

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **ORDER PO-3871**

Appeal PA15-208

Ontario Power Generation

July 31, 2018

**Summary:** The appellant, which is an environmental organization, submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Ontario Power Generation (OPG) for the table of contents of a level 3 probabilistic risk assessment for the Darlington Nuclear Generating Station (DNGS). OPG denied access to this record under the discretionary exemptions in sections 14(1)(i) (security of a building, vehicle, system or procedure) and 16 (national security) of the *Act*. In addition, during the adjudication stage of the appeal process, OPG argued that the adjudicator should exercise his discretion under section 52(1) of the *Act* to dismiss the appeal without conducting an inquiry. In this order, the adjudicator finds that there are no grounds that would lead him to exercise his discretion not to conduct an inquiry to review OPG's access decision under section 52(1) of the *Act*. In addition, he finds that the table of contents is not exempt from disclosure under sections 14(1)(i) or 16 of the *Act*, except for those parts that identify specific "release category" numbers and "plant damage state" numbers. He orders OPG to disclose a severed version of the record to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 1, 10(1), 14(1)(i), 16 and 52(1).

**Orders Considered:** Orders PO-2500 and PO-2960-I.

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII); and *Ontario (Attorney General) v. Fineberg*, 1994 CanLII 10563 (ON SC).

## OVERVIEW:

[1] Ontario Power Generation (OPG) is a company established under the *Business Corporations Act*<sup>1</sup> that is wholly owned by the Government of Ontario. It operates a number of power generating stations, including the Darlington Nuclear Generating Station (DNGS). The appellant, which is an environmental organization, submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to OPG for the table of contents of a level 3 probabilistic risk assessment (PRA) for the DNGS.

[2] A publically available document on OPG's website, "Darlington NGS Risk Assessment Summary Report,"<sup>2</sup> sets out the meaning of the term, "probabilistic risk assessment," and defines the three levels of PRAs:

. . . Probabilistic Risk Assessment, or PRA, represents the process by which risk is quantified, leading to the identification of the dominant contributors to risk. If necessary, the dominant contributors can be used to create strategies to reduce risk and improve safety.

For a nuclear generating plant, the events studied are those leading to damage to fuel in the core or releases of radioisotopes into the environment and the resultant public dose. [OPG] uses a three level PRA method to assess the risk from a nuclear generating plant: Level 1 of the PRA assesses the frequency of varying degrees of fuel failures, which lead to release of radioactivity into containment; Level 2 of the PRA assesses the frequency and magnitude of the release of this radioactivity from containment to the outside environment; Level 3 of the PRA assesses the offsite consequences and public health risk as a result of the radioactivity release to the outside environment, together with economic consequences and risks associated with plant damage, offsite countermeasures and health effects. . . .<sup>3</sup>

[3] OPG located a two-page table of contents for the Darlington level 3 PRA that is responsive to the appellant's access request. It denied access to this record under the discretionary exemptions in sections 14 (law enforcement), 16 (national security) and 20 (danger to health and safety) of the *Act*.

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<sup>1</sup> R.S.O. 1990, c. B.16.

<sup>2</sup> [www.opg.com/generating-power/nuclear/stations/darlington-nuclear/darlington-refurbishment/Documents/DarlingtonNGSRiskAssessmentSummaryReport.pdf](http://www.opg.com/generating-power/nuclear/stations/darlington-nuclear/darlington-refurbishment/Documents/DarlingtonNGSRiskAssessmentSummaryReport.pdf).

<sup>3</sup> *Ibid.*, pp. 20-21.

[4] The appellant appealed OPG's decision to deny it access to this record to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute. The appellant advised the mediator that he believes that the public interest override in section 23 of the *Act* applies to the record at issue. Under section 23, an exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[5] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. The adjudicator assigned to this appeal solicited and received representations from the parties on the issues to be resolved. In its representations, OPG argued that this appeal should be dismissed without an inquiry. In addition, it specified that it was relying on the exemptions in sections 14(1)(i) and 16 of the *Act*, but that it was no longer relying on the section 20 exemption. As a result, the public interest override cannot be invoked in this appeal because sections 14(1)(i) and 16 are not amongst the list of exemptions that can be overridden under section 23.

[6] This appeal was then transferred to me to complete the inquiry. In this order, I find that there are no grounds that would lead me to exercise my discretion not to conduct an inquiry to review OPG's access decision under section 52(1) of the *Act*. In addition, I find that the table of contents of the Darlington level 3 PRA is not exempt from disclosure under sections 14(1)(i) or 16 of the *Act*, except for those parts that identify specific "release category" numbers and "plant damage state" numbers. I order OPG to disclose a severed version of the record to the appellant.

## **RECORD:**

[7] The record at issue in this appeal is a two-page table of contents for an 88-page Darlington level 3 PRA.

## **ISSUES:**

- A. Should the appeal be dismissed without an inquiry?
- B. Do the discretionary exemptions at sections 14(1)(i) or 16 apply to the record?
- C. Did OPG exercise its discretion under sections 14(1)(i) and 16? If so, should the IPC uphold OPG's exercise of discretion?

## **DISCUSSION:**

### **PRELIMINARY ISSUE**

#### ***A. Should the appeal be dismissed without an inquiry?***

[8] OPG submits that this appeal should be dismissed, without an inquiry, either pursuant to: (1) the IPC's discretionary power under section 52(1) of the *Act*; or (2) the common-law doctrine of abuse of process.

[9] Section 52(1) states, in part:

The Commissioner may conduct an inquiry to review the head's decision if,

(b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.

[10] In short, the *Act* provides an adjudicator, as a delegated decision-maker of the Commissioner, with the discretion to decide whether to conduct an inquiry to review a head's access decision in an appeal that has not been resolved during the mediation stage of the appeal process. An adjudicator should only exercise his or her discretion not to conduct an inquiry under section 52(1) in exceptional circumstances, because it curtails an appellant's right to seek an independent review of an institution's access decision with respect to a request for records. Some of the limited and specific grounds for not conducting an inquiry could include the following:

- there is no issue to adjudicate;
- the record is clearly not in the custody or under the control of an institution;
- the IPC has previously issued a decision with respect to the same record;
- the request is for a record which will, by definition, be subject to an exemption;
- mandatory exemptions are claimed for the record and have been upheld for this type of record, in a comparable fact situation, in many previous IPC decisions;
- an exclusion in the *Act* will clearly apply to the record; or
- the sole issue is reasonable search and the appellant has provided no cogent basis for believing additional records may exist.

[11] OPG also submits that the appellant's access request constitutes an abuse of

process at common law.<sup>4</sup> Abuse of process is one of a number of doctrines or techniques that have been developed under the common law to prevent abuse of the decision-making process by parties at proceedings before both administrative tribunals and the courts.<sup>5</sup> In my view, although OPG cites abuse of process as a distinct reason for dismissing the appeal without an inquiry, this doctrine could also fall within the limited and specific grounds that may trigger the IPC's discretionary power not to conduct an inquiry under section 52(1) of the *Act*.

[12] For the reasons that follow, I find that there are no grounds, including abuse of process, that would lead me to exercise my discretion not to conduct an inquiry to review OPG's access decision under section 52(1) of the *Act*.

[13] To support its position that this appeal should be dismissed without an inquiry, OPG claims that the appellant failed to obtain a similar record (a level 3 PRA for the Pickering B Nuclear Generating Station) in a 2008 licensing renewal proceeding before the Canadian Nuclear Safety Commission (CNSC), which is a federal regulatory body.<sup>6</sup> It states:

In the course of an earlier proceeding in which the appellant was an intervenor, the CNSC refused to order the disclosure of a PRA for the Pickering B nuclear station, on the basis that "disclosure of this information may be prejudicial to the security interests of Canadians" and that in any event, disclosure was not necessary to facilitate the appellant's participation in the proceeding (Attachment #1). While this decision concerned the PRA for a different facility, OPG submits that the CNSC's decision supports the conclusion that disclosure of any PRA and the categories of information customarily contained therein raises serious concerns about security.

[14] OPG submits that bringing more than one proceeding to address a matter that has already been determined is one example of conduct that may amount to an abuse of process.<sup>7</sup>

[15] In my discussion later in this order about whether the table of contents of the

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<sup>4</sup> Orders M-618 (aff'd *Riley v. Ontario (Information and Privacy Commissioner)* (March 23, 1999), Toronto Doc. 59/98 (Ont. Div. Ct.)), PO-2490 and PO-3184.

<sup>5</sup> *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44. Other such doctrines include issue estoppel, the rule against collateral attack, and *res judicata*.

<sup>6</sup> See attachment 1 of OPG's representations. CNSC record of proceedings, including reasons for decision, in the matter of Ontario Power Generation, dated June 24, 2008.

<sup>7</sup> *Foy v. Foy* (No. 2) (1979), 26 O.R. (2d) 220 (C.A.).

Darlington level 3 PRA is exempt from disclosure (Issue B), I find that the CNSC's decision to deny access to a level 3 PRA for the Pickering B Nuclear Generating Station is one relevant and persuasive factor that should be taken into account in determining whether disclosing the information in the level 3 PRAs for other nuclear generating stations operated by OPG could reasonably be expected to lead to the harms set out in the sections 14(1)(i) and 16 exemptions.

[16] However, the fact that the CNSC denied the appellant access to a level 3 PRA for the Pickering B Nuclear Generating Station in a 2008 licensing renewal proceeding does not mean that the appellant's current access appeal before the IPC amounts to an abuse of process. The IPC and the CNSC have very different statutory mandates and processes, including with respect to determining whether records should be disclosed to the public.

[17] The IPC is an officer of the Ontario Legislature and oversees the province's access and privacy laws, including the *Act*. This legislation contains a presumption that records held by institutions such as OPG are accessible to the public, subject to the limited and specific exemptions, and gives the public the right to appeal access decisions by institutions to the IPC for an independent review.<sup>8</sup>

[18] By contrast, the CNSC is a federal body that regulates the use of nuclear energy and materials to protect health, safety, security and the environment; to implement Canada's international commitments on the peaceful use of nuclear energy; and to disseminate objective scientific, technical and regulatory information to the public.<sup>9</sup> It appears to have the authority to address requests from participants in its proceedings that records be disclosed. However, unlike the IPC or the federal Information Commissioner, it is not an independent oversight body to which members of the public can appeal if they have been refused access to records held by government.

[19] In addition, the record sought by the appellant in the proceeding before the CNSC in 2008 was a level 3 PRA for the Pickering B Nuclear Generating Station. The record that is at issue in the appeal before me is one part of the level 3 PRA for the DNGS. Although OPG did not provide me with full copies of these PRAs for comparison purposes, I accept that they may be similar in many respects. However, they are clearly not the same record. In addition, the record at issue in this appeal is a much less detailed table of contents for the Darlington PRA, not the full Pickering B PRA that was before the CNSC.

[20] In short, the IPC and the CNSC have very different mandates and processes, and the record sought by the appellant in the appeal before me was not the one before the

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<sup>8</sup> Section 1 of the *Act*.

<sup>9</sup> [www.nuclearsafety.gc.ca/eng/about-us/index.cfm](http://www.nuclearsafety.gc.ca/eng/about-us/index.cfm).

CNSC in the 2008 licensing renewal proceeding for the Pickering B Nuclear Station. In these circumstances, I find that OPG's claim that the appellant is "bringing more than one proceeding to address a matter that has already been determined" is simply not accurate and does not support its claim that the appellant's appeal to the IPC is an abuse of process.

[21] To further support its position that this appeal should be dismissed without an inquiry, OPG also submits that the appellant is making "piecemeal" requests for information contained in the PRAs for nuclear generating stations to obtain indirectly what it has been unsuccessful in obtaining directly. It refers to a previous appeal before the IPC which addressed OPG's refusal to provide the same appellant with access to "source term information" that formed part of the PRAs for the Pickering and Darlington nuclear generating stations. It submits that in Orders PO-2960-I and PO-3019-F, the IPC upheld its decision to refuse access to such information.

[22] OPG further submits that the appellant's "true purpose" for requesting the table of contents of the Darlington level 3 PRA is to facilitate subsequent access requests for individual chapters of this record. It states:

The table of contents contains some information [which] on its own would pose security risks if disclosed (as discussed in further detail below in OPG's submissions regarding ss. 14 and 16 of *FIPPA*). The only rational reason for the appellant's request is to piece together the substantive information in the table of contents and to obtain a blueprint from which it might begin to build a record that it would otherwise not be able to obtain under *FIPPA*. OPG submits that the IPC should curtail this activity at an early stage. Given the national security context, the risks involved in even piecemeal disclosure are significant.

[23] I do not find these arguments to be persuasive. The right of access to records is set out in section 10(1) of the *Act*, which states, in part, that, "every person has a right of access to a record or *a part of a record* in the custody or under the control of an institution." Consequently, although OPG accuses the appellant of making "piecemeal" requests for information to obtain indirectly what it has been unsuccessful in obtaining directly, the appellant has a statutory right to seek access to a part of a record, as it has done here, by requesting the table of contents of the Darlington level 3 PRA.

[24] Similarly, even if the appellant is seeking access to the table of contents of the Darlington level 3 PRA for the purpose of making subsequent access requests to OPG for individual chapters of this record, it has a statutory right to do so, as set out in section 10(1) and to appeal any OPG access decisions to the IPC, as provided for in section 50(1) of the *Act*.

[25] In summary, I find that there are no grounds, including abuse of process, that would lead me to exercise my discretion not to conduct an inquiry to review OPG's

access decision under section 52(1) of the *Act*. As a result, I have decided to proceed with my inquiry to review OPG's access decision and will determine whether the information in the table of contents of the Darlington level 3 PRA is exempt from disclosure under sections 14(1)(i) or 16 of the *Act*.

## **SECURITY OF BUILDING, VEHICLE, SYSTEM OR PROCEDURE/NATIONAL SECURITY**

### ***B. Do the discretionary exemptions at sections 14(1)(i) or 16 apply to the record?***

[26] OPG claims that the table of contents is exempt from disclosure under the discretionary exemptions in sections 14(1)(i) and 16 of the *Act*.

[27] Section 14(1)(i) states:

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;

[28] Although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, it is not restricted to law enforcement situations and can cover any building, vehicle or system which requires protection.<sup>10</sup>

[29] 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.

[30] It is evident from the context of this exemption that it is intended to protect vital public security interests.<sup>11</sup>

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<sup>10</sup> Orders P-900 and PO-2461.

<sup>11</sup> Order PO-2500.



## *Summary of parties' representations*

### OPG's representations

[31] To support its claim that the table of contents of the Darlington level 3 PRA is exempt from disclosure under sections 14(1)(i) and 16 of the *Act*, OPG provided me with submissions on these exemptions and various supporting attachments, including an affidavit from its Director, Nuclear Safety; some previous IPC orders and court decisions; background information on the nuclear power industry in Ontario; and a document from the Office for Civil Nuclear Safety in the United Kingdom.<sup>12</sup>

### **Section 14(1)(i)**

[32] With respect to the section 14(1)(i) exemption, OPG states that in light of world events, including attacks on Canadian locations, it continues to protect information that could be used to target its facilities where an attack could lead to rapid and devastating radiological or other impact on public safety and/or the environment.

[33] It then cites previous IPC orders that have found that:

- where the section 14 exemptions are assessed, the analysis must be approached with sensitivity as a result of the potential dangers and negative impacts that could result if certain records are disclosed;<sup>13</sup> and
- these exemptions have been found to apply where potential threats to buildings create dangers to large numbers of persons or where essential public services are located.<sup>14</sup>

[34] OPG submits that the record at issue in this appeal meets both of these criteria.

[35] It further states that OPG's nuclear facilities employ a significant number of people and that nuclear stations produce more than half of Ontario's electricity. It submits that effective risk management for essential service infrastructure must include preventing identifiable security threats in order to maintain facility and public safety.

[36] OPG also submits that the threats faced by nuclear power facilities in Ontario are "real" and cites Order PO-2500, in which the adjudicator noted that although there has never been an attempt to attack or sabotage any North American nuclear facility, such concerns should not be considered "fanciful, imaginary or contrived." In addition, OPG

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<sup>12</sup> Appendices 2 and 4 to 8.

<sup>13</sup> Orders PO-2906-I and PO-2500.

<sup>14</sup> Orders P-217, P-246, PO-1691, MO-2249-I and PO-2500.

cites the Divisional Court's decision in *Ontario (Attorney General) v. Fineberg*,<sup>15</sup> which confirmed 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." Next, it points to the terrorist attacks on September 11, 2001 and the recent attack on Parliament Hill as "proof" that the threat to North American installations is "real and possible."

[37] OPG then cites Order PO-2960-I and submits that it is 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 PRAs.

[38] OPG further submits that public safety and nuclear security would be compromised if the record at issue is disclosed to the appellant. To support this argument, it cites the following passages from the accompanying affidavit of its Director, Nuclear Safety:

Many of the chapters in the table of contents to the PRA contain headings and subheadings. The subheadings provide a level of detail that if released provides persons knowledgeable in the area a level of detail that creates a significant nuclear safety and security risk if used inappropriately.

For example, the subheadings highlight the methodologies and the computer code used in the modelling and calculation of risks (Chapter 4 ). This information reveals the most sensitive release pathways affecting public safety and nuclear security. This is the type of information that could be exploited and used with malevolent purpose to maximize damage.

Subheadings in chapter 5 highlight the source terms and severe accidents representing each of the release categories and several plan damage states. Information relating to the identification of the release categories used in the PRA level 3 could be used to sabotage plant equipment to cause the larger releases from a most severe accident.

Subheadings in chapter 6 indicate Release Categories (RC) where additional sensitivity cases were warranted while omitting RC that were determined not to be present. Release of this information indicates the most relevant release categories which would maximize damage in the event of malicious attack.

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<sup>15</sup> 1994 CanLII 10563 (ON SC).

Subheadings in chapter 7 identify parametric uncertainty for the PRA results. Again this information would allow a more focused attack on certain risks to maximize release and damage from an accident.

Chapter 8 provides the summary and conclusions. The subheadings in chapter 8 provide the criteria and most important risks that have to be identified and studied. Again, release of the subheadings allows for more focused planning by malevolent agents to cause the consequences and exploit the risks provided.

[39] Next, OPG cites the following passage from a 2005 document issued by the Office for Civil Nuclear Security in the United Kingdom on balancing the need for openness about nuclear-related information with the harms that could result from disclosing such information:

. . . a malevolent act on a nuclear facility may give rise to a release of radioactivity which may be confined to the site or worse, may affect an area surrounding the site. Information which if disclosed could lead to an action which could cause such a release of radioactivity would be exempt." (from disclosure under U.K. Access Laws.)

[40] OPG also submits that in assessing whether the section 14(1)(i) exemption applies, it is "critical" to consider what other information is publicly available to effectively determine the level of potential impacts of disclosing the record at issue in this appeal. To support this argument, it cites another passage from the accompanying affidavit of its Director, Nuclear Safety:

OPG publishes Summary Reports of the Probabilistic Risk Assessment on its website. There is also a draft CNSC report titled "Study of Consequences of a Hypothetical Severe Nuclear Accident and Effectiveness of Mitigation Measures" (the "CNSC Study") available from the CNSC. As a result, there is a significant amount of information on risks and accident mitigation available to the public without compromising facility safety and security. If OPG was required to release the table of contents for the level 3 PRA for Darlington generating station, people with the technical know-how would be able to co-relate these pieces of information and with nefarious intent cause significant and devastating impact on public safety and the environment.

[41] Finally, OPG submits that in applying the section 14(1)(i) exemption, it is not necessary to demonstrate that the information could reasonably be expected to be used by this particular appellant for nefarious or criminal purposes, because disclosure under

the *Act* is effectively disclosure to the world.<sup>16</sup>

## Section 16

[42] At the beginning of its representations on the section 16 exemption, OPG quotes this provision and emphasizes in italics those parts it submits are applicable to the record at issue:

A head may refuse to disclose a record where the disclosure *could reasonably be expected* to prejudice the defence of Canada or 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 Executive Council.

[43] To support its position that the record at issue is exempt from disclosure under section 16, OPG cites Order PO-2960-I and submits that in light of recent terrorist attacks, national security has now become an increasingly important objective. As a result, this exemption is now assessed with "greater sensitivity" given the difficulty in predicting specific future events.

[44] OPG then cites Order PO-2500 and submits that under section 16, an institution must only provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure instead of the higher "detailed and convincing" evidence required under other exemptions in the *Act* which also contains the wording "could reasonably be expected to . . . ."

[45] It further states that in deciding an appeal where the section 16 exemption is claimed, the effects of the information ending up in the hands and minds of those with "nefarious intent" must be considered and balanced against the appellant's purpose for requesting disclosure of the record.

[46] OPG also states that it disagrees with the appellant's position that the risks to Ontario's nuclear facilities are "speculative and unsubstantiated" and cites the terrorist attacks on September 11, 2001 in the United States and the 2014 terrorist attack on Parliament Hill in Canada. It submits that this is the world in which OPG operates its nuclear facilities and cites the same passage from the accompanying affidavit of its Director, Nuclear Safety as it provided above in its representations on the section 14(1)(i) exemption about individuals with "nefarious intent."

[47] Finally, it submits that disclosing the record at issue would heighten the risk of future sabotage or terrorist attack on nuclear facilities in Ontario. In particular, it states:

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<sup>16</sup> Order PO-2461.

The Darlington generating station would become a more attractive target. Not only would our buildings be potentially at risk, but our off-site mitigation measures could also be targeted. OPG strives to continually improve on the safety of its facilities taking into account recent world events. Whenever significant world events occurs (e.g. Fukushima earthquake, Parliament Hill attacks, 9/11 World Trade Centre attacks etc.), OPG initiates a course of action to determine what should be done to prevent the effects of similar events at or near our facilities. Once a reasonable basis to believe release of information would be injurious to preventing or suppressing sabotage or terrorism has been established, OPG submits that the decision to withhold the records must be upheld.

### Appellant's representations

[48] The appellant's representations include submissions on the purpose of its access request for the record at issue, the sections 14(1)(i) and 16 exemptions; and various supporting attachments, including an affidavit from a senior nuclear analyst employed by the appellant; some previous IPC orders; and a number of records that the appellant has obtained through access-to-information legislation and other means relating to Bruce Power, a privately operated nuclear generator, and the Pickering Nuclear Generating Station.

### **Purpose of access request**

[49] The affidavit of the appellant's senior nuclear analyst sets out why it is seeking access to the table of contents for the Darlington level 3 PRA. It states, in part:

There are four CANDU reactors at the Darlington Nuclear Generating Station (NGS). OPG hopes to rebuild and extend the operational lives of the Darlington reactors. The work required to extend the life of the four Darlington reactors is complex and risky. It involves the removal and replacement of hundreds of highly radioactive pressure tubes from the reactor core, as well as the replacement of other life-limiting components, and upgrading the plant systems to approach (as much as OPG deems reasonable) modern regulatory requirements. OPG estimates the cost of rebuilding the Darlington reactors will be over \$10 billion.

The continued operation of a nuclear reactor is also accompanied by significant risks to public safety and the production of long-lived radioactive waste. Despite these significant environmental risks and impacts, there has also been no public process to evaluate whether the proposed Darlington refurbishment is advisable from a sustainable development perspective.

The Darlington NGS sits just 60 km from downtown Toronto. Over 475,000 people live within 20 km of the station and approximately six

million people within the Greater Toronto Area (GTA). Due to the dense and growing population around the Darlington nuclear station, the human health, economic losses as well as social consequences would be enormous and arguably irreversible in the event of a Chernobyl- or Fukushima-scale radioactive release.

A level 3 probabilistic risk or safety assessment evaluates the offsite consequences of reactor accidents. The information contained in a level 3 risk assessment can be used to evaluate the adequacy of offsite nuclear emergency plans. It can also be used to evaluate the potential financial liability in the event of a nuclear accident. It is also be used by OPG and the CNSC to evaluate the benefit of potential safety upgrades. At a societal level, it could be used by the public to understand the societal risk posed by a nuclear station such as Darlington.

I filed this request because in my view it is in the public interest to discuss and assess the risks associated with operating the Darlington NGS before billions of dollars are spent to extend its operational life. I suspect the information in the level 3 probabilistic risk assessment may reveal significant public safety hazards and weaknesses in Ontario's offsite nuclear emergency plans.

I also filed this request because the federal *Nuclear Liability and Compensation Act* caps OPG's liability for compensating victims in the event of an accident to just \$1 billion. I have learned through other Access to Information (ATI) and Freedom of Information (FOI) requests that OPG asked for the federal government to cap the company's liability while it was drafting the act. As a result, Canadians carry the majority of OPG's financial liability in the event of an accident. Access to the level 3 risk assessment will allow Canadians to better understand the potential liability they will assume with Darlington's continued operations.

I requested only the table of contents for two reasons. First, it allows me to make subsequent requests that are targeted and limited in scope. It is meant to save search times. Second, targeted requests avoid broad and general requests that could capture material that is obviously covered by exemptions under the *Act* . . . .

### **Sections 14(1)(i) and 16**

[50] The appellant submits that under section 53 of the *Act*, OPG bears the burden of proving that the record at issue is exempt from disclosure under the sections 14(1)(i) and 16 exemptions.

[51] With respect to section 14(1)(i), the appellant submits that OPG has failed to prove that this exemption applies to the record at issue. It submits that OPG has not

provided adequately persuasive evidence of the danger posed to the security of a building, nor a vehicle carrying items that would result from disclosure of the record at issue. With respect to section 16, the appellant submits that OPG has failed to establish that disclosing the record could reasonably be expected to lead to the public security harms protected by that exemption.

*Analysis and findings*

[52] I have carefully reviewed the table of contents of the Darlington level 3 PRA and considered the parties' representations. For the reasons that follow, I find that this record is not exempt from disclosure under sections 14(1)(i) and 16 of the *Act*, except for those parts that identify specific "release category" numbers and "plant damage state" numbers.

[53] In determining whether the public should be granted access to a record held by an institution, it is important to start by considering the purposes of the *Act*, which are set out in section 1. This provision states, in part:

The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific,

. . . .

[54] In addition, section 10(1) of the *Act* states, in part:

Subject to subsection 69(2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22;

. . . .

[55] In *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*,<sup>17</sup> the Ontario Divisional Court provided the following guidance about how the *Act*

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<sup>17</sup> 2013 ONSC 7139 (CanLII).

should be interpreted:

Access to information legislation must be interpreted within the context of its purpose which is to facilitate democracy by ensuring that citizens have the information required to participate meaningfully in the democratic process and to hold politicians and bureaucrats accountable to the citizenry.<sup>18</sup> . . . According to s. 1 of the *Act*, statutory exemptions such as the third party exemption claimed in this case exist to protect privacy interests in “limited and specific” situations. Our courts have held that those exceptions from the general purpose of making government-held information available to the public are to be construed narrowly.<sup>19</sup>

[56] The record at issue in this appeal is a two-page table of contents for an 88-page level 3 PRA for the DNGS. The chapter headings and sub-headings in the table of contents provide a general overview or outline of the material found in the broader PRA. I do not have the broader PRA before me. However, based on the parties’ representations, the summary report on OPG’s website, and my review of the table of contents, it appears that a level 3 PRA assesses, models and calculates the offsite consequences and risks of a serious nuclear accident (i.e., the impact of such an accident on the public and the surrounding environment).

[57] The DNGS is located on the north shore of Lake Ontario in the Regional Municipality of Durham, which is part of the Greater Toronto Area (GTA). As pointed out by the appellant, more than 475,000 people live within 20 km of the station and approximately six million people within the GTA. In my view, in light of the nuclear accidents that have occurred in Chernobyl in 1986, and more recently, Fukushima in 2011, it is not far-fetched for the appellant to argue that a large-scale release of radiation from the DNGS could have long-term, devastating effects both on the people who live in one of Canada’s largest population centres and the surrounding environment.

[58] Given the serious impact that could result from a nuclear reactor accident at the DNGS and the significant public funds that are needed to prevent and address such an accident, there are clear transparency and accountability interests at stake with respect to accessing records relating to how OPG assesses the offsite consequences and risks of such an accident. In accordance with the interpretive principles set out in *Miller Transit Limited*, providing citizens with such information would enable them to participate meaningfully in the democratic process by providing them with the opportunity to

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<sup>18</sup> See *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), [2004 CanLII 15009 \(ON SCDC\)](#), 181 O.A.C. 251 (C.A.), at para. 66, citing *Dagg v. Canada (Minister of Finance)*, [1997 CanLII 358 \(SCC\)](#), [1997] 2 S.C.R. 403 at paras. 61-63.

<sup>19</sup> *Supra* note 17, at para. 45.



scrutinize whether OPG is properly assessing the offsite consequences and risks of a nuclear accident at the DNGS, and to more effectively hold provincial politicians and OPG officials accountable with respect to nuclear safety and the expenditure of public funds.

[59] However, it is clear from the wording of both sections 1 and 10(1) of the *Act* that the right to access information in the custody or control of institutions such as OPG is not absolute. Despite the transparency and accountability interests that exist, the appellant's right to access the table of contents of the Darlington level 3 PRA must yield if OPG establishes that such information is exempt from disclosure under the discretionary exemptions in sections 14(1)(i) and 16 of the *Act*.

[60] Under section 14(1)(i), OPG 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. In the circumstances of this appeal, OPG appears to be arguing that disclosing the record at issue in this appeal could reasonably be expected to endanger the security of buildings at the DNGS or of a system or procedure established for the protection of items at the DNGS, for which protection is reasonably required.

[61] Under section 16, OPG 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. OPG submits that disclosing the record at issue in this appeal could reasonably be expected to be injurious to the detection, prevention, or suppression of espionage, sabotage or terrorism with respect to the DNGS.

[62] The sections 14(1)(i) and 16 exemptions both contain the words, "could reasonably be expected to . . ." In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,<sup>20</sup> the Supreme Court of Canada cited its previous decision in *Merck Frosst*, in which a unanimous Court addressed the meaning of this phrase and affirmed as correct the elaboration of this standard as a "reasonable expectation of probable harm." It stated the following:

. . . As this Court affirmed in *Merck Frosst*, the word "probable" in this formulation must be understood in the context of the rest of the phrase: there need be only a "reasonable expectation" of probable harm. The "reasonable expectation of probable harm" formulation simply "captures the need to demonstrate that disclosure will result in a risk of harm that is

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<sup>20</sup> 2014 SCC 31 (CanLII).

well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm”: para. 206.<sup>21</sup>

[63] The Court further stated:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.<sup>22</sup>

[64] In short, to establish that disclosing the record at issue “could reasonably be expected to” lead the harms set out in the sections 14(1)(i) and 16 exemptions, OPG must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm.

[65] With respect to how much evidence and the quality of evidence that OPG must provide to meet the “reasonable expectation” standard in sections 14(1)(i) and 16, it important to consider the fact that the record at issue in this appeal relates to the safety of a nuclear generating station. In this context, both sections 14(1)(i) and 16 are designed to prevent individuals with malevolent intent, such as terrorists, from gaining access to information in a record for the purposes of assisting them in causing damage or harm to a nuclear facility, which would have serious consequences for the public.

[66] Moreover, the Divisional Court has found that 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.”<sup>23</sup> Although section 14(1)(i) is not restricted to law enforcement situations,<sup>24</sup> the same principle applies to

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<sup>21</sup> *Ibid.*, at para. 52.

<sup>22</sup> *Ibid.*, at para. 54.

<sup>23</sup> *Supra* note 15.

<sup>24</sup> Orders P-900 and PO-2461.

this exemption. Similarly, I find that it is also necessary to approach section 16 in a sensitive manner, given the difficulty of predicting future events affecting the vital security interests of nuclear facilities, particularly in the context of possible espionage, sabotage or terrorism.<sup>25</sup>

[67] The IPC has found in previous orders that disclosing records or parts of records setting out detailed technical information about the operations of a nuclear facility could reasonably be expected to lead to the harms set out in the sections 14(i) and 16 exemptions. For example, in Order PO-2500, the adjudicator found that drawings and plans for the Bruce Power nuclear generator were exempt from disclosure under those provisions. In Order PO-2960-I, the same adjudicator found that "source term" information in the PRAs for the Pickering A, B and Darlington nuclear stations, which included "data tables presenting details of the radiological release (by radionuclide) as a function of time for various accident categories,"<sup>26</sup> were exempt from disclosure under sections 14(1)(i) and 16.

[68] I agree with a number of the points that OPG makes in its representations, which should be considered when assessing whether disclosing detailed technical information about the operations of a nuclear facility could reasonably be expected to lead to the harms in the sections 14(1)(i) and 16 exemptions. There is no doubt, for example, that nuclear power facilities in Ontario, including the DNGS, could be the target of sabotage or a terrorist attack, particularly given the attacks on the World Trade Centre and the Pentagon in the United States on September 11, 2001 and the more recent attacks on Canadian soil, including the targeting of Parliament Hill, the murder of Canadian soldiers and the foiled attempt to attack a VIA rail train. It is well within the realm of possibility that a terrorist organization or a lone individual who gained access to detailed technical information about a nuclear facility could use that information to successfully attack that facility, which could have devastating consequences on the public, the environment and the Ontario economy.

[69] In addition, I agree with OPG that it is not necessary for it to demonstrate that this particular appellant would make use of the information in the record in a manner that would trigger the application of the sections 14(1)(i) and 16 exemptions, because disclosure under the *Act* to any party amounts to disclosure to the world.

[70] OPG also refers to Order PO-2960-I, in which the detailed "source term" information in the PRAs for the Pickering A, B and Darlington nuclear stations was at issue. In that order, the adjudicator stated:

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<sup>25</sup> See Order PO-2500, which reached a similar conclusion.

<sup>26</sup> This description was in an affidavit provided by OPG's manager responsible for nuclear safety and technology.

. . . 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."

[71] The record sought by the appellant in the 2008 licensing renewal proceeding before the CNSC was a level 3 PRA for the Pickering B Nuclear Generating Station. In addressing the appellant's request that the CNSC instruct OPG to disclose the "Pickering B Probabilistic Risk Assessment documentation," the CNSC stated the following in its decision:

The Commission is of the view that disclosure of this information may be prejudicial to the security interests of Canadians. The Commission is also of the view that disclosure of this information is not essential for the development of [the appellant's] intervention for Day 2 of the Pickering B license renewal hearing, as comprehensive and relevant information is available to interested parties.<sup>27</sup>

[72] I note that the CSNC did not provide any detailed explanation or reasons to explain why disclosing such information "may be prejudicial to the security interests of Canadians." Nevertheless, given the CNSC's expertise in nuclear safety issues, I find that its decision to not order disclosure of a level 3 PRA for the Pickering B Nuclear Generating Station is one relevant and persuasive factor that should be taken into account in determining whether disclosing detailed technical information in the level 3 PRAs for other nuclear generating stations operated by OPG could reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16. However, it is not determinative and must be assessed along with other evidence submitted by the parties in an appeal before the IPC.

[73] I would also qualify the application of the CNSC's decision to an extent in the circumstances of this appeal, because the CSNC was asked to direct OPG to provide the appellant with a full copy of a level 3 PRA in that proceeding, not a table of contents, which is the case here. Moreover, although OPG relies on Order PO-2960-I to emphasize the relevance and persuasiveness of the CNSC's decision, most of the information in the table of contents for the Darlington level 3 PRA is much less detailed than the "source term" information that was before the adjudicator in Order PO-2960-I.

[74] Finally, OPG states there is a significant amount of information on risks and

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<sup>27</sup> *Supra* note 6, at para. 6.

accident mitigation available to the public, including the summary reports of PRAs for nuclear generating stations on its own website and other reports on the CNSC website. It submits that if it is required to disclose the information in the table of contents for the Darlington level 3 PRA, it is reasonable to expect that people with “technical know-how” would be able to “co-relate” these pieces of information and with nefarious intent cause significant and devastating impact on public safety and the environment. As will be explained below, I find that with some limited and specific exceptions, most of the information in the table of contents is not sufficiently detailed to lead to such a result. Consequently, disclosing such information could not reasonably be expected to endanger the security of a building or of a system or procedure established for the protection of items, for which protection is reasonably required [section 14(1)(i)] or be injurious to the detection, prevention, or suppression of espionage, sabotage or terrorism [section 16].

#### Opening part of table of contents and chapters 1.0, 2.0 and 3.0

[75] The top section of the table of contents includes some general information, such as the document number, the full title of the PRA, a list of four items that appear on the opening pages of the PRA, and the headings for chapters 1.0, 2.0 and 3.0. OPG does not specifically address these parts of the record in its representations, and I find they do not contain the type of technical detail that could reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16 of the *Act*.

#### Chapter 4.0

[76] This part of the table of contents includes a chapter heading and a number of sub-headings. In his affidavit, OPG’s Director, Nuclear Safety states that the subheadings for chapter 4.0 highlight the methodologies and the computer code used in the modelling and calculation of risks. He submits that this information reveals the most sensitive release pathways affecting public safety and nuclear security, which is the type of information that could be exploited and used with malevolent purpose to maximize damage.

[77] I do not find these submissions to be persuasive with respect to the chapter heading and the sub-headings. Although OPG claims that the information in the subheadings “reveals the most sensitive release pathways affecting public safety and nuclear security,” most of these sub-headings simply identify general subjects that any reasonably informed person would expect to see in a document that assesses, models and calculates the offsite consequences and risks of a nuclear accident. In addition, sections 6.0 to 6.3 of the publically available summary report on the OPG website, which summarize the Darlington level 3 PRA, specifically discuss many of the same topics found in the subheadings of chapter 4.0.<sup>28</sup>

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<sup>28</sup> *Supra* note 2, pp. 54-56.

[78] These subheadings do not reveal in detail how the offsite consequences and risks of a nuclear accident at the DNGS are specifically assessed, modelled or calculated. As a result, I find that the chapter heading and the subheadings do not contain the type of detail that could be exploited by a technically knowledgeable party with malevolent intent in the manner suggested by OPG, and disclosing them could not reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16 of the *Act*. These include subheadings 4.1, 4.2, 4.2.1, 4.2.1.1, 4.2.1.2, 4.2.2, 4.2.2.1, 4.2.2.3, 4.3, 4.3.1, 4.3.2, 4.4.1, 4.4.1.1, 4.4.1.2, 4.4.1.3 and 4.4.2.

[79] OPG also claims that disclosing those subheadings (4.2.2.2 and 4.4) that identify the specific computer code used in the modelling and calculation of risks could reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16. However, section 6.2 of the publically available summary report on OPG's website specifically identifies this computer code by name and spends almost two pages discussing how it is used by the DNGS to model and calculate "offsite health and offsite economic consequences," including the general types of pathways and modelling set out in subheadings 4.2.2.2 and 4.4. In these circumstances, I find that the subheadings do not contain the type of detail that could be exploited by a technically knowledgeable party with malevolent intent in the manner suggested by OPG, and disclosing them could not reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16 of the *Act*.

## Chapter 5.0

[80] This part of the table of contents also includes a chapter heading and a number of sub-headings. As noted above, OPG's Director, Nuclear Safety states that the subheadings in chapter 5 highlight the source terms and severe accidents representing each of the "release categories" and several "plant damage states." He submits that information relating to the identification of the "release categories" used in the Darlington level 3 PRA could be used to sabotage plant equipment to cause the larger releases that result from a severe nuclear accident.

[81] I do not find these submissions to be persuasive with respect to the chapter heading and a number of the sub-headings. In Order PO-2960-I, the adjudicator found that "source term" information in the PRAs for the Pickering A, B and Darlington nuclear stations, which comprised "data tables presenting details of the radiological release (by radionuclide) as a function of time for various accident categories," was exempt from disclosure under sections 14(1)(i) and 16. In the record before me, some of the subheadings under chapter 5.0 refer to "source terms" (e.g., subheadings 5.1.1, 5.1.2 and 5.1.3) and reveal in a general way that they are used to assess, model and calculate offsite consequences and risks, but unlike the records in PO-2960-I, do not contain any technical details about them. As a result, I find that these subheadings do not contain the type of detail that could be exploited by a technically knowledgeable party with malevolent intent in the manner suggested by OPG, and disclosing them could not reasonably be expected to lead to the harms set out in sections 14(1)(i) and

16 of the *Act*.

[82] Chapter 5.0 also contains some other subheadings (e.g., 5.1.4 and 5.1.5) that any reasonably informed person would expect to see in a document that estimates and assesses the offsite consequences and risks of a nuclear accident. They do not reveal in any detail how the offsite consequences and risks of a nuclear accident are specifically assessed, modelled and calculated. As a result, I find that these subheadings do not contain the type of detail that could be exploited by a technically knowledgeable party with malevolent intent in the manner suggested by OPG, and disclosing them could not reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16 of the *Act*.

[83] Several subheadings under chapter 5.0 refer to “release category” (RC) numbers (subheadings 5.1.2.1, 5.1.2.2, 5.1.2.3, and 5.1.2.4) and “plant damage state” (PDS) numbers (subheadings 5.1.3.1 and 5.1.3.2). The publically available summary report on the OPG website contains tables that list all of the RC numbers<sup>29</sup> and PDS numbers<sup>30</sup> used at the DNGS. Consequently, this information is publically available.

[84] However, unlike the summary report, the subheadings in the table of contents specifically identify which RC and PDS numbers are the subject of risk modelling and calculation. In my view, it is reasonable to expect that disclosing the specific RC category numbers and PDS numbers in each subheading could assist terrorists groups or lone individuals who have technical knowledge of nuclear facilities, because this information reveals which ones are the focus of risk modelling and calculation for nuclear accidents, and which are not. In these circumstances, I find that this information is exempt from disclosure under sections 14(1)(i) and 16 of the *Act*.

[85] Finally, chapter 5.0 also contains some subheadings (5.1, 5.1.2 and 5.2) that again identify the specific computer code used to model and calculate risks that is named and discussed in section 6.2 of the publically available summary report on the OPG website. For the same reasons set out above under chapter 4.0, I find that these subheadings do not contain the type of detail that could be exploited by a technically knowledgeable party with malevolent intent in the manner suggested by OPG, and disclosing them could not reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16 of the *Act*.

## Chapter 6.0

[86] This part of the table of contents includes a chapter heading and a number of sub-headings. OPG’s Director, Nuclear Safety states that the subheadings in this

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<sup>29</sup> Table 10 on page 94.

<sup>30</sup> Table 9 on page 93.

chapter identify those RCs where additional sensitivity cases were warranted, while omitting other RCs that were determined not to be present. He submits that disclosing the information that shows the most relevant RCs would maximize damage in the event of a malicious attack.

[87] The chapter heading and most of the subheadings only contain general information relating to "sensitivity cases." As a result, I find that they do not contain the type of detail that could be exploited by a technically knowledgeable party with malevolent intent in the manner suggested by OPG, and disclosing them could not reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16 of the *Act*.

[88] However, for the same reasons as above under chapter 5.0, I find that it is reasonable to expect that disclosing the specific RC category numbers in those subheadings that contain such information (6.2 and 6.3) could assist terrorists groups or lone individuals who have technical knowledge of nuclear facilities, because this information reveals which ones are the focus of risk modelling and calculation for nuclear accidents, and which are not. In these circumstances, I find that this information is exempt from disclosure under sections 14(1)(i) and 16 of the *Act*.

#### Chapter 7.0

[89] This part of the table of contents includes a chapter heading and a number of sub-headings. OPG's Director, Nuclear Safety states that the subheadings in this chapter identify parametric uncertainty for the PRA results. He submits that this information would allow a more focused attack on certain risks to maximize release and damage from an accident.

[90] However, the chapter heading and the subheadings only contain very general information relating to uncertainty in the process of assessing, modelling and calculating the offsite consequences and risks of a nuclear accident, including parametric uncertainty. They do not contain any detail about how such uncertainty is specifically assessed, modelled or calculated. In these circumstances, I find that they do not contain the type of detail that could be exploited by a technically knowledgeable party with malevolent intent in the manner suggested by OPG, and disclosing them could not reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16 of the *Act*.

#### Chapter 8.0

[91] This part of the table of contents includes a chapter heading and a number of sub-headings. OPG's Director, Nuclear Safety states that this chapter provides the summary and conclusions, and the subheadings provide the criteria and the most important risks that have to be identified and studied. He submits that disclosing the subheadings would allow for more focused planning by malevolent agents to cause the



consequences and exploit the risks set out in the subheadings.

[92] Once again, however, the chapter heading and the subheadings only contain very general information relating to the summary and conclusions for the Darlington level 3 PRA. They do not contain any specific details about the process of assessing, modelling and calculating the offsite consequences and risks of a nuclear accident. In these circumstances, I find that they do not contain the type of detail that could be exploited by a technically knowledgeable party with malevolent intent in the manner suggested by OPG, and disclosing them could not reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16 of the *Act*.

#### Chapter 9.0

[93] This part of the table of contents includes a chapter heading and the title of two appendices. OPG's Director, Nuclear Safety does not address this particular chapter in his affidavit.

[94] The chapter heading and the title of the two appendices only contain very general information. They do not contain any specific details about the process of assessing, modelling and calculating the offsite consequences and risks of a nuclear accident. In these circumstances, I find that they do not contain the type of detail that could be exploited by a technically knowledgeable party with malevolent intent in the manner suggested by OPG, and disclosing them could not reasonably be expected to lead to the harms set out in sections 14(1)(i) and 16 of the *Act*.

#### **EXERCISE OF DISCRETION**

##### ***C. Did OPG exercise its discretion under sections 14(1)(i) and 16? If so, should the IPC uphold OPG's exercise of discretion?***

[95] I have found that those parts of the table of contents for the Darlington level 3 PRA that identify specific "release category" numbers and "plant damage state" numbers are exempt from disclosure under sections 14(1)(i) and 16 of the *Act*. However, these exemptions are discretionary and permit OPG to disclose this information, despite the fact that it can withhold it.

[96] An institution must exercise its discretion in applying such exemptions. On appeal, the IPC may determine whether the institution failed to do so. In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[97] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>31</sup> It may not, however, substitute its own discretion for that of the institution.<sup>32</sup>

[98] OPG submits that it exercised its discretion under sections 14(1)(i) and 16 to refuse disclosure of the information at issue and did so appropriately after taking into account only relevant factors and no irrelevant factors. To support its position, it provided a letter from its senior vice-president, business and administrative services, who has been delegated to act as the head of OPG for the purposes of the *Act*. As set out in this letter, OPG states that it took into account and balanced the following factors:

- the fact that the security-sensitive information in the table of contents "could cause harm to the detection, prevention, or suppression of sabotage or terrorism";
- the fact that people with technical know-how and nefarious intent could use the information in the table of contents to "cause significant nuclear safety and security impacts";
- the public interest in open government, public debate, and the proper functioning of government institutions, including the need for transparency and accountability in the expenditure of public funds;
- that OPG has already publicly disclosed a "significant body of information" regarding the safety and security of the DNGS in order to meet the regulatory requirements of the CNSC;
- public confidence in the information provided by OPG should be heightened by the CNSC's scrutiny of that information at licensing hearings, including multi-day hearings in 2012 and another licensing hearing scheduled to commence in 2015;
- the fact that the appellant has previously made requests to the CNSC and the IPC for similar information, and disclosure has consistently been refused; and
- sufficient information regarding nuclear safety and security has been and continues to be made publicly available through the CNSC public review process, which serves the public interest in open government and public accountability.

[99] The appellant submits that OPG exercised its discretion in bad faith because it decided to withhold the record in its entirety and further submits that it failed to take

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<sup>31</sup> Order MO-1573.

<sup>32</sup> Section 54(2).

into account the following relevant factors:

- the purposes of the *Act* include disclosing information to the greatest extent possible, which OPG failed to do;
- the appellant has a sympathetic and compelling need to receive the information, because it has the experience and expertise required to help OPG make wise energy policy decisions in the public interest;
- disclosure could significantly increase public confidence in the operation of OPG, because it would show the extent to which OPG is taking steps to adequately address the offsite consequences of nuclear accidents;
- OPG failed to consider the public benefit of intervenors verifying the adequacy and compliance of offsite nuclear emergency plans; and
- disclosure would allow the public to verify OPG's regulatory compliance.

[100] Although the appellant has raised some additional transparency-related factors that it believes that OPG should have considered, I am satisfied that OPG took a sufficient number of relevant factors into account in deciding to withhold under sections 14(1)(i) and 16 those parts of the table of contents for the Darlington level 3 PRA that identify the specific "release category" numbers and "plant damage state" numbers. In addition, I am satisfied that OPG did not exercise its discretion in bad faith or for an improper purpose with respect to this information and did not consider irrelevant factors.

[101] In short, I find that OPG exercised its discretion to withhold this limited and specific information and did so in an appropriate manner. As a result, I uphold its exercise of discretion with respect to this particular information.

**ORDER:**

1. I order OPG to disclose the table of contents of the Darlington level 3 PRA to the appellant, except for the following parts, which are exempt from disclosure under sections 14(1)(i) and 16 of the *Act*:
  - a. the specific "release category" (RC) numbers identified in the subheadings under chapters 5.0 and 6.0 (subheadings 5.1.2.1, 5.1.2.2, 5.1.2.3, 5.1.2.4, 6.2 and 6.3); and
  - b. the specific "plant damage state" (PDS) numbers identified in the subheadings under chapter 5.0 (subheadings 5.1.3.1 and 5.1.3.2).

2. I am providing OPG with a severed copy of the record and have highlighted in yellow those parts to be withheld from the appellant.
3. I order OPG to disclose a severed version of the record to the appellant by **August 30, 2018.**

Original Signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

July 31, 2018 \_\_\_\_\_