comments and background information regarding the Summit which appear to have been widely communicated at that time. This is one of the records on which Hydro chose not to make section 15 representations. Absent evidence or representations establishing the requirements of section 15(b), I am not persuaded that the information contained in the record was provided to Hydro in confidence by any party, and I find that Record 64 does not qualify for exemption under section 15(b).

With the exception of Record 64, I find that all other Category A records qualify for exemption under section 15(b) of the *Act*.

Category B

Hydro claims that Records 137, 140, 142, 143, 145, 146, 147, 149, 152, 153, 164, 168, 169, 170, 171, 172, 173, 176, 177, 180 and 181, which were authored by affected party A, qualify for exemption under section 15(b) of the *Act*. These records are dated between May 1995 and February 1997.

The records, all of which are authored by the same US-based company, are addressed to a number of different parties. Based on the information provided to me, I am able to determine that affected party A provided input to AECL and Hydro on a number of issues relating to the work of the various study groups. Certain documents are addressed to a particular study group, which includes Hydro (Records 137, 140, 142, 143, 149, 152, 164, 169, 170, 171, 172, 173, 176, 177, 180 and 181); some are addressed to AECL (Records 147 and 168); and some are addressed to foreign governments and/or foreign companies (Records 145, 146, 153), and provided to Hydro as a member of the study group.

The circumstances concerning the Category B records are somewhat unique. Unlike records which involve AECL directly, or which originate from a foreign government or one of its agencies, Category B records are authored by affected party A, a foreign corporation. I have no

evidence that this affected party was in any way acting as an agent of any foreign government. That being said, I am satisfied that all of the records in this category were received by Hydro (Requirement 1 of section 15(b)) and, given the role played by affected party A for the various study teams, and the evidence of confidentiality provided to me by Hydro as it relates to the operation of these teams, I accept that these records were received by Hydro in confidence (Requirement 3).

Given the particular circumstances surrounding the creation of the Category B records, I am also satisfied that they would reveal information received from another government or its agencies, thereby satisfying Requirement 1 of the section 15(b) exemption claim. All of these records were created by affected party A and shared with members of the various study teams. These study groups were comprised of representatives of AECL, Hydro and private companies, and were established for the purpose of reviewing various issues concerning the use of plutonium/MOX fuel in CANDU nuclear reactors. The various governments or their agencies involved in the work of these study groups, including affected party A, shared information amongst each other and, in most cases, the Category B records were provided to Hydro at the same time they were distributed to AECL and other members of a particular study group. In these circumstances, it is reasonable to assume and conclude that records exchanged among study group members in the context of their work were treated by the members in the same manner and with the same degree of confidentiality, and that disclosure of these records would reveal information received by Hydro from AECL and other governments or agencies involved in the work of these study groups (Orders P-1552 and R-970003).

Accordingly, I find that the records in Category B qualify for exemption under section 15(b) of the *Act*.

Category C

Section 15 was not claimed for any Category C records.

Category D

Records 195 and 196 were authored by staff of the United States Department of Energy and sent to AECL. Both of them provide descriptions of specified aspects of the work of the multi-national group investigating implications of using plutonium/MOX fuel in CANDU reactors. Record 195 is specifically identified as confidential and the content of Record 196 is similar in nature. Hydro submits that these two records were provided to it by AECL in the context of activities undertaken by one of the study groups.

Disclosure of these records would reveal information received by an agency of another government, the Department of Energy, which was received in confidence by Hydro from AECL and, based on the reasoning in Order P-1552, I find that Records 195 and 196 qualify for exemption under section 15(b) of the *Act*.

Category E

Section 15 was not claimed for any Category E records.

Category F

Records 202, 204, 205, 206, 207, 209, 210, 211, 212, 213, 214, 215, 216 and 230, as well as the severed portion of Record 208 involve foreign governments. They include correspondence to and from these foreign governments as well as other documents referring to foreign government interests. The Canadian Department of Foreign Affairs was notified by Hydro on behalf of these various foreign government interests, but declined to provide representations in the context of this inquiry.

Having reviewed these records, I am satisfied that they qualify for exemption under section 15(b), with one exception. They were all received by Hydro in the context of its involvement on various study groups which also included foreign government representation, and disclosure of the records would reveal information received from AECL and these other governments. Given the nature of the work of these study groups and my previous conclusion that documents created or distributed in this context were confidential, I find that all three requirements of the section 15(b) exemption claim are present for these records.

The one exception is Record 207, which is a December 1996 letter from the Canadian Minister of Natural Resources to a Liberal Member of Parliament. There is a handwritten notation on this letter indicating that it was sent to all Liberal MPs. The letter summarizes actions taken to that point regarding the possible use of plutonium/MOX fuel in CANDU reactors, and attaches a series of questions and answers on the project for use by the Liberal MPs in responding to questions that might arise about these issues. Given the nature of this record, I do not accept that it was intended to be treated confidentially, nor that it was received by Hydro with a reasonably held expectation of confidentiality. Accordingly, I find that Record 207 does not qualify for exemption under section 15(b) of the *Act*.

Category G

Records 235, 236, 242, 245 and 260 were created by Hydro staff, and include confidential attachments, a review of various international strategies, minutes of meetings, briefing materials prepared for meetings, and payment structure proposals. All of these letters reflect aspects of Hydro’s involvement on various study groups. Applying the reasoning in Orders P-1350 and P-1137, I find that disclosure of these records would reveal information received by Hydro in confidence from AECL and/or foreign governments and their agencies participating in the work of the multi-national group investigating the feasibility of using plutonium/MOX fuel in CANDU reactors. Accordingly, Records 235, 236, 242, 245 and 260 all qualify for exemption under section 15(b) of the *Act*.

In summary, I find that all of the records at issue in this appeal for which section 15(b) was claimed qualify for this exemption, with the exception of Records 64, 135 and 207. No other exemptions were claimed for these three records, so they should be disclosed to the appellant.

SECTION 18

The sections 18(1)(a), (c) and (d) exemption claims were included as issues in the Notice of Inquiry sent to the Hydro and the appellant. Both parties submitted representations on the application of these exemptions to the records for which they were claimed.

On the other hand, I decided to defer consideration of the third party information exemption claims in sections 17(1)(a), (b) and (c), pending a determination of the jurisdictional issues, and did not include these exemptions in the Notice.

Now that I have determined that I have jurisdiction to deal with the records and issues in this appeal, I must provide the various affected parties with an opportunity to provide representations on the application of section 17(1) for those records for which they have an interest, and I will be issuing a Supplementary Notice of Inquiry to Hydro and those affected parties for this purpose.

Given the nature of the sections 17 and 18 exemption claims, and some similar considerations that apply to both of them, I have decided to defer my decisions regarding the application of the sections 18(1)(a), (c) and (d) exemption claims until I have received representations from the parties on section 17(1). All issues relating to sections 17 and 18 will be addressed in my final order.

PUBLIC INTEREST IN DISCLOSURE

The appellant raised the possible application of the section 23 public interest override in this appeal, and I invited the parties to address this issue in their representations. Only the appellant provided representations on this issue.

Section 23 states:

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

The two requirements must be established in order for section 23 to apply: (1) there must be a compelling public interest in disclosure; and (2) this **compelling** public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order 24).

The *Act* is silent as to who bears the burden of proof in respect of section 23. The burden of proof in law generally is that a person who asserts a position must establish it. However, 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 (Order P-1190). Therefore, the nature of the information contained in the record may also play a role in the determination of whether there is a compelling public interest in the disclosure of the information.

The appellant submits:

> The records address the use of Plutonium/MOX fuel at [Hydro] nuclear stations and, presumably, contemplate the safety and reliability of [Hydro's] nuclear power plant operations. I submit that there is a compelling public interest in the disclosure of nuclear safety-related information. There is abundant jurisprudence from the Information and Privacy Commissioner attesting to the overwhelming public interest in the disclosure of this sort of information held by Hydro.

The appellant then reviews some of this jurisprudence, which includes Order P-270 and the Divisional Court's comments in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636, leave to appeal refused [1997] O.J. No. 694 (C.A.), in its judicial review of my Order P-1190.

In one portion of his representations the appellant states:

> The records address the safety and reliability of [Hydro's] nuclear plant operations if plutonium/MOX fuel were to be used in nuclear power plants in Ontario. The public health and safety ramifications are obvious as anything touching on [Hydro's] operational procedures could lead to catastrophic results.

Hydro's representations specifically decline to comment on the application of section 23 of the *Act*.

Compelling public interest

A number of previous orders have discussed the issue of whether there is a compelling public interest in issues regarding nuclear safety. In Order P-1552, former Adjudicator Miller had to determine whether there was a compelling public interest in disclosing records relating to nuclear safety. In making her decision, she summarized a number of the relevant orders of this Office as follows:

> In Order 270, which involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by Hydro under section 17(1) of the *Act*, former Commissioner Tom Wright discussed the issue of nuclear safety and section 23 when considering whether there was a compelling public interest in disclosure of nuclear safety related information. He stated:

> 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 [Hydro] 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.

Assistant Commissioner Tom Mitchinson quoted from Order 270 and made a similar finding in Order P-1190 which involved a request for all peer evaluation reports conducted on nuclear power plants operated by Ontario Hydro.

Former Assistant Commissioner Irwin Glasberg also dealt with the issue of nuclear safety in Order P-901, which also involved Ontario Hydro. In that case, he found that records prepared by a working group involved in nuclear emergency planning qualified for exemption under section 12 of the *Act* (Cabinet records), which is not subject to the section 23 public interest override. However, he went on to state that:

> Were it not for the fact that the records at issue are subject to the Cabinet records exemption, I would have had no hesitation in finding that there exists a compelling public interest in the disclosure of these documents which clearly outweighs the purposes of the exemptions found in the *Act*.

(See also Order P-956).

I agree with these comments, and find that there is a compelling public interest in disclosure of records concerning nuclear safety. In my view, this interest extends to information about the storage and disposal of nuclear waste. The question which remains is whether this compelling public interest is sufficient to clearly

> outweigh the purpose of the section 15 exemption in respect of the disclosure of these records.

Order P-1190 involved a request to Ontario Hydro for access to certain peer evaluation reports. After finding that the section 18(1)(c) exemption applied to these reports, I went on to determine whether there was a compelling public interest in their disclosure. In finding that there was, I stated:

> It is clear that public concerns regarding the safety of nuclear facilities was the impetus behind the creation of Hydro's Peer Evaluation Program. In my view, it is not possible to allay these concerns by merely advising the public that reviews of nuclear operations are conducted against the highest possible standards. This simply does not provide enough information for the public to assess the adequacy of the program in meeting its objectives. I am unable to accept Hydro's position that the results of the Peer Evaluation Program should not be disclosed to the very public whose concerns about nuclear safety the Program was designed to allay.
>
> As far as Hydro's submissions about confidentiality and the openness of its employees are concerned, in my view, it is in the interests of both Hydro and the public to ensure that Hydro continues to receive frank and open input and to report on nuclear safety issues in the most fulsome manner possible. This enables Hydro to represent itself in its commercial ventures as operating nuclear plants as closely as possible to the highest standards of excellence.

As noted earlier, my decision in Order P-1190 was reviewed and upheld by the Divisional Court, and leave to appeal to the Ontario Court of Appeal was denied.

In Order P-1805, Senior Adjudicator Goodis also reviewed the application of the public interest override to records dealing with nuclear safety. He stated as follows:

> In my view, for reasons similar to those of the former Commissioner and the Assistant Commissioner in Orders P-270 and P-1190, there is a compelling public interest in the disclosure of the records at issue in this case. From the perspective of protecting public health and safety and the natural environment, the public has a compelling interest in scrutinizing the safety related activities of Hydro in respect of its nuclear facilities, especially in light of the enormous consequences of inaction. The public's compelling interest extends to ensuring bureaucratic accountability in these areas, engaging in informed discussion and debate, and exercising its democratic rights at the ballot box in order to contribute to the direction that public policy in the nuclear energy arena will take.

Applying the reasoning in these previous orders to the particular circumstances of this appeal, and considering the representations provided by the appellant, I find that there is a public interest in issues concerning plutonium/MOX fuel, and fuel conversion for the purpose of nuclear energy. However, I am not persuaded that this public interest is **compelling** as it relates to all of

the records. In my view, in order to satisfy the "compelling" threshold, the records must contain information that relates to **nuclear safety**.

The circumstances surrounding the creation of the records at issue in this appeal are unique. To a large extent, the records can accurately be characterized as "working papers" or "works in progress". Many of them relate to the issues discussed in the meetings of the various study groups, and others deal with process issues relating to the mandate of the multi-national team charged with responsibility for reviewing the feasibility of using plutonium/MOX fuel in CANDU reactors.

Many of the records which qualify for exemption under section 15(b) of the *Act* consist of feasibility studies, reviews, and minutes of numerous meetings where the pros and cons of the various options are reviewed, discussed or analysed. The subject matter of these discussions includes cost/benefit analyses, policy considerations, and many technical details concerning the use of plutonium/MOX fuel. Although I accept that there is a public interest in these records, because most of them do not deal directly with any specific nuclear safety issue or reflects any actions or possible actions taken by Hydro or other members of the multi-national group that could have a direct bearing or impact on the public, I am not satisfied that the public interest as it relates to these records is compelling. I have come to this conclusion based on my review of the records, the time and circumstances under which they were created, and the manner in which some of the information concerning the use of plutonium/MOX fuel is generally made available to the public.

However, I am satisfied that there is a compelling public interest in the disclosure of records which deal with certain specific nuclear safety related matters. I have reached this decision based on an application of the reasoning and rationale used in previous orders dealing with similar records and issues, as discussed earlier. These records or portions of records include information concerning general safety measures and matters, and issues regarding the safety of the transportation of plutonium/MOX fuel to and from nuclear plants. The records or portions of records that fall within this category are:

> Records 1, 31, 34, 40, 46, 51, 55, 56, 62, 63, 66, 71, 72, 73, 81, 102, 108, 113, 133, 155, 164, 213 and 245.

That being said, I also find that not all records which touch on matters of nuclear safety are automatically included in this category. In my view, there is not a compelling public interest in the disclosure of records that merely contain or reflect general statements concerning the need for safety; records that include comments on safety-related issues involving other countries (eg. Records 124, 153, 180 and 181); or records which deal generally with an analysis of plutonium/MOX fuel and a comparison of its qualities.

Purpose of the exemption

In order to complete my analysis of section 23, I must go on to determine if the compelling public interest in disclosing these identified records clearly outweighs the purpose of the

exemption claims found to apply (see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)).

In the case of almost all of the records that meet the "compelling public interest" threshold, other exemptions apart from section 15 have also been applied, specifically sections 17 and 18. Because I have not yet made my determination of the application of sections 17 and/or 18 to these records, I have decided it would be appropriate to defer consideration of the second part of the section 23 test until all of the exemption claims have been applied to Records 1, 31, 34, 40, 46, 51, 55, 56, 62, 63, 66, 71, 72, 73, 81, 102, 108, 113, 133, 155, 164, 213 and 245.

This Interim Order disposes of all of the records at issue, with the exception of the following records, which are subject to consideration under section 17(1)(a), (b) and (c) following notification of the relevant affected parties; sections 18(1)(a), (c) and (d); and/or section 23 of the *Act*:

- Records 1, 31, 34, 40, 46, 51, 55, 56, 62, 63, 66, 71, 72, 73, 81, 102, 108, 113, 133, 155, 164, 213 and 245; and
- Records 12, 33, 47, 48, 49, 50, 52, 68, 79, 86, 90, 91, 106, 125, 136, 138, 139, 141, 148, 150, 151, 154, 156, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167, 174, 175, 178, 179, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 248, 251, 254, 261, 265, 267, 268 and 269, and the undisclosed portions of Records 197, 203, 256 and 262.

INTERIM ORDER:

1. I order Hydro to disclose Records 64, 135 and 207 to the appellant by **August 15, 2001**.

2. I uphold the Hydro's decision to deny access to the following records under section 15(b) of the *Act,* and find that the section 23 public interest override does not apply to these records:

   Records 3, 4, 5, 6, 11, 14, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 32, 36, 37, 38, 41, 43, 45, 54, 57, 58, 59, 60, 61, 64, 67, 69, 70, 75, 85, 87, 92, 93, 94, 95, 97, 98, 104, 107, 110, 111, 112, 114. 115, 116, 117, 118, 119, 120, 122, 123, 124, 126, 128, 129, 130, 131, 132, 134, 135, 137, 140, 142, 143, 145, 146, 147, 149, 152, 153, 168, 169, 170, 171, 172, 173, 176, 177, 180, 181, 195, 196, 202, 204, 205, 206, 207, 209, 210, 211, 212, 214, 215, 216, 230, 235, 236, 242 and 260, and the undisclosed portions of Records 9 and 208.

3 I remain seized of the following records, pending a determination of the application of sections 17(1)(a), (b) and (c) following notification of the relevant affected parties; sections 18(1)(a), (c) and (d); and/or section 23 of the *Act*:

Records 1, 12, 31, 33, 34, 40, 46, 47, 48, 49, 50, 51, 52, 55, 56, 62, 63, 66, 68, 71, 72, 73, 79, 81 86, 90, 91, 102, 106, 108, 113, 125, 133, 136, 138, 139, 141, 148, 150, 151, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 174, 175, 178, 179, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 213, 245, 248, 251, 254, 261, 265, 267, 268 and 269, and the undisclosed portions of Records 197, 203, 256 and 262.

Original signed by: July 24, 2001
Tom Mitchinson
Assistant Commissioner