Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

FINAL ORDER PO-3019-F

Appeal PA08-96

Ontario Power Generation

December 7, 2011

Summary: Ontario Power Generation denied access to "source term" data, consisting of information about the projected release of radioactive materials from three Ontario nuclear power plants under various "event sequences," under the discretionary exemptions found at sections 14(1)(i) (security) and 16 (national security) of the *Freedom of Information and Protection of Privacy Act*. This decision was upheld in Order PO-2960-I. However, Order PO-2960-I also required OPG to re-exercise its discretion with respect to its decision to deny access to the information under these exemptions. This order upholds OPG's re-exercise of discretion, in which it maintained its decision to deny access under these exemptions, and the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(i), 16.

Orders and Investigation Reports Considered: Orders PO-2858-I, PO-2960-I.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23; *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.); *Attaran v. Canada (Minister of Foreign Affairs)*, 2011 FCA 182.

OVERVIEW:

[1] This is my third order in this appeal, which arises from a request by a public interest advocacy group (the appellant) made to Ontario Power Generation (OPG) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant requested information about the release of radioactive materials into the environment under a number of categories of "event sequences," with respect to three nuclear energy facilities in Ontario.

[2] Specifically, the appellant requested access to the following information:

> the "source term" information for all Ex-Plant Release Categories included in the probabilistic risk assessments for the Darlington and Pickering A and B nuclear stations.

[3] "Source terms" are estimates of the release of radio-nuclide species from containment into the environment due to postulated event sequences. In the records that are responsive to the request (described in more detail below), source term information for each of the three facilities is given for a number of "Ex-Plant Release Categories" (EPRCs). An EPRC is a category of generally described malfunction and accident scenarios, ranked according to the probability of occurrence. Each EPRC description also refers to the quality or success of containment that would go with an accident or malfunction in that category.

[4] In Order PO-2858-I, I ordered OPG to provide me with additional evidence in support of its exemption claims. In Order PO-2960-I, I considered the evidence provided by the parties, and found the records exempt under sections 14(1)(i) (security) and 16 (national security). However, I also ordered OPG to re-exercise its discretion with respect to its decision to deny access to the information under these sections.

[5] In ordering OPG to re-exercise its discretion, I emphasized the importance of considering whether there is a public interest in disclosure. I stated:

> … [OPG's] representations specifically directed at the exercise of discretion do not even mention the public interest in disclosure. Viewed from that perspective, the evidence supports a conclusion that when OPG initially exercised its discretion to deny access, it failed to consider the issue of the public interest in disclosure, and by doing so, failed to take into account a vitally relevant factor.
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> Even viewed as a totality, OPG's representations give little weight to the notion that the public has a significant role to play in decisions about nuclear safety or the expansion or continuation of Ontario's nuclear power

> program. Taken as a whole, the impression given by these representations is that there is no valid public purpose to be served by the dissemination of detailed information that would permit informed public debate. Rather, the only public interest given serious consideration by OPG was the public interest in *non*-disclosure in order to protect public safety. While this remains a valid consideration, it is distinct from the public interest in *disclosure*, which must also be considered in exercising discretion under the *Act*.
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> Most significantly, and through no fault of its own, OPG was not able to consider the impact of recent events in Japan in deciding whether to disclose the records in the public interest, since they had not occurred yet when it provided its representations in this appeal. The impact on public policy wrought by the terrorist attacks of September 11, 2001 demonstrates how public policy can be affected by world events, and there is no avoiding the significance of the nuclear crisis now underway in Japan as a consequence of the recent earthquake and tsunami.
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> In my view, in these circumstances, it is appropriate to order OPG to re-exercise its discretion in this case, taking into account the public interest in disclosure of detailed information that would permit informed public debate, bearing in mind all of the appellant's points concerning that public interest, as summarized above; the discussion in Orders P-270, P-901, P-1190, PO-1805 and PO-2072-F; and also taking into account the significance of the events now unfolding in Japan, which in my view underline the vital necessity for informed public debate about nuclear safety issues.

[6] OPG proceeded to re-exercise its discretion, and reaffirmed its decision to deny access. The appellant submits that, once again, OPG did not adequately consider the public interest in disclosure in this re-exercise of discretion.

[7] Because I am now satisfied that OPG has demonstrated that it properly exercised its discretion to deny access, I am upholding its exercise of discretion and dismissing the appeal.

RECORDS:

[8] The three records at issue are entitled "EPRC Source Terms" for each of the Pickering A, B and Darlington nuclear stations. Each of the records is one page in length, and consists of a table showing the expected release of a number of substances in relation to each EPRC identified for the facility in question. Two of the records show the expected release figures for a number of different time periods.

DISCUSSION:

Has OPG properly exercised its discretion to deny access to the records under sections 14(1)(i) (security) and 16 (national security)?

[9] The exemptions in sections 14(1)(i) and 16 state:

> **14.** (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (i) 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;
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> **16.** 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.

[10] In its letter explaining how it re-exercised its discretion in response to Order PO-2960-I, OPG stated that the purpose of section 14(1)(i) is "to protect the public and prevent interference with law enforcement." It stated further that "the purpose of the national security exemption in section 16 is 'to protect vital national security interests.'"

[11] It went on to indicate that, in re-exercising its discretion:

> OPG has considered the other interests at stake in favour of greater openness. Accordingly, OPG has considered the public interest in open government, public debate and the proper functioning of government institutions, including the need for transparency and public accountability in the exercise of its discretion as it relates to nuclear facilities.

[12] It states that it considered the arguments raised by the appellant in the appeal, summarized at pages 25-26 of Order PO-2960-I, including the need for public discussion to ensure the safe operation of nuclear facilities and to ensure public confidence. To place this statement in context, my summary of the appellant's points concerning the public interest in Order PO-2960-I was as follows:

- excluding information about nuclear facilities from the public domain has adverse societal impacts including suppression of policy and technical debate about design of nuclear facilities to employ best practices;

- the reason information about design specifications and safety protocols of Canadian nuclear power plants could assist attackers is that these plants do not employ best-practice design in passive safety principles and robustness against attack;

- repeated public discussion is critical to ensure more robust plans for nuclear facilities, safer operation and to ensure public confidence;

- it is the public that bears the risks associated with a potential nuclear accident;

- although some information about the safety of nuclear power plants has been made public, it is inadequate;

- secrecy concerning the consequences of an accident does not protect the public, but simply hides possible consequences from public view;

- disclosure of the source term data would add to information the public has about the consequences of serious accidents, which is centrally relevant to public opinion, public policy debate and political choices;

- information about potential consequences of accidents or malicious acts, such as those provided by source term data, are essential to public discussion of the "pros" and "cons" debate, as well as public debate on risks and risk reduction concerning nuclear facilities;

- disclosure would facilitate public discussion about whether to close or refurbish existing nuclear power plants;

- without disclosure of information about potential accidents, there may be narrow consideration of risks by operators, and reduced public scrutiny;

- some source term data has been disclosed in the past;

- as noted in Order P-1190, it is not possible to allay public concern by simply providing assurances that reviews of nuclear operations are conducted against the highest possible standards;

- in addition to [the Canadian Nuclear Safety Commission], there are important issues to debate at the provincial level; for example, the choice of "electricity mix"; and

- the purpose of the request is for public policy debate.

[13] OPG goes on to mention previous orders[1] of this office addressing nuclear safety issues, and notes that there was a shift following the terrorist attacks of September 11, 2001, such that, after those attacks, "the IPC has supported a more cautious approach to disclosure…."[2]

[14] OPG also states that it has considered the impact of recent events unfolding at the Fukushima Daiichi nuclear power plant in Japan, and my comment in Order PO-2960-I that this "may underline the vital necessity for informed public debate about nuclear safety issues." However, OPG also refers to my other comments in that order, to the effect that in the context of a general access request such as the one under consideration here, disclosure is "disclosure to the world," meaning that the information enters the public domain, which necessitates consideration of the possibility that the information will come into the hands of those with nefarious intent if it is disclosed.

[15] OPG concludes that, on balance, disclosure of the source term data would pose a threat to the security of its nuclear facilities, thereby impairing public safety and national security, and requests that its decision to deny access be upheld in full.

[16] The appellant responded to OPG's explanation of its re-exercise of discretion. It made the following points:

- there is no evidence that OPG properly considered the public interest in disclosure of the record given the ongoing disaster at Fukushima Daiichi;

- OPG makes only a passing reference to this disaster, and its statements provide no details that would allow a decision-maker to assess how OPG considered the public interest;

- OPG's representations reiterate that there needs to be a "cautious approach" to disclosure, which demonstrates a "business as usual" approach and indicates that OPG "has given virtually no weight to the events in Japan;"

- OPG "completely fails to address the issue of whether disclosure would, in fact, serve the public interest by allowing for informed public debate on

[1] P-270, P-901, P-1190 and PO-1805.
[2] In this regard, OPG cites Order PO-2075-F.

nuclear safety issues given the events in Japan," and "makes no mention of whether the events in Japan have caused it to reassess the need for greater openness and transparency in relation to nuclear safety issues;"

- public reaction to the Fukushima disaster worldwide underscores the vital need for public debate regarding the future of Ontario's nuclear policy, which cannot take place without up-to-date, comprehensive and relevant information about the potential consequences of a serious accident;

- the requested source term information would contribute to public understanding of the consequences of serious nuclear accidents, and there is an overwhelming public interest in the disclosure of the records; and

- OPG's position contrasts with the views of many members of the international nuclear community, who have emphasized the need for greater openness and transparency about the risks and benefits of nuclear power.

[17] In support of the last point, the appellant quotes statements by officials from the International Atomic Energy Agency, the United Kingdom and the United States. The appellant also refers to Germany's decision, in the aftermath of the events at Fukushima Daiichi, to shut down all nuclear power stations by 2022.

[18] The appellant also argues that OPG's refusal to disclose the records is "at odds with its release of similar information to the Joint Review Panel (JRP) under the *Canadian Environmental Assessment Act* and the *Nuclear Safety Control Act*, which concluded that a report entitled, *OPG New Nuclear at Darlington – Dose Consequence Analysis in Support of Environmental Assessment* (the Dose Consequence Analysis), should be publicly released.

[19] In that regard, the appellant refers to OPG's argument before the JRP that the information in this Dose Consequence Analysis is similar to other information it withholds for its existing facilities, such as probabilistic risk assessments. This argument made to the JRP by OPG was based on a decision of the Canadian Nuclear Safety Commission (CNSC) issued in October 2008, which refused to disclose a probabilistic risk assessment to the appellant. Significantly, however, this argument was rejected by the JRP. In its decision, which the appellant provided with its representations on the re-exercise of discretion, the JRP underscored the difference between the information in a probabilistic risk assessment and the Dose Consequence Analysis. The JRP stated:

> The 2008 Decision targeted probabilistic risk assessment documents that contained specific detailed analysis of nuclear facility weaknesses and

> combinations of component failures which could result in damage to the reactor core. The disclosure of that type of information was deemed to be prejudicial to the security interests of Canadians. The information contained in the [Dose Consequence Analysis] is significantly different in nature and specificity than the information contained in the probabilistic risk assessment. The Panel has concluded that the 2008 decision referred to by Ontario Power Generation as reason to request non-disclosure is completely different, is not relevant and does not apply to the present situation. Further, the Panel notes that the [Dose Consequence Analysis] contains information that is already available in the public domain.

[20] The OPG then conceded that the information in the Dose Consequence Analysis is different than the information in a probabilistic risk assessment, and the Dose Consequence Analysis was publicly released.

[21] In my view, the different nature of the information in the Dose Consequence Analysis and in a probabilistic risk assessment, as confirmed by the JRP in this ruling, indicates that the appellant's attempt to draw an analogy between the records at issue in this appeal and the Dose Consequence Analysis must be rejected. As noted earlier in this order, the appellant's request acknowledges that source term data are, in fact, contained in probabilistic risk assessments.

[22] In addition, the appellant provided a copy of the Dose Consequence Analysis with its representations on the re-exercise of discretion. I have reviewed this document and compared it with the records at issue, and this comparison is consistent with the conclusion reached by the JRP. The information in the Dose Consequence Analysis is significantly different in nature, and in detail, than the source terms at issue in this appeal. For example, the Dose Consequence Analysis does not set out a detailed description of the quantity of various identified radioactive materials that would be released in a number of different accident scenarios, which is the essential information contained in the source term data. Also, unlike the source term data, the Dose Consequence Analysis ordered disclosed by the JRP relates to the future construction of a new facility at Darlington, for which a design had not yet been chosen.

[23] I also note that, as referenced in Order PO-2960-I, the confidentiality of a probabilistic risk assessment, as a totality, was upheld by the CNSC in April 2008. On this point, I commented as follows in deciding to uphold OPG's claim that the records are exempt under section 16 of the *Act*:

> . . . [A]lthough I did not accept OPG's argument that the doctrine of issue estoppel applies to the records at issue on the basis of previous findings of the CNSC, I find it to be both relevant and persuasive that the CNSC, a body charged with protecting the public interest in the licensing of nuclear power facilities, has previously refused the appellant's request for access

> to a record containing the source term data at issue in this appeal for the Pickering B facility. As already noted, this occurred during a CNSC licence renewal hearing, during which the appellant was an intervenor. The CNSC denied access on the grounds that disclosure "may be prejudicial to the security interests of Canadians."

[24] In my view, therefore, the disclosure of the Dose Consequence Analysis does not provide a basis for arguing that information of the kind contained in the records has been publicly disclosed.

[25] In assessing OPG's re-exercise of discretion, I have carefully considered the detailed statements and representations provided to me by both OPG and the appellant, as summarized above. I appreciate the appellant's position that OPG's explanation of its exercise of discretion "completely fails to address the issue of whether disclosure would, in fact, serve the public interest by allowing for informed public debate on nuclear safety issues given the events in Japan," and "makes no mention of whether the events in Japan have caused it to reassess the need for greater openness and transparency in relation to nuclear safety issues."

[26] Nevertheless, in my view, the arguments put forth by the appellant are more in the nature of a disagreement with the manner in which OPG has chosen to exercise its discretion, rather than a persuasive argument that OPG has failed to do so in a proper manner. As many previous orders of this office have noted, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; and/or
- it fails to take into account relevant considerations.

[27] I am not persuaded, on the evidence, that OPG has exercised its discretion in bad faith, and I find that it has considered relevant factors in doing so, and not irrelevant ones. It is evident from the OPG's letter outlining its re-exercise that it considered the public interest in disclosure of the information at issue, as well as the interests of public safety and national security. Moreover, the extracts from Order PO-2960-I that I reproduced above make it clear that the appellant's position on the public interest was squarely placed before OPG, and OPG expressly indicates that it took these factors into account. However, it decided that, on balance, the issues of national security and public safety were more compelling.

[28] I addressed the factors that must be taken into account in the exercise of discretion in Order PO-2960-I, with reference to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[3] in which Court stated as follows (at paras. 45-49):

> However, by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head. A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. *It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.*
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> By way of example, we consider s. 14(1)(a) where a head "may refuse to disclose a record where the disclosure could reasonably be expected to ... interfere with a law enforcement matter". The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word "may" which confers a discretion on the head to make the decision whether or not to disclose the information.
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> In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. *These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions.* A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.
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> The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption". But *a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption*, to prevent

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[3] 2010 SCC 23.

> interference with law enforcement. If the head, acting judicially, were to find that such an interest exists, the head would exercise the discretion conferred by the word "may" and order disclosure of the document.
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> [Emphases added.]

[29] I went on to state that:

> This passage clarifies that the public interest is to be taken into account in the exercise of discretion. Accordingly, in this case, the focus must shift to whether OPG took this factor into account in deciding not to disclose the records, and whether it exercised its discretion reasonably, weighing factors for and against disclosure, including legislative purpose.
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> As noted in *Ontario Hydro*[4], . . . there can be a public interest in both disclosure and non-disclosure, and it is clear that both of these are relevant in the present appeal, given the importance of nuclear safety and public discussion of that subject, on the one hand, and the importance of avoiding inappropriate disclosure of sensitive information that could be detrimental to public safety and national security on the other. Accordingly, in assessing the exercise of discretion, both of these public interests must be taken into account.

[30] Given OPG's explanation that it considered both the public interest in disclosure and the factors weighing against disclosure, I am satisfied that it has properly exercised its discretion to deny access to the records. In reaching this conclusion, I am mindful of the fact that, in Order PO-2960-I, I upheld its decision to deny access to the records under sections 14(1)(i) and 16, and of the important purposes of these exemptions, which OPG expressly recited in its re-exercise, as referred to above.

[31] In *Attaran v. Canada (Minister of Foreign Affairs)*,[5] the Federal Court of Appeal ruled that a public body had the burden of demonstrating that it had reasonably exercised its discretion to deny access to records under a discretionary exemption in the federal *Access to Information Act*. For the foregoing reasons, I am satisfied that, in this case, OPG has done so.

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[4] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

[5] 2011 FCA 182.

ORDER:

I uphold OPG's exercise of discretion to deny access to the records at issue under sections 14(1)(i) and 16 of the *Act*, and dismiss the appeal.

Original Signed by   December 7, 2011
John Higgins
Senior Adjudicator