

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-3844

Appeal PA14-543

Ministry of Energy

May 18, 2018

**Summary:** The ministry received a request under the *Act* for access to records relating to technical recommendations it provided related to the scientific basis of the ministry's Provincial Nuclear Emergency Response Plan. The ministry denied access to the responsive draft reports and draft slide decks on the basis of a number of exemptions, including section 12(1) (Cabinet records). In this decision, the adjudicator finds that the records qualify for exemption under section 12(1).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 11 and 12(1).

**Orders and Investigation Reports Considered:** Orders PO-2320, PO-3199.

### OVERVIEW:

[1] As background, Ministry of Energy (the ministry) staff undertook a project to provide technical recommendations to Emergency Management Ontario (now the Office of the Fire Marshal and Emergency Management (OFMEM)) and Ontario Power Generation (OPG) related to the scientific basis of the Provincial Nuclear Emergency Response Plan (the PNERP).

[2] The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the technical recommendations it provided to OFMEM and OPG related to the scientific basis of the

ministry's PNERP. In its request, the requester, now the appellant, noted that the ministry agreed to undertake "a short project to provide technical recommendations" to OFMEM and OPG on February 11, 2014.

[3] The ministry located 10 responsive records consisting of "draft reports and slide decks related to the review of the scientific basis for [PNERP] planning assumptions." The ministry denied access to the records in full under section 12 (Cabinet records) of the *Act*, and also cited section 5.1(3) (confidentiality of third party information) of the *Emergency Management and Civil Protection Act (EMCPA)*.

[4] The appellant appealed the ministry's decision to this office, and the ministry issued a supplementary decision to the appellant. In its supplementary decision, the ministry stated,

In addition to our initial decision, the [ministry] is applying the exemptions in sections 13(1) (advice to government), 14(1)(i) (law enforcement) and 16 (defence) of the *Act*, to part of the records, in accordance with the attached index.

[5] During mediation, the appellant raised the applicability of sections 11 (obligation to disclose) and 23 (public interest override) as additional issues in this appeal.

[6] Also during mediation, the appellant's representative provided this office with a lengthy document outlining a number of reasons why he believes the exemptions relied on by the ministry do not apply and why the requested records ought to be disclosed.

[7] Mediation did not resolve the issues, and this appeal proceeded to the adjudication stage where an adjudicator conducts an inquiry. I initially sent a Notice of Inquiry to the ministry, along with a complete copy of the material provided to this office by the appellant during the mediation stage of the process.<sup>1</sup> The ministry submitted representations in response. I then provided the appellant with the Notice of Inquiry and a copy of the ministry's non-confidential representations.<sup>2</sup> The appellant also provided representations. I then sought and received reply and sur-reply representations from the ministry and the appellant respectively.

[8] In this order, I find that the records qualify for exemption under section 12(1), and uphold the decision of the ministry.

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<sup>1</sup> The appellant consented to sharing this information with the ministry.

<sup>2</sup> The confidential portions of the ministry's representations, as well as the confidential attached affidavits, were not shared with the appellant.

## **RECORDS:**

[9] The ministry identified ten records responsive to the request. It confirms that Record 1 has been disclosed and is not at issue.

[10] There are nine records remaining at issue, identified as records 2 – 10, which the ministry describes as follows:

Records 2, 3, 4, 5, 6, and 7 are drafts (the Draft Reports) of the final report (the Final Report) prepared by Ministry staff, which summarize the findings and recommendations of the review (the Review) Ministry staff undertook in February 2014 to evaluate the current planning basis assumptions for the PNERP.

Records 8, 9, and 10 are drafts of a slide deck that was prepared by Ministry staff and presented at an April 2, 2014 “in camera” meeting to Ontario's Nuclear Emergency Management Coordinating Committee (NEMCC). These drafts outline the preliminary results of the Review and further steps that were required to be taken in order to complete this Review.

## **DISCUSSION:**

### **Does the mandatory exemption at section 12 apply to the records?**

[11] The ministry takes the position that the mandatory exemption in section 12(1) applies. It refers to the introductory wording of 12(1), as well as sections 12(1)(b) and (c). These sections read:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

***Section 12(1): introductory wording***

[12] The use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).<sup>3</sup>

[13] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.<sup>4</sup>

[14] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.<sup>5</sup>

***Section 12(1)(b): policy options or recommendations***

[15] To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made.<sup>6</sup>

***Section 12(1)(c): background explanations or analyses of problems***

[16] Like section 12(1)(e), this section is prospective in its application. It will apply to exempt background explanations or analyses of problems before decisions are made and implemented, but will not apply to exempt such records after the fact.<sup>7</sup>

***Section 12(2): exceptions to the exemption***

[17] Section 12(2) reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

- (a) the record is more than twenty years old; or

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<sup>3</sup> Orders P-22, P-1570 and PO-2320.

<sup>4</sup> Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

<sup>5</sup> Order PO-2320.

<sup>6</sup> Order PO-2320, PO-2554, PO-2677 and PO-2725.

<sup>7</sup> Orders PO-2554 and PO-2677.

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[18] Section 12(2)(b) does not impose a requirement on the head of an institution to seek the consent of Cabinet to release the relevant record. What the section requires, at a minimum, is that the head turn his or her mind to this issue.<sup>8</sup>

### **The ministry's representations**

[19] The ministry begins by identifying the nature of the records at issue, as set out above. It then confirms its position that records 2-10 are exempt under the introductory wording of section 12(1) as the disclosure of these records would reveal the substance of deliberations of Cabinet that will take place. The ministry also takes the position that records 2 - 7 are exempt under sections 12(1)(b) and 12(1)(c).

[20] The ministry submits that disclosure of records 2-7 (the draft reports) would reveal the substance of deliberations because "they contain similar or identical analyses, findings, and recommendations on how to revise the PNERP's current planning basis assumptions as those contained in the Final Report."<sup>9</sup> The ministry then provides confidential representations which detail the connection between the information in the draft reports and the Cabinet deliberations. The ministry then states:

... the updated PNERP to be submitted to Cabinet will be modelled on the revised planning basis assumptions that have been developed based on the analyses and recommendations outlined in the Draft Reports ...

Cabinet's deliberations and decision with respect to the updated PNERP will thus also involve deliberations and a decision with respect to the revised planning basis assumptions outlined in the ... Draft Reports. Revealing the analyses, findings and recommendations in the Draft Reports would provide insight into the deliberations of Cabinet and are accordingly protected from disclosure under the introductory wording of section 12(1).

[21] The ministry also submits that records 8-10 are exempt from disclosure under the introductory wording of section 12(1). It states:

These records are drafts of a slide deck summarizing the preliminary results of the Ministry's Review of the current PNERP planning basis assumptions and/or next steps required in order to complete the Review that was presented at an "in camera" meeting of NEMCC on April 2, 2014. The information contained in records 8-10 would reveal the substance of

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<sup>8</sup> Orders P-771, P-1146 and PO-2554.

<sup>9</sup> The ministry provides confidential affidavit material in support of its position.

the deliberations of Cabinet that will take place ... with respect to approval of the updated PNERP.

[22] The ministry then refers to Order PO-2320 in support of its position that in order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.

[23] The ministry then states that "given that records 8-10 provide specific details about ... the Ministry's review ... such information provides a sufficient linkage to the actual substance of Cabinet deliberations."<sup>10</sup>

[24] In support of its position that records 2-7 also qualify for exemption under section 12(1)(b) (policy options or recommendations prepared for submission, or submitted to Cabinet), the ministry states:

The Draft Reports contain recommendations on how the current planning basis assumptions should be revised. The Draft Reports outline the detailed technical and scientific analyses and corresponding results of the planning basis assumptions Review undertaken by the Ministry upon which the recommendations derived from. ...

[25] The ministry also identifies the connection between the Final Report and the Draft Reports, and provides evidence regarding the steps taken by the ministry in dealing with the Final Report. The ministry also provides additional confidential representations in support of its position.

[26] The ministry also takes the position that, in the alternative, records 2-7 contain "background explanations or analyses of problems submitted, or prepared for submission, to Cabinet for their consideration in making decisions, before those decisions are made and implemented," and are thus exempt under section 12(1)(c). The ministry states:

As outlined [above], the Draft Reports detail analyses and reasons upon which the recommendations contained in these reports and the Final Report were developed.

[27] The ministry then provides confidential representations identifying the specific nature of the details and explanations contained in the draft reports.

[28] The ministry's representations also address a number of the arguments made by the appellant during mediation, and shared with the ministry, in support of the appellant's position that the section 12(1) exemption does not apply to these records.

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<sup>10</sup> The ministry also refers to confidential representations and an affidavit in support of its position.

The ministry states:

... the appellant [submits] that the records at issue in this appeal cannot be subject to an exemption under the introductory wording of section 12(1) because no submission has yet been made to Cabinet and would only be made two years after the initial request was made in 2014.

However, previous IPC decisions have consistently held that the timing of when the information was prepared has no bearing on the issue of whether a record qualifies as exempt under the introductory wording of section 12(1).<sup>11</sup> In fact:

... a record that has never been placed before Cabinet or its committees could qualify for exemption under the introductory wording of section 12(1) where disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.<sup>12</sup>

[29] The ministry also addresses the appellant's position that the records at issue cannot be exempt under section 12(1) because the updated PNERP will be submitted to the public for review before it goes to Cabinet. The ministry acknowledges that the updated PNERP will be made available to the public in the future, but states that "... it will only contain a general summary of the revised planning basis assumptions and their rationale. The rationale provided to the public will include a high-level summary of the recommendations made in the Final Report. However, records 2-10 themselves, or the technical/scientific details of the findings of the Review and recommendations made in these records, will not be made available to the public."<sup>13</sup>

### **The appellant's representations**

[30] In its representations made during the mediation stage of the appeal, which were shared with the ministry, the appellant identifies the nature of the information it is seeking and the reasons for making the request. The appellant notes that the records relate to nuclear emergency plans, for which there is a very significant public interest. The appellant identifies that previous planning of this nature involved a transparent information gathering process, that Ontario has stated its commitment to greater transparency, and that the denial of access to the requested records ought not to be upheld. The appellant also addresses the application of the various exemptions.

[31] In its representations in response to the ministry's submissions, the appellant

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<sup>11</sup> The ministry refers to Order PO-2320.

<sup>12</sup> The ministry cites orders PO-2725, P-226, P-293, P-331, P-361 and P-506.

<sup>13</sup> The ministry references the confidential affidavit in support of its position.

begins by noting that based on the lessons learned from other nuclear disasters,<sup>14</sup> transparent decision-making "is essential to ensure that institutions responsible for nuclear emergency planning are truly protecting the public." It then reiterates that the ministry's decision to deny access "undermines public accountability" and shields the decision-making from the public. The appellant then reviews the nature of the information being withheld, the history of the technical reviews of the planning basis for off-site nuclear plans, and the specific concerns it has regarding the current planning process.

[32] Regarding the application of section 12(1), the appellant takes the position that the ministry's application of section 12(1) to "a review of the scientific basis of the emergency plan and the slide deck" is "overly broad and improperly shields the records from public scrutiny." The appellant argues that the ministry has "improperly conflated the scientific analysis performed by ministry staff with the political decision-making that will eventually occur at Cabinet about the planning basis."<sup>15</sup>

[33] The appellant then reviews the introductory wording of the section 12(1) exemption, as well as the wording of section 12(1)(b) and (c) and then states:

The records have not yet been presented to Cabinet. They can be withheld under the introductory wording of subsection 12(1) only if they reveal the actual substance of Cabinet deliberations or permit the drawing of inferences with respect to those deliberations.<sup>16</sup> It is not necessarily determinative if a record is placed before Cabinet.

[34] The appellant then states:

The section 12 exemption is linked to discussions between Ministers with a tradition of collective ministerial responsibility or Cabinet prerogative.<sup>17</sup> It is not the timing of the review and slide deck presentation *per se* that brings it outside the scope of section 12, but that the records are preliminary technical reports prepared for the [OFMEM], OPG, and the Nuclear Emergency Management Coordinating Committee (NEMCC), which includes members of OPG, Bruce Power, Atomic Energy of Canada Limited and municipal staff.<sup>18</sup>

[35] The appellant then refers to what it considers an analogous situation, which it states illustrates the distinction between a technical review and a Cabinet submission. It refers to information that was disclosed in connection with a 1993 Cabinet submission

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<sup>14</sup> The appellant references the Fukushima event throughout its representations.

<sup>15</sup> The appellant also provides affidavit evidence in support of its position.

<sup>16</sup> The appellant references Order PO-2725.

<sup>17</sup> The appellant references Order PO-2707 at p. 13 and Order P-604 at pp. 8-9.

<sup>18</sup> The appellant references the representative's affidavit in support of its position.



as follows:

A comparison of the technical review of the planning basis performed by Provincial Working Group #8 and the corresponding Cabinet Submission of September 30, 1993 clearly illustrates this distinction.

Provincial Working Group #8's report is 157 pages. It explains the assumptions used to calculate maximum doses of radioactivity, the methodology for calculating source terms, the extent of any reliance on Probabilistic Risk Assessment methodology and its limitations, including the necessary reliance on expert judgment when no data is available, public opinion about emergency planning and the level of risk, its reasoning for the recommendation to plan for accidents predicted to occur less than once per million years of accident operation and its probabilities calculations for severe accidents. Throughout the report, the Working Group explains its sources of information and assumptions about the hypothetical accidents being considered and its reasoning for recommending two tiers of emergency planning.<sup>19</sup>

In contrast, the Ministry of the Solicitor General and Correctional Services Cabinet Submission is 17 pages. The Cabinet briefly summarizes Provincial Working Group #8's recommendations but does not attempt to discuss the scientific or technical calculations in the report. Instead, the report is one factor to be considered, along with recommendations of the Ontario Nuclear Safety Review, public opinion and impact, international practice, recent studies of severe accidents and resource requirements. The Cabinet decision-making process is exemplified by its consideration of one policy option before it, namely, to maintain the current PNERP planning basis. The Cabinet considered that no additional measures would be required and Ontario Hydro would not incur any additional expense, but that the province would be rejecting a generally held concern that the existing planning basis is inadequate, anti-nuclear groups would be dissatisfied and public safety would be jeopardized if a severe accident were to occur.<sup>20</sup>

[36] The appellant references the above in support of its position that the ministry was over-broad in its application of section 12 to the records at issue. It then argues the "over-breadth" of the ministry's application of section 12 "is further demonstrated by examining the extent of the documents being withheld" which include two documents attached as appendixes to Record 7, and "which appear to be in the public

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<sup>19</sup> The appellant refers to various portions of the Working Group #8 Report in support of its position.

<sup>20</sup> The appellant refers to excerpts from the Cabinet Submission in support of its position.

domain.”<sup>21</sup>

[37] The appellant then refers to Order PO-3199 and argues that the approach taken in that order should be followed. It states:

... The records [in PO-3199] included permit applications under the *Endangered Species Act*, species-at-risk impact assessment reports with supplementary documentation, memoranda regarding alternatives, preliminary designs and highway designs, and aerial photographs. The Arbitrator found that the Ministry of Transportation and the Ministry of Natural Resources had not put the full 950-page record before Cabinet and had not adequately explained what portions of the report were summarized for the 20-page Cabinet Submission. Section 12 was not applied because the Ministry did not prove that the actual substance of the deliberations of Cabinet would be revealed by the records.

[38] The appellant then addresses the possible application of the exemptions in sections 12(1)(b) and (c), and takes the position that they do not apply to the records. It states that section 12(1)(b) does not apply because “the record contains technical analysis, not political policy options, and the records were submitted and prepared for the OFMEM, OPG and NEMCC.” Regarding section 12(1)(c), the appellant states that “none of these documents were prepared for Cabinet” and that the preliminary reports and slide decks “are too far removed from the eventual Cabinet decision to be covered by this provision.”

[39] The appellant also provides a lengthy affidavit by a representative, which includes numerous attachments. In this affidavit, the representative identifies the general nature of the information contained in the records, the history of Ontario’s planning basis for nuclear emergencies, and various reasons for the request, including the appellant’s concerns regarding the suitability of the emergency plan. The representative also reviews the manner in which related information is made available to the public, and the public interest in the information. Various attachments to the affidavit are provided in support of the representative’s affidavit.

[40] The appellant also provides an affidavit sworn by an identified expert. In this affidavit, the expert reviews the general nature of the information contained in the records, and the importance of having information of this nature available to the public to allow scrutiny of the technical rationale for the planning basis of Ontario’s emergency plan.

### **The ministry’s reply representations**

[41] In response to the appellant’s representations, the ministry refers to its previous

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<sup>21</sup> These two documents are two of the appendixes attached to Record 7.

representations identifying why the records qualify for exemption under section 12(1). It then specifically addresses the appellant's arguments.

[42] Regarding the appellant's reference to the 1993 Cabinet submission and the related report prepared by Working Group #8, the ministry states:

... the Appellant highlights the extent to which a report prepared by Provincial Working Group #8 is summarized in the corresponding September 30, 1993 Cabinet submission seeking approval to expand the technical basis of the provincial nuclear emergency plan that was in place at that time. The Appellant highlights that only the recommendations, and not the technical or scientific calculations, were summarized in the Cabinet submission. Provincial Working Group #8's technical report does not seem to have been appended to the September 30, 1993 Cabinet submission.

However, the IPC has previously supported withholding, in their entirety, records containing technical/scientific information and analyses, in addition to the actual recommendations under s.12(1) where such information would reveal the substance of deliberations of Cabinet or lead one to make inferences about the substance of deliberations. This reasoning has been applied to such information even where it has not been directly placed before Cabinet.<sup>22</sup>

[43] The ministry then distinguishes that situation from the records at issue in this appeal. It states:

... Because the recommendations contained in the Draft Reports are based on the technical analyses contained in the Draft Reports, disclosing the technical analyses could lead one to make inferences about these recommendations and thus the substance of Cabinet's deliberations.

The same reasoning supports the Ministry's decision with respect to records 8-10. Records 8-10 summarize the preliminary results of the Review and/or next steps required in order to complete the Review. At paragraph 13 of its Representations, the Ministry explained how the technical analyses in these records are linked to the information in the Draft Reports and the deliberations of Cabinet with respect to the updated PNERP. Releasing these records would allow one to draw inferences about the substance of deliberations of Cabinet regarding the updated PNERP.

[44] The ministry then argues against the appellant's position that Order PO-3199 should be followed in this appeal, and distinguishes the circumstances in that order. It states:

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<sup>22</sup> The ministry refers to Order PO-2227 in support.

... In PO-3199 the IPC rejected the application of s. 12(1) to expert reports that the respondent claimed were summarized in a Cabinet submission and thus should be withheld entirely. The appellant's argument seems to suggest that the ruling in PO-3199 should be followed because the ministry has failed to demonstrate what parts of records 2-10 will be summarized in the Cabinet submission seeking approval of the updated PNERP. In PO-3199, the adjudicator rejected the application of s. 12(1) because the respondent had not provided evidence to demonstrate how the records were linked to the Cabinet deliberations.<sup>23</sup>

The adjudicator's rationale for rejecting the application of s. 12(1) in PO-3199 cannot be extended to this case. The ministry has provided sufficient evidence that the information in the Draft Reports will ... be submitted to Cabinet as part of the updated PNERP submission.<sup>24</sup> In PO-3199, the adjudicator acknowledged that although not determinative, the fact that a record is actually placed before Cabinet in itself is strong evidence that disclosing the record would reveal the substance of deliberations.<sup>25</sup> The Ministry has also outlined [in its representations] how the records otherwise reveal the substance of deliberations of Cabinet. Unlike in PO-3199, the evidence before the adjudicator sufficiently justifies exempting the Draft Reports from disclosure under s. 12(1).

[45] The ministry also concedes that appendix C and D of the Draft Reports are in the public domain. However, the ministry states that it has "withheld the Draft Reports in their entirety because appendix C and D alone are not directly responsive to the appellant's request." It states that the appellant's request is more specifically for information related to the actual Review itself, and that "appendix C and D alone do not provide any meaningful information about the Review."

[46] The ministry also addresses the appellant's arguments relating to sections 12(1)(b) and 12(1)(c). Addressing the appellant's 12(1)(b) position, it states:

The appellant argues that subsection 12(1)(b) does not apply because the records contain technical analysis and not policy options, and because the records were prepared for OFMEM, OPG and NEMCC, rather than for Cabinet.

... The information contained in the Draft Reports will be submitted to Cabinet ... and thus satisfy the "prepared for submission to Cabinet" requirement of s. 12(1)(b). That OFMEM, OPG, NEMCC were consulted in the process of developing the Draft Reports and Final Report and that the

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<sup>23</sup> The ministry refers to paragraphs 42 - 45 of Order PO-3199.

<sup>24</sup> The ministry refers to its previous representations and supporting affidavit.

<sup>25</sup> The ministry refers to paragraphs 43 of Order PO-3199.

Draft Reports and Final Report were submitted to OFMEM before going to Cabinet does not exclude the Draft Reports from being 'prepared for submission to Cabinet.'

The Draft Reports contain recommendations and supporting analyses .... These recommendations will inform the revised planning basis upon which the updated PNERP will be developed. ...

[47] Regarding the appellant's position on section 12(1)(c), the ministry reiterates its representations set out earlier that the Draft Reports were "prepared for Cabinet" and notes that the appellant has not specifically challenged the ministry's position that the Draft Reports constitute "background explanations or analyses of problems."

[48] Regarding the appellant's position that the records "are too far removed from the eventual Cabinet decision to be covered by section 12," the ministry notes that the PNERP is developed pursuant to section 8 of the *Emergency Management and Civil Protection Act, 1990* ("EMCPA") and is subject to Cabinet approval. The ministry states that it has provided evidence that gives a specific timeline when the matter will be considered by Cabinet, and that the records are not too far removed from the Cabinet decision on the updated PNERP.

[49] In addition, in the confidential portion of its representations, the ministry updates some of the information it referenced in its earlier representations,<sup>26</sup> and clarifies other information. However, the ministry states that these updates do not impact the application of section 12 to the records.

### **The appellant's sur-reply representations**

[50] The appellant provides sur-reply representations as well as further affidavit evidence.

[51] The appellant argues that the records are "too far removed from any future Cabinet deliberation," both in time and in substance, to be covered by section 12. It argues that the records were created during the early stages of a much larger, ongoing consultation process being conducted by MCSCS staff, and that the content of the records will not reveal what Cabinet might ultimately discuss at a future time when the consultation process is complete. It argues that section 12(1) "cannot be stretched so far as to include any document created at any time in a government decision-making process."

[52] The appellant also argues that it is MCSCS, through the OFMEM, which is conducting the review of the PNERP and planning basis, and that the records relate to the ministry's 2014 presentation and report.

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<sup>26</sup> The ministry refers to a confidential affidavit in support.

[53] The appellant also argues that, contrary to the ministry's claim, there is no indication of in the meeting minutes April 2, 2014 NEMCC meeting that it was held "in camera." The NEMCC stakeholder meeting included representatives of the federal government, representatives from affected municipalities, and representatives from the nuclear industry, such as Bruce Power and OPG.

[54] The appellant also takes the position that the records and more recent information have been shared with other levels of government and industry stakeholders. It refers to the ministry's reply representations,<sup>27</sup> and then provides additional evidence which sets out various "intervening steps" to review the PNERP and planning basis that have taken place, or will take place prior to any ultimate decision by Cabinet. These include that further discussions were conducted involving members of the NEMCC, CNSC staff and PNERP members. The appellant argues that unless these further discussions have been "meaningless," Cabinet deliberations will "necessarily be different in substance" than the report prepared by the ministry "very early in the process."

### ***Analysis and findings***

[55] I have reviewed the records at issue as well as the detailed representations of the parties, including the affidavit evidence provided by both parties and, in particular, a confidential affidavit provided by the ministry in support of its section 12(1) claim. I find that the records at issue qualify for exemption under the introductory wording of section 12(1) of the *Act*. I make this finding for the following reasons.

#### *Records 2 – 7 (the draft reports)*

[56] As noted by the ministry, records 2, 3, 4, 5, 6, and 7 are drafts of a final report (the Final Report) prepared by ministry staff, which summarize the findings and recommendations of the review (the Review) ministry staff undertook in February 2014 to evaluate the current planning basis assumptions for the PNERP.

[57] Records 2 – 7 vary in length between 27 and 78 pages. Record 2 is the earliest draft and is 27 pages long. Record 7 is the latest draft. It is 78 pages long and includes four appendixes.

[58] The ministry states that disclosure of records 2-7 would reveal the substance of deliberations because "they contain similar or identical analyses, findings, and recommendations on how to revise the PNERP's current planning basis assumptions as those contained in the Final Report." The ministry then states:

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<sup>27</sup> The appellant refers to paragraphs 11 to 16 of the ministry's reply representations, which confirm that OFMEM, OPG and NEMCC were consulted in the process of developing the drafts.

... the updated PNERP to be submitted to Cabinet will be modelled on the revised planning basis assumptions that have been developed based on the analyses and recommendations outlined in the Draft Reports ...

Cabinet's deliberations and decision with respect to the updated PNERP will thus also involve deliberations and a decision with respect to the revised planning basis assumptions outlined in the ... Draft Reports. Revealing the analyses, findings and recommendations in the Draft Reports would provide insight into the deliberations of Cabinet and are accordingly protected from disclosure under the introductory wording of section 12(1).

[59] The ministry's confidential representations provide more detail about the connection between the information in the draft reports and the Cabinet deliberations. In addition, the ministry's affidavit in support of its position also provides particular details about the connection between the records and the Cabinet deliberations.<sup>28</sup>

[60] Based on my review of the representations of the ministry, particularly the confidential affidavit material, I am satisfied that the ministry has provided sufficient evidence to establish a linkage between the content of the records and the actual substance of Cabinet deliberations.<sup>29</sup> As a result, I find that disclosure of Records 2-7 would reveal the substance of deliberations of Cabinet, and these records qualify for exemption under section 12(1).<sup>30</sup>

[61] I have also considered the appellant's arguments in support of its position that Records 2-7 do not qualify for exemption under section 12.

[62] To begin, the parties agree that two of the four appendixes to Record 7, which are listed in the index of records and for which the section 12 exemption claim was made, are public. The appellant argues that this shows the ministry's "over-broad" application of section 12. The ministry's response is somewhat confusing, taking the position that these appendixes are not really responsive to the request. However, at this point it is clear that those two appendixes are public and that access to these two appendixes is not at issue. Accordingly, I will not consider them in this order. However, I do not consider that the ministry's approach to these two records necessarily informs whether or not the section 12 exemption applies to the records which are at issue. Regardless of whether the ministry improperly considered these records as "not responsive to the request," or applied the section 12 exemption too broadly to these two appendixes, I must review the application of section 12 to the records which are at issue.

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<sup>28</sup> This affidavit was not shared with the appellant and I cannot refer to it in further detail in this order.

<sup>29</sup> Order PO-2320.

<sup>30</sup> See Orders P-22, P-1570 and PO-2320. See also Order PO-2466.

[63] The appellant also initially argued that the date of the records and the timing of the Cabinet submission suggest that the records cannot be exempt under section 12(1). Later in its submissions the appellant suggests that this is not the basis for its argument that section 12(1) does not apply. In any event, I accept the submissions of the ministry that the information in the records contains information to be submitted to Cabinet. The dates of when they were to be submitted to Cabinet do not impact the application of the exemption in the circumstances of this appeal.

[64] Regarding the appellant's position that the 1993 Cabinet submission and the related report prepared by Working Group #8 should inform my decision, I am satisfied that there is a difference between the nature of the information contained in the 1993 Cabinet submission and the information at issue in this appeal. As noted by the ministry, the 17-page 1993 Cabinet submission seeking approval to expand the technical basis of the provincial nuclear emergency plan appears to have contained only the recommendations, and not information from the 157-page technical report. This is different from the situation in this appeal, where the ministry has provided sufficient evidence to establish a linkage between the content of the records and the actual substance of Cabinet deliberations.

[65] I have also considered the appellant's position that the approach taken in Order PO-3199 ought to be applied in the circumstances of this appeal. I accept the ministry's position that the adjudicator in Order PO-3199 rejected the application of s. 12(1) because there was insufficient evidence to demonstrate how the records were linked to the Cabinet deliberations. In this appeal, I am satisfied that the ministry has provided sufficient evidence that the information in the Draft Reports will be submitted to Cabinet, and that the ministry has identified how disclosing the records would reveal the substance of deliberations.

[66] Lastly, I have also considered the appellant's position that because additional discussions were conducted and input sought relating to the records, the Cabinet deliberations will "necessarily be different in substance" than the report prepared by the ministry "very early in the process." I do not accept the appellant's position. Clearly documents can be modified, refined and adjusted over time; however, in the circumstances, I am not satisfied that the fact that further input was sought affects the application of the section 12 exemption to the records at issue.

#### *Records 8 – 10*

[67] As identified by the ministry, Records 8, 9, and 10 are drafts of a slide deck summarizing the preliminary results of the ministry's Review of the PNERP planning basis assumptions and/or next steps required in order to complete the Review, that was presented at an "in camera" meeting of NEMCC. The ministry states that disclosure of the information contained in records 8-10 "would reveal the substance of the deliberations of Cabinet that will take place ... with respect to approval of the updated PNERP." The ministry also provides affidavit evidence in support of its position that the



disclosure of the records would reveal the substance of the deliberations of Cabinet, and also evidence that the NEMCC meeting at which the slide deck was presented was held "in-camera."

[68] Based on my review of the representations of the ministry and the confidential affidavit material provided by it, I am satisfied that the ministry has provided sufficient evidence to establish a linkage between the content of the records and the actual substance of Cabinet deliberations.<sup>31</sup> I find that disclosure of Records 8, 9 and 10 would reveal the substance of deliberations of Cabinet, and that these records also qualify for exemption under section 12(1).<sup>32</sup>

[69] Having found that the records qualify for exemption under section 12(1), it is not necessary to review whether the exemptions in sections 13(1), 14(1)(i) or 16 apply to all or part of the records, nor is it necessary to determine whether section 5.1(3) of the *Emergency Management and Civil Protection Act (EMCPA)* applies. Furthermore, the public interest override in section 23 cannot apply to section 12. Lastly, although the appellant initially raised the possible application of section 11, it did not provide representations on that issue, and I do not address it in this order.

**ORDER:**

I uphold the decision of the ministry that the records qualify for exemption under section 12(1), and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Frank DeVries  
Senior Adjudicator

\_\_\_\_\_ May 18, 2018

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<sup>31</sup> Order PO-2320.

<sup>32</sup> Orders P-22, P-1570 and PO-2320.