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

ORDER PO-2500

Appeal PA-030106-5

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> I am requesting all reports, briefing notes, memos, e-mail correspondence, plans, documents, specifications, policy statements, faxes, meeting notes, and other such information produced within the ministry or received by the ministry from any other source specifically involving the Bruce Nuclear Power Development (Tiverton, ON) associated with the following:
>
> 1. Environmental Non-Compliance Report details (Dec 30 1999 to Dec 30 2002)
> 2. Certificate of Approval exceedences or Amendments (Dec 30 1999 to Dec 30 2002)
> 3. Events reports, spills, or discharges to the environment (Dec 30 1999 to Dec 30 2002)
> 4. Acute lethality / toxicity violations (Dec 30 1999 to Dec 30 2002)
>
> By "Bruce Nuclear Power Development" I mean to include all corporations, government bodies, etc. that have operations on the site including:
>
> - Ontario Power Generation
> - Bruce Power
> - Hydro One
> - AECL
> - any others that apply
>
> Further I am requesting all reports, briefing notes, memos, e-mail correspondence, plans, documents, specifications, policy statements, faxes, meeting notes, and other such information produced within the ministry or received by the ministry from any other source pertaining to mortality or adverse effects of discharges from any entity at the BNPD to the Environment affecting waterfowl and aquatic life within the timeframe of Dec 30 1999 to Dec 30 2002.
>
> I am also requesting all reports, briefing notes, memos, e-mail correspondence, plans, documents, specifications, policy statements, faxes, meeting notes, and other such information produced within the ministry or received by the ministry from any other source pertaining to the following:

- hydrazine
- morpholine
- ammonia
- chromium
- cesium-137
- carbon-14

within the timeframe of Dec 30 1999 to Dec 30 2002.

Further I am requesting all reports, briefing notes, memos, e-mail correspondence, plans, documents, specifications, policy statements, faxes, meeting notes, and other such information produced within the ministry or received by the ministry from any other source pertaining to water quality or aquatic life including all trout species in regards to Stream "C" within the timeframe of Dec 30 1999 to Dec 30 2002.

By way of background, the Bruce Nuclear Power Plant is located in the Municipality of Kincardine about 250 kilometres northwest of Toronto. The Ontario Power Generation (OPG) is the owner of the site but Bruce Power (Bruce) operates the facility as an arm's length agency.

This request has been the subject of a series of appeals to this office, of which the present appeal (PA-030106-5) is the fifth. The history of the first four appeals is described in detail in Order PO-2243, which resolved Appeal PA-030106-4. In Order PO-2243, this office ordered the Ministry to issue final access decisions. Order PO-2243 also dealt with the payment of outstanding fees, as well as the notification of affected parties (Bruce and OPG) under section 28(1) of the *Act*.

In response to Order PO-2243, the Ministry decided to disclose a portion of the responsive records and to deny access to other records, in whole or in part, pursuant to the exemptions at sections 14(1)(i) (security of a building), 16 (defence), 17(1)(a) and (c) (third party information), 21(1) (personal privacy) and 22(a) (publicly available information) of the *Act*. The specific exemptions claimed for each record were indicated in indices that accompanied the decision. The Ministry's decision also informed the requester of the amount of fees outstanding, which the appellant subsequently paid in full. The requester (now the appellant) appealed this decision, and the current appeal (PA-030106-5) was opened.

In her appeal letter, the appellant discusses the public interest in disclosure of the records at issue, and raises the possible application of the "public interest override" at section 23 as an issue. The appellant's letter also refers to section 11(1) of the *Act*, which requires the head of an institution to disclose information "… if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health

or safety hazard to the public." Previous orders of this office have found that the duties and responsibilities set out in section 11 of the *Act* belong to the head alone (Orders 65, 187 and P-293). As a result, I do not have the power to make an order pursuant to section 11 of the *Act*.

In addition to the appeal by the appellant in relation to the Ministry's decision in response to Order PO-2243, Bruce decided to appeal the Ministry's decision to disclose some records pertaining to it. However, Bruce's appeal was settled in mediation as a result of Bruce's agreement to disclose all of the records it originally objected to disclosing, except for Bruce Record 76, which the Ministry decided to withhold. As a result, Bruce's appeal is resolved and only the current appeal by the appellant (PA-030106-5) remains outstanding.

During mediation of the current appeal, the Ministry issued a revised decision to the appellant. This decision informed the appellant that, as a consequence of its decision in the settlement of the Bruce appeal, one page within Bruce Record 76 was to be withheld pursuant to the mandatory exemptions at sections 17(1)(a) and (c) of the *Act* and the discretionary exemptions at sections 14(1)(i) and 16. The remainder of Bruce Record 76 is not at issue. In that same revised decision, the Ministry also claimed sections 14(1)(i) and 16 as added reasons for denying access to Bruce Records 55 and 58. The Mediator's report also notes these sections as added exemptions for the withheld part of Bruce Record 96. I note, however, that with the exception of Bruce Record 76, the application of these exemptions was, in fact, claimed by the Ministry in a decision letter sent to the appellant prior to the commencement of this appeal. Accordingly, in my view, those exemption claims by the Ministry were timely. As regards the portion of Bruce Record 76 that remains at issue, the discretionary exemptions at sections 14(1)(i) and 16 were not claimed within 35 days following the commencement of this appeal, as contemplated in section 11 of the Commissioner's *Code of Procedure*, and this raises the issue of whether the Ministry was entitled to claim those exemptions for that record.

Also during mediation, the Ministry disclosed all information for which it claims section 22(a), and the appellant confirmed that she does not seek access to information withheld under section 21(1). Those exemptions are therefore not at issue. It was also confirmed during mediation that the Ministry's position, holding that certain portions of some records are not responsive to the appellant's request, is not at issue in this appeal. Fees are also not at issue. The outstanding issues in this inquiry were outlined in the July 30, 2004 Mediator's Report, which was provided in draft to the parties for comment, and amended to reflect comments received by the Mediator.

In order to address the issues that remained outstanding at the end of mediation, this appeal proceeded to the adjudication stage, which takes the form of an inquiry under the *Act*. In order to commence the inquiry, this office sent a Notice of Inquiry to the Ministry and the two affected parties (OPG and Bruce). All three parties provided representations. In the Ministry's representations, it indicated that in addition to the exemptions already claimed for Ministry Records 198, 200, 202 and 203, it also claims the mandatory exemptions at sections 17(1)(a) and (c) of the *Act*.

This office then sent the Notice of Inquiry, along with the complete representations of the affected parties and the non-confidential portions of the Ministry's representations, to the appellant. The appellant did not provide any representations.

SUMMARY OF RECORDS, EXEMPTIONS AND OTHER ISSUES

The following table briefly describes the records at issue and outlines the exemptions claimed for each. I have adopted the Ministry's numbering system, which divides the records into "Ministry" (or "MOE"), "OPG" and "Bruce" records.

Record Number	Description	Exemptions	Denied in whole (D) or part (P) by the Ministry
OPG 1	Construction Waste Disposal Area (drawing withheld)	14(1)(i), 16, 17(1)(a), (c)	P
OPG 21	OPG Landfill Annual Report (drawing withheld)	14(1)(i), 16, 17(1)(a), (c)	P
OPG 22	Safety Report	14(1)(i), 16, 17(1)(a), (c)	D
OPG 23	Industrial Sewage application (part of drawing withheld)	14(1)(i), 16, 17(1)(a), (c)	P
OPG 24	Two drawings	14(1)(i), 16, 17(1)(a), (c)	D
OPG 25	Amendment application – Certificates of Approval (Air)	14(1)(i), 16, 17(1)(a), (c)	D
Bruce 55	2 sketches, 1 flow chart	14(1)(i), 16, 17(1)(a), (c)	D
Bruce 58	Certificate of Approval amendment application (attachment 6 denied)	14(1)(i), 16, 17(1)(a), (c)	P
Bruce 61	Certificate of Approval notices (process flow diagrams 1, 2 and 3 denied)	17(1)(a), (c)	P
Bruce 76	Certificate of Approval amendment application (drawing denied)	14(1)(i), 16, 17(1)(a), (c)	P
Bruce 79	Attachments to Certificate of Approval amendment application	17(1)(a), (c)	P
Bruce 94	Bruce A Restart Project Draft EA Study	17(1)(a), (c)	P
Bruce 96	Facility Description (deny description and schematic)	14(1)(i), 16, 17(1)(a), (c)	P
MOE 64	Correspondence	17(1)(a), (c)	P
MOE 123	Certificate of Approval Amendment	17(1)(a), (c)	P
MOE 126	Correspondence	17(1)(a), (c)	P
MOE 191	E-mail	19	D

MOE 195	E-mail	19	D
MOE 198	Drawing	14(1)(i), 16, 17(1)(a), (c)	D
MOE 200	Drawing	14(1)(i), 16, 17(1)(a), (c)	D
MOE 202	Drawing	14(1)(i), 16, 17(1)(a), (c)	D
MOE 203	3 Drawings	14(1)(i), 16, 17(1)(a), (c)	D

In this order, I will consider, as a preliminary issue, whether the Ministry should be entitled to add new discretionary exemption claims for Bruce 76 outside the period specified for doing so in the *Code of Procedure*. I will review whether the records are exempt, and also consider the possible application of the public interest override at section 23.

DISCUSSION:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

The Ministry is claiming additional discretionary exemptions for Bruce 76 that it did not identify in its original decision letter. The Ministry had initially claimed sections 14(1)(i) and 16 for a substantial number of records. As noted in its representations, the Ministry decided to claim these exemptions for Bruce 76 some 11 days beyond the 35-day time limit specified for this purpose in the IPC's *Code of Procedure*.

Section 11.01 of this office's *Code of Procedure* provides:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

In Order PO-2113, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in the Confirmation of Appeal:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
>
> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

The Ministry submits that the appellant has not been prejudiced by the late raising of the new discretionary exemptions because:

> The Ministry holds that the appellant has in no way been prejudiced by the late raising of these discretionary exemptions to this record, nor has the integrity of the appeals process been compromised in any way, given the length of time that has been afforded all parties to respond and provide submissions to the exemptions raised.
>
> Although the Ministry raised sections 14(1)(i) and 16 eleven days beyond the 35 days provided for in the Code of Procedure, the Ministry respectfully submits that, the mediation of PA-040120-1 (a related appeal), had the effect of suspending the clock on appeal PA-040106-5 until the outcome of the mediated settlement of the third party appeal. Further, the use of sections 14(1)(i) and 16 was not a "new" raising of exemptions that had not been previously raised.

> The Ministry has participated in a meaningful and co-operative way in this appeal process. In fact, in an attempt to reach a meaningful and successful conclusion to this appeal, the Ministry disclosed additional records … to the appellant subsequent to the conclusion of appeal PA-04120-1.

In the circumstances of this appeal, I am prepared to accept the Ministry's submissions on this point. This appeal is the culmination of a long and complex process involving multiple files. The exemptions had already been claimed for other records. In my view, given this history, a short delay of eleven days in claiming the discretionary exemptions has not resulted in any demonstrated prejudice to the appellant. I note that the appellant has had an opportunity to make representations on the application of the new discretionary exemptions and chose not to do so. The Ministry's timing in claiming sections 14(1)(i) and 16 in this case did not result in any significant delay in the proceedings or compromise the integrity of the process. Further, the late raising of the discretionary exemptions has not significantly prejudiced the appellant. In the circumstances, I find that the prejudice to the Ministry in disallowing its sections 14(1)(i) and 16 claims would outweigh any prejudice to the appellant in allowing it. Therefore, I will proceed to consider sections 14(1)(i) and 16 for Bruce 76.

The Ministry also claimed the section 17(1) exemption for certain records in addition to those for which it was originally claimed, more than 35 days after the issuance of the Confirmation of Appeal. Because section 17(1) is a mandatory exemption, the 35-day time limit does not apply in that instance. Therefore, I would have considered the application of section 17(1) to these additional records (MOE 198, 200, 202 and 203), except for the fact that, because of my findings under section 16, it is not necessary for me to do so.

DEFENCE

The Ministry claims that the exemption at section 16 of the *Act* applies to the following records:

- portions of OPG 1, 21 (drawings) and 23 (part of a drawing)
- portions of Bruce 58, 76 (drawings) and 96 (facility description and schematic)
- all of OPG 22 (Safety Report), 24 (drawings) and 25 (Application for Amendment to Certificates of Approval (Air))
- all of Bruce 55 (2 sketches and 1flowchart)
- All of MOE 198, 200, 202 and 203.

Section 16 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

In *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy,* 1980 (the "Williams Commission Report"), the report which led to the drafting of the *Act* and forms part of its legislative history, the authors considered the need for an exemption in relation to the defence of Canada. They stated (at vol. 2, pp. 304-306):

> Freedom of information laws invariably make some provision for the exemption of information relating to matters of foreign relations and national defence. The reasons for this are perhaps self-evident. As a general rule, freedom of information laws require the disclosure of documents or parts of documents containing factual information. … With respect to foreign relations and national defence, however, the disclosure of purely factual information could have undesirable consequences. The need for confidentiality relating to military matters need not be belaboured. …
>
> Although it is evident that an exemption for material relating to international relations and national defence must be included in any freedom of information law enacted by a national government, it is less obvious that a similar exemption would be appropriate in the context of a provincial scheme. The conduct of international relations and the protection of national defence are, of course, primarily federal concerns. Accordingly, it is unlikely that extensive information relating to these matters is contained in the files of the provincial government. However, the question is not whether such collections are extensive but whether they exist at all and are therefore in need of protection under the statute. In our view, there is a basis on which the inclusion of such an exemption can be recommended.
>
> Although matters of national defence may appear to be a remote concern for a provincial government, especially in peacetime, this too is a subject which should not be ignored when drafting exemptions for a freedom of information scheme. Again, we emphasize that the question to be considered is not whether the province plays a significant role in such matters, but whether the province is in possession of information the disclosure of which could prejudice the interests of national defence. … The fact that there may be little of interest in this respect to be found in provincial government files is not, we believe, a reason for denying protection to that which may be sought. Accordingly, we further recommend that an exemption be included in the proposed legislation which would exempt documents whose disclosure would prejudice the defence of Canada.

In drafting section 16, the Legislature amplified this theme, and in particular, added explicit reference to information whose disclosure could reasonably be expected to be "… injurious to the detection, prevention or suppression of espionage, sabotage or terrorism …" and went so far as to indicate that, although the exemption is discretionary, heads of institutions "shall not disclose any such record without the prior approval of the Executive Council".

It is evident from the context of this exemption that it is intended to protect vital public security interests. The importance of these interests has become increasingly clear in recent years, particularly in light of the September 11, 2001 terrorist attacks in the United States, and subsequent threats of terrorist attacks in North America. The law enforcement exemptions found at section 14 "must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context" (see *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div.Ct.)). In my view, for similar reasons, it is also necessary to approach section 16 in a sensitive manner, given the difficulty of predicting future events affecting the defence of Canada and other countries, particularly in the context of possible espionage, sabotage or terrorism.

As well, in the case of "health and safety" related exemptions such as sections 14(1)(e) and 20, which use the words "could reasonably be expected to", the standard of proof is that the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, it must be demonstrated that the reasons for resisting disclosure are not frivolous or exaggerated [see *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)]. Again, in my view, given the nature of the interests intended to be protected by section 16 of the *Act*, it would be appropriate to apply this standard of proof.

In the context of this appeal, the Ministry's representations refer to concerns about violent attacks against the Bruce nuclear facilities. The Ministry also makes it clear that its concerns arise from the fact that, once information is disclosed, it is in the public domain (Order P-169). The Ministry sought advice from the local police force concerning the impact of disclosing the records for which it claimed this exemption (and the exemption at section 14(1)(i) which relates to the security of a building). The Ministry explains:

> As a result of this appeal, the Ministry contacted the regional police service for a risk assessment on the affected properties taking into consideration the release of the records at issue and on the applicability of section 14(1)(i) and section 16 to the records at issue. As a result of this request the Ministry received the attached report (attachment "A"). The author of this report's expertise lies within the areas of terrorism and organized crime….The Ministry is relying upon the author's conclusions to substantiate that there is a "reasonable expectation of harm" should the records or the portions of records at issue be disclosed. The author has provided numerous examples from public sources showing that there is a legitimate concern for the safety of nuclear facilities and their protection against terrorist attacks. He has shown to the Ministry's satisfaction that the records contain information that would be of assistance to would-be terrorists and their activities in providing a target, which he has identified as one of the four elements required for a terrorist to be successful.
>
> The Ministry is concerned that should this information be disclosed to the appellant and it becomes public it could fall into the public domain, i.e. the

> internet or written publication, for ready access by anyone who wants it and for whatever purpose.

I also note that the Ministry decided not to seek the consent of the Executive Council to disclose the records since it would not recommend their release.

Although the appellant did not provide comments on the Ministry's representations during the inquiry process, she did comment on this issue when initiating her appeal with this office. At that time, she stated:

> If the Ministry believes that the potential for harm is inherent in information regarding a nuclear facility, then that foreseen harm must be established as not "fanciful, imaginary, or contrived." To my knowledge, there has never been an attempt at sabotage or harm to a nuclear facility in North America. If the Ministry maintains the possibility of harm resulting from release of records, then it is maintaining the belief that there is a significant risk and possibility of harm to the public that results from the operation of the Bruce Nuclear facility.

In my view, even if the appellant is correct in stating that attempts have not been made to attack or sabotage any North American nuclear facility, it does not necessarily follow that concerns about such an attempt are "fanciful, imaginary, or contrived", or, to use the words of the Court of Appeal in *Office of the Worker Advisor*, quoted above, "frivolous or exaggerated". Moreover, as I have noted above, the comments of the Divisional Court in *Fineberg*, quoted above, to the effect that "the law enforcement exemption prescribed by section 14 must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context", also have resonance in the context of section 16.

The governments of Canada and the United States have both recognized the risk of attacks intended to harm their populations in the wake of the terrorist attacks of September 11, 2001 with legislative action, for example the U.S. *Patriot Act* and Canada's *Anti-Terrorism Act*. Clearly this risk extends to facilities such as nuclear power plants. Former Assistant Commissioner Mitchinson referred to the possible impact of the events of September 11, 2001, in his Order PO-2072-F:

> … [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…

Order PO-2072-F dealt with a request for "[a]ll documents from Jan. 1, 1995 to present on the use of plutonium/MOX as fuel at Ontario Hydro". In two previous orders, former Assistant

Commissioner Mitchinson determined that sections 15(b), 17(1) and 18(1) applied to some of the information at issue, and Order PO-2072-F went on to consider whether there was a compelling public interest in disclosure, under section 23 of the *Act*, that outweighed the purpose of those exemptions.

The records at issue in Order PO-2072-F related to plutonium/MOX fuel, fuel conversion for the purpose of nuclear energy, and the transportation of plutonium/MOX fuel to and from nuclear plants. They included plans of a prototype MOX file manufacturing facility, information about the radioactivity and toxicity of spent fuel, and details of the shipping and handling of nuclear fuel including associated security measures. Some of this is similar to the information before me in this appeal. Order PO-2072-F also dealt with more general information relating to nuclear safety concerns, which was ordered disclosed.

Section 16 was not at issue in Order PO-2072-F, nor was somewhat similar exemption provided by section 14(1)(i) (security of a building). Nevertheless, the order provides helpful guidance because, in the context of section 23 of the *Act*, the former Assistant Commissioner considered whether there was a public interest in *non*-disclosure that was sufficient to overcome the compelling public interest in disclosure that he had identified for some of the records. The identified public interest in non-disclosure was the threat to Canada's national security that would result from disclosure. This interest closely resembles the one protected by section 16.

Former Assistant Commissioner Mitchinson found that the public interest in national security was sufficiently compelling to overcome the public interest in disclosure of the following:

> … 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:
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> - plans of a prototype MOX fuel manufacturing facility;
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> - detailed information about the radioactivity and toxicity of spent fuel; and
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> - detailed information about the shipping and handling of MOX fuel, and about security measures to be used during transport or otherwise.

Former Assistant Commissioner Mitchinson went on to state:

> 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".

Former Assistant Commissioner Mitchinson's concerns about security are discussed and expanded upon in the report obtained by the Ministry from the regional police service which was provided to this office. The specific contents of the report are confidential, but refer to the potential for terrorist attacks in Canada, and comment on particular areas of vulnerability. The report outlines specific concerns about the records for which section 16 is claimed. In some instances, particular parts of the records are highlighted as presenting particular cause for concern. I have carefully considered this report, and its detailed comments on the records, in reaching my decision in this appeal.

I note that the report does not specifically address the records known as OPG 25 (entirely withheld), Bruce 76 (drawing withheld) and Bruce 96 (facility description, drawing and schematic withheld). The Ministry, on the other hand, submits that the withheld portion of Bruce 76 contains a significant amount of detailed information about the layout of the plant and environs that could be correlated with other records in a way that would produce a reasonable expectation of harm.

Bruce and OPG were invited to provide submissions in this inquiry in relation to sections 17 and 23, but not section 16 or 14(1)(i). OPG did not object to disclosure of the records in which it had an interest under section 17(1). Bruce objected only to the disclosure of part of Record 76 consisting of a specified flow sheet entitled "Bruce GSA Site Layout". The Ministry submits that OPG and Bruce therefore reviewed the records only from that limited perspective, which relates to what the Ministry calls "proprietary interests". I agree with the Ministry on this point, and have conducted an independent review of the records to determine whether section 16 applies.

Having reviewed the records and the submissions of the parties, I find that disclosure of records or parts of records setting out detailed technical information about the nuclear and related operations of the Bruce facility could reasonably be expected to "… prejudice the defence of Canada … or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism". In this case, this consists of all information withheld from OPG 1, OPG 21, OPG 23, OPG 24, Bruce 55, Bruce 58, Bruce 76, MOE 198, MOE 200, MOE 202, and MOE 203. These consist of drawings and/or plans of parts of the facility, and are exempt under section 16 of the *Act*.

OPG 22 and OPG 25 were entirely withheld by the Ministry. Parts of them consist of detailed technical information which is exempt under section 16 for the reasons outlined above. These records also contain non-technical information of a more general nature, but because their subject matter is identified in the report provided by the regional police service as a source of particular concern, I have concluded that these records, in their entirety, properly qualify for exemption under section 16. I have reached this conclusion despite the fact that one of the appendices in OPG 25 describes dissemination of information similar to what is now being withheld as having been previously discussed in public education sessions held before the attacks of September 11, 2001. In my view, a former disclosure practice does not necessarily preclude taking a different approach at a later point in time, and I am satisfied that the Ministry has a sound basis for withholding this information. I am not able to provide further detail on this point

without disclosing confidential information. I also note that OPG 25 includes previously issued Certificates of Approval, which the Ministry makes public in some instances, but a search of the Ministry's web site makes it apparent that these particular certificates are not available. Again, given their subject matter, they are exempt under section 16. As well, OPG 25 contains some information that appears to be in the public domain, and other information that might be disclosed elsewhere as environmental data, but its inclusion in this record, given its subject matter, renders all of this information exempt under section 16. I find that OPG 25 is entirely exempt under section 16.

One section in Bruce 96 was withheld in its entirety. The remainder of this record has been disclosed. In my view, parts of the withheld section consist of the kind of technical information that is exempt under section 16 for the reasons described above. Bruce 96 relates to a different subject than OPG 22 and 25, and given its subject matter and context, I find that some parts of the withheld section are too general to trigger a reasonable expectation of the harms mentioned in section 16. As well, much of this information is publicly available on Bruce Power's website, including a map showing the location of the facility. In Bruce 96, I find that this general and/or publicly available information is not exempt under section 16.

I have also concluded that some of the withheld parts of Bruce 94 contain detailed technical information of the sort that I have exempted under section 16 in the preceding discussion. The Ministry did not claim this exemption for Record 94, and under normal circumstances I would not apply it. However, given the nature of the information and the importance of this exemption and the interests it protects, and to avoid the absurdity of disclosing the same or similar information in one record while finding it exempt in another, I will apply section 16 to parts of this record. The parts of Record 94 that remain at issue are the executive summary and section 2 of the report, and I find parts of both to be exempt under section 16.

To summarize, I uphold the Ministry's decision to deny access to all of the withheld information in the following records: OPG 1, OPG 21, OPG 22, OPG 23, OPG 24, OPG 25, Bruce 55, Bruce 58, Bruce 76, MOE 198, MOE 200, MOE 202, and MOE 203. In addition, parts of the withheld section of Bruce 94 and Bruce 96 are exempt under section 16. I have highlighted the parts of Bruce 94 and Bruce 96 that are exempt under section 16 on a copy provided to the Ministry with this order.

As these records and portions of records are exempt under section 16, I will not consider them under the other exemptions claimed.

SECURITY

The Ministry claims section 14(1)(i) for the same records as section 16. I will therefore consider whether section 14(1)(i) applies to the information for which it is claimed and to which I have not applied section 16.

Section 14(1)(i) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

As noted above, section 14 must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.

The threat to the security of buildings that is at the heart of the Ministry's section 14(1)(i) claim relates to potential terrorism or sabotage, just as in the Ministry's section 16 arguments. The Ministry's representations on this issue are closely related to those on section 16, and it relies on the same report as the one referenced in my section 16 analysis, above.

In my view, the information that I have found not to be exempt under section 16, because its disclosure could not reasonably be expected to prejudice defence of Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism, is also not exempt under section 14(1)(i). For the same reasons given under section 16, I find that disclosure of this information could not reasonably be expected to endanger the security of a building, or result in any of the other harms described in section 14(1)(i).

THIRD PARTY INFORMATION

Sections 17(1)(a) and (c) have been raised as one basis for denying access to the following remaining records, in whole or in part: Bruce 61 (Certificate of Approval notices), Bruce 79 (attachments to Certificate of Approval amendment application), Bruce 94 (Restart project study), Bruce 96 (Facility Description, partly exempt under section 16), MOE 64 (correspondence), MOE 123 (Certificate of Approval amendment) and MOE 126 (correspondence).

Sections 17(1)(a) and (c) state:

> 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;

> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the Act is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the Ministry and/or OPG and Bruce 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 the Ministry 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

In the circumstances of this appeal, it is sufficient to deal with part 3. Under this part, the Ministry and/or OPG and Bruce must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry submits:

> Previously in these representations, in regard to section 14(1)(i) and section 16, the Ministry has demonstrated that in its opinion there is a reasonable expectation of harm resulting from the disclosure of the records at issue that goes beyond mere speculation. The attached report provides numerous examples of the new global threat environment that exists and how it specifically relates to nuclear facilities. It is only a small step in understanding how this kind of threat, if realized, would impact on the interests of Bruce Nuclear power and the Province of Ontario in a monetary way.

In effect, the Ministry is arguing that the disclosure of these records could potentially lead to the harm referred to in section 17(1)(c); for example, undue loss in terms of physical damage to the Bruce facility. As noted above, the purpose of this exemption is to protect "informational assets" of businesses that are held by government bodies, and is intended to prevent exploitation of that information in the marketplace. In my view, the type of damage referred to by the Ministry is more properly addressed under provisions such as section 14(1)(l) and 16. I note that, with the

exception of Bruce 96, the Ministry did not claim section 16 for the records under consideration here.

In any event, the Ministry goes on to state that:

> It is the Ministry's view that both OPG (owner of the site) and Bruce Nuclear Power (the operator of the facility) *would be in the best position to address the reasonable expectation of harms that may result from the disclosure of the records at issue*. [Emphasis added.]

As noted previously, both OPG and Bruce were expressly invited to provide representations on the potential application of section 17(1). While Bruce did not consent to disclosure of information pertaining to it, its representations objected only to the disclosure of one flow sheet, which is part of Record 76 and has already been found exempt under section 16, and did not object to disclosure of anything else, nor explain in any way how other information could be exempt under this section. OPG expressly stated that it has "no objection" to the release of any of the "OPG" records at issue in this appeal, and it did not object to the disclosure of any other records. Like Bruce, OPG did not explain how any of the information at issue could be exempt under section 17(1).

I have reviewed the records at issue, and in my view, those for which I am now considering section 17(1) are not records which, in and of themselves, provide "detailed and convincing" evidence to support a claim that their disclosure could reasonably be expected to cause the types of harm described in section 17(1)(a) or (c). I have already upheld the Ministry's claim that a number of the records are exempt under section 16. In my view, even if the potential for physical damage in the manner suggested by the Ministry were a proper basis for applying sections 17(1)(a) or (c) (which I have expressed doubts about in the discussion above), any information that could possibly meet the requirements of section 17 on that basis has already been exempted under section 16.

I have not been provided with evidence to support any reasonable expectation of harm under section 17(1)(a) or (c) in the event of disclosure of the remaining information for which those sections have been claimed. Therefore, part 3 of the test is not met. Because all three parts must be met, I find that section 17(1) does not apply to the remaining information for which it is claimed.

SOLICITOR-CLIENT PRIVILEGE

The final remaining records to be considered are Ministry records 191 and 195. Records 191 and 195 are e-mails to or from Ministry counsel. Section 19 has been raised by the Ministry as the basis for denying access to these records.

General principles

When the request in this matter was filed, section 19 stated as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended by the *Budget Measures Act*. However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" refers to the substantive rule of law that protects the confidentiality of the solicitor-client relationship. Branch 1 does *not* encompass litigation privilege. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 31, *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.), Orders PO-2483, PO-2484]

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

In its representations, the Ministry submits that record 191 consists of an e-mail chain among staff and Ministry counsel in which confidential legal advice is sought, provided, and discussed. With respect to Record 195, the Ministry submits that it constitutes the initial communications between solicitor and client with respect to providing legal advice.

I have reviewed these records and I agree with the Ministry's submissions. I find that records 191 and 195 are privileged solicitor-client communications at common law and exempt under branch 1 of section 19.

PUBLIC INTEREST IN DISCLOSURE

Although the appellant did not submit representations during the course of this appeal, her original letter that commenced the appeal process raised the applicability of the public interest override at section 23 of the *Act* to the records forming the basis for her appeal. In her appeal letter, the appellant stated:

> In my view, there is a public interest in the disclosure of the record at issue in this case…My finding is consistent with one of the fundamental, public interest purposes of the EBR which, as the ECO has stated, is the protection of the environment, in part by providing mechanisms to ensure that government ministries act in the public interest when making decisions about the government.
>
> …The information requested directly pertains to toxic chemical discharges and releases from a nuclear power plant. The disclosure of this information "could have the effect of providing assurance", yet in withholding it the ministry has done nothing to reassure the public of their safety.

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.

In this appeal, I have found that some information is exempt under sections 16 and 19. I have not applied other exemptions. Sections 16 and 19 are not subject to the public interest override provided by section 23, which therefore can have no application in this appeal.

ORDER:

1. I uphold the decision of the Ministry to deny access to the following records and withheld portions of records:

   OPG 1, 21, 22, 23, 24, 25
   Bruce 55, 58, 76
   MOE 191, 195, 198, 200, 202, 203

2. I uphold, in part, the Ministry's decision to deny access to parts of Bruce 94 and Bruce 96. For greater certainty, I have highlighted the exempt parts of these records on a copy of the previously withheld parts of the records that is being sent to the Ministry with this order. The highlighted information is *not* to be disclosed.

3. I order the Ministry to disclose the following records to the appellant:

   All previously withheld portions of Bruce 61, 79 and MOE 64, 123, 126

   All non-highlighted portions of the previously withheld sections of Bruce 94 and Bruce 96 (on the copy sent to the Ministry with this order).

   The Ministry is to disclose these records by sending copies to the appellant by **October 16, 2006** but not before **October 10, 2006**.

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

Original Signed by: September 8, 2006
John Higgins
Senior Adjudicator