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

RECONSIDERATION ORDER PO-2098-R

Appeal PA-990381-1

Final Order PO-2072-F

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This order sets out my decision on the reconsideration of certain identified portions of Final Order PO-2072-F, issued November 22, 2002.

BACKGROUND AND NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Ontario Hydro (Hydro) for access to "[a]ll documents from Jan. 1, 1995 to present on the use of plutonium/MOX as fuel at Ontario Hydro". Hydro identified a number of responsive records and provided the appellant with access to some of them. The appellant appealed Hydro's decision to deny access to the remaining records. After conducting an inquiry, which involved the appellant, Hydro, and a number of affected parties including Atomic Energy of Canada Limited (AECL), I issued a series of orders disposing of all of the issues raised in the appeal [See Interim Order PO-1927-I (Order #1), Interim Order PO-2014-I (Order #2) and Final Order PO-2072-F (Order #3)].

In Provision 1 of Order #3, I ordered Hydro to disclose a number of records. Prior to the compliance date for Provision 1, I received a letter from AECL, asking me to reconsider my decision as it applied to one specific record, Record 164. In response, I issued a stay of Provision 1 as it related to Record 164, pending the outcome of the reconsideration process. Hydro disclosed all other records covered by Provision 1 of Order #3 to the appellant.

AECL bases its reconsideration request on not having been given an opportunity to make representations with respect to the application of section 23 of the *Act* to Record 164. The reconsideration letter includes ACEL's position on how its request fits within the grounds for reconsideration set out in Section 18.01 of this office's *Code of Procedure* (the *Code*). The letter also includes representations on section 23, specifically whether there is a compelling interest in disclosing the relevant portions of Record 164 that clearly outweighs the purpose of the sections 15 and/or 17 exemption claims found to apply to this record in Order #1 and Order #2.

I invited the appellant and Hydro to make representations on whether AECL's reconsideration request fits within the grounds set out in section 18.01 of the *Code*. I also asked these two parties to provide representations on the application of section 23 to the portions of Record 164 ordered disclosed in Order #3, should I decide to reconsider my order as it relates to this record. I provided the appellant and Hydro with a copy of AECL's reconsideration request and representations on these issues.

Neither the appellant nor Hydro submitted representations in response.

SHOULD THE ORDER BE RECONSIDERED?

Introduction

The reconsideration procedures for this office are set out in section 18 of the *Code*. In particular, section 18.01 of the *Code* states:

> 18.01 The IPC [Information and Privacy Commissioner] may reconsider an order or other decision where it is established that there is:

(a) a fundamental defect in the adjudication process;

(b) some other jurisdictional defect in the decision; or

(c) a clerical error, accidental error or omission or other similar error in the decision.

AECL's representations

As AECL points out in its representations, I found that Record 164 qualifies for exemption under section 15(b) in Order #1 and under section 17(1)(a) in Order #2.

In its representations in response to the Supplementary Notice of Inquiry leading to Order #2, AECL stated that it had not been provided with a copy of Record 164, and its representations on the application of section 17 in that inquiry did not make reference to this record.

In its reconsideration request, AECL provides the following summary about how it approached its response to the Supplementary Notice of Inquiry leading to Order #3:

> On June 28, 2002, AECL submitted its representations in response to the Supplementary Notice of Inquiry … on the application of Section 23, but did not make representations in relation to record 164, which had not been provided to it earlier. The Assistant Commissioner then issued [Order #3]. Applying the Assistant Commissioner's earlier finding that record 164 or portions of it contained information for which there was a compelling public interest in disclosure, the Assistant Commissioner went on to find (at page 25) that portions of record 164 presented a sufficient public interest in non-disclosure to bring the public interest in disclosure of the information below the threshold of "compelling". Here again, no submissions had been made by AECL with respect to the application of Section 23 to record 164.
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> As AECL has not been given an opportunity to make representations with respect to the application of Section 23 to record 164, it is submitted that the Assistant Commissioner can properly reconsider [Order #3] in relation to that record pursuant to Section 18.01(a). …

I accept AECL's position. Although ACEL made submissions regarding Record 164 in its original correspondence to Hydro, which I referred to in Order #2, AECL did not provide me with any representations relating to this record at any point during the series of inquiries that took place at the appeal stage. In addition, AECL made me aware that it had not received a copy of Record 164 and that it requested an opportunity to provide further representations with respect to this record prior to any order disclosing its content.

The usual practice of this office during an appeal is to refer an affected party to the institution in order to obtain copies of any relevant records. I followed that practice in this appeal, referring AECL and other affected parties to Hydro in order to obtain information regarding the various records. That being said, I find that my decision not to satisfy myself that AECL had a copy of

Record 164 and was given an opportunity to provide representations on the application of section 23 prior to ordering partial disclosure of this record in Order #3, particularly when I had notice from AECL regarding its interest in providing representations on this record, represents a fundamental defect in the adjudication process as it relates to Record 164. Accordingly, I find that the requirements of section 18.01(a) of the *Code* have been established, and I will proceed to reconsider the portions of Record 164 covered by Provision 1 of Order #3.

PUBLIC INTEREST

In Order #1, I found that Record 164 qualifies for exemption under section 15(b), and in Order #2 I found that it also qualifies for exemption under section 17(1)(a). Both of these exemptions are subject to the public interest override in section 23 of the *Act*.

In Order #1, I also found that there was a compelling public interest in disclosing Record 164, and I confirmed this finding in Order #2. In Order #3, I considered the two remaining aspects of section 23:

1. whether any public interest in non-disclosure of any portions of Record 164 brings the public interest in disclosure below the threshold of "compelling"; and, if not

2. whether the compelling public interest in disclosure clearly outweighs the purpose of the sections the 15(b) and 17(1)(a) exemptions.

In my analysis of the first aspect, I divided the content of Record 164 into two categories of information. For Category I, I found that the public interest in non-disclosure brought the public interest in disclosure below the threshold of "compelling", and ordered that this information not be disclosed; and for Category II, I reached the opposite conclusion. The relevant portions of Order #3 read as follows:

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

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

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

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

…

Category II

On the other hand, where the information relating to nuclear safety issues is in the nature of a more general policy discussion or analysis, including clearly hypothetical examples, I have concluded that the security-related concerns are less significant and that the public interest in non-disclosure of this type of information is not sufficient to reduce the public interest in its disclosure to a level below the threshold of "compelling". Accordingly, I find that the first requirement of section 23 has been established for records or partial records that fit within this category.

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

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

AECL does not dispute my finding as it relates to the portions of Record 164 that fall within Category I.

AECL takes the position that the remaining portions of Record 164 do not properly fall within the scope of Category II because they "do not relate to nuclear safety". AECL submits:

> It is not known by AECL whether, in the view of the Assistant Commissioner, all or portions of record 164 fell within Section 23 as presenting a compelling public interest in disclosure. The [Category I portions] do deal with specific transportation and safety matters. The remaining portions of record 164, however, do not present specific transportation or safety issues or discussions on such issues, but rather describe the strategy by which approval from the U.S. for the Parallex project could be obtained, and what the appropriate study structure to produce an assessment of the feasibility for a Russian CANDU MOX fuel supply program would be (see the first page and last two paragraphs of the record).
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> The third complete paragraph on page 2 of the record … reveals technical considerations and issues as well as a cost estimate for MOX process equipment. This kind of technical and costing information was not accepted by the Assistant Commissioner as raising a compelling public interest in disclosure in [Order #3] and does not relate to the security and transportation matters identified by the Assistant Commissioner in Order #1 and #2 as presenting a compelling interest in disclosure. Given the strong grounds on which Section 17 of the Act would apply to this paragraph, and particularly to the comparative cost estimate in the paragraph, it is submitted that any compelling public interest in disclosure found does not "clearly" outweigh the purpose of Section 17 as applied to this paragraph.
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> [Certain other identified portions of the fourth complete paragraph on page 2 of Record 164] do deal with transportation plans for the movement of the MOX fuel. It is submitted that the discussion in the second, third and fourth sentences of that paragraph reveals information about transportation options eliminated from consideration. Disclosure of this information would be of value to a person attempting to determine possible transportation routes for the fuel with a view to stopping, delaying or sabotaging transportation of the fuel while enroute. As such, AECL submits that this information presents a significant public interest in non-disclosure which brings the public interest in disclosure of the information below the level of "compelling".

I accept AECL's position, in part.

Record 164 is a 2-page e-mail chain. The main body of the message is authored by a representative of an affected party (not AECL) and sent to a member of the MOX study team at AECL and copied to others involved with the project. The ACEL recipient of the message in turn forwarded it to other project team members with the notation "fyi". The subject matter of the e-mail is "Russian MOX Study: DOE Record of Decision".

In Order #3, I found that the second complete paragraph on page 2 of Record 164, which describes a particular scenario under consideration by the project team, fell within the scope of Category I, meaning that the public interest in not disclosing the information in this paragraph was sufficient to bring the public interest in disclosure below the threshold of "compelling" for the purposes of section 23 of the *Act*. The appellant has indicated that he is not seeking "technical information that would be of direct assistance to someone seeking to obtain MOX fuel and use it to harm the Canadian public" and I find that the information in the second paragraph on page 2 fits this description.

Having now had the benefit of AECL's submissions, in my view, the third paragraph on page 2 of this record should be treated in the same manner as the second paragraph. It continues the discussion of the identified scenario from paragraph two, and includes the type of technical information found in other Category I records. Accordingly, I find that the public interest in not disclosing the third complete paragraph on page 2 of Record 164 is sufficient to bring the public interest in disclosing this information below the threshold of "compelling". Therefore, this paragraph does not fall within the scope of section 23 and should not be disclosed to the appellant.

In Order #3, I found that certain identified portions of the fourth paragraph on page 2 of Record 164 fell within the scope of Category I and should not be disclosed, and that the rest of the paragraph did not. The Category I portions describe a specific transportation scenario for the MOX fuel, and I found that the public interest in not disclosing this information was sufficient to bring the public interest in disclosure below the threshold of "compelling" for the same reasons that we applied to the second paragraph. AECL argues that the second, third and fourth sentences of this paragraph should be treated in the same manner.

I disagree. The sentences identified by AECL do not contain any technical information, and consist of general statements regarding approaches to transportation issues. In my view, these sentences do not consist of "detailed technical analyses", nor am I persuaded, based on AECL's representations and the contents of these sentences, that they contain information that would be "of direct assistance to someone seeking to obtain MOX fuel and use it to harm the Canadian public", as required in order to fit within the scope of Category I. I find that the second, third and fourth sentences of the fourth paragraph, which clearly deal with transportation-related issues, should be treated in the same manner as the Category II portions of this paragraph, for the reasons outlined in Order #3.

As far as the rest of Record 164 is concerned, AECL submits that it deals with a discussion of a proposed study structure for assessing the feasibility of the MOX study, drawing on experience

from the prior U.S. study, and does not relate to any specific transportation or safety issues. For that reason, AECL argues that there is no compelling public interest in disclosing these portions of Record 164, and section 23 of the *Act* does not apply.

In Order #1, I determined that Record 164, among others, contained information relating to nuclear safety, and that there was a compelling public interest in disclosing this information. In Order #3, I stated that, "unless I was persuaded that there was a public interest in non-disclosure of this type of information sufficient to bring the public interest in disclosure below the threshold of 'compelling', I would find that there was a compelling public interest in disclosing this type of information". Although AECL has now had an opportunity to review the contents of Record 164, its representations on the remaining portions of this record do not address the public interest in non-disclosure. In the circumstances, I am not persuaded that I should alter my finding that the remaining portions of Record 164 fall within the scope of Category II. Therefore, for the reasons outlined in Order #3, I confirm that the remaining portions of Record 164 satisfy all of the requirements of section 23 and should be disclosed to the appellant.

ORDER:

1. Provision 1 of Order PO-2072-F is revoked as it relates to Record 164.

2. I order Hydro to disclose portions of Record 164 as described in the body of this reconsideration order to the appellant by **February 15, 2003** but not before **February 20, 2003**. I have attached a copy of Record 164 with the copy of this reconsideration order sent to Hydro that highlights in yellow the portions that should be disclosed in compliance with this provision.

3. In order to verify compliance with this order, I reserve the right to require Hydro to provide me with a copy of the record disclosed to the appellant pursuant to Provision 2, upon request.

Original signed by: January 16, 2003
Tom Mitchinson
Assistant Commissioner