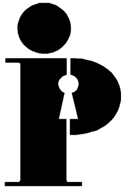

INTERIM ORDER PO-2858-I

Appeal PA08-96

Ontario Power Generation

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NATURE OF THE APPEAL:

Ontario Power Generation (the OPG) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a public interest advocacy group, for access to the following information about three nuclear energy facilities in Ontario:

> 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.

"Source terms" are estimates of the amount and nature of radio-nuclide species released from containment to the environment. 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" (EPRC). 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.

The OPG identified three responsive records and issued a decision denying access to the records pursuant to sections 13 (advice to government), 14(1)(i) (security of a building), 15 (relations with other governments), 16 (national security) and 18 (economic and other interests) of the *Act*.

The records show the source term data for numbered EPRC categories, but do not contain descriptions that explain the meaning of the categories. Descriptions of the EPRC categories, and the nature of the quality or success of containment for each category, are publicly available for the Pickering B nuclear facility and are published on the OPG web site in a report entitled "Pickering B Risk Assessment Summary."

As noted, the request refers to the source term information as being included in a probabilistic risk assessment (PRA). To meet regulatory requirements, nuclear energy facilities submit PRA Reports to the Canadian Nuclear Safety Commission (CNSC), which is the primary regulator of nuclear energy facilities in Canada. PRA reports review pathways and mechanisms that may lead to damage to the core of the reactor, the environment and/or to the public, and they include detailed models and analyses of the mechanics of accident scenarios. Source term data, which is the information at issue in this appeal, appears as a subset of information that is contained in the PRA.

The requester (now the appellant) appealed the OPG's decision to deny access.

During mediation of the appeal, the OPG provided the appellant and this office with an index of records, withdrew its claim that the records were exempt pursuant to sections 13 and 15 and specified that it relied on the exemptions in sections 14(1)(i), 16, 18(1)(a), (c), (d) and (e) of the *Act*.

Also during mediation, the appellant raised the public interest in disclosure of the records and the possible application of section 23 (public interest override). No further mediation was possible and this appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

Subsequently, the OPG wrote to the mediator and advised that it wished to raise two additional issues in this appeal. The OPG stated that it has "acted reasonably within the meaning of section 10(2) of [the *Act*] in refusing to sever the source information from the record the source information is contained within." It also raised an issue about the jurisdiction of this office to proceed with the appeal in light of the conclusion reached by the CNSC on April 11, 2008 concerning the disclosure of the PRA for the Pickering B nuclear facility, a "security matter" which it argues is exclusively within the CNSC's jurisdiction.

I began my inquiry by sending a Notice of Inquiry to the OPG inviting it to submit representations on the facts and issues set out in the notice. I received representations with appendices and an affidavit from the OPG, sworn by the Manager, Nuclear Safety and Technology Department of the OPG (the Manager, NST).

I then sent a Notice of Inquiry to the appellant inviting it to submit representations in response to the representations and the affidavit of the OPG, and to comment on the facts and issues set out in the notice. Complete copies of the representations, appendices and affidavit provided by the OPG were sent to the appellant with the Notice of Inquiry. I received representations and an affidavit from the appellant in response.

I decided that the OPG should have an opportunity to comment on the issues raised in the appellant's representations. Consequently, I sent a complete copy of the appellant's representations and the affidavit to the OPG and invited it to submit reply representations. I subsequently received the OPG's reply representations.

RECORDS:

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:

REQUESTED INFORMATION/SEVERANCE UNDER SECTION 10(2)

As noted above, following mediation, the OPG wrote to this office and asked that the following issue be added:

> Whether the OPG has acted "reasonably" within the meaning of ss. 10(2) of FIPPA in refusing to sever the source information from the record the source information is contained within. Previous orders of the Commission and the Divisional Court have consistently held that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless",

> "meaningless" or "misleading" information. See Order PO-2033-I (August 9, 2002), Orders PO-1663 (March 30, 1999), PO-1735 (November 30, 1999) and MO-2139 (December 22, 2006), Order PO-2612 (September 20, 2007) and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

In its representations, the OPG addressed this issue as follows:

> The OPG exercised its discretion in refusing to sever the source information from the record the source information was contained within. It determined that the source information was meaningless outside of the background information contained within the probabilistic risk assessment which includes plan operating assumptions, credited mitigating system functions and failure modes. This contextual information in OPG's view would if released with the source information, pose a threat to the security of the nuclear facilities.

The OPG goes on to argue, in a different part of its representations, that the requested information is "misleading if released without its context." The affidavit accompanying its representations expands on this, stating that "source term data would predict radiological consequences that would be at variance with OPG's estimates of such impacts, and lead to misleading allegations that our facilities are 'unsafe.'"

The OPG also explains in its representations that the source term data relating to Pickering B derives from the PRA presented to the CNSC in relation to that facility, and that the PRAs for Pickering A and Darlington "have as yet not been finalized." It is therefore possible, but not entirely clear, that the source terms for Pickering A and Darlington will form part of the PRAs for those facilities.

For his part, the appellant states that his request is "narrow and specific," "severance is not relevant in this case" and the information requested "is quite meaningful in itself for a variety of purposes."

Section 10(2) states:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Section 10(2) only applies in those circumstances where a requester seeks access to a record and the institution claims that portions are exempt. It creates an obligation on an institution to disclose information that can reasonably be severed *without disclosing the information that falls under one of the exemptions*. In this regard, I note that all of the decisions cited by the OPG

relate to whether it is possible to disclose *non-exempt* information. They do not relate to the question of whether only part of a record, in this case the source term data, should be considered as responsive to a request.

In that regard, I also note that section 10(1) of the *Act*, which creates the right of access, expressly refers to the right of access to *part of a record*:

> Every person has a right of access to a record *or 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; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. [Emphasis added.]

In this case, the requested information may derive from, or be part of, a PRA. That does not, in my view, bring section 10(2) into play. It is common for requesters to ask for information found in a portion of a record, as contemplated under section 10(1), and institutions routinely decide that other parts of such a record are non-responsive. The responsive portion may then be disclosed or it may be withheld under an applicable exemption under the *Act*, and severance under section 10(2) comes into play at that point.

In my view, as is made clear by section 10(1), section 10(2) does not preclude disclosure of a discrete portion of a record that may be responsive unless that portion of the record contains information that is subject to an exemption, or the request is frivolous or vexatious.

In this case, it is clear that the appellant requested *only* the source term data, which is the subject of the three tables the OPG has identified as responsive. The appellant has not argued that additional information in the PRA is responsive.

To be clear, the question of whether the PRA (or PRA's) from which the requested information may be derived should be disclosed is not before me in this appeal. The issues I must determine in this appeal are whether the information to which the appellant seeks access, i.e. the source term data for the three facilities, is subject to the doctrine of issue estoppel, and if not, whether it is exempt from disclosure under the *Act*.

The OPG's request to have the issue of severance considered in the adjudication of this appeal, and its representations on this issue, also suggest that the source term data in the records would require additional explanations if disclosed, and are misleading, meaningless or worthless on their own, or alternatively, "disconnected snippets." Although this analysis normally arises in the context of section 10(2) and the proper application of severance to non-exempt information, which I have already found not to be engaged in determining that information is *responsive*, I will nevertheless consider these arguments.

For the reasons that follow, I disagree with the OPG's position that the records are misleading, meaningless, worthless or "disconnected snippets" for the purposes of its severance argument. An examination of the records makes it clear that they set out very detailed technical information about the release of various substances in the event of different categories of accidents or malfunctions occurring. It is evident that, as confirmed in the affidavit provided by the OPG with its representations, the source terms were "developed by experts retained by the OPG at considerable expense…."

Regardless of whether the OPG would consider it necessary to provide additional explanations of the information if it were disclosed, it is clear that it has meaning. It is inaccurate to describe this type of information as "misleading", "meaningless," "worthless" or "disconnected snippets." In that regard, I note that in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71, [1997] O.J.No.1465 (Div. Ct.), referred to by the OPG, the Court quashed an order to disclose information under section 10 (2) that had been found not to be exempt. It described the non-exempt information that had been ordered disclosed:

> Little is left of a letter or memorandum other [than] the letterhead, date, salutation and concluding paragraph. …
>
> In my view, the Commissioner has ignored the word "reasonable" and taken a literal and mechanical word-by-word approach.

This can hardly be said of the records at issue here, which consist of comprehensive and complete tables of data tabulated, as the OPG submits, by experts.

In addition, commentary by the Federal Court, also cited by the Divisional Court in the *Ministry of Finance* case which I have quoted from, above, provides helpful guidance. In *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 at 558, the Federal Court stated as follows in interpreting the analogous provision in the federal *Access to Information Act*, found at section 25 of that statute:

> One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby *disconnected phrases* which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. … *[T]he resulting document may be meaningless or misleading* as the information it contains is taken totally out of context. [Emphases added.]

The Divisional Court judgement in *Ministry of Finance* also cites *Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs)* (1988), 51 D.L.R. (4th) 306 at 320 (F.C.), in which the Court again referred to the analogous provision of the federal statute:

> To attempt to comply with s. 25 would result in the release of a entirely blacked out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the department is not proportionate to the quality of access it would provide.

The responsive information in the appeal before me cannot be described as "disconnected phrases" that are "picked out of otherwise exempt material." Nor does it consist of a blacked out record or records showing only two or three lines. As I have already stated, the responsive records in this case have meaning. They were prepared by experts. As the reasons of the Divisional and Federal Courts in the cases just cited make clear, the records before me in this appeal cannot accurately be described as "meaningless", "worthless" or "disconnected snippets."

I also conclude that the records are not "misleading" in the sense intended by the discussion in the authorities just cited, despite the OPG's assertion that they require further explanation. These are comprehensive tables prepared by experts retained by the OPG at considerable expense. Upholding the OPG's claim that they should not be considered as a legitimate, responsive portion of a record and withholding them from disclosure because the OPG argues that they are "misleading," in the absence of a finding that an exemption applies, would be a misreading of the *Act*, and in particular, would fail to give effect to the right of access to non-exempt information that is clearly set out in section 10(1), reproduced above. This point is further underscored by the fact that section 10(1) clearly confers a right of access to *part of* a record, as I have already discussed.

For all these reasons, I do not accept the OPG's arguments in relation to section 10(2) or severance. The information at issue in this appeal consists of the source term data, as set out in the records that the OPG has identified as responsive and provided to this office. This information is the legitimate subject of a request.

Before leaving this discussion, it is important to reiterate, for the purposes of the analysis that follows, that the remainder of the information in the PRA is not before me in this appeal, nor are any "additional explanations" the OPG may consider necessary if the records at issue are disclosed. None of that information is responsive to the request.

This point is important for the purposes of the analysis that follows because much of the OPG's argument is predicated on the idea that the disclosure of the information contained in the PRA, or other information or explanations that it may wish to provide if the source term data is to be disclosed, would be exempt under the *Act*. I will not be considering the impact of disclosure of the PRA or any other information here – the only determination I must make under the *Act* is whether the source term information is exempt.

As well, much of the OPG's argument regarding the application of the doctrine of issue estoppel turns on the findings that the CNSC made about the disclosure of the PRA in the licensing hearing. Before I turn to these arguments, it is worth reiterating here that the issue of the

disclosure of the PRA is not before me in this appeal because the appellant is only seeking access to source term data relating to three nuclear power plants.

JURISDICTION/ISSUE ESTOPPEL

The OPG claims that the doctrine of issue estoppel, which prevents the re-litigation of an issue that a court or tribunal has decided in a previous proceeding, applies in the circumstances of this appeal. It also argues that this office has the jurisdiction to dismiss an appeal pursuant to section 52(1) of the *Act*.

The essence of the OPG's argument is that the CNSC previously considered the same question in an inquiry involving the same parties and the same record in its licence renewal hearing for Pickering B. It refers to *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, where Justice Binnie set out the three conditions for the application of the doctrine of issue estoppel. The conditions are:

(1) that the same question has been decided,

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

The OPG elaborates:

> The CNSC's legislative mandate in such a hearing was to ensure that the application for licence renewal can be carried out by OPG with adequate protection for the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.

As part of the CNSC process, the appellant, an intervenor at the hearing, wrote to the CNSC asking the OPG to release the PRA relating to Pickering B on the basis that it was "essential for the development of its intervention for day two of the Pickering B licence renewal hearing" and "for assessing the safety case for Pickering B relicensing." The CNSC sought submissions from all parties on the release of the PRA and rendered its decision. Its decision on this point stated as follows:

> The Commission is of the view that disclosure of this information may be prejudicial to the security interests of Canadians. It 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 licence renewal hearing as there is already comprehensive and relevant information available to interested parties. The Commission concluded that it is not necessary to require Ontario

> Power Generation (OPG) to produce such documents for the due exercise of its duties in accordance with the Nuclear Safety and Control Act and the Rules of Procedure. The decision of the Commission on this ruling request will be entered into the record as part of the opening remarks at Hearing Day 2 on May 14, 2008.

As previously noted, the OPG states that the source term information requested by the appellant in this appeal formed part of the PRA for Pickering B, which the CNSC decided the OPG did not have to disclose to the appellant.

The OPG submits that I have before me the same parties (the OPG and the appellant) and the same questions (national security, public safety, environmental protection and the ability of an intervener to meaningfully understand and address these issues in public) and a final decision of the CNSC. It refers to the decision of the Ontario Court of Appeal in *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 at 703 as authority for the proposition that even if the question being put to this office is characterized differently (under the guise of public interest in transparency and disclosure), this characterization does not mean that a different question is being asked. The OPG submits that, based on the foregoing, all three criteria for the application of issue estoppel set out in the *Danyluk* decision (cited above) have been met in this appeal.

The appellant disputes the OPG's claim that the criteria for the application of the doctrine of issue estoppel have been met in the circumstances of this appeal. It argues that the records it has requested are not the same as those dealt with in the CNSC hearing. The appellant points out that the record dealt with there was the PRA for the Pickering B facility, which is a lengthy document of some 48 volumes and seven appendices of which the source term data is only a small part. It explains that the PRA reviews the pathways and mechanisms that may lead to damage to the core of the reactor, the environment and/or to the public and it includes detailed models of accident scenarios. However, the source term data merely provides information about the consequences of an escape from containment. Additionally, it states that the question before the CNSC was whether the PRA should be released for the CNSC hearing and the question before me is whether the source term data for the Pickering A, Pickering B and Darlington Nuclear Generating stations should be disclosed under the *Act*. It further argues that the information requested is different in terms of its scope, detail, extent, coverage and may have different implications for security and national/provincial interests. The appellant notes that the CNSC was also not considering issues relating to the "value of freedom of information."

The appellant distinguishes Orders P-1392 and MO-1907 referred to by the OPG on the basis that the previous decisions referred to by the adjudicators in those orders were decisions of this office and not decisions of other administrative bodies. It also argues that those orders found that the doctrine of issue estoppel does not apply under the *Act* in the same way that it applies to cases before the courts because this office has the statutory discretion under section 52(1) to proceed with or dismiss an appeal.

In reply, the OPG submits that the questions that have already been decided by the CNSC which the appellant raises again in this appeal are:

1) Does the disclosure of the requested information and any background information necessary to add meaningful context to the requested information compromise the security interests of Canadians?

2) Does the disclosure of the information potentially advance the understanding of the safety risk surrounding the operation of the nuclear facility?

It states:

> The appellant should not have the opportunity to obtain different answers to these questions from the present tribunal, simply because the answers may support a broader or different public policy objective. If that were the case, *issue estoppel* would rarely, if ever apply, since most tribunal and court proceedings should and in practice, do, have distinct public policy objectives. … The Supreme Court reasons in [*Danyluk*] are prefaced on the doctrine of issue estoppel being applicable to different tribunals and courts with different public policy objectives.

As I have already noted, the OPG also submits that this office may dismiss an appeal pursuant to s. 52(1) without conducting an inquiry in circumstances where the appeal involves the same parties, issues and records previously considered. In that regard, the OPG refers to Orders P-1392 and MO-1907.

Section 52(1) states:

> The Commissioner may conduct an inquiry to review the head's decision if,
>
> > (a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or
> >
> > (b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.

In Order P-1392, Adjudicator Anita Fineberg concluded that "the doctrine of issue estoppel does not apply to requests or appeals under the *Act*," but she decided that this office could decline to conduct an inquiry under section 52(1) "… if the appeal involves the same parties, issues and records which had previously been considered."

After Order P-1392 was issued, several judgments clarified that issue estoppel could apply to administrative proceedings, and these decisions (*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267, 112 D.L.R. (4th) 683 (Ont. C.A.) and *Minott v. O'Shanter Development Co.*, (1999), 42 O.R. (3d) 321 (C.A.)) are mentioned in Orders PO-1676 and MO-1907. Neither of

those orders reaches a definitive conclusion about whether issue estoppel applies to appeals under the *Act*.

In Order MO-1907, referred to by the OPG, Adjudicator Sherry Liang excluded records from the scope of an appeal on the basis that the same records had been the subject of a previous appeal involving the same parties. She stated:

> This appeal and Appeal No. MA-010272-2 involve the same institution (the Board) and the same appellant. Orders MO-1574-F and 1595-R, issued in the context of Appeal No. MA-010272-2, decided the issue of the appellant's entitlement to have access to a number of records, approximately 80 of which are also before me. Whether as a matter of issue estoppel, or the application of section 41(1) (the equivalent to section 52(1) of the provincial *Act)*, I find that the policy of judicial finality would be undermined if I were to review the issue of access to these 80 records once again. These records are therefore excluded from the scope of this appeal.

In Order MO-1907, Adjudicator Liang quotes the following passage from *Minott* (cited above):

> Issue estoppel has pervasive application and extends not just to decisions made by courts but, as this court's judgment in *Rasanen* affirms, also to decisions made by administrative tribunals. Whether the previous proceeding was before a court or an administrative tribunal, the requirements for the application of issue estoppel are the same.

In my view, therefore, issue estoppel would provide a proper basis for concluding that an appeal under the *Act* ought not to proceed in respect of all or part of a requested record if the criteria in *Danyluk* are satisfied. The OPG's argument under section 52(1) is made on exactly the same basis as its issue estoppel argument, and therefore, the question is whether the three conditions enunciated by Justice Binnie have been met in this case. To reiterate, the three conditions are:

(1) that the same question has been decided,

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

For the reasons that follow, I am not satisfied that the first condition has been met, and for this reason, I conclude that the doctrine of issue estoppel does not apply.

In my view, the CNSC did not decide "the same question" as the one before me in this appeal. Rather, it decided whether, in the context of the hearing before it, the appellant should have access to the full PRA for the Pickering B case in order to be able to effectively intervene in the

hearing. Although the source term data for Pickering B formed a very small part of the full PRA report, the CNSC did not consider the question of whether the Pickering B source terms, as a stand alone document, should be disclosed. As regards Pickering B, that is the issue before me, not the disclosure of the full PRA report. I also note that the source term data for the Pickering A and Darlington facilities were not considered by the CNSC, as its proceeding only concerned Pickering B.

In my view, this simple analysis of the facts is a sufficient basis for me to reject the OPG's issue estoppel argument, because the case did not decide the same question as the one before me.

However, there are further reasons for doing so. As outlined above in my discussion of the issue of severance and section 10(2), the OPG itself has made extensive arguments to support its view that the source term data, by itself, does not convey meaningful information, whereas the full PRA, a much larger document, is of significant value.

While I have found, above, that the source term data, on their own, were prepared by experts and do have meaning, I also conclude that the OPG's own representations concede that the source term data, on their own, are a very different record than the full PRA report. In my view, it is simply not sustainable to suggest that the disclosure of the full PRA report, even if the CNSC had in fact considered it for all three facilities at issue before me (which it has not), is the same question as disclosure of the three tables of source term data, on their own, which is the issue before me. Accordingly, I conclude that there is a material difference in nature and scope between the information that was at issue before the CNSC and the information that is at issue in this appeal.

In addition, the issue before the CNSC related to the licensing of the Pickering B station and the question of whether the disclosure was essential for the participation of the appellant at the licensing hearing. The issue before me in this appeal is whether the source term information should be disclosed in the context of freedom of information legislation.

For all of these reasons, I find that the question before the CNSC was materially different from the questions that are before me in this appeal and, therefore, the first precondition for the application of the doctrine of issue estoppel has not been met. As all three preconditions must be met, there is no need for me to consider the others. Accordingly, I find that the doctrine of issue estoppel does not apply and the appellant is not precluded from proceeding with this request and appeal. For the same reasons, I am not persuaded that I should exercise my discretion under section 52(1) by refusing to conduct an inquiry.

REPRESENTATIONS OF THE PARTIES/EVIDENCE

The OPG claims that the source term data for the three nuclear stations are exempt pursuant to sections 14(1)(i), 16 and 18(1)(a), (c), (d) and (e) of the *Act*. These sections 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;

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.

18(1) A head may refuse to disclose a record that contains,

> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

The importance of protecting nuclear power facilities from threats of terrorism or sabotage was recognized by this office in Order PO-2500. In that order, I applied section 16 to withhold detailed information about the Bruce Nuclear Power Plant. The importance of national security issues of this nature is underscored by the fact that, while section 16 is a discretionary exemption, it includes the unusual proviso that an institution shall not disclose information that is subject to the exemption "without the prior approval of the Executive Council."

As I have already noted, the OPG's representations focus on the idea that the disclosure of the information contained in the PRA, or other information or explanations that it may wish to provide if the source term data is to be disclosed, would be exempt under the *Act*, but that information is not before me in this appeal. Only the source term information is at issue.

On the other side of the equation, the appellant disputes the applicability of the exemptions, and also argues that there is a public interest in disclosure of information that would advance public knowledge concerning the safety of nuclear power facilities, an interest previously recognized by this office in Order P-1190.

The representations of the OPG state that, on the one hand, disclosure of the source term data would endanger the safety of the nuclear power facilities dealt with in the records, but at the same time, the OPG also submits that the information in the records is meaningless on its own. I have found in the severance discussion, above, that the data is comprehensive and has meaning, in the sense that it is not a "disconnected snippet," or misleading, in the context of deciding that it is the legitimate subject of an access request. Nevertherless, that does not erase the impact of these submissions in relation to the question of whether the information is exempt. In that context, I am troubled by this apparent contradiction in the OPG's submissions.

This appeal raises significant issues of public safety. Having reviewed the representations of both parties, and the affidavit provided by the OPG, I have decided to order the OPG to provide further affidavit evidence pertaining to the information I have found to be at issue. Before concluding this discussion, I will set out the portions of the representations that have resulted in this decision.

In the affidavit that accompanied the OPG's representations, the Manager, NST states as follows:

> A knowledge of radionuclide release (as a function of time) could be used to target equipment and structures in a manner that would lead to rapid and large radiological impact to the environment and the public. The source term data (in terms of radiological release as a function of time) could be used to both plan attacks to maximize impact against the public and to stymie off-site measures to mitigate the impact.

But in its opening "Summary of OPG's Position," the OPG states:

> The source term data for any of the requested nuclear facilities are, on its own, meaningless, and can only be accurately explained by reference to the full package of information in the PRA.
>
> …
>
> … [D]isclosure of the information would, on its own, be misleading and *if explained*, make the nuclear reactors at Pickering and Darlington more attractive targets for attack. The source term data are estimates of release of radio-nuclide species from containment to the environment as a function of time. The information would enable an attack of the reactors and the buildings in which they are housed, as well as the components and systems designed to protect them, with greater rapidity and with a larger scale impact than without this information.

> Furthermore disclosure of the information would stymie off-site measures to mitigate such impact. [Emphasis added.]

As noted in the emphasis I have added, this submission is predicated on the need to provide further information if the source term data are disclosed.

In his affidavit, the Manager, NST explains the consequence of an order requiring the disclosure of what he states is "meaningless" information:

> Used on its own, without the detailed information regarding the event sequences and related technical details of station operation, source term data could be used to predict radiological consequences that would be at variance with OPG's estimates of such impacts, and lead to misleading allegations that our facilities are "unsafe." This would require OPG to respond publicly. In addition to the time and effort OPG would need to repudiate such misleading allegations, and to the damage to the corporate reputation of OPG, OPG would be required to release further information regarding the event sequences, thereby revealing further information that would be of value to those interested in causing damage to the nuclear facilities and/or panic in the community, the nation and/or globally.

The Manager, NST also explains in his affidavit that even the inclusion of EPRC categories, which, as I have explained, are included in the records at issue, does not make the source term data meaningful:

> Source term data does not become more meaningful by being assigned to a specific Ex Plant Release Category (EPRC). EPRC refers to various event sequences which can result in the release of radionuclides from the containment envelope to the environment with a potential impact on the public. *For the source term data, combined with the EPRC information to have any meaning, more detailed information around a particular event sequence would need to be included.* This would identify plant operating assumptions, credited mitigating system functions and failure modes. This more complete package of information is what the CNSC, in its decision of April 2008, declined to order released because its disclosure may prejudice the security of Canadians. [Emphasis added.]

In the context of its argument regarding the possible application of section 23, the OPG repeats its claim that the source term information is meaningless:

> There is no public interest in the disclosure of meaningless information which becomes misleading if released without context and is misinterpreted and only becomes meaningful by additional explanation which a competent statutory authority has previously held to be unnecessary to the determination of matters of public safety and the protection of the environment.

The appellant submitted representations in response to those of the OPG in which it argues that the OPG's claim to the exemption should not be upheld. With respect to the OPG's claim that the information requested by the appellant is meaningless, the appellant states that the source term data provides information only about the consequences of a leak from the nuclear power plant. He disputes that the information is "meaningless" and states that using the information, a member of the public could commission modelling that would calculate the consequences of different types of nuclear accidents, and this could help inform the public understanding of the environmental and societal hazards posed by OPG's nuclear stations.

The appellant interprets the OPG's argument that the source term data is meaningless as implying that the appellant and the public will be unable to utilize the information in a meaningful context, an implication that the appellant disputes. For example, in its supporting affidavit, the appellant's representative states:

> As a result of my experience, I am capable of understanding the requested information and can consider the source term data in context. In addition, I have access to experts, and a great deal of knowledge and prior information in my own right, which enables the requested information to be put into context for the purposes of participation in public debates and proceedings.
>
> …
>
> The statement "Disclosure of the information would, on its own, be misleading" (OPG Representations, page 12) assumes that members of the public or public interest organizations are unable to commission expert advice to produce reliable analysis. This information could be contextualized by a discussion of the known uncertainties. Public disclosure of information also permits public discussion of how the information should be interpreted.

The appellant also states that the OPG's representations focus primarily on the harm that will result from the disclosure of the PRA and states, quite correctly, that the PRA's are not at issue in this appeal. The appellant also disputes that the source term information can be equated to the safety information referred to in the full PRA, which includes information characterized as "details of the strengths and weaknesses of processes, structure and protection systems designed to contain, control or secure material."

In its reply representations, the OPG focuses on the impact of the disclosure of the full PRA and not on the information that is at issue in this appeal. For example, it states that the appellant's assurances that the source term data is devoid of detail on how an accident will occur presumes that the risk profile which it is attempting to establish does not require any reference to the specific plan operating assumptions, credited mitigating system functions, failure modes and event sequences contained in the PRA. The OPG states that this background information must be referenced and that:

> The public's interest is not therefore, in disclosing, but withholding, the requested information. On its own, the information is unhelpful. When accompanied by the requisite contextual information in the [PRA], an expert tribunal, empowered by Parliament to review both nuclear facility safety and security, has determined the full information would compromise the security of Canadians and have no material bearing on the nuclear risk profile.

I have found, above, that the information at issue in this appeal is the source term information for the Darlington, Pickering A and Pickering B nuclear stations. I have rejected the OPG's argument that this office has no jurisdiction to proceed with the appeal and that I should refuse to exercise my discretion to proceed with the appeal under section 52(1).

I also noted, above, that this appeal raises significant issues of public safety, which are argued on behalf of both the OPG and the appellant to support each one's position. In view of the significance of the issues raised, and having carefully reviewed the representations, the affidavit evidence, the exhibits and the three records that set out the information at issue, I have decided that I require further information in order to decide this appeal, which I will order the OPG to provide to me by way of a further affidavit.

In particular, I require further information in relation to the OPG's argument that disclosure of the records at issue, as opposed to additional information from the PRA or other explanations that the OPG may wish to provide if the information is disclosed, could reasonably be expected to result in harms protected under sections 16 and 14(1)(i). I also require an explanation as to how the harms would be triggered by information that the OPG also submits is meaningless. The order provision below sets out the questions the OPG is required to answer. Once I receive the affidavit, if I consider it necessary to do so, I will provide the non-confidential portions to the appellant and invite it to reply.

ORDER:

1. I find that the records at issue provided to me by the OPG are properly responsive to the request, and dismiss the OPG's arguments concerning section 10(2) of the *Act* and the severability of the record.

2. I find that this office is not estopped from conducting an inquiry into the appeal in relation to the records at issue and whether they are exempt under the provisions claimed by the OPG, and I decline to exercise my discretion not to conduct an inquiry under section 52(1).

3. I order the OPG to produce a further affidavit from a qualified individual to answer the following questions with specific reference to the records I have found to be at issue, namely the source term data tables it provided to this office as the responsive records in this appeal:

How could the disclosure of the information in the records at issue reasonably be expected to endanger the security of the nuclear facilities, or be injurious to the detection, prevention or suppression of sabotage or terrorism?

In particular, does the following submission apply to the records at issue themselves, not including additional information and/or explanations the OPG may wish to provide if the source term data are disclosed? If so, explain how and why this is the case.

> "A knowledge of radionuclide release (as a function of time) could be used to target equipment and structures in a manner that would lead to rapid and large radiological impact to the environment and the public. The source term data (in terms of radiological release as a function of time) could be used to both plan attacks to maximize impact against the public and to stymie off-site measures to mitigate the impact."

How can this submission be reconciled with your previous submission to the effect that the information in the records is meaningless?

4. I order the OPG to produce this affidavit to me on or before **January 15, 2010.** If the affidavit contains confidential information in accordance with Practice Direction 7 issued by this office, the OPG is further required to identify this information and explain why it falls within the description of confidential information in that Practice Direction.

Original Signed By: December 22, 2009

John Higgins
Senior Adjudicator