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

INTERIM ORDER PO-2014-I

Appeal PA-990381-1

Ontario Hydro

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NATURE OF THE APPEAL:

This is my second interim order with respect to some of the outstanding issues from Interim Order PO-1927-I.

Ontario Power Generation Inc. (formerly part of Ontario Hydro) (for simplicity, both referred to interchangeably as Hydro in this 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 (now the appellant). 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 issued a fee estimate.

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*. As well, during the mediation stage of this appeal, one of the affected parties took the position that the *Act* has no application to certain records on the basis that, as a constitutional matter, the Parliament of Canada, not the Government of Ontario, has exclusive jurisdiction over matters relating to atomic energy.

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, as well as on most of the substantive issues that remained outstanding. I also sent the Notice to a number of parties, asking them to provide representations on the constitutional issue. I decided not to seek representations on the section 17(1) exemption claim at that time, pending my determination on the constitutional issue.

Following the receipt and exchange of representations, I issued Interim Order PO-1927-I in which I found that:

- the *Act* applied to the records;
- the section 15(a) exemption claim was not applicable in the circumstances of the appeal;
- many of the records qualified for exemption under section 15(b);

- under section 23 of the *Act*, there existed a compelling public interest in the disclosure of twenty-three records or portions of records that qualified for exemption under section 15(b).

I decided to defer consideration of the second part of the section 23 test (whether the compelling public interest was sufficient to override the purpose of the section 15(b) exemption) until all of the exemption claims had been applied to the twenty-three records that had met the first part of the test.

I had initially also sought representations on the application of the section 18 exemption claim, but decided to defer consideration in Interim Order PO-1927-I for the following reasons outlined in that order:

> 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.

Finally, in Interim Order PO-1927-I summarized the matters which remained at issue as follows:

> 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
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> - 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.

After issuing Interim Order PO-1927-I, I sent a Supplementary Notice of Inquiry to Hydro and the six identified affected parties. I received representations from Hydro and four affected parties. I then sent the Supplementary Notice, along with Hydro's representations and the non-confidential portions of the representations of one of the affected parties, Atomic Energy Canada Limited (AECL), to the appellant. The appellant did not provide representations in response.

RECORDS:

The records remaining at issue in this appeal are listed above. However, because some records are essentially duplicates of others, I have removed certain records from the scope of my inquiry. Specifically:

- Record 34 is similar to Records 40, 46 and 155, but for some notations and/or cover pages that are not relevant to my section 23 discussion;
- Records 63 and 71 are similar to records 73 and 72 respectively, and the minor differences are not relevant to my section 23 discussion;
- Record 55 is contained in record 56, but for a date stamp that is not relevant to my section 23 discussion.

Accordingly, the records remaining at issue in this appeal consist of the following two groups:

#1 Records or portions of Records 1, 31, 34, 51, 56, 62, 63, 66, 71, 81, 102, 108, 113, 133, 164, 213 and 245; and

#2 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.

I found in Interim Order 1927-I that the section 15(b) exemption applies to the records in Group #1, but I concluded that there was a compelling public interest in disclosing these records or portions of them to the appellant. In order to facilitate the discussion that follows, I will indicate at this point the portions of the Group #1 records that I decided at the time of issuing my first interim order fell within the scope of the first part of the section 23 test (i.e., those where there was a compelling public interest in disclosure):

Record 1: all

Record 31: final paragraph on page 2 through 3, and first full paragraph on page 3

Record 34: all

Record 51: all except Russian language portions

Record 56 2-page minutes of June 4, 1996 meeting

Record 62: 2 paragraphs headed "Task 3" on page 3, page 7, and top 4 paragraphs on page 8

Record 63: sections headed "Task 3" on page 7, and portions of one page of attachments dealing with "Task 3"

Record 66: questions and answers on last 4 pages of record

Record 71: 2 paragraphs headed "Transportation, Safeguards and Security" on page 2

Record 81: "Attachment 16" and "Attachment 21"

Record 102: all

Record 108: top portion of page 7 to the end of the section headed "Security"

Record 113: pages 3-29 through 3-33, 3-52 through 3-54 and 4-21 through 4-24

Record 133: sections headed "Task 8" and "Task 9" on pages 10-11

Record 164: all

Record 213: all

Record 245: "Attachment B"

I must now determine whether any other exemption claims have been established for these portions of the Group #1 records, and then complete my section 23 analysis as it relates to these records.

For the records listed in Group #2, I must determine whether any of them qualify for exemption under sections 17(1) and/or 18(1), and if so, whether section 23 applies to override these exemptions.

DISCUSSION:

PRELIMINARY MATTER

Additional records covered by section 15(b)

In its representations, AECL correctly identifies that section 15(b) was claimed for Record 49, although not included in my analysis of that section in Interim Order PO-1927-I. In addition, I have identified a revised confidentiality agreement (Record 79) that is highly similar in content to an earlier version of a confidentiality agreement (Record 235) that I found was exempt under section 15(b) in Interim Order PO-1927-I. These two records clearly fall within two of the categories of exempt records described in Interim Order PO-1927-I: Category A for Record 49

and Category G for Record 79. I find that both of these records qualify for exemption under section 15(b) of the *Act* for the same reasons as other similar records in the two categories.

THIRD PARTY INFORMATION

Hydro claims section 17(1)(a)(b) and/or (c) of the *Act* as one basis for denying access to many of the records at issue in this appeal. These sections 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

A number of previous orders have reviewed the section 17(1) exemption claim.

For the record to qualify for exemption under sections 17(1)(a), (b) or (c), Hydro and/or any affected party resisting disclosure must satisfy each part of the following three-part test:

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 Hydro in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

Part 1 Test

This office has defined the terms "trade secret or scientific, technical, commercial, financial or labour relations information" as follows:

Trade secret

"Trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order M-29].

Scientific information

Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the *Act* [Order P-454].

Technical information

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act* [Order P-454].

Commercial information

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order P-493].

Financial information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs [Orders P-47, P-87, P-113, P-228, P-295 and P-394].

Labour relations information

"Labour relations information" is information concerning the collective relationship between an employer and its employees [Order P-653].

I adopt these definitions for the purpose of this appeal.

Part 2 Test

In order to satisfy part two of the test, Hydro and/or the affected parties resisting disclosure must show that the information was **supplied** to Hydro, either implicitly or explicitly **in confidence**.

In order to establish that the record was supplied either explicitly or implicitly in confidence, the parties resisting disclosure must demonstrate that an expectation of confidentiality existed at the time the record was submitted (Order M-169), and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

(1) Communicated to Hydro on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to Hydro.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[See Order P-561]

Part 3 Test

To discharge the burden of proof under the third part of the test, Hydro and the affected parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed.

In *Ontario* (*Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 (C.A.) the Ontario Court of Appeal stated as follows:

> Lastly, as to Part 3, the use of the words "**detailed and convincing**" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

PRELIMINARY FINDINGS ON SECTION 17(1)

Although invited to do so, AECL did not provide representations on the application of section 17(1) to Records 48, 52 (which includes an earlier draft of record 48 as well as a cover memo), 86, 90, 91, 157 and 159. With respect to Record 86, AECL identifies that another affected party could have an interest in this record. AECL also states that it defers to Hydro with respect to the application of section 17(1) to Records 48 and 52.

One affected party was notified with respect to Record 86 and the severed portions of Records 203 and 256. This affected party did not submit representations on Record 86 or the severed portions of Records 203 and 256.

I have reviewed Records 48, 52, 86, 90, 91, 157, 159 and the severed portions of Records 203 and 256, and, in the absence of representations, I find that they do not qualify for exemption under section 17(1) of the *Act*.

One other affected party responded to the Supplementary Notice by consenting to disclosure of any information relating to it that was contained in the relevant records (Records 187, 188, 189, 190, 191, 192, 267 and 268). Accordingly, I find that section 17(1) does not apply to these records.

REPRESENTATIONS SUBMITTED BY THE PARTIES

As identified above, I sought representations from Hydro, the appellant, and six affected parties.

Two affected parties chose not to submit representations, and one other affected party responded by simply stating that, in its view, the information at issue relates more particularly to one of the other affected parties.

The appellant did not provide representations.

Hydro provided representations on some of the issues raised in the Supplementary Notice of Inquiry, including section 17(1).

Two affected parties (AECL and Affected Party H) provided detailed representations on the issues raised. AECL indicated in its representations that it was also providing representations on behalf of one of the other affected parties.

Hydro

Hydro submits that the information contained in the records is either technical, scientific, financial, commercial or trade secret information, or a combination of these types of information; and that the records for which section 17(1) is claimed were "supplied" to Hydro in the context of its participation on the study group investigating the feasibility of using MOX fuel in CANDU reactors.

As to whether the records were supplied "in confidence", Hydro states that all of the documents it received were held in confidence, and identifies that it has or had a number of confidentiality agreements with the other affected parties involved in the project. In this regard, Hydro states:

> Most of the records at issue were supplied by AECL under the terms of the confidentiality agreements. … [Hydro] considers that the confidentiality provisions of these agreements apply to all of the documents for which [Hydro] has claimed a section 17 exemption. Also, in their comments to [Hydro], some third parties have identified these documents as coming under the provisions of the confidentiality agreements and that the release of the documents would result in commercial harms to them.
>
> [Hydro] has treated this information as confidential, restricting its access and keeping it locked in cabinets.

Hydro's representations do not address the third part of the test. Because the information in the records relates to other parties, Hydro submits that these affected parties are best positioned to establish the harms component of the section 17(1) exemption claim.

AECL

AECL was identified as an affected party with an interest in the following records:

- Records or portions of Records 1, 31, 34, 51, 56, 62, 63, 66, 71, 81, 102, 108, 113, 133, 164 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, 248, 251, 254 and 261.

AECL's representations include a detailed index of the records, in which it identifies specific factors it asks me to consider for each record. They also include copies of a number of records, which had been severed to indicate the portions that, in AECL's view, qualify for exemption

under section 17(1). The representations deal exclusively with these severed portions. Accordingly, I find the unsevered portions of these records do not qualify for exemption under section 17(1) of the *Act*.

As identified earlier, I found in Interim Order PO-1927-I that only portions of certain records that qualify for exemption under section 15(b) satisfied the requirements of the first part of the section 23 public interest override. Unless AECL's representations under section 17(1) deal with these portions of records, it is not necessary for me to consider them, since I have already determined that they are exempt under section 15(b) and that the section 23 override has no application. On the other hand, if AECL's representations deal with any portions of records in this category, I must make an alternative finding under section 17(1), since any compelling public interest in disclosure of a record must override the purpose of any and all exemption claims before section 23 can apply. The records that fall into this category are:

Record 1:	all
Record 31:	final paragraph on page 2 through 3, and first full paragraph on page 3
Record 34:	section 2.3.2.3 and the four attached figures
Record 51:	all except Russian language portions
Record 56:	2-page minutes of June 4, 1996 meeting
Record 62:	2 paragraphs headed "Task 3" on page 3, page 7, and top 4 paragraphs on page 8
Record 81:	"Attachment 21"
Record 102:	the last two pages
Record 108:	top potion of page 7 to the end of the section headed "Security"
Record 113:	pages 3-29 through 3-33, 3-52 through 3-54 and 4-21 through 4-24
Record 164:	all

It is not necessary for me to review the possible application of section 17(1) to the relevant portions of Records 63, 66, 71, 81 (attachment 16), 133, 245 and the remaining portions of Records 34 and 102, since AECL has not argued that section 17(1) applies to the relevant portions of these records. Accordingly, I find that section 17(1) of the *Act* does not apply to these portions of records.

In Interim Order PO-1927-I, I set out in detail the context in which the records at issue were created or came into the custody or control of Hydro. To briefly summarize, a U.S. study was

undertaken 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, and, 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 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.

In its representations, AECL also identified the extent of its involvement in the study teams. It states:

> The [records] for which the section 17 and 15(b) exemptions are claimed relate in general terms to the studies and tests undertaken by AECL, under commission to the U.S. Department of Energy, to assess the feasibility of using MOX fuel containing weapons grade plutonium in CANDU reactors. … The study groups convened to conduct the MOX fuel feasibility assessment between 1995 and 1998 and included AECL, Ontario Hydro and a number of private companies with facilities and/or expertise in the fuel fabrication aspects of the feasibility studies as required.

AECL then summarizes its specific role in the MOX fuel studies, identifying that it holds the intellectual property and licensing rights for the fabrication of a particular fuel, and therefore is involved in licensing the operators of fuel fabrication facilities to manufacture the fuel. This requires assessing the facilities and, by necessity, the disclosure by the facilities to AECL of facility-related information on a confidential basis. AECL states that the reports concerning these assessments are not disclosed to other parties, but were disclosed to Hydro, on a confidential basis, as a result of Hydro's involvement in preparing a "Phase 2" proposal.

This "Phase 2" proposal reviewed the use of MOX fuel in reactors involving Hydro. It also involved third parties who entered into confidentiality agreements during the course of the studies and the development of the proposal. Following the assessments of the issues in the "Phase 2" proposal, further studies concerning the use of MOX fuel were undertaken by the parties, involving other governments. These studies resulted in further agreements between AECL and other parties.

AECL also identifies that these studies are ongoing, and that it faces competition for work of this nature from international competitors. Finally, AECL identifies that the work reflected in the records represents significant commitments and costs incurred by AECL.

With respect to the specific records remaining at issue, AECL divides them into four categories according to the type of information contained in the records and the harm that it argues will result from disclosure. Some records are included in more than one category.

In general, AECL submits:

> The information in the categories ... comprises trade secrets and confidential scientific, technical and commercial or financial information of AECL or of third parties with whom AECL worked in the course of the assessments and proposal [process]. It was supplied by AECL to Ontario Hydro in the course of this work with the expectation that it would be maintained in confidence by Ontario Hydro and not released to the public. AECL maintains the information in the categories … on a confidential basis, and limits its distribution internally and externally and secures and stores it using physical protection measures.

AECL also identifies the express confidentiality agreements entered into between the parties, and indicates that one of the conditions of participation by certain bodies in the process was that the information would not be further disclosed. AECL states that, if the information in the four identified categories is disclosed, it would reconsider its willingness to supply further information to Hydro as the study progresses, and it would severely disrupt the flow of information from others to AECL. This, in turn, would hamper the ability of AECL to continue its work on the project.

Category 1: Records 1, 31, 33, 34, 47, 49, 50, 51, 56, 62, 68, 102, 106, 113, 125, 138, 156, 166, 167, 178, 179, 182, 183 and 184.

AECL states that this category of records contain information relating to the reactor design as well as the design and characteristics of the fuelling systems for the reactor; information assessing the reactor in relation to the MOX fuels; information about the fuel fabrication processes developed by AECL; and information identifying and assessing the particular fuel characteristics.

AECL submits that, as a potential commercial manufacturer of MOX fuels, it would be significantly prejudiced by the disclosure of information. Specifically, AECL argues that disclosure of these records would deprive AECL of its proprietary rights in these records and would interfere with its negotiation of commercial licensing terms and its ability to enforce its proprietary rights under its various patents.

Category 2: Records 47, 49, 51, 56, 102, 113, 125, 138, 139, 151, 154, 156, 166, 174, 178, 179, 182, 183 and 184.

AECL indicates that records in this category deal with the development of new fuel fabrication systems. This includes information relating to the development, study and experiments involved in the process; the assessment of certain facilities for the fabrication; information discussed and exchanged in the study group meetings and site visits; and terms and arrangements regarding the licensing of and contracts for fuel fabricators.

AECL submits that at the site visits and meetings it attended as part of the study group reviewing various options, information was exchanged on the explicit understanding that deliberations of the study group would remain confidential. AECL identifies that disclosure of meeting minutes,

site visit observations and facility assessments would "significantly jeopardize" the involvement of AECL as a participant in future similar projects. As well, given the nature of the industry, AECL identifies that its ability to maintain and develop commercial relationships would be severely jeopardized by disclosure of this type of information.

AECL's representations also describe the unique set of requirements it must meet in order to maintain the confidence of the international participants and regulators involved in the fuel fabrication and irradiation assessments.

Finally, AECL identifies that disclosure of the arrangements and terms on which it agreed to license fuel fabrication at particular facilities would provide other fuel fabricators with commercial intelligence, including AECL's costing and the conditions it would impose.

Category 3: Records 12, 62, 108, 125, 138, 139, 141, 148, 150, 151, 154, 158, 160, 161, 163, 167, 174, 175, 178, 179, 182, 183, 184, 185 and 186.

AECL describes these records as containing information relating to the internal strategizing, problem solving and deliberations undertaken by AECL, Hydro and other third parties in relation to preparing proposals.

AECL submits that disclosure of the internal deliberations and bid strategies to competing proposal sponsors would equip competitors with information relating to the potential strengths and weaknesses in developing the proposals.

Category 4: Records 108, 141, 148, 150, 151, 154, 158, 160, 161, 163, 174, 175, 178, 179, 184, 185, 186 and 251.

As stated earlier, AECL's representations include submissions made on behalf of one of the other affected parties. This affected party was hired by AECL to provide certain expertise relating to AECL's work on the study group. The fourth category of records relates to this affected party. AECL identifies that these records consist of information relating to the contractual relationship between AECL and the affected party.

AECL submits that the work product of the affected party is also the work product of AECL, and that disclosure of this information, which was supplied directly to Hydro by the affected party, would result in the same degree of commercial harm as if it was supplied to Hydro by AECL. As well, AECL identifies that some of the information in this category reveals confidential commercial information as between AECL and the affected party, and submits that disclosing this information would reveal consultancy pricing and project authorization protocols and correspondence that would equip competitors with information which would harm AECL's business interests.

ANALYSIS

General

I will now proceed to apply the requirements of all three parts of the section 17(1) test to each of the records. However, it is useful to state at the outset that I accept the position put forward by AECL and Affected Party H, and supported by Hydro, regarding the way in which the records came into the custody and control of Hydro. It would appear clear, based on the representations of these three parties, that the records at issue were supplied to Hydro by various other participants on the project group investigating the MOX fuel proposal. It is also clear that the issues under consideration by this group were highly sensitive, and that the records were supplied with a reasonably held expectation that they would be treated confidentially by Hydro. I base this conclusion on the nature of the records themselves, the type of work undertaken by the study group, the existence of confidentiality agreements entered into by the parties, and the representations provided by Hydro, AECL and Affected Party H.

Records that qualify for exemption under section 15(b)

I would normally not consider records that I have already determined qualify under another exemption claim, in this case section 15(b). However, In Interim Order PO-1927-I, I concluded that some of these section 15(b) records fell within the scope of the first part of the section 23 public interest override. Accordingly, I must determine whether these records also qualify under section 17(1) in order to complete my analysis of section 23.

Record 1 (category 1)

AECL submits that Record 1 contains design information and other technical information that was provided to Hydro explicitly in confidence, and that its disclosure would prejudice AECL's competitive position in future similar circumstances. I accept AECL's position, and find that Record 1 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 31 (category 1)

Record 31 consists of minutes of a meeting where third party vendor proposals are reviewed. AECL submits that the information in Record 31 was supplied to certain assessors on a confidential basis, and was in turn supplied in confidence to Hydro along with other records in the context of its involvement in the study group. AECL submits that disclosure of the information in this record would prejudice AECL's competitive position amongst competing proposal proponents and equip them with information to the detriment of AECL's business strategies. I accept AECL's position, and find that Record 31 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 34

The severed portion of Record 34 contains information concerning physical security, site plans and production process diagrams. AECL submits that this record was supplied to Hydro in

confidence, and that it would be significantly prejudiced by disclosure of the severed portions. I accept AECL's position, and find that the severed portions of Record 34 qualify for exemption under section 17(1)(a) of the *Act*.

Records 51 and 56 (categories 1 and 2)

Record 51 consists of minutes of a meeting, as does the relevant portions of Record 56. AECL submits that these records contain technical information supplied to Hydro in confidence, and that disclosure would jeopardize future ongoing relations between AECL and foreign companies. AECL bases its position on the confidentiality undertakings entered into with respect to the information contained in these records. I accept AECL's position and find that Records 51 and 52 qualify for exemption under section 17(1)(a) of the *Act*.

Record 62 (categories 1 and 3)

Record 62 also consists of meeting minutes, and the relevant portions are the two paragraphs headed "Task 3" on page 3. AECL submits that this record contains commercial information concerning the negotiating strategy used by AECL in preparation for the meetings with other parties. AECL argues that this record was supplied to Hydro in confidence, and that disclosing it would prejudice ongoing commercial relations between AECL and other parties, resulting in significant prejudice to AECL's competitive position. I concur, and find that the requirements of section 17(1)(a) have been established for Record 62.

Record 81 (attachment 21 – categories 1 and 2)

AECL identifies that this attachment consists of security arrangements for the transportation and packaging of MOX fuel pellets. It submits that the attachment qualifies for exemption under section 17(1) because it contains a detailed overview of security requirements that would apply to transportation and packaging, both in Canada and outside Canada. Again, AECL identifies that the record was supplied to Hydro in confidence, and that disclosure would create a significant security risk, and would severely prejudice AECL's ongoing and future participation in projects of this nature with foreign governments. I accept AECL's position as it relates to attachment 21 of Record 81, and find that disclosure of the confidential technical information contained in this attachment could reasonably be expected to significantly prejudice AECL's competitive position in future similar contexts. Therefore, attachment 21 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 102 (categories 1 and 2)

AECL has severed portions of this record, and submits that disclosing these portions would reveal information relating to security, transportation, packaging and personnel. It also submits that the record was supplied to Hydro in confidence, and that its disclosure could reasonably be expected to prejudice AECL in its relations with foreign companies. I find that the severed portions of this record contains technical information relating to security and transportation information, that was supplied in confidence to Hydro. I also accept AECL's position that disclosure of this information could reasonably be expected to prejudice AECL's competitive

position in future similar contexts. Accordingly, I find that the severed portions of Record 102 qualify for exemption under section 17(1)(a) of the *Act*.

Record 108 (categories 3 and 4)

In Interim Order PO-1927-I, I restricted my finding of a compelling public interest under section 23 to information that involved a Canadian interest, and not to information relating to facilities located in other countries. AECL's representations on the section 17(1) exemption relate primarily to information about facilities in other countries, and not the portions on page 7 that I have determined satisfy the first part of the section 23 test. I find that disclosing the relevant portions of Record 108 (i.e. the top portion of page 7 to the end of the section headed "Security") could not reasonably be expected to result in any of the harms identified in section 17(1), and these portions do not qualify for exemption.

Record 113 (categories 1 and 2)

Record 113 is a report prepared by a third party on an aspect of the operation of CANDU reactors. In Interim Order PO-1927-I, I found that this record qualified for exemption under section 15(b), and that only certain portions satisfied the first part of the section 23 test. Of these portions, pages 3-29 through 3-33, 3-52 through 3-54 and 4-21 through 4-24 have been severed by AECL on the basis that they contain costing information and sensitive technical information relating to the adaptation of CANDU reactors for MOX fuel. AECL submits that this information was supplied to Hydro in confidence, and that its disclosure could harm AECL's business interests. I accept AECL's position as it relates to these pages, and I find that pages 3-29 through 3-33, 3-52 through 3-54 and 4-21 through 4-24 qualify for exemption under section 17(1)(a) of the *Act*.

Record 164 (no category identified)

This record is a 2-page memorandum outlining the results of meetings dealing with MOX fuel. AECL submits that the record contains sensitive technical, commercial and financial information relating to the project, including design and cost information, which was provided to Hydro in confidence. I accept that the disclosure of Record 164 could reasonably be expected to result in harm to AECL's competitive position, and I find that it qualifies for exemption under section 17(1)(a) of the *Act*.

Summary

In summary, I find that the records or portion of records that were subject to the section 15(b) claim and which also qualify for exemption under section 17(1)(a) of the *Act* are: Records 1, 31, 34 (in part), 51, 56, 62, 81 (Attachment 21), 102 (in part), 113, and 164. I also find that section 17(1) does not apply to the relevant portions of Record 108.

Records that are not subject to a section 15 exemption claim

Record 12 (category 3)

This record consists of two letters revealing proposals between AECL and other affected parties. I am satisfied that they contain commercial information relating to proposals and capacity information relating to these proposals that was supplied to Hydro on a confidential basis. Based on the submissions provided by AECL, I accept that disclosing this record would reveal business strategies of AECL, which could reasonably be expected to result in significant prejudice to AECL's future competitive position. Accordingly, I find that Record 12 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 33 (category 1)

Record 33 is an excerpt of a proposal that includes costing and bidding information provided by an affected party. I am satisfied that disclosure of this information would reveal commercial and financial information supplied to AECL and in turn to Hydro in confidence, and that this disclosure could reasonably be expected to interfere significantly with AECL's future negotiations in similar contexts. Accordingly, I find that Record 33 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 47 (categories 1 and 2)

AECL submits that portions of Record 47 can be disclosed, but that the other portions contain confidential technical information, including information concerning packaging and transportation of goods involving other participants on the project. Having carefully reviewed this record, I accept AECL's position, in part. I am satisfied that certain portions severed by AECL clearly contain confidential technical information relating to the packaging and transportation of the fuel, and that disclosure of these portions could reasonably be expected to result in harm to AECL's future competitive position. However, I am not persuaded that disclosure of the signatories to an agreement severed from page 1 and the two fax cover sheets on pages 10 and 11, which simply identify when the records were faxed and to whom, could reasonably be expected to result in any of the harms envisioned by section 17(1). Accordingly, I find that the signatories and fax cover sheets do not qualify for exemption under section 17(1) and the remaining severed portions of Record 47 qualify for exemption under section 17(1)(a) of the *Act*.

Record 49 (categories 1 and 2)

It is a letter addressed to a foreign government, with a twelve-page attachment addressing certain aspects of the study group's work. AECL identifies that the information in this record is highly sensitive information concerning security and transportation that was supplied to Hydro in confidence. It submits that the disclosure of this record would breach security requirements and irreparably prejudice AECL's ongoing relation with other governments. It also submits that the information discloses certain costing formulae. I accept AECL's position, and find that Record 49 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 50 (category 1)

AECL has only identified portions of Record 50, a draft report, as qualifying for exemption under section 17(1). These portions consist of AECL's confidential technical proprietary information, as well as costing and scheduling data. Based on AECL's representations and my review of Record 50, I find that the portions severed by AECL qualify for exemption under section 17(1)(a) of the *Act*.

Record 68 (category 1)

Again, only portions of Record 68 are subject to AECL's section 17(1) exemption claim. They consist of cost breakdowns and allocations and, for the same reasons as outlined for Record 50, I find that these portions qualify for exemption under section 17(1)(a) of the *Act*.

Record 106 (category 1)

AECL submits that Record 106 contains design planning and costing information that was supplied to Hydro in confidence, and that disclosing this information could reasonably be expected to significantly prejudice its competitive position. I concur, and find that Record 106 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 125 (categories 1, 2 and 3)

Record 125 sets out conceptual equipment layout and design information. AECL submits that this record was supplied to Hydro in confidence, and that its disclosure would allow competitors access to this confidential technical information, to the prejudice of AECL in future similar contexts. I accept this position, and find that Record 125 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 136 (category 1)

Record 136 is correspondence to study group members containing design and other technical information. It is highly similar to the information contained in Record 1, and some of the attachments to the record are identical to that other record. For the same reasons identified earlier regarding Record 1, I find that it qualifies for exemption under section 17(1)(a) of the *Act*.

Record 138 (categories 1, 2 and 3)

Again, only portions of Record 138 are subject to AECL's section 17(1) claim, specifically those portions that contain capital and operating cost estimates. I find that the portions severed by AECL consist of confidential financial information, the disclosure of which could reasonably be expected to result in harm to AECL's future competitive position, and that these portions qualify for exemption under section 17(1)(a) of the *Act* on that basis.

Record 139 (categories 2 and 3)

Record 139 consists of a memorandum related to a particular facility meeting and site visit. AECL has severed portions of the record containing technical information concerning other affected parties, as well as summaries of the plant visit and design information. I am satisfied that the severances made by AECL contain technical information that was supplied in confidence to Hydro, and that its disclosure could reasonably be expected to result in undue loss or gain to AECL and future competitors respectively, as argued by AECL. Accordingly, I find that the severed portions of Record 139 qualify for exemption under section 17(1)(a) of the *Act*.

Record 141 (categories 3 and 4)

AECL claims section 17(1) for certain severed portions of Record 141, which consists of correspondence relating to the position taken by an affected party regarding a proposal put forward by AECL. AECL submits that this record was supplied to Hydro in confidence, and argues that the severed portions consist of sensitive commercial information concerning AECL's business strategies, as well as funding and costing information, and that disclosing this information could reasonably be expected to significantly prejudice its future competitive position in similar contexts. I accept AECL's position, and find that the severed portions of Record 141 qualify for exemption under section 17(1)(a) of the *Act*.

Record 148 (categories 3 and 4)

Record 148 is a memorandum from a representative of AECL to an affected party. AECL submits that this record was supplied to Hydro in confidence, and contains confidential information that would identify internal strategies, and that disclosing this information could potentially reveal these strategies to its competitors. Having reviewed Record 148, I accept AECL's position, and find that the requirements of section 17(1)(a) have been established.

Record 150 (categories 3 and 4)

AECL has severed those portions of Record 150 that contain information about proposed commercial relationships with other parties, as well as specific costs paid by AECL. I am satisfied that the severed portions contain commercial and financial information, supplied in confidence to Hydro, and that disclosing this information could reasonably be expected to result in future competitive harm to AECL. Accordingly, I find that the severed portions of Record 150 qualify for exemption under section 17(1)(a) of the *Act*.

Record 151 (categories 2, 3 and 4)

AECL submits that Record 151 contains technical production information and cost breakdowns that was supplied to Hydro in confidence, and that disclosing it could reasonably be expected to prejudice AECL's future negotiations in similar contexts. I accept AECL's position, and find that Record 151 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 154 (categories 2, 3 and 4)

AECL submits that the severed portions of Record 154 contain sensitive commercial information that was supplied to Hydro in confidence, and that if this information is disclosed it could reasonably be expected to provide competitors with commercial intelligence. AECL identifies that the information was provided to AECL by third parties and submitted to Hydro on a confidential basis, and submits that its disclosure could reasonably be expected to prejudice AECL's future commercial relationships. Having reviewed the severed portions, I am satisfied that the requirements for exemption under section 17(1)(a) of the *Act* have been established for these portions of Record 154.

Record 156 (categories 3 and 4)

AECL submits that Record 156 contains highly sensitive technical information that was supplied to Hydro in confidence, and that if this information is disclosed it would provide competitors with information to the prejudice of AECL. I accept this position, and find that Record 156 contains confidential technical information the disclosure of which could reasonably be expected to result in future competitive harm to AECL, and that it qualifies for exemption under section 17(1)(a) of the *Act*.

Record 158 (categories 3 and 4)

AECL submits that the information severed from Record 158 consists of highly sensitive technical information that was supplied to Hydro in confidence, and that disclosing this information would prejudice AECL in future fuel fabrication negotiations. I accept AECL's position, and find that the severed portions of Record 158 qualify for exemption under section 17(1)(a) of the *Act*.

Records 160, 161, 162, 163 and 165 (categories 3 and 4)

AECL submits that the severed portions of Records 160, 161, 162, 163 and 165 contain confidential technical, commercial and financial information relating to the project, including specific design and cost information, that was supplied to Hydro in confidence. AECL argues that disclosure of these records would result in harm to AECL's future competitive position. Having reviewed these records, I accept AECL's position and find that the severed portions of Records 160, 161, 162, 163 and 165 qualify for exemption under section 17(1)(a) of the *Act*.

Record 166 (categories 1 and 2) and Record 167 (categories 1 and 3)

Like a number of other records at issue in this appeal, Records 166 and 167 were provided to AECL by other affected parties and in turn submitted to Hydro as a result of the various parties' participation on the joint study teams. AECL submits that the severed portions of these records contain confidential cost estimate information, and that disclosing this information could reasonably be expected to prejudice AECL's future competitive position. I accept this position, and find that the severed portions of Records 166 and 167 qualify for exemption under section 17(1)(a) of the *Act*.

Record 174 (categories 2, 3 and 4)

Record 174 consists of draft minutes of a meeting. AECL submits that the severed portions of this record contain technical information relating to the fuel facilities, the production process and plans that was supplied to Hydro in confidence. AECL identifies the potential harm which would result from disclosure of these portions of Record 174, including prejudice to AECL's ongoing commercial relationships, and its ability to enforce its licensing rights in the future. I accept AECL's position, and find that the severed portions of Record 174 qualify for exemption under section 17(1)(a) of the *Act*.

Record 175 (categories 3 and 4)

Record 175 consists of correspondence regarding a proposal and various strategies put forward by AECL. AECL submits that certain severed positions of the record qualify for exemption under section 17(1), specifically those portions consisting of sensitive internal strategizing activities. It argues that the record was supplied to Hydro in confidence, and that disclosure of the severed portions of these records could result in future competitive harm. I accept AECL's position, and find that the severed portions of Record 175 qualify for exemption under section 17(1)(a) of the *Act*.

Records 178 and 179 (categories 1, 2, 3 and 4)

AECL has severed those portions of Records 178 and 179 it claims relate to production data, including scheduling and operating cost information. It submits that these portions contain commercial and financial information that was supplied to Hydro in confidence, and that disclosure would provide competitors with valuable information that could reasonably be expected to prejudice AECL's future competitive position. I accept AECL's position, and find that the severed portions of Record 178 and 179 qualify for exemption under section 17(1)(a) of the *Act*.

Records 182 and 183 (categories 1, 2 and 3)

Records 182 and 183 consist of minutes of meetings, including site plan, facility and costing information. AECL submits that this information was supplied to Hydro in confidence, and, if it is disclosed, it would provide competitors with valuable information that could reasonably be expected to prejudice AECL's future competitive position. I accept AECL's position, and find that Record 182 and the severed portion of Record 183 qualify for exemption under section 17(1)(a) of the *Act*.

Record 184 (categories 1, 2, 3 and 4)

AECL submits that Record 184 contains technical information relating to specific facilities, which, if disclosed, would provide competitors with valuable commercial intelligence, and interfere with AECL licensing rights. Having reviewed this record, I find that it contains technical information, which was supplied to Hydro in confidence, and I accept AECL's position that disclosure could reasonably be expected to prejudice AECL's competitive position in future

similar contexts. Accordingly, I find that Record 184 qualifies for exemption under section 17(1)(a) of the *Act*.

Record 185 (categories 3 and 4)

Record 185 consists of correspondence regarding a proposal. AECL submits that it was supplied to Hydro in confidence, and that the portions severed by AECL contain handwritten calculations and monetary figures relating to costs. I am satisfied that the severed portions of Record 185 contain confidential financial information, and that their disclosure could reasonably be expected to result in prejudice to AECL's future competitive position in similar contexts. Accordingly, I find that the portions of Record 185 severed by AECL qualify for exemption under section 17(1)(a) of the *Act*.

Record 186 (categories 3 and 4)

Record 186 consists of a memorandum concerning a work plan relating to an evaluation of the conversion of a facility. AECL submits that it was supplied to Hydro in confidence, and that the severed portions relate to production data including, scheduling and operating cost information. AECL submits that the severed information, if disclosed, would provide competitors with valuable information that could reasonably be expected to prejudice AECL's future competitive position. I accept AECL's position, and find that the severed portions of Record 186 qualify for exemption under section 17(1)(a) of the *Act*.

Records 248 and 251

Record 248 consists of correspondence regarding the MOX initiative. AECL submits that Record 251 contains draft portions of Record 248, along with additional documents that were supplied to Hydro in confidence, and the disclosure of the severed portions of these records would disclose AECL's confidential business strategies. Having reviewed Records 248 and 251, I find that they contain confidential commercial information, which, if disclosed, could reasonably be expected to significantly prejudice AECL's future competitive position in similar contexts. Accordingly, I find that the severed portions of Records 248 and 251 qualify for exemption under section 17(1)(a) of the *Act*.

Records 254 and 261

AECL has deferred to Affected Party H with respect to records 254 and 261.

In summary, I find that the section 17(1)(a) exemption applies to the following records or portions of records relating to AECL: Records 12, 33, 49, 106, 125,136, 148, 151, 156, 182 and 184, and the severed portions of Records 47, 50, 68, 138, 139, 141, 150, 154, 158, 160, 161, 162, 163, 165, 166, 167, 174, 175, 178, 179, 183, 185, 186, 248 and 251. I also find that some portions of Record 47 do not qualify for exemption under section17(1).

Affected Party H

Affected Party H was provided with an opportunity to submit representations on the application of section 17(1) to Records 254, 261, 269 and the severed portion of Record 197. Pricing information provided by Affected Party H was severed by Hydro from Record 262, and I will review the application of section 17(1) to this information as well.

After identifying its relationship with the parties, Affected Party H states that the four records at issue were submitted to Hydro on a confidential basis. It identifies that the records contain its trade secrets and commercial and technical information, and submits that their disclosure would significantly prejudice that party's competitive position, lead to undue loss, and interfere with that party's contractual and other negotiations with other outside parties. Affected Party H then reviews each of the four records in detail, including the specific information in each record, and describes how disclosure could reasonably be expected to result in specific harms. It also identifies the ongoing nature of its commercial interests, and the potential impact of disclosing specific information, including pricing and proposal information.

Having reviewed the records, I find that they contain technical, commercial and/or financial information that was either supplied to Hydro by Affected Party H or would reveal information provided to Hydro by this affected party. On the basis of the representations received, I am satisfied that the information contained in Records 254, 261, 269, as well as the severed portions of Records 197 and 262, was provided to Hydro in confidence, and that its disclosure could reasonably be expected to result in prejudice to the future competitive position of Affected Party H in similar contexts. Therefore, I find Records 254, 261, 269 and the severed portions of Records 197 and 262 qualify for exemption under section 17(1)(a) of the *Act*.

Summary of section 17(1)

In summary, I find that the relevant portions of Records 1, 31, 34, 51, 56, 62, 81 (attachment 21), 102, 113 and 164, all of Records 12, 33, 49, 106, 125,136, 148, 151, 156, 182, 184, 254, 261 and 269 and the severed portions of Records 47, 50, 68, 138, 139, 141, 150, 154, 158, 160, 161, 162, 163, 165, 166, 167, 174, 175, 178, 179, 183, 185, 186, 197, 248, 251 and 262 qualify for exemption under sections 17(1)(a) of the *Act*.

As well, in the absence of representations, I find that Records 48, 52, 86, 90, 91, 157, 159 and the severed portions of Records 203 and 256 also do not qualify for exemption under these sections.

The affected party whose interests are affected by disclosure of Records 187, 188, 189, 190, 191, 192, 267 and 268 has consented to their disclosure, so these records do not qualify for exemption under section 17(1) of the *Act*.

I have also found that section 17(1) does not apply to the relevant portions of Records 108 or certain identified portions of Record 47.

In my analysis of section 23 of the *Act* set out below, I have concluded that there is no compelling public interest in the disclosure of the following records or portions of records which qualify for exemption under section 17(1)(a): Records 12, 33, 106, 125, 148, 151, 156, 182, 184, 254, 261 and 269 and to the severed portions of records 50, 68, 138, 139, 141, 150, 154, 158, 160, 161, 162, 163, 165, 166, 167, 174, 175, 178, 179, 183, 185, 186, 197, 248, 251, and 262. Because these records or portions of records qualify for exemption under section 17(1)(a) and, in light of my findings under section 23 for these records, it is not necessary for me to determine whether they also qualify for exemption under section 18(1) of the *Act*.

VALUABLE GOVERNMENT INFORMATION/ECONOMIC AND OTHER INTERESTS

SECTION 18

I will restrict my discussion of section 18 to those records, or portions of records, that are not otherwise protected from disclosure as a result of my decisions relating to sections 15, 17(1), and 23 made in this order as well as Interim Order PO-1927-I.

These records are:

- Records or portions of Records 1, 31, 34, 51, 56, 62, 63, 66, 71, 81, 102, 108, 113, 133, 164, and 245, which qualify for exemption under sections 15 and/or 17(1), but where I found a compelling public interest in the disclosure of the records in whole or in part; and

- Records 47, 48, 49, 52, 90, 91, 136, 157, 159, 187, 188, 189, 190, 191, 192, 265, 267, 268 and the severed portions of records 50, 68, 138, 139, 141, 150, 154, 158, 160, 161, 162, 163, 165, 166, 167, 174, 175, 178, 179, 183, 185, 186, 248 and 251, which do not qualify for exemption under either section 15 or 17(1), or to which section 23 might apply as identified below.

Sections 18(1)(a), (c) and (d) of the *Act* read:

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;

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18(1)(a): Information that belongs to an institution and has monetary value

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, it must be established that the information contained in the record:

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 [Orders 87, P-581].

The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) provides the following description of the rationale for including a "valuable government information" exemption in the *Act*, which is helpful in considering the section 18(1)(a) exemption claim in the context of this appeal:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute. . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited. The activities of the Ontario Research Foundation, for example, are a primary illustration of this phenomenon. We are not opposed in principle to the sale of such expertise or the fruits of research in an attempt to recover the value of the public investments which created it. Moreover, there are situations in which government agencies compete with the private sector in providing services to other governmental institutions . . . on a charge back basis. . . . In our view, the effectiveness of this kind of experimentation with service delivery should not be impaired by requiring such governmental organizations to disclose their trade secrets developed in the course of their work to their competitors under the proposed freedom of information law.

Part 1: type of information

Hydro submits:

> The documents for which [Hydro] has claimed a section 18(1)(a) exemption are either technical, or scientific, in nature, financial, or commercial, or a trade secret, or all of the above.

> For example, document #1 is clearly a technical assessment, prepared by engineers, of an aspect of using MOX fuel in CANDU reactors. It includes technical drawings of spent modules, graphs and tables. Many of the records are similarly technical assessments of particular aspects of the technical feasibility of using MOX fuel in CANDU reactors.
>
> Documents #265, for example, is a financial, or commercial, assessment of the MOX project, prepared by [Hydro]....
>
> Similarly, the dollar values withheld in documents #197 and #262 are financial/commercial information and are a trade secret of [an identified company] and [Hydro]. ...

The appellant submits:

> ... While the documents may contain scientific or technical information, I do not believe that they would meet the remaining criteria of the exemption.

Hydro's submissions with respect to the nature of the information are, for the most part, general in nature, referring only to a few examples of records identifying the types of information covered by the first part of the section 18(1)(a) test. In light of my findings under the third part of the test below, it is not necessary for me to review and make specific findings on each of the records. It is sufficient for me to identify that some of them do contain the types of information listed in section 18(1)(a), including Record 265, which contains financial, commercial and technical information.

Part 2: "belongs" to the institution

Hydro also submits that the records belong to it. Hydro refers to previous orders that have held that information "belongs" to an institution if the law would recognize a substantial interest in protecting the information from misappropriation by another party. In support of its position, Hydro relies on nature of the information and the fact that it held this information in confidence pursuant to confidentiality agreements with various affected parties.

The appellant submits that, in order for the information to belong to Hydro, Hydro must have a proprietary interest in the information beyond mere possession and control, either in a traditional intellectual property sense or in the sense that the law would recognize an interest in protecting the information from misappropriation.

Both parties refer to Order PO-1763, where Senior Adjudicator Goodis made the following interpretation of the phrase "belongs to" in the context of section 18(1)(a), which I adopt for the purposes of this appeal:

> [Assistant Commissioner Tom Mitchinson in Orders P-1114 and P-1281] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right

> simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, *Lac Minerals Ltd. v. Int. Corona Resources Ltd.* (1989), 61 D.L.R. 4th 14 (S.C.C.), and the cases discussed therein].

Applying this reasoning, I find that only a small number records "belong to" Hydro. With the exception of Record 265 (and other specific records that are not under consideration here), Hydro's representations consist of generalized statements, focused on the confidential context in which the records came into its possession, rather than the specific requirements of the second part of the section 18(1)(a) test. Although, as Senior Adjudicator Goodis points out, confidentiality is a relevant factor in ascertaining whether an institution has a proprietary interest in information, it alone is not determinative of the issue. In my view, Hydro's representations, for the most part, would appear to suggests that, to the extent that the information "belongs to" any party, it belongs to some of the other affected parties, whose interests have already been considered by me in the context of my section 17(1) discussion. As far as Record 265 is concerned, it is a draft report on MOX-related issues prepared by a financial team. The record identifies that it was supplied to Hydro in confidence, and was prepared to provide Hydro with financial information necessary to facilitate a decision. Hydro submits:

> [This] document assesses a number of options and concludes which of the options is the lowest cost option in terms of potential contract proposals and negotiations with prospective international partners.

Based on the nature of Record 265 and the representations provided to me, I am satisfied that the information contained in this record "belongs to" Hydro.

As far as the other records are concerned, the representations provided by Hydro have not persuaded me that any of them contain information that "belongs to" it, as that term has been defined as interpreted in Order PO-1763 and other previous orders of this office.

Part 3: has monetary or potential monetary value

In Order M-654, Adjudicator Holly Big Canoe made the following finding under section 11(a) of the Municipal Freedom of Information and Protection of Privacy *Act* (the equivalent to section 18(1)(a) in the provincial *Act*):

> The use of the term **"monetary value"** in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(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 . . . [emphasis in original].

Again, Hydro's representations on this part of the section 18(1)(a) are a combination of general statements and more focused submissions on four specific records. I have already determined that two of these records, Record 197 and 262, qualify for exemption under section 17(1) of the *Act*, and will not consider them further here. Hydro submits:

> [Hydro] submits that the remaining information for which [Hydro] has claimed section 18 has potential monetary value. [Hydro's] position on the MOX project, as is well known, is that it is open to participation if the project is shown to be commercially viable and if it passes all regulatory requirements. If the project is shown to be commercially viable, it is reasonable to believe that the documents have monetary value. For example, document 265 is an analysis of the potential financial value of the project. This document and all of the other documents at issue, have value since the analysis that they contain could be sold to another party. For example, this information could potentially be sold to a company leasing a [Hydro] nuclear facility. The potential for this information to be sold is also shown by the fact that some of the analysis in the documents was prepared under a consulting contract between AECL and the U.S. Department of Energy.

In addressing this aspect of the exemption, the appellant submitted the following:

> I submit that these records do not contain a proprietary interest in an intellectual property sense, nor is the information in the nature of a confidential trade secret. It follows that there is no inherent monetary value or potential monetary value in the information contained in the records.

In responding to Hydro's representations on this issue, the appellant points out that they only address four records specifically, and "as [Hydro] has the onus of proving its reliance on [section 18(1)(a)]... more justification would be required, failing which, access to the records should be granted."

I concur with the appellant on this issue. With the exception of Record 265, I have not been provided with sufficient evidence to persuade me that any of the records under consideration have monetary or potential monetary value, as these terms have been interpreted and applied in previous orders, including Order M-654.

As far as Record 265 is concerned, it consists of a detailed analysis of various alternative options for the use of nuclear reactors, including an analysis of possible options for many years into the future. On the basis of Hydro's representations and my review of Record 265, I am satisfied that the information it contains has potential monetary value.

In summary, I find that all three parts of the section 18(1)(a) test have been established for Record 265, and it therefore qualifies for exemption on that basis. Parts two and three of the test have not been established for any of the other section 18(1)(a) records and, accordingly, they do not qualify for this exemption claim.

Section 18(1)(c): prejudice to economic interests or competitive position

In Order P-1190 (upheld on judicial review 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.)), I made the following statements with respect to the purpose of section 18(1)(c):

> In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

As identified in previous orders, this exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.

Hydro's submissions on this exemption claim again focus primarily on certain specific records, including three records I have already determined qualify for exemption - Records 197 and 262 under section 17(1), and Record 265 under section 18(1)(a). Hydro goes on to state:

> … If document 265 and the other documents at issue were to be released and the project shown to have commercial viability, the release would prejudice negotiations with prospective partners. This expectation is reasonable since the project is predicated on commercial arrangements.

Hydro also points out that the Ontario government is in the process of creating a competitive market for electricity generation, and implies that disclosure of Record 265 (which I have already determined qualifies for exemption under section 18(1)(a)) and other unspecified records could prejudice Hydro's position in that context.

The appellant submits:

> The exemption under subsection 18(1)(c) does not apply as the provision of the information requested . . . cannot reasonably be expected to prejudice Hydro's economic interests or competitive position.

He also refers to Order PO-1805 in support of the view that it is equally plausible that disclosure of the information would enhance, rather than harm, Hydro's competitive position.

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), 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, 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 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.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Applying this reasoning, in order to establish the requirements of the sections 18(1)(c) or (d) exemption claims, Hydro must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm as described in these sections resulting from disclosure of the records. [See also Order Po-1887-I and PO-1976].

In my view, Hydro has not established the requirements for exemption under section 18(1)(c). The information contained in the records is identified above, and relates to a broad range of information concerning Hydro's involvement in a project. I am not convinced, based on the representations provided by Hydro, that disclosing this information could reasonably be expected to prejudice the economic interests of Hydro or harm its competitive position in the industry. Hydro's position that disclosure of certain unspecified records could have an impact on its interests as the electricity market is opened up to competition is speculative and not linked to any specific harm or any record under consideration here. Accordingly, I find that Hydro has failed to provide the level of detailed and convincing evidence required to establish a reasonable expectation of probable harm to the economic interests of hydro or its competitive position, and the record does not qualify for exemption under section 18(1)(c).

Section 18(1)(d): injury to financial interests/ability to manage the Ontario economy

In the context of section 18(1)(d), Hydro relies on its representations under sections 18(1)(a) and (c), and also submits that any negative impact on its ability to negotiate competitively with third

parties as the electricity market is opened to competition will have a direct impact on the financial interests of its sole shareholder, the Government of Ontario.

The appellant submits that "there is nothing in the Records which, if disclosed, could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario." He goes on to dispute Hydro's ability to rely on section 18(1)(d), maintaining that Hydro is not accurately considered to be the "Government of Ontario."

Irrespective of whether the section 18(1)(d) exemption is available to Hydro, for the same reasons outlined above regarding section 18(1)(c), I find that Hydro has not provided the type of detailed and convincing evidence of harms necessary to establish the section 18(1)(d) exemption claim for any of the records.

Accordingly, I find that only Record 265 qualifies for exemption under the section 18 of the *Act*.

Section 18(2)

The appellant submits that section 18(2) of the *Act* is relevant in the circumstances of this appeal. This section states:

> A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,
>
> (a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or
>
> (b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.

I find that Record 265 does not include any product or environmental test results carried out by Hydro, and section 18(2) is not applicable to this record.

PUBLIC INTEREST IN DISCLOSURE

The appellant raised the possible application of the section 23 public interest override. 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.

Compelling public interest

In Interim Order PO-1927-I, I reviewed the representations of the parties and several pervious orders of this office to determine whether there existed a compelling public interest in the disclosure of any of the records at issue in this appeal. I made the following findings:

> 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 (e.g., Records 124, 153, 180 and 181); or records which deal generally with an analysis of plutonium/MOX fuel and a comparison of its qualities.

My Supplementary Notice of Inquiry sent to the parties after the issuance of Interim Order PO-1927-I invited the parties to address the section 23 issues.

Hydro did not provide representations on section 23.

Affected Party H submits that there is no "public interest" in the four records relating to it, and that none of these records contain the type of nuclear safety-related matters identified in Interim Order PO-1927-I has bringing records within the scope of the "compelling public interest" component of section 23. I concur.

AECL refers to my findings in Interim Order PO-1927-I, and goes on to submit:

> At a first level of analysis, AECL submits that the same criteria be applied to determine whether there is a compelling public interest in disclosure of the records [which were not reviewed in Order PO-1927-I] for which section 17 exemptions are claimed. If this is done, AECL submits all of the records [in this group] are eliminated from consideration.

I concur with AECL's position that the same criteria should be applied to the remaining records to determine if there exists a compelling public interest in their disclosure, although I do not necessarily agree with the outcome suggested by AECL.

In Interim Order PO-1927-I, I determined that there was a public interest in all of the records under consideration in that order, in light of their subject matter and the fact that they were all produced in the context of the possible use of plutonium/MOX fuel in CANDU reactors operating in Ontario. However, I also found that "… because most of [the records] do not deal directly with any specific nuclear safety issue or reflect 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." Similarly in this order, I find that there is a public interest in all of the records

found to be exempt under sections 17(1)(a) or 18(1)(a). However, the majority of these records do not deal specifically with a nuclear safety issue or reflect any actions or possible actions taken by Hydro or other members of the multi-national group that could have a direct bearing on the public, and I find that the public interest as it relates to these records is not compelling. I again point to the relatively dated nature of most of these records, and also to the manner in which some of the information concerning the use of plutonium/MOX fuel is generally made available to the public. The records or portions of records that fit in this category are:

> Records 12, 33, 79, 106, 125, 148, 151, 156, 182, 184, 254, 261, 269 and the undisclosed portion of Records 197 and 262; and the severed portions of Records 50, 68, 138, 139, 141, 150, 154, 158, 160, 161, 162, 163, 165, 166, 167, 174, 175, 178, 179, 183, 185, 186, 248 and 251.

In contrast, Records 49, 136, all portions of Record 47 that qualify for exemption under section 17(1)(a) and portions of page 8 of Record 265, contain information concerning general safety measures and matters and issues regarding the safety of the transportation of plutonium/MOX fuel to and from nuclear plants. In my view, different considerations apply to these four records.

AECL submits that, before determining whether there is a compelling public interest in disclosing records, I must consider whether there is a more compelling competing public interest in not disclosing these records in order to protect the confidentiality of the information contained in them. AECL states:

> [D]isclosure of information related to the [safety] arrangements would be contrary to the purpose of the security arrangements themselves, which by their nature require that confidentiality be maintained. Although this argument applies equally to the assessment of whether the public interest in disclosure clearly outweighs the purposes of the section 17 and 15(b) exemptions, it is difficult to conclude, in AECL's submission, that there is a compelling public interest in disclosure of information outlining [security measures], when disclosure would compromise the effectiveness of the measures themselves. AECL submits that a determination of a compelling public interest in disclosure of information related to [safety measures] would be unreasonable, and respectfully requests that any determination in this regard related to [the Group #1 records] be reconsidered in the context of the final order.

This responsibility to adequately consider the public interest in both disclosure and non-disclosure of records in the context of a section 23 finding was also pointed out by the Divisional Court in *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636. Before upholding my decision to apply the public interest override in section 23 and order the disclosure of certain peer review reports on the operation of Hydro facilities, the court in that case stated that it needed to first satisfy itself that ".. in deciding as to the existence of a compelling public interest [I took] into account the public interest in protecting the confidentiality of the peer review process". Once satisfied that I had, the court upheld my section 23 finding.

In my view, the issue of whether there is a compelling public interest in disclosure of records is highly dependent on context. Certain key indicators of compellability can be identified, but each fact situation and each individual record must be independently considered and analysed on the basis of argument and evidence presented by the parties.

In Interim Order PO-1927-I, I made reference to two previous orders that identify a key indicator of compellability: safety issues relating to nuclear energy. These orders are helpful in reaching a determination of the "compelling public interest" component of section 23 in the context of records at issue in this appeal. In Order P-270, former Commissioner Tom Wright 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.

In a later order, P-1190, I found:

> 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.

[See also Orders P-1805 and P-1552]

However, as both AECL and the Divisional Court have identified, consideration of the public interest in non-disclosure of records is also an integral part of any determination as to whether there is a compelling public interest in disclosure. If I determine that there is public interest in disclosing certain records and, based on the particular facts and circumstances of the appeal, the nature of the records and the representations of the parties, and go on to conclude that this public interest appears to be compelling, I must take further steps before making a final determination on the "compelling" aspect of section 23. Specifically, I must then assess whether there is also a public interest in not disclosing these records, again based on the specific context of the appeal and, if so, whether this competing public interest is strong enough to impact my conclusion about the public interest in disclosing the records. In order words, is the public interest in non-disclosure strong enough to bring the public interest in disclosure below the threshold of "compelling"? If it is, then section 23 of the *Act* is not applicable in the circumstances.

Between the time of the appellant's original request and the commencement of this appeal, societies throughout the world have been forced to grapple with dramatic social change. Terrorist threats have brought security issues to the forefront of public debate. Members of the public, in Ontario and elsewhere, have a heightened level of concern for adequate security, and governments charged with responsibility for public safety have identified the need to review and reconsider whether they have found the proper balance between security on the one hand and the long-recognized need for transparency in public administration on the other. I cannot ignore this fundamental change in the social and political landscape, and it is important that I provide the parties to this appeal with an opportunity to address this issue before reaching my final decision on the application of section 23 in this context.

Accordingly, I will be issuing a further Supplementary Notice of Inquiry to the parties, asking for further representations on the section 23 issues. This Notice will include reference to the impact of the events of September 11, 2001 and their aftermath, the passage of the federal *Anti-terrorism Act*, the tabling of a revised new *Public Safety Act* by the federal government as recently as last week, and recent jurisprudence on the topic of nuclear safety.

Conclusion

In Interim Order PO-1927-I, I dealt with the jurisdictional issue raised by one of the affected parties, and also made my decision on the application of the section 15(b) exemption claim to various records. After notifying the affected parties and considering their representations, I have now completed my assessment of the application of the two remaining exemption claims, section 17(1) and section 18. I have also identified any exempt records that warrant consideration under the section 23 public interest override. The only remaining issue in this appeal is my final determination as to whether there is a compelling public interest in disclosing any of these exempt records and, if so, whether it is sufficient to clearly outweigh the purpose of any of the exemptions found to apply. I have outlined the approach I intend to follow in dealing with this one remaining issue, and intend to issue my final order after allowing the parties an opportunity to submit representations.

ORDER:

Records disposed of in this interim order:

1. I find that Records 12, 33, 106, 125, 148, 151, 156, 182, 184, 254, 261, 269 and the undisclosed portion of Records 197 and 262 qualify for exemption under section 17(1)(a) of the *Act*. I also find that section 23 does not apply to these records. Accordingly, I uphold Hydro's decision to deny access to these records.

2. I find that the severed portions of Records 50, 68, 138, 139, 141, 150, 154, 158, 160, 161, 162, 163, 165, 166, 167, 174, 175, 178, 179, 183, 185, 186, 248 and 251 qualify for exemption under section 17(1)(a) of the *Act*. I also find that section 23 does not apply to the exempt portions of these records. As well, I find that section 18 does not apply to the portions of the records not exempt under section 17(1). Accordingly, I uphold Hydro's

decision to deny access to portions of these records, but order that the remaining portions be disclosed to the appellant. I have attached a severed copy of these records along with the copy of this interim order being sent to Hydro, with the portions **not** to be disclosed to the appellant highlighted.

3. I find that Records 48, 52, 86, 90, 91, 157, 159, 187, 188, 189, 190, 191, 192, 267 and 268 and the undisclosed portions of Records 203 and 256 do not qualify for exemption under section 17(1) and/or section 18, and order that they be disclosed to the appellant.

4. I find that Record 79 qualifies for exemption under section 15(b) of the *Act*.

Records subject to further consideration under section 23

5. I find that Record 265 qualifies for exemption under section 18(1)(a) of the *Act*.

6. I find that Record 49 qualifies for exemption under section 15(b) of the *Act*.

7. I find that Records 49 and 136, and a portion of Record 47, qualify for exemption under section 17(1)(a) of the *Act*.

8. I find that portions of Records 47 and 108 do not qualify for exemption under section 17(1) or 18. Record 108 has been found to qualify under section 15(b); however, no other exemption claim has been made for the portions of Record 47, which I found do not qualify for exemption. Accordingly, I order Hydro to disclose the relevant portions of Record 47 to the appellant. I have attached a severed copy of this record, with the copy of this interim order being sent to Hydro, with the portions **not** to be disclosed to the appellant highlighted.

9. I have found that Records or portions of Records 1, 31, 34, 47, 49, 51, 56, 62, 63, 66, 71, 81, 102, 108, 113, 133, 136, 164, 213, 245 and 265 qualify for exemption under sections 15(b), 17(1)(a) and/or 18(1)(a), but I have concluded that there is a compelling public interest in the disclosure of these records or portions of records. However, for reasons outlined in this interim order, I have decided to seek further submissions from the parties before finalizing my decision on the application of secion 23 of the *Act* to these records.

10. I order Hydro to disclose the records referred to in Provisions 2, 3 and 8 to the appellant by **June 11, 2002** but not before **June 6, 2002**.

11. I reserve the right to require Hydro to provide me with a copy of the records disclosed to the appellant pursuant to Provisions 2, 3 and 8.

Original signed by: May 7, 2002
Tom Mitchinson
Assistant Commissioner