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

FINAL ORDER PO-2072-F

Appeal PA-990381-1

Ontario Hydro

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This is my final order with respect to the outstanding issues from Interim Order PO-1927-I and Interim Order PO-2014-I.

BACKGROUND:

Ontario Hydro (now Ontario Power Generation Inc.) received a request in 1999 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". For simplicity, I will refer to Ontario Hydro and Ontario Power Generation Inc. interchangeably as "Hydro".

Hydro identified a large number of responsive records and, after notifying a number of parties whose interests might be affected by disclosure of the records, issued its decision to the requester. Hydro provided full access to 78 records totalling approximately 300 pages, and denied access to the remaining records, in whole or in part, on the basis of a number of exemptions in the *Act*.

The requester (now the appellant) appealed Hydro's decision, and also raised the possible application of the "public interest override" contained in section 23 of the *Act*. As well, one of the affected parties took the position that the *Act* had 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, Hydro and a number of affected parties, asking for representations on the constitutional issue, as well as on most of the substantive issues that remained outstanding. I decided not to seek representations on the section 17(1) exemption claim at that time, pending my determination on the constitutional issue. I then exchanged the non-confidential portions of the representations with the other parties and provided an opportunity for reply representations. Only the appellant submitted reply representations.

Interim Order PO-1927-I (Order #1)

Following the receipt and exchange of representations, I issued Order #1 in which I determined that:

- the *Act* applies to the records;
- many of the records qualifies for exemption under section 15(b);
- under section 23 of the *Act*, there exists a compelling public interest in the disclosure of twenty-three records or portions of records that qualify 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 met the first part of the test.

After issuing Order #1, I sent a Supplementary Notice of Inquiry to the parties, inviting them to address the matters remaining at issue. I received submissions from the appellant and four affected parties. I then sent a modified Notice of Inquiry to the appellant, along with Hydro's representations and the non-confidential portions of the representations of one affected party, Atomic Energy of Canada Limited (AECL). In the Notice to the appellant I summarized the positions of the three other affected parties. The appellant did not provide representations in response.

Interim Order PO-2014-I (Order #2)

I then issued Order #2, in which I resolved a number of other issues in this appeal. In that order I found that certain records qualified for exemption under section 17(1) and/or 18(1)(a) of the *Act*. I also determined that six of the twenty-three records identified in Order #1 as possibly subject to the section 23 public interest override were in fact duplicate records. As well, I found that section 23 might apply to four additional records which qualified for exemption under section 17(1) and/or 18(1)(a) of the *Act*. As a result of my findings, there are 21 records or portions of records that qualify for exemption under sections 17(1), 18(1)(a) and/or 15(b) of the *Act*, but which might also fit within the public interest override in section 23.

In its submissions in response to the Supplementary Notice of Inquiry issued after Order #1, AECL requested that I reconsider my determination that there is a compelling public interest in the disclosure of certain records under section 23. One of the reasons for that request was AECL's view that, based on security concerns, there is a public interest in the non-disclosure of the relevant records. AECL also suggested that its argument regarding a public interest in non-disclosure "applies equally to the assessment of whether the public interest in disclosure clearly outweighs the purpose …" of exemptions that apply to the records. I considered this request in Order #2. My analysis of the issue is discussed in more detail below. My conclusion in this regard appears at Order Provision 9 of Order #2, where I referred to my finding in Order #1 that there is a compelling public interest in disclosure of certain records, and stated that:

> … 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 section 23 of the *Act* to these records.

As a result, I issued a further Supplementary Notice of Inquiry to Hydro, the appellant, the affected parties whose records remained at issue, as well as the parties who received the original Notice of Inquiry in this appeal. The Supplementary Notice included reference to the impact of the events of September 11, 2001 and their aftermath, the passage of the federal *Anti-terrorism Act* and the introduction of other security legislation by the federal government, and recent jurisprudence on the topic of nuclear safety. I invited comment on whether there is a compelling interest in non-disclosure that would bring the public interest in disclosure below the threshold of "compelling". I received representations from the appellant and two affected parties (AECL and

the federal Department of Justice), which were shared with the other parties. I then received reply representations from the appellant and AECL.

RECORDS:

The 21 records or parts of records that remain at issue are identified in the attached Appendix "A".

DISCUSSION:

PRELIMINARY ISSUE: ACCESS TO THE RECORDS AT ISSUE AND REPRESENTAIONS BY APPELLANT'S COUNSEL FOR THE PURPOSE OF ARGUMENT

In his representations in response to the Supplementary Notice of Inquiry issued after Order #2, the appellant, through his counsel, requests access to the records at issue, and full access to the representations of "the respondent" for the purpose of preparing argument. The appellant submits:

> … [I]t is virtually impossible to make meaningful submissions on the applicability of s. 23 to the Records that remain under contemplation "in the blind". That is, as [the appellant], we are asked to make submissions on what may very well be exaggerated concerns raised with respect to documents that we have never seen. In addition, we are required to comment on unidentified harms and perils that may come about if these documents that are unknown to us are made public.
>
> In this regard, it is our view that the Commission[er] should exercise its discretion to alter its own procedure and the processing of this access request to employ a process that is routinely utilized on judicial review of [the Commissioner's] orders whereby counsel for [the appellant] is given access to the records in question, subject to a confidentiality undertaking, for the limited purpose of making submissions. This process was utilized (on consent of the parties) in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. 42 (S.C.C.) [also reported at 211 D.L.R. (4th) 193]. …
>
> In our submission, the failure to allow the requester's counsel the opportunity to view the Records in order to assess the validity of [the appellant's] arguments is critical and, accordingly, we would request that the Commission[er] permit counsel for [the appellant] access to the Records (as well as the full text of the Respondent's submissions) to assist in preparing a more meaningful argument for disclosure. Without such access, [the appellant's] counsel will not know the case to be met in this appeal, and accordingly, [the appellant's] right to natural justice is significantly impeded. It is patently unfair that, in the usual course, [the appellant] would have access to the records on a judicial review (when the

> standard of review is at a higher threshold, i.e. reasonableness), but not at first instance when the standard of review is correctness.

In its reply representations, AECL argues against the appellant's request for access to the records and further access to representations. In this regard, AECL relies on sections 52(3) and 52(13) of the *Act*, which are reproduced and discussed in greater detail below.

AECL also refers to section 5 of *Practice Direction 7*, which sets out the Commissioner's practice regarding the sharing of representations, and states:

> The IPC Practice Direction on Sharing of Representations provides that information contained in a party's representations will be withheld where disclosure of the information would reveal the substance of a Record claimed to be exempt or if the information itself would be exempt if contained in a record subject to the *Act*. Clearly, the Commissioner cannot, in the course of an appeal, disclose the Records at issue in the appeal or information in the representations which would disclose the very information claimed to be exempt. While the appellant argues that this is contrary to the rules of natural justice, the language of subsection 52(13) of the *Act* clearly demonstrates the intention of the Legislature to abrogate the rules of natural justice to the extent specified therein (see *Grant v. Cropley* (2001), 143 O.A.C. 131, at 136 (Ont. Div. Ct.))
>
> This prohibition extends to legal counsel representing requesters. Even in the context of a judicial review, the Federal Court of Appeal has made it clear that counsel are not automatically entitled to have access to confidential Records. The Court, after it has carefully reviewed the Records, must determine whether counsel for the Requester has enough relevant information to argue the application. The objective is to protect confidentiality while allowing an intelligent debate on the question of its disclosure (see *Hunter v. Canada (Consumer and Corporate Affairs)* (1991), 35 C.P.R. (3d) at 513-4, per Décary J.A. [also reported at 80 D.L.R. (4th) 497]). If, as here, counsel for [the appellant] can argue its case without access to the Records, then access must not be provided.
>
> The Commissioner has struck a reasonable balance between disclosure of representations and information to the requester and confidentiality in the context of the appeals under the [*Act*] through the *Practice Direction*. The Commissioner's Interim Order and Supplementary Notice of Inquiry provide a sufficient description of the content of the Records at issue and of the various public interest considerations which arise from the Records to enable the appellant to provide meaningful representations. Disclosure must "stop short of disclosing the contents of the records at issue, and institution must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed" (see IPC Order 164 (April 24, 1990)). The Commissioner's practice of sharing representations with all parties, while preserving the confidentiality of representations that would reveal the substance

> of a Record claimed to be exempt from disclosure, fully permits the appellant to make representations about the application of section 23 to the Records.

The *Sierra Club* case, cited by the appellant, arose from a motion for disclosure in a judicial review application launched in the Federal Court, Trial Division by an environmental organization. The decision under review was not an access to information matter. It concerned a decision by the government of Canada to provide financial assistance for the sale of two nuclear reactors by AECL, a Crown corporation, to the government of China. The applicant alleged that the government had failed to comply with the *Canadian Environmental Assessment Act* in making this decision. AECL sought a confidentiality order for evidence it intended to introduce, the disclosure of which would have been a breach of its contract with the government of China. The Supreme Court of Canada analyzed whether this derogation from the norm of open court proceedings, which the court describes as "inextricably linked" to the value of freedom of expression protected by section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), would be a justified protection of a commercial interest under those circumstances. The Court decided that the confidentiality order would be justified because failing to grant it could hinder AECL's ability to present its case. The Court noted that "… under the terms of the order sought, the only restrictions on these documents relate to their public distribution. [They] would be available to the court and the parties …".

The central issue in *Sierra Club* was not access by the parties or their counsel, but whether the confidentiality order was permissible when measured against the open court principle at common law or under the *Charter*. The Court did not set out any reasoning about granting access to these documents to counsel. Moreover, the documents were possibly relevant evidence in the proceeding, rather than the central focus of the entire proceeding as they are in an access to information case.

In *Steinhoff v. Canada (Minister of Communications)*, [1996] F.C.J. No. 756 (T.D.), the Court distinguished between access to documents in litigation generally, and applied a higher standard in access to information cases, stating:

> As a general rule, counsel should have access to all relevant documents in the interests of fairness. Where the Court is deciding a matter based upon the contents of documents, it seems to me that there is a very low standard for counsel to meet in arguing that he or she requires access to the information in order to effectively represent his or her client. **Documents in an access to information matter, however, must be viewed somewhat differently from other cases. Where disclosure of the documents is the very issue before the Court, the threshold that counsel must satisfy is higher.** [my emphasis]

Since access by counsel was not specifically addressed in *Sierra Club*, which in any event involved general litigation, I have concluded that it does not advance the appellant's argument that his counsel should have access to the records at issue in this appeal.

AECL refers to the Federal Court of Appeal's judgment in the *Hunter* case, cited earlier. Unlike *Sierra Club*, *Hunter* does relate to access by counsel to records at issue under the federal *Access*

to Information Act. However, as in *Sierra Club*, the context in which the issue arose was judicial review proceedings before a court rather than proceedings before an administrative tribunal.

As noted by AECL, *Hunter* sets out criteria for access by counsel to records at issue in judicial reviews of decisions made under an access law. Ontario's Divisional Court follows a similar approach with respect to judicial reviews of orders issued by this office, as spelled out in *N.E.I. Canada Ltd. v. Information and Privacy Commissioner (Ont.)* (1990), 40 O.A.C. 77. In such proceedings, counsel is frequently granted access to the private record of proceedings (including the records at issue) on signing an appropriate undertaking of confidentiality. It is clear from the *N.E.I.* case that this practice of Ontario's Divisional Court arises from the approach taken by the Federal Court in cases under the *Access to Information Act*.

While the *Act* does not expressly preclude access to records by counsel during an appeal before the Commissioner, it sets up a specialized inquiry process for the adjudication of appeals that is quite different from court proceedings. Courts operate under a presumption that their proceedings are open and that court files are accessible to the public. For the Ontario courts, this principle is embodied in sections 135 and 137 of the *Courts of Justice Act*, which state, in part, as follows:

> 135(1) Subject to subsection (2) and rules of court, all court hearings shall be open to the public.
>
> (2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.
>
> (3) Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information.
>
> 137(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.
>
> (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.
>
> (3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.
>
> (4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

In contrast, proceedings before the Commissioner are subject to very different considerations, which are laid out, in part, in sections 52 and 55 of the *Act*. These sections provide, in part, as follows:

> 52(1) The Commissioner may conduct an inquiry to review the head's decision if,
>
> (a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or
>
> (b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.
>
> (2) The Statutory Powers Procedure Act does not apply to an inquiry under subsection (1).
>
> (3) The inquiry may be conducted in private.
>
> (4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation. ...
>
> (13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.
>
> 55(1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

It is evident from these legislative provisions that different assumptions apply as between court proceedings and appeals before the Commissioner and, in my view, rules that govern court proceedings may not necessarily be the most appropriate ones to follow in appeals before the Commissioner. The Court operates under a presumption of openness with the capacity to conduct proceedings *in camera* and to seal court documents where circumstances warrant. By contrast, the Commissioner's process, which is called an "inquiry" rather than a "hearing", operates under a legislative scheme aimed, in part, at protecting against the inappropriate disclosure of the contents of a record during the proceedings. To this end, the parties are not even entitled as of right to see or hear one another's representations, which generally entails much less risk of disclosure than allowing access to the records themselves. In addition, the application of the *Statutory Powers Procedure Act*, with its various disclosure requirements, is

expressly excluded by section 52(2). The inherent power of courts to impose sanctions for behaviour that amounts to contempt, which is stronger than any enforcement power available to the Commissioner under the *Act*, may provide a further basis for distinguishing between court processes and an appeal before the Commissioner.

For all of these reasons, I have concluded that court decisions to grant counsel access to the records at issue do not require the Commissioner to follow a similar process and, for the reasons outlined, in my view, there are strong reasons for not doing so in the context of appeals under the *Act*.

Moreover, as noted by Alberta's Information and Privacy Commissioner in Order 2000-016, such an approach would not be desirable because of the inequity it would create among appellants:

> … [I]t is my view that if I gave the Applicant's lawyer information regarding the existence of the records and/or provided the Applicant's lawyer with a copy of the records, it would, in essence, set a precedent and force all future applicants to hire a lawyer if they wanted to gain access to this type of information to prepare their submission. This would render useless section 66(5) [similar to section 52(14) of the *Act*] which gives applicants, among others, the choice whether to be represented by a lawyer or an agent. Applicants who did not hire a lawyer or could not afford a lawyer, would not gain the same access and would not be able to use this information. I do not think it is appropriate to create this type of inequity between applicants.

I share this concern.

Even if I were to adopt the approach of the Federal Court of Appeal in *Hunter*, I would not grant the appellant's request for access to the records in the context of this inquiry. I agree with AECL's submissions on this point. The Commissioner's process for sharing representations, which was followed in this case, is intended to ensure procedural fairness while at the same time recognizing the unique confidentiality concerns addressed by the legislature in sections 52 and 55 of the *Act*. The appellant's original request indicated that he was seeking access to "[a]ll documents from Jan. 1, 1995 to present on the use of plutonium/MOX as fuel at Ontario Hydro." The records at issue have been described in a number of Notices of Inquiry as well as Order #1 and Order #2 already issued by me in this appeal. As regards the possible application of section 23, the appellant has indicated that he "… is not requesting disclosure of the technical information that would be of direct assistance to someone seeking to obtain MOX fuel and use it to harm the Canadian public", but rather of information that "relate[s] to policy issues". The information already provided to the appellant has enabled him to make focused arguments concerning the application of section 23 to the policy-related portions of records pertaining to the use of plutonium/MOX by Hydro.

In my view, the information provided to the appellant about the records meets the standard set out by the Court in *Hunter*, which states that: "[t]he objective in each case is to protect the confidentiality of the information while allowing an intelligent debate on the question of its

disclosure". I am also satisfied that the sharing of representations that occurred in this case, as mentioned by AECL, has provided the appellant with sufficient information about the arguments of other parties, to which the appellant has had an adequate opportunity to respond.

I have therefore decided not to grant the requester's counsel access to the records at issue in this inquiry, or to unsevered copies of the representations of other parties, for the purpose of making argument.

PUBLIC INTEREST IN DISCLOSURE

Introduction

The sole remaining issue in this appeal is whether the public interest override at section 23 of the *Act* applies to the 21 records and parts of records that remain at issue. Section 23 states:

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

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption (see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)). In Order P-1398, former Adjudicator John Higgins stated:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it 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.
>
> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Determination of "compelling"

Order #2

As noted above, AECL made submissions prior to Order #2 regarding the possibility that a compelling public interest in non-disclosure might bring the public interest in disclosure below the threshold of "compelling". I addressed this issue as follows in Order #2:

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.

Later in Order #2, I analysed this issue further:

> … [A]s 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 other 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.

I then referred to the possible impact of the events of September 11, 2001, which took place after I issued Order #1 but prior to Order #2:

> … [S]ocieties 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.

Jurisdictional Objections of the Appellant

In its representations in response to the Supplementary Notice of Inquiry sent out after Order #2, the appellant submits that:

> The Supplementary Notice of Inquiry suggests that there may be a compelling public interest in not disclosing the Records, and, therefore, the argument goes that this finding mitigates against the Commissioner's determination that the disclosure of the records is, in fact, compellingly in the public interest. There is a further suggestion that the public interest in non-disclosure could lower the level of "public interest" in the Records to something less than a compelling level, and, thereby the Records should not be disclosed. …
>
> … [I]t is submitted that s. 23 … plainly reads that once there is a finding that there is a compelling public interest in the disclosure of a record, the

> Commission[er] can only weigh this compelling public interest against the general purpose of the exemption being overridden. That is, in our submission, the Commission[er] only has the jurisdiction to weigh the public interest against the policy reason for having the associated exemption in a general (and not a specific) sense.
>
> To put it another way, the legislation only provides that the public interest override found in s. 23 can be used as a "sword" by [the appellant] – and does not provide for it acting as a "shield" by the institution in question.
>
> For the reasons set out above, we submit that the Commission[er] would be committing a jurisdictional error in making a finding that "a public interest in non-disclosure" can vitiate against a situation where a compelling interest in disclosure has already been found to exist. Disclosure is either in the public interest, or it is not. In this case, the Commission[er] has already found a compelling public interest in disclosure, and therefore, the Records should be made public.

In other words, the appellant submits that I am precluded from considering the public interest in non-disclosure in determining whether the public interest in disclosure is "compelling" for two reasons: (1) the language and structure of section 23 do not permit me to do so, and (2) I have already determined in Order #1 that the public interest in some of the records at issue is "compelling". I will deal with these two arguments in turn.

In my view, the appellant's first argument cannot be sustained in light of the Divisional Court's ruling on my Order P-1190 in *Ontario Hydro v. Mitchinson*. As noted in the discussion of that case in the extract from Order #2 reproduced above, the Court followed the exact approach now opposed by the appellant in assessing my decision that there was a compelling public interest in the disclosure of nuclear-safety related peer review information. Before upholding my decision, the Court wanted to be satisfied that ".. in deciding as to the existence of a compelling public interest [I had taken] into account the public interest in protecting the confidentiality of the peer review process". As framed by the Court, this consideration of the possible public interest in non-disclosure goes to the issue of whether the public interest in disclosure is compelling, rather than the second aspect to be considered under section 23, namely whether the compelling public interest, once established, clearly outweighs the purpose of any applicable exemption.

This approach to section 23 also accords with the intention of the legislature to permit the disclosure of exempt material to serve the public interest. If there is a public interest in non-disclosure that, while not related to the "purpose of the exemption" as canvassed in the second part of section 23, is nevertheless strong enough to indicate that disclosure would have a serious adverse impact on the public interest, this would, in my view, demonstrate that any public interest in disclosure that might exist would not be "compelling".

The appellant's second argument, relating to my previous finding that there is a compelling public interest in the disclosure of some of the records, appears to rely on an unstated view that I am "*functus officio*" in that regard. I disagree. Mr. Justice Sopinka discussed the application of this principle to administrative tribunals in his majority reasons in *Chandler v. Alberta Assn. of*

Architects (1989), 62 D.L.R. (4th) 577 (S.C.C.). He states that "… once such a tribunal has reached a **final** decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal changed its mind, made an error within jurisdiction or because there has been a change of circumstances" [my emphasis]. Justice Sopinka also found that, because decisions of administrative tribunals are generally subject only to judicial review rather than the broader remedy of an appeal, the application of *functus officio* to tribunals should be "more flexible and less formalistic" than its application to courts.

In my view, because I have not made a final determination on the application of section 23 in this appeal, the *functus officio* principle does not apply and I continue to have jurisdiction to consider the evidence and submissions of the parties and to render a decision regarding the potential application of section 23 to all records that remain at issue.

Appellant's Submissions on Burden of Proof re: Public Interest in Non-Disclosure

The appellant further submits that:

> "[I]n the alternative, if the Commission[er] is entitled to find that a compelling public interest in non-disclosure can defeat a compelling public interest in disclosure of a record, it is our submission that there must be a heavy onus on Ontario Hydro to establish this point, especially in light of the fact that Ontario Hydro is the only party in this appeal that is able to adduce this evidence.
>
> As the Commission[er] is aware, and as reflected in the original Notice of Inquiry, when a requester is relying on s. 23 of [the *Act*] to support the disclosure of certain documents, there is a rigorous process that s/he must follow in laying a foundation for disclosure. It therefore follows that, if an institution seeks to avoid disclosure by virtue of s. 23, it, too, should have to meet the heavy burden imposed by [the *Act*], failing which, disclosure should be ordered.

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 an appellant has raised the application of section 23 to a record, 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 that could seldom, if ever, be met by an appellant (Order P-1190).

However, it is also my view that the *Act* does not impose a burden on the parties resisting disclosure to disprove the application of section 23 in the circumstances of a particular appeal.

In my view, no individual party bears the burden of proof under section 23. The question that needs to be addressed is more accurately characterized as whether, on balance, section 23 has the effect of requiring disclosure. This determination must be made on the basis of the facts and

circumstances of a specific appeal, and the evidence and arguments made by the various parties regarding its application to particular records.

Is there a compelling public interest in disclosure in this case?

Introduction

In Order #1, I reached a preliminary conclusion that there was a compelling public interest in the disclosure of 23 records or portions thereof. In Order #2, I determined that six of these 23 records were in fact duplicates and should be removed from the scope of the appeal. As a result, the following records or portions of records identified in Order #1 as possibly subject to section 23 remain at issue:

> Records 1, 31, 34, 51, 56, 62, 63, 66, 71, 81, 102, 108, 113, 133, 164, 213 and 245.

In reaching my preliminary conclusion in Order #1, I stated:

> A number of previous orders have discussed the issue of whether there is a compelling public interest in issues regarding nuclear safety. In Order P-1552, former Adjudicator Miller had to determine whether there was a compelling public interest in disclosing records relating to nuclear safety. In making her decision, she summarized a number of the relevant orders of this Office as follows:
>
> > In Order 270, which involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by Hydro under section 17(1) of the *Act*, former Commissioner Tom Wright discussed the issue of nuclear safety and section 23 when considering whether there was a compelling public interest in disclosure of nuclear safety related information. He stated:
> >
> > > In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.

> I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.
>
> In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

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

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

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

(See also Order P-956).

I agree with these comments, and find that there is a compelling public interest in disclosure of records concerning nuclear safety. In my view, this interest extends to information about the storage and disposal of nuclear waste. The question which remains is whether this compelling public interest is sufficient to clearly outweigh the purpose of the section 15 exemption in respect of the disclosure of these records.

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

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

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

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

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

Applying the reasoning in these previous orders to the particular circumstances of this appeal, and considering the representations provided by the appellant, I find that there is a public interest in issues concerning plutonium/MOX fuel, and fuel

> conversion for the purpose of nuclear energy. However, I am not persuaded that this public interest is **compelling** as it relates to all of the records. In my view, in order to satisfy the "compelling" threshold, the records must contain information that relates to **nuclear safety**.
>
> …
>
> That being said, I also find that not all records which touch on matters of nuclear safety are automatically included in this category. In my view, there is not a compelling public interest in the disclosure of records that merely contain or reflect general statements concerning the need for safety; records that include comments on safety-related issues involving other countries (eg. Records 124, 153, 180 and 181); or records which deal generally with an analysis of plutonium/MOX fuel and a comparison of its qualities.

For the reasons outlined in Order #1, I remain satisfied that there is a public interest in the disclosure of information on issues concerning plutonium/MOX fuel, and fuel conversion for the purpose of nuclear energy, and that records containing information that relates to nuclear safety are those for which the public interest may be "compelling". The question raised in the Supplementary Notice of Inquiry, which I must address in this order under the first part of the section 23 test, is whether the public interest in disclosure is "compelling" when measured against the possible public interest in non-disclosure.

Based on the discussion in Order #1, unless there is a public interest in non-disclosure that is sufficient to bring the public interest in disclosure below the "compelling" threshold, I would find that there is a compelling public interest in the disclosure of the relevant portions of Records 1, 31, 34, 51, 56, 62, 63, 66, 71, 81, 102, 108, 113, 133, 164, 213 and 245.

In Order #2, I determined that there might be a compelling public interest in disclosure of the following additional records or portions:

> Records 47, 49, 136 and 265.

As noted in Order #2:

> In [Order #1], 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.

After listing the records for which the public interest was not "compelling", I identified the four records listed above as those that "… 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". For the same reasons outlined in Order #1 quoted above, I am satisfied that there is a public interest in the disclosure of these four records and that, because they contain information that relates to nuclear safety, this public interest may be "compelling" and must be measured against the possible public interest in non-disclosure in order to make that determination.

The information in the four records or partial records identified in Order #2 as attracting the possible application of section 23 are described in that order as containing information similar in character to the information identified in Order #1 as possibly attracting a "compelling" public interest in disclosure. Accordingly, as I concluded above for the Order #1 information, unless there is a public interest in non-disclosure that brings the public interest in disclosure below the "compelling" threshold, I would find that there is a compelling public interest in the disclosure of the relevant portions of Records 47, 49, 136 and 265.

Therefore, the only issue for me to consider under the first requirement of section 23 is whether any public interest in non-disclosure of any of the identified records brings the public interest in disclosure below the threshold of "compelling". If I find that the public interest in disclosure is "compelling" for some or all of the records or portions remaining at issue, I will then move on to the second requirement of section 23, namely whether the compelling public interest "clearly outweighs" the purpose of any of the applicable exemptions.

As noted earlier, the records or partial records that will be considered under section 23 in this order are described in the attached Appendix A.

Submissions of the Parties

AECL

AECL submits that:

> The records identified as raising a public interest in disclosure describe security concerns, plans and planning for the transportation of nuclear materials, qualities and properties of the MOX fuel and its irradiation, facility lay-outs and the facility modifications required to package, store, burn and dispose of MOX fuel, the security issues and measures required to protect against potential accidents or sabotage … Disclosure of this information would compromise the security

> arrangements and precautions taken, and equip saboteurs, terrorists or any person motivated to disrupt delivery or divert use of the nuclear material involved with valuable knowledge of its fissionability, the potential damage and irradiation impact of a release of the material to the nearby environment or the facilities involved.
>
> … When release of detailed information on safety and security arrangements would compromise the integrity of the security measures, or the confidentiality of the arrangements, the interest in public safety becomes one of maintaining confidentiality, as opposed to disclosure.

Later in its representations, AECL submits:

> The events of September 11 generated significant concerns regarding the security of nuclear facilities and technology. The disclosure of information having an impact on nuclear security issues is of equal concern, and has been a feature of nuclear safety legislation and regulation prior to the events of September 11. Under section 44(1)(d) and 48(b) of the *Nuclear Safety and Control Act*, for example, the Canadian Nuclear Safety Commission can make regulations prohibiting the disclosure of information relating to the packaging and transporting of nuclear materials. … Under section 21 of the General Nuclear Safety and Control Regulations, SOR/2000-202, the disclosure of information relating to the security arrangements as well as the transportation of nuclear material … is prohibited and persons who possess or have knowledge of such information are required to take all necessary precautions to prevent any disclosure of it except as authorized by the Regulations.
>
> After September 11th, amendments to the *Security of Information Act* enacted pursuant to the *Anti-terrorism Act* make it an offence to communicate information which governments are taking steps to safeguard to terrorist groups or foreign entities presenting security threats. … These provisions highlight the concerns about disclosure of information with potential to assist terrorist groups or adverse foreign entities or to release information with an impact on national security. Information concerning the packaging, storing, transportation and security arrangements for the protection of nuclear material clearly fall into this category, as would information regarding the qualities and safety issues with respect to the qualities of MOX fuel.
>
> …
>
> [I]t is respectfully submitted that the Assistant Commissioner recognize that the interest in public safety and security which in fact generated the records identified by the Commissioner as raising a public interest would best be met, in current circumstances and the context of the records themselves, [by] non-disclosure.

AECL cites the *Sierra Club* case as standing for the proposition that courts have recognized a public interest in maintaining the confidentiality of information relating to nuclear security, and the role that confidentiality plays in enhancing nuclear safety. AECL quotes a passage from

Sierra Club in which the Court indicates that it "may be in keeping with the public interest" to prevent "… detailed technical information pertaining to the construction and design of a nuclear installation" from entering the public domain.

In this same vein, AECL refers to *Grant v. Atomic Energy of Canada Ltd.*, [1994] F.C.J. No. 1179, in which the Federal Court Trial Division upheld certificates of objection filed by AECL under the *Canada Evidence Act* on grounds that "disclosure would be injurious to the public interest and national security". Similar to the process I am engaged in here, the Court had to balance the public interest in disclosure against the public interest in non-disclosure. Unfortunately, the *Grant* case does not describe the documents for which the certificate was filed, except to say that they were documents whose disclosure "…would contribute significantly to the espionage activities of foreign sovereign states and organizations in gathering technical and strategic Canadian nuclear technology information", and also "… result in a transfer of technology that would be detrimental to Canadian interests of economic security and international peace and stability."

Department of Justice - Canada

The federal Department of Justice submits that "the national security landscape has indeed been affected significantly by the events of September 11, 200[1]", and that these events have led to the *Anti-terrorism Act* and other legislative initiatives by the federal government. The Department goes on to submit:

> … [T]he present-day environment of increased terrorist threat must be a significant consideration in determining the "public interest" in the non-disclosure of sensitive information and documents under section 23 of the [*Act*]. The new section 83.01 of the *Criminal Code* as amended by the *Ant-terrorism Act* defines "terrorist activity" to include an offence under section 7(3.4) or (3.6) implementing the *Convention on the Physical Protection of Nuclear Material*.
>
> Section 27 of the *Anti-terrorism Act* creates a new section 3 of the *Security of Information Act*. It contains the concept of a "purpose prejudicial to the interests of the State", and it includes the activity of developing or using various substances, including radiation, to cause death or serious injury to a significant number of people. Furthermore, Bill C-55 in proposing to enact the *Biological and Toxin Weapons Convention* contains a clause to protect confidential information.
>
> Depending on the information in question, the publication of information about plutonium, its use or location may facilitate the commission of an offence under the above provisions. With the increased threat to nuclear facilities, the transportation of nuclear material and to the public in general by the misuse of nuclear material, this increased risk should be taken into account in deciding whether or not to disclose the records at issue. The public interest in protecting sensitive information can, in specific circumstances, outweigh the public interest

> in disclosing it when its release could endanger public safety, national security or international relations.

Hydro

Hydro's initial submissions did not address section 23, and Hydro specifically declined to make submissions on section 23 in its representations in response to the Supplementary Notice of Inquiry issued after Order #1. Hydro also did not provide any representations in response to the Supplementary Notice of Inquiry issued after Order #2.

The Appellant

For ease of reference and clarity, I will address some of the appellant's specific submissions in this section of my order, while leaving the broader analysis of his positions to the "Analysis" section that follows.

The appellant submits that:

> … in order to make [the events of September 11, 2001] relevant to this appeal, there must be some clear and convincing evidence that disclosure of the Records will result in a similar type of security risk to the public.
>
> Much speculation has arisen as a result of these tragic events. Nevertheless, such speculation should not cloud our views on the important role that openness in government plays in Canadian society. To use September 11 as a justification [for] limiting this valued principle on speculative grounds is to give in to "fear-mongering" and to deny the very important purposes of the [*Act*], which, among other things, serves to ensure the accountability of the government and its institutions.

Later in his representations, the appellant returns to this theme:

> … [D]enial of access to these records simply by suggesting that terrorists may take an interest in them is not sufficient to deny the public access to the Records that they would otherwise have been entitled to on the basis that their disclosure is in the public interest. There must be evidence led in this regard, and such evidence must be compelling and not solely inferential".

On a similar note, the appellant comments that "… fanciful or alarmist connections between September 11, 2001 and the disclosure of the Records should not be entertained on the basis that they may, in some vague and unsubstantiated way, lead to a security breach." And in his reply representations, the appellant argues that "the standard for non-disclosure is on a clear and convincing scale".

I agree with the appellant that openness in government is an important principle, and that fanciful or alarmist connections to terrorism are not a sufficient basis to find a public interest in non-

disclosure of records that would otherwise meet the requirements of the first part of the section 23 test. However, it is not possible to avoid speculation or hypothetical analysis in assessing possible threats to Canada's national security that might arise from disclosure of records. In my view, it would not be reasonable, or respectful of those important interests, to require proof of a particular intended use of the information by a particular terrorist group, for example.

In his main representation in response to the Supplementary Notice of Inquiry, the appellant goes on to submit that:

> … because Ontario Hydro failed to seek leave to file additional submissions in this matter after September 11, 2001, we would suggest that the Commissioner is required to infer that disclosure of the Records will not result in the alleged increased security risk set out in the Supplementary Notice of Inquiry.

Again, I do not accept this submission. AECL asked that I inquire further into whether there was a public interest in non-disclosure based on security concerns, and I agreed to do so. The Commissioner's process under the *Act* takes the form of an inquiry, which is described in some detail in section 52. For example, section 52(8) permits the Commissioner to "… summon and examine under oath any person who, in the Commissioner's opinion, may have information relating to the inquiry… ". As is generally the case for administrative tribunals, this section makes it clear that the process is controlled by the Commissioner, and that the Commissioner is empowered to decide what issues are relevant and which parties are in a position to provide relevant information. In this case, I did not issue a summons, but instead sent out a Supplementary Notice of Inquiry to elicit evidence and submissions that would allow me to decide this issue.

The appellant also makes lengthy submissions to the effect that *Sierra Club* supports the application of section 23 on the basis that the test for a confidentiality order in the context of civil litigation has not been met. That test is based on the open court principle, and involves an analysis of whether a serious risk to an important interest has been established, as well as the balance between the salutary and deleterious effects of a confidentiality order. While the context of a motion seeking a confidentiality order in judicial review litigation relating to environmental concerns differs significantly from the application of section 23 in an appeal before the Commissioner, I believe that two factors from this decision have a bearing on the findings I must make in this order. The first of these is the Court's view that "… by their very nature, environmental matters carry significant public import". The second is the Court's recognition that there may also be a public interest in the confidentiality of information about nuclear construction and design.

The appellant further submits that disclosure is important for government accountability:

> In our view, a greater risk would result if one were to thwart the goals of government accountability provided for in the [*Act*]. This could result in more unchecked, and possibly dangerous management of nuclear facilities in Ontario – thereby creating a security risk in its own right. It is important to note prior mismanagement of nuclear facilities in Ontario was revealed previously by our

> client in his request relating to Order PO-1805 where the disclosure of certain nuclear operator peer reviews was opposed by the World Association of Nuclear Operators ("WANO").

As regards the federal legislation passed in response to the events of September 11, 2001, the appellant submits:

> ... s. 43 of the *Anti-Terrorism Act* amends the *Canada Evidence Act* to implement a safeguard to prevent against the disclosure of information that would compromise the national defence and security of Canada.
>
> This new section of the *Canada Evidence Act* authorizes the Attorney General of Canada to issue a certificate prohibiting disclosure of that type of sensitive information. However, it is important to [note that] this certificate "may only be issued after an order or decision that would result in the disclosure of the information." The suggestion being that the Attorney General should fulfill this role and not the Commissioner.

In his reply representations, the appellant makes a similar submission to the effect that if the Director of the Canadian Security and Intelligence Service (CSIS) has not made an order preventing disclosure of documents in the public interest under section 60.1(8) of the *Proceeds of Crime (Money-Laundering) and Terrorists Financing Act*, then neither should the Commissioner.

In my view, neither the power of the federal Attorney General to issue certificates prohibiting the disclosure of sensitive information under the *Canada Evidence Act*, nor of the Director of CSIS to order non-disclosure in the public interest, relieves me of the obligation to consider whether, in applying section 23 of the *Act*, security issues might support a finding that there is a public interest in non-disclosure.

In his reply representations, the appellant further submits:

> As stated in our prior submissions, the use of MOX fuel is a political choice, which is being examined by the government. Policy-making should not be an insular process from which the public is excluded.
>
> … Nuclear power generation is already a reality in Canada. The use of MOX fuel is at the policy-making stage. …
>
> To be clear, our client is not requesting disclosure of the technical information that would be of direct assistance to someone seeking to obtain MOX fuel and use it to harm the Canadian public. This level of technical detail is not policy related. On the other hand, it is important that the public have access to the documentation that assesses the risk of this alternative fuel so that it can make educated decisions about its electoral choices.

> … [T]he records being sought relate to policy issues and not the hard-core technical data that would assist those inclined to launching a terrorist attack in Canada or elsewhere.

The scope of the appellant's request is identified at the beginning of this order, and includes information of both a technical and a policy nature. Sometimes both of these categories of information appear within the same record. As the appellant's submissions in this regard are aimed at the application of the public interest override, I will take them into account in addressing that issue, rather than regarding them as a reduction of the scope of the appellant's request.

Analysis

After reviewing the submissions of the parties and the federal government's recent security legislation, I remain convinced that there is a strong public interest in the disclosure of information relating to nuclear safety issues. However, I am also persuaded that the valid security concerns articulated by AECL and the federal Department of Justice must be taken into account in deciding whether the public interest in disclosure is "compelling". As noted, I also agree with the appellant that fanciful or alarmist connections to terrorism are not a sufficient basis to find a public interest in non-disclosure, subject to the proviso that any assessment of the possible use of information for the purposes of terrorism or sabotage must, by necessity, involve some degree of speculation or hypothetical analysis.

AECL has made detailed, record-specific submissions as to the public interest in non-disclosure. I have carefully considered these representations in reaching the conclusions set out below. AECL also indicates that it does not object to the disclosure of the portions of Records 66 and 71 that remain at issue, and I have taken this position into account in making my findings for these records.

Category I

In the context of this appeal, I find that the records or parts of records that raise a public interest in non-disclosure consist, in large measure, of information the appellant says he is not seeking to obtain on the basis of section 23, namely, records that set out "the technical information that would be of direct assistance to someone seeking to obtain MOX fuel and use it to harm the Canadian public". This encompasses virtually all of the technical information in the records, including, for example:

- plans of a prototype MOX fuel manufacturing facility;

- detailed information about the radioactivity and toxicity of spent fuel; and

- detailed information about the shipping and handling of MOX fuel, and about security measures to be used during transport or otherwise.

I have concluded that, as far as all of these types of information are concerned, the public interest in non-disclosure is significant, and sufficient in the circumstances of this appeal to bring the public interest in disclosure of records containing this information below the threshold of "compelling". Similarly, I find that the threshold of "compelling" is not present for records containing detailed information relating to the potential from blackmail, bribery or sabotage included in some records, and the names of certain individuals who are experts in the field when associated with their particular involvement in studying the possible use of MOX fuel as reflected in certain specific records. Accordingly, I find that the first requirement of section 23 has not been established for records or partial records that fit these descriptions.

More specifically, a number of Category I records set out detailed technical analyses or information which, in my view, would fall into the category of information that would be "of direct assistance to someone seeking to obtain MOX fuel and use it to harm the Canadian public", or could otherwise assist individuals or groups intending to commit acts of terrorism or sabotage. The records or portions that fall into this category are: Records 1 and 36 in full, and portions of Records 31, 47, 51, 62, 81, 113, 164 and 213.

Record 34 includes generic plans for constructing a MOX fuel fabrication plant. In my view, this record is primarily technical in nature, with the exception of most of the Table of Contents, the section entitled "Introduction", and two general safety-related portions. With the exception of these parts of Record 34, I find that the information in the rest of this record raises the same concerns as the records in the preceding paragraph, because it could assist individuals or groups intending to commit acts of terrorism or sabotage.

Other Category I records set out detailed information about the handling and transport of MOX fuel, or about security measures to be used during transport or otherwise. I find that all of this information would be "of direct assistance to someone seeking to obtain MOX fuel and use it to harm the Canadian public", or could otherwise assist individuals or groups intending to commit acts of terrorism or sabotage. The records or portions that fall into this category are portions of Records 49, 51, 62, 63, 113, 133 and 213.

Record 49 also includes information relating to the potential for blackmail, bribery or sabotage; and Records 81 and 102 include the names of individuals who are experts in the field and their particular assignments regarding the possible use of MOX fuel. As noted above, I find that the public interest in non-disclosure of this type of information is significant, and sufficient in the circumstances of this appeal to bring the public interest in disclosure of records containing this information below the threshold of "compelling".

Category II

On the other hand, where the information relating to nuclear safety issues is in the nature of a more general policy discussion or analysis, including clearly hypothetical examples, I have concluded that the security-related concerns are less significant and that the public interest in non-disclosure of this type of information is not sufficient to reduce the public interest in its disclosure to a level below the threshold of "compelling". Accordingly, I find that the first

requirement of section 23 has been established for records or partial records that fit within this category.

The Category II records contain information relating to nuclear safety, and consist of information and analysis that raise a strong public interest in disclosure. As stated earlier in this order, unless I was persuaded that there was a public interest in non-disclosure of this type of information sufficient to bring the public interest in disclosure below the threshold of "compelling", I would find that there was a compelling public interest in disclosing this type of information. As far as Category II records are concerned, I find that the public interest in non-disclosure is not sufficient to reduce the public interest in disclosure below the level of "compelling".

Based on the discussion from Order #1 outlined above, I have concluded that the public interest in disclosure of this information is compelling because it "rouses strong interest or attention", a definition of "compelling" that was adopted by former Adjudicator Higgins in Order P-1398 and upheld by the Ontario Court of Appeal in *Ontario (Ministry of Finance*), *supra*. The following records or portions fall within the categorization: all of remaining portions of Records 66, 71, 108, 245 and 265 as described in Appendix A, and portions of Records 31, 34, 47, 49, 51, 62, 63, 81, 102, 113, 133, 164 and 213.

Category III

In addition, I find that, on further analysis, there are three records that contain information that does not raise particular security concerns, but is nonetheless not sufficiently linked to nuclear safety issues or policy issues to bring them within the scope of "compelling" for the purposes of the first part of the section 23 test. These Category III records are: the remaining portions of Record 56, and portions of Records 63 and 81.

Does the compelling public interest in disclosure of Category II records clearly outweigh the purpose of the exemptions that have been found to apply?

I will now consider whether the compelling public interest in disclosing the Category B records clearly outweighs any of the exemption claims I have found to apply to these records or portions of records. The relevant exemption claims for these records are found at section 15(b), 17(1)(a) and 18(1)(a) of the *Act*.

Purpose of the Exemptions

Section 15(b)

Section 15 (b) reads as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,

> (b) reveal information received in confidence from another government or its agencies by an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

As I stated in Order #1, the purpose of the section 15 exemption has been set out in previous orders as follows:

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

Section 17(1)(a)

This section states:

> 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;

In Order P-607, former Adjudicator Holly Big Canoe commented on this exemption claim as follows:

> In my view, the purpose of the section 17 exemption is the protection of third party information supplied to an institution in confidence, so that the third party's interests will not be harmed by disclosure.

Section 18(1)(a)

This section states:

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;

As noted in Order #1, 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*:

> 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.

In my view, the purpose of the exemption at section 18(1)(a) is similar to the purpose of section 17, that is, to protect the commercially valuable information of government institutions.

Submissions of the Parties

AECL

AECL submits that the public interest in disclosure does not "clearly outweigh" the purposes of sections 15(b) and 17. AECL's representations do not address section 18.

AECL submits that disclosure of records detailing various activities undertaken by Russia in the context of the MOX fuel initiative would, quite simply, cause AECL and Hydro to lose the confidence of both Russian and American suppliers of excess plutonium, and result in the withdrawal of these countries from participation in similar programs or in using CANDU reactors for MOX fuel irradiation.

AECL also submits that:

> This would have a severe impact on AECL's reputation for safe and secure fuel handling and would seriously jeopardize its significant investment in development of the CANDU MOX fuel programs as a whole.
>
> Beyond the immediate impact on AECL, AECL submits that the public purposes of the MOX fuel programs should also be considered. The ultimate objective for governments of allowing MOX fuel programs to proceed is to reduce the supply of excess weapons grade plutonium in surplus nuclear weapons arsenals. The public purposes of the MOX fuel programs undertaken by AECL, in our submission, adds to or extends the commercial objectives of section 17 in the particular circumstances of this appeal.
>
> In addition to these concerns, the disclosure of [safety measures], as indicated above, would countermand security arrangements described in the documents themselves. The [safety measures] were developed for valid purposes of public safety. In these circumstances, the purposes of section 17 should be read broadly so as to embrace the public safety objectives of keeping the information confidential. There is no question that these public safety objectives fall within the purposes of maintaining confidentiality of intergovernmental exchanges in section 15(b).
>
> …
>
> Given the significant negative impact of disclosure, and the tangential interest of [Hydro] in the records, the purposes of section 15 of protecting confidential intergovernmental exchanges and section 17 of protecting against disclosure of confidential information where disclosure will cause competitive prejudice to the third party should prevail over any public interest in disclosure….

As far as Record 63 is concerned, AECL points out that the relevant portions were withheld from disclosure by the federal government in response to a request made under the *Access to Information Act*. AECL does not specify whether these access decisions were made at first instance, or reviewed by the Information Commissioner or by the Federal Court, and in any event, the federal legislation does not contain a broadly worded provision such as section 23 to mandate disclosure in the public interest. The only provision in the federal legislation that resembles section 23 appears as a discretionary exception to the third party information exemption at section 20 of that statute, similar to section 17 of the *Act*. Only section 15 of the *Act* was claimed for Record 63, and not section 17. In my view, any decision that may have been made under the federal legislation is irrelevant to my consideration of whether the compelling public interest in disclosure of this record clearly outweighs the purpose of the exemption at section 15. I will therefore not give further consideration to this particular part of AECL's submission.

Department of Justice – Canada

The submissions of the federal Department of Justice do not specifically address the issue of whether a compelling public interest in disclosure clearly outweighs the purposes of the exemptions in the circumstances of this appeal. In my view, the Department's submissions are only relevant to the issue of whether there is a compelling public interest in disclosure, and I have already considered them in the context of my discussion of the first part of the section 23 test. Because they do not address the purpose of any of the exemptions, or the balance between the purpose and any compelling public interest in disclosure, the Department's submissions do not assist me in my analysis of the second part of the section 23 test.

Hydro

Hydro has not made any representations about the potential application of section 23 at any stage of this appeal.

The Appellant

On the question of balancing the compelling public interest in disclosure against the purposes of the exemptions, the appellant submits:

> While I acknowledge the policy reasons behind [section 15(b)], I would argue that the importance of disclosing records of this nature outweighs their purpose in this particular situation. As stated throughout these submissions, it has been recognized that in the exchange of information, not all of it will be allowed to be withheld from public scrutiny, especially when the record contains information that directly concerns the fate of the well-being of the public, as is the case with information about the use of nuclear energy.
>
> I would submit that in Order PO-1805, the balancing of s. 18(1) rights has already been performed under very similar factual circumstances. Should the Commission[er] find that s. 18(1)(a), (c) and/or or (d) apply to this request, I would invite the Commission[er] to make a similar ruling to that made by [Senior Adjudicator David] Goodis, as follows:
>
> > In the circumstances of this case, the public interest in protecting the business or economic interests of public organizations is clearly outweighed by the compelling public interest in disclosure of these records for the purposes of scrutinizing the safety related activities of Hydro in respect of its nuclear facilities, in the interests of protecting public health and safety and protecting the natural environment. Therefore, I find that section 23 would apply to override the application of section 18.

Balancing the compelling public interest in disclosure against the purposes of the exemptions

In Order P-1190, as noted earlier in this order, I found that it was not possible "…to allay [public concerns about nuclear safety] 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."

In Order P-1805, also referred to earlier in this order, Senior Adjudicator Goodis stated, in applying section 23 to nuclear safety-related information:

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

In my view, both of these decisions underline the crucial nature of the public interest in information about nuclear safety. In this appeal, the information I have found to attract a compelling public interest in disclosure falls into the category of nuclear safety. It consists specifically of general policy discussion or analysis, including clearly hypothetical examples of situations that could impact public health and safety. In my view, the reasoning in Orders P-1190 and PO-1805 applies equally to the Category II information at issue in this appeal.

It is also important to note in this context that in my discussion of the first part of the section 23 text, I declined to find a compelling interest in the various Category I records that contain detailed technical information in the records, detailed information about the shipping and handling of MOX fuel, information about security measures to be used during transport or otherwise, and information relating to the potential for blackmail, bribery or sabotage.

In my view, the compelling public interest in disclosure of the Category II information outweighs the purpose of the three exemptions I have found to apply. Some of the concerns of AECL about the negative effects of disclosure in connection with sections 17(1)(a) and 15(b) might apply to some Category I records, but I am not persuaded by the arguments and information provided to me in this appeal that these negative impacts could reasonably be expected to flow from the disclosure of the specific information in the policy-based Category II records that I have found to attract a compelling public interest.

As far as the Category II information is concerned, I find that the compelling public interest in their disclosure clearly outweighs the purposes of allowing the Ontario government to assure other governments that it is able and prepared to receive information in confidence (section 15(b)), protecting third party information supplied to an institution in confidence, so that the third party's interests will not be harmed by disclosure (section 17(1)(a)), and protecting the

commercially valuable information of government institutions. In my view, the information for which I have identified a compelling public interest is, in any event, not strongly related to any of these purposes.

ORDER:

1. I order Hydro to disclose all of Records 66, 71, 108, 245 and 265 that remain at issue, and portions of Records 31, 34, 47, 49, 51, 62, 63, 81, 102, 113, 133, 164 and 213, to the appellant by **December 27, 2002** but not before **December 19, 2002**. I have attached a copy of these records with the copy of this order sent to Hydro that highlights in yellow the portions that should be disclosed in compliance with this provision.

2. I uphold Hydro's decision to deny access to Records 1 and 36, the remaining portions of Record 56, and all portions of Records 31, 34, 47, 49, 51, 62, 63, 81, 102, 113, 133,164 and 213 not covered by Provision 1 of this order. These portions are highlighted in blue on the attached copy of the records sent to Hydro with this order.

3. In order to verify compliance with this order, I reserve the right to require Hydro to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.

Original Signed By: November 22, 2002
Tom Mitchinson
Assistant Commissioner