

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3909

Appeal PA16-485

Ontario Power Generation

December 7, 2018

Summary: The appellant, which is an environmental organization, submitted an access request under the *Freedom of Information and Protection of Privacy Act* to Ontario Power Generation (OPG) for graphs that demonstrate the estimated release of radionuclide species from containment to the surrounding environment in the event of a reactor accident. OPG denied access to the records under the discretionary exemption in section 16 (prejudice defence of Canada).

In this order, the adjudicator upholds OPG's decision that the records are exempt under section 16 and dismisses the appeal. The adjudicator also finds that the obligation to disclose the information under section 11(1) rests with the head and not the IPC.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 11(1) and 16.

Orders Considered: Orders 65, PO-2960-1 and PO-3019-F.

OVERVIEW:

[1] The appellant, which is an environmental organization, made a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) to Ontario Power Generation (OPG) for graphs of Release Categories 1 and 2 for the most recent risk assessments for the Pickering A and B nuclear generating stations (the PNGS).

[2] OPG issued a decision denying access to all of the responsive records pursuant to the discretionary exemptions in sections 16 (prejudice defence of Canada) and 20 (danger to health or safety) of the *Act*.

[3] The appellant appealed OPG's decision.

[4] Mediation was unsuccessful in resolving the appeal, and the appellant decided to proceed to the next phase in the appeal process, adjudication, where an inquiry is conducted.

[5] Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] OPG's representations raised an additional discretionary exemption, section 14(1)(i) (endanger security of building, vehicle, system or procedure), as a basis for withholding the responsive records. Accordingly, this exemption and the issue of whether OPG should be allowed to raise the section 14(1)(i) exemption late were added as issues in this appeal.

[7] In addition, the appellant raised the issue of the head's obligation to disclose under section 11(1). This issue was added as a preliminary issue to this appeal.

[8] In this order, I uphold OPG's decision that the records are exempt under section 16, and I dismiss the appeal. I also find that I do not have the authority under section 11(1) of the *Act* to order disclosure of the records.

RECORDS:

[9] The records at issue consist of seven pages containing 11 charts relating to the release of cesium iodide (CsI) in various hypothetical accident scenarios at the PNGS. The charts are labelled Figure 4-26, Figure 4-27, Figure 4-47; Figure 8, Figure 10, Figure 19, Figure 22, Figure 29, Figure 35, Figure 37, and Figure 38.

[10] OPG states that the records contain source term data that demonstrate the estimated release of radionuclide species from containment to the surrounding environment as a function of time due to postulated event sequences. It states that the source term data in the records is part of the Probabilistic Safety Assessment (PSA) for the PNGS, which is required to be submitted to the Canadian Nuclear Safety Commission (the CNSC).

[11] The appellant further describes the source term data in the records as information that refers to the timing, inventory and magnitude of radionuclides released to the environment following a reactor accident, which can be used to calculate the dose of radioactivity received by members of the public. It states that these dose estimates can be used to forecast the need for emergency protective measures or

future health effects.

ISSUES:

- A. Does the discretionary exemption for prejudice to the defence of Canada at section 16 apply to the records?
- B. Did OPG exercise its discretion under section 16? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Preliminary Issue: the obligation to disclose under section 11(1)

[12] The appellant raised the application of section 11(1) (obligation to disclose) for the first time in its representations. It submits that OPG has failed to consider the application of section 11(1), which reads:

Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[13] The appellant submits that the records reveal a grave safety hazard to the public, as they identify accident scenarios leading to large radioactive releases within the first 24 hours after a reactor accident. It submits that these scenarios meet the prior recommended criteria for preparing detailed emergency response measures and that Ontario's current detailed emergency plans are not designed to address such accident scenarios.

[14] In the appellant's view, Ontario's current detailed nuclear emergency plans around the PNGS are insufficient to protect the public and this constitutes reasonable grounds for the records to be disclosed under section 11(1).

[15] OPG states that the IPC has previously recognized that the duties and responsibilities set out in section 11(1) belong to the head of the institution alone and, as a result, the IPC does not have the power to order disclosure of a record pursuant to this section.¹

[16] OPG further states that, in any event, the appellant provides no evidence beyond

¹ OPG cites Orders P-1336, PO-3418, and MO-2205 as examples.

mere speculation that the records sought reveal a grave environmental, health or safety hazard to the public. OPG argues that the opposite is true, namely that the information contained in the records is intended to assist OPG in protecting the health and safety of the public and the environment.

Analysis/Findings

[17] I agree with OPG that section 11(1) does not apply in this appeal. As set out above, section 11(1) is a mandatory provision, which requires the head to disclose records in certain circumstances; specifically, if the head has reasonable and probable grounds to believe that it is in the public interest to do so and the record reveals a grave environmental, health or safety hazard to the public.

[18] Order 65, and subsequent orders, including the orders cited by OPG, have affirmed that the duties and responsibilities set out in section 11(1) of the *Act* belong to the head alone. As a result, neither the Information and Privacy Commissioner nor his delegate have the authority under section 11(1) of the *Act* to order disclosure of the records, and I expressly decline to do so in this appeal.

Issue A: Does the discretionary exemption for prejudice to the defence of Canada at section 16 apply to the records?

[19] OPG withholds the records under section 16 of the *Act*, which states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

Representations

[20] OPG states that disclosure of the highly confidential source term data contained in the records could allow a person, with the right technical know-how and nefarious intent, to co-relate it with other information that is already in the public domain to plan a rapid and large radiological attack that would have devastating effects on public safety and the environment. OPG also states that this information could be exploited to impede or neutralize mitigation measures after an attack or accident.

[21] OPG relies on Orders PO-2960-I and PO-3019-F, which it states have upheld the section 16 exemption in respect of records containing detailed technical information about the operations of a nuclear facility, including the same information at issue in this appeal, which reflect source term data for the PNGS.

[22] OPG states that it has never released the full version of a PSA or source term

data for any accident model for any of its nuclear facilities, and it submits that the potential risks from disclosure are amplified by the fact that there is already a significant amount of information in the public domain about risks and accident mitigation at the PNGS. OPG states:

...the records in issue are qualitatively quite different than the graph that was publicly disclosed in the CNSC Report. [T]hey disclose data for different scenarios than the graph in the CNSC Report. ... Public release of these records would create risks that were not caused by the release of the CNSC Report, which was prepared with public disclosure in mind.

...The CNSC Report likely incorporates information (including source term data) about OPG's facilities, which OPG is required to submit to CNSC as part of the latter's regulatory requirements. The assessment identifies points at which operator action becomes critical to stop the progression of an accident. CNSC therefore applied highly improbable assumptions to create a "worst case scenario" for analysis. For this purpose, the CNSC's assessment is based on an "extremely unrealistic" assumption that operators would take absolutely no action after a full station blackout. The application of such unrealistic assumptions makes it unlikely that a person reviewing the CNSC Report, even someone with a high level of technical expertise, would be able to derive meaningful information about the source term data from the descriptions and figures in the report.

Conversely, the graphs contained in the records in issue are based on analyses that apply conservative but realistic assumptions to assess possible accident scenarios [and] could be exploited by individuals with the right expertise and nefarious intent to cause a serious threat to OPG's nuclear facilities.

[23] The appellant states that OPG has failed to provide any detailed or persuasive evidence that the requested graphs could in fact cause harm and submits that OPG's evidence is effectively speculation. The appellant suggests that OPG has acknowledged that source term data by itself does not expose additional vulnerabilities.

[24] The appellant states that as source term data describes the release to the environment after an accident and does not describe specific design vulnerabilities that may in fact be security sensitive, source term data could not be used to maliciously target or attack equipment and structures. It submits that source term data by itself does not expose additional vulnerabilities, nor could it be used to trigger an accident.

[25] The appellant submits that the findings in Orders PO-2960-I and PO-3019-F should not be followed as the underlying circumstances that led to the issuance of these orders have changed.

[26] In reply, OPG reiterates that the data reflected in the records could be exploited by individuals with the right expertise and nefarious intent to cause a serious threat to OPG's nuclear facilities.

Analysis/Findings

[27] It is evident from the context of the section 16 exemption that it is intended to protect vital public security interests. Section 16 must be approached in a sensitive manner, given the difficulty of predicting future events affecting the defence of Canada and other countries.²

[28] In order for section 16 to apply, OPG was required to provide evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.³

[29] This office has previously applied section 16 to exempt records containing detailed technical information about the operations of a nuclear facility.⁴

[30] As stated, OPG relies on the findings in Orders PO-2960-I and PO-3019-F. In Order PO-2960-I, the records were similar to those in this appeal. In that order, the records also showed the expected release of a number of substances in relation to each category of generally described malfunction and accident scenarios at the Pickering A, Pickering B and Darlington nuclear stations. In that order, the records were found to be exempt under section 16, but the OPG was ordered to re-exercise its discretion under that exemption. In Order PO-3019-F, OPG's re-exercise of discretion was upheld.

[31] In Order PO-2960-I, Senior Adjudicator John Higgins found that:

On the other hand, the manager himself, and the authors of the other affidavits and letters provided by OPG, and quoted extensively above, are united in their view that the source terms on their own are sufficient to provide significant assistance to terrorists and others with nefarious intent. For example, part of the affidavit provided by the director of Health Canada's Radiation Protection Bureau contains the following statement, reproduced above, which bears repeating here:

The radionuclide source terms are of interest to terrorist groups and others who would like to inflict damage on a nuclear facility

² See Order PO-2500.

³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁴ Order PO-2500.

and to harm the surrounding population. For example, knowledge of the quantity of a specific radionuclide in the emissions ... would enable a knowledgeable individual to target specific parts of a facility to maximize the release and impact of their attack.

In addition, the appellant's own submissions state that the source term data would provide information that could contribute meaningfully to the assessment of risk associated with the facilities referred to in the records.

... I find it to be both relevant and persuasive that the CNSC, a body charged with protecting the public interest in the licensing of nuclear power facilities, has previously refused the appellant's request for access to a record containing the source term data at issue in this appeal for the Pickering B facility. As already noted, this occurred during a CNSC licence renewal hearing, during which the appellant was an intervener. The CNSC denied access on the grounds that disclosure "may be prejudicial to the security interests of Canadians."⁵

Having carefully reviewed the records, the representations and the description of EPRC⁶ categories in the Pickering B Risk Assessment Summary Report, I am satisfied that the description of event sequences for each EPRC is sufficient, in combination with information in the records, to produce the risks described by OPG, the manager and the director in their affidavits. In addition, based on the evidence provided by OPG, I am satisfied that the source term data could reasonably be expected to assist those with malicious intent in planning acts of sabotage or terrorism with greater efficiency and more deadly effect.

In the circumstances of this appeal, and bearing in mind that the standard of proof for this exemption is lower than the "detailed and convincing" evidence required elsewhere, and the need for a sensitive approach given the difficulty of predicting events in the context of sabotage and terrorism, I have therefore decided that the evidence before me is sufficient to demonstrate that disclosure of the records into the public domain could reasonably be expected to be injurious to the suppression of sabotage or terrorism. The consequence of this conclusion is that the records are exempt under section 16.

This conclusion is reinforced by the appellant's own submissions to the effect that it would find the information meaningful and of assistance in

⁵ Senior Adjudicator Higgins noted that in *Athabasca Regional Government v. Canada (Attorney General)*, 2010 FC 948, in assessing the standard of review for a CNSC decision under the federal *Nuclear Safety and Control Act*, the Federal Court found that the CNSC had greater expertise than the Court.

⁶ Ex-Plant Release Categories.

the public debate concerning the degree of risk associated with the nuclear facilities. Indeed, if no information were publicly available describing event sequences that co-relate in a meaningful way to the information in the records, it is difficult to comprehend how the information could in fact be used by the appellant for the type of analysis that it clearly intends to carry out using this data.

I also note that previous orders have found that technical information about nuclear energy, of a similar nature to the records at issue in this appeal, is either exempt under section 16 or that its disclosure would raise national security concerns. In Order PO-2500, I found that:

... disclosure of records or parts of records setting out detailed technical information about the nuclear and related operations of the Bruce facility could reasonably be expected to "... prejudice the defence of Canada ... or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism."

In Order PO-2072-F, former Assistant Commissioner Tom Mitchinson dealt with a request for "[a]ll documents from Jan. 1, 1995 to present on the use of plutonium/MOX as fuel at Ontario Hydro." Section 16 was not at issue in Order PO-2072-F, but the order provides helpful guidance because, in the context of section 23 of the *Act*, the former Assistant Commissioner considered whether there was a public interest in *non*-disclosure that was sufficient to overcome the compelling public interest in disclosure that he had identified for some of the records. The identified public interest in non-disclosure was the threat to Canada's national security that would result from disclosure. This interest closely resembles the one protected by section 16.

Former Assistant Commissioner Mitchinson found that the public interest in national security was strong enough to overcome the compelling public interest in disclosure of 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 encompassed virtually all of the technical information in the records, including detailed information about the radioactivity and toxicity of spent fuel.

For all these reasons, I find that section 16 applies to exempt the records, in their entirety, from disclosure.

[32] The appellant was asked in the Notice of Inquiry to provide representations on OPG's representations, which included its reliance on Orders PO-2960-I and PO-3019-F, as well as the issues set out in the Notice of Inquiry.

[33] In response, the appellant submits that Orders PO-2960-I and PO-3019-F should not be followed as the "...underlying circumstances that lead to the issuance of these orders has changed." The appellant provided an affidavit filed in another appeal that was sworn by a former OPG employee who is an expert in nuclear safety issues in support of its position that these two orders should not be followed.

[34] However, I cannot ascertain from my careful review of the appellant's affidavit what circumstances have changed and why these orders should not be followed. The appellant's representations focus on the increased public interest in the information at issue in the records, not the change in the application of section 16 to the records. I note that the appellant also states that the records likely "...reveal a grave safety hazard to the public."

[35] The affiant in the affidavit, which was prepared for another appeal, indicates that he does not need any information about the hypothetical accident being assessed, as he only wants information about the amount of CsI being released into the environment following a reactor accident. However, from my review of the records in this appeal, the accident scenario is an integral part of each graph in the records.

[36] In making these findings as to the application of section 16 and the relevance of the affidavit in this appeal, I have taken into account that the appellant has provided 479 pages of supporting documents in addition to its eight pages of submissions. However, the appellant has not directed me in a clear and comprehensive manner as to what particular information it relies on in support of its assertion that the findings in Orders PO-2960-I and PO-3019-F should not be followed. Nor has the appellant indicated what particular information in these 479 pages of attachments to its representations relate specifically to the non-applicability of section 16 to the information at issue in this appeal. The majority of the 479 pages of attachments to the appellant's representations consist of highly technical scientific papers, reports and submissions regarding nuclear reactors. These documents contain numerous charts, graphs and attachments dated between 1996 and 2015.

[37] In this context, I find that the appellant's representations are not record and exemption specific. They do not provide sufficient information to allow me to find that the section 16 exemption does not apply. The entirety of the appellant's actual representations on section 16 are very brief and read as follows:⁷

Sections 14 and 16 Do Not Apply

In my view, OPG's assertion that the requested graphs could reasonably be expected to pose a risk to a facility or public safety under sections 14(1)(i) and 16 of FIPPA is a far-fetched exaggeration.

⁷ The appellant combined its section 16 representations with its section 14(1)(i) representations.

In my experience, OPG asserts security provisions in an overly broad and generalized manner. This is [a] contravention of Section 1(ii) of FIPPA, which requires exemptions to be "limited and specific".

In my opinion, OPG has failed to provide any detailed or persuasive evidence that the requested graphs could in fact cause harm. OPG's evidence is effectively speculation. The company has failed to tangibly show how the release of these graphs would cause harm.

[38] Based on my review of the parties' representations and the records, I do not agree that the circumstances have changed since the issuance of Orders PO-2960-I and PO-3019-F such that the section 16 findings in these two orders should not be considered. From my review of them, the records and the representations in this appeal are very similar to those before Senior Adjudicator Higgins in Orders PO-2960-I and PO-3019-F.

[39] I agree with OPG that, as was the case in Orders PO-2960-I and PO-3019-F, disclosure of the source term data in the records in this appeal could reasonably be expected to assist those with malicious intent in planning acts of sabotage or terrorism with greater efficiency and more deadly effect.

[40] Therefore, I adopt the finding in Orders PO-2960-I and PO-3019-F and find, subject to my review of OPG's exercise of discretion, that section 16 applies to exempt the records.

Issue B: Did OPG exercise its discretion under section 16? If so, should this office uphold the exercise of discretion?

[41] The section 16 exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[42] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[43] In either case, this office may send the matter back to the institution for an

exercise of discretion based on proper considerations.⁸ This office may not, however, substitute its own discretion for that of the institution.⁹

[44] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁰

- the purposes of the *Act*, including the principles that:
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[45] OPG states that while there may be some public interest in the disclosure of information concerning the safety of OPG's nuclear facilities, this public interest is already served by the significant amount of information that is already available as a

⁸ Order MO-1573.

⁹ Section 54(2).

¹⁰ Orders P-344 and MO-1573.

result of the extensive regulatory oversight of those facilities.

[46] OPG refers to the public CNSC hearings that occur when the PNGS's operating license is being amended or renewed, where members of the public receive information and can make submissions. It states that these regulatory hearings not only facilitate the disclosure of appropriate information directly to the public, but demonstrate that the evidence that is provided receives serious regulatory scrutiny.

[47] OPG also refers to the Office of the Fire Marshal and Emergency Management (OFMEM) public consultations on the adequacy of the Provincial Nuclear Emergency Response Plan (PNERP) as another avenue through which the public receives information about the safety of OPG's nuclear facilities.

[48] OPG states that in exercising its discretion, it was mindful that industrial institutions, including nuclear facilities, have been targeted in the past and remain potential targets for terrorists and saboteurs. It states that in exercising its discretion to withhold the records, it determined that the interests of both OPG and the broader public in protecting the safety and security of OPG's nuclear facilities outweighed any public interest in disclosure of the records, particularly in light of the amount of information that is already publicly available.

[49] The appellant did not provide representations that directly address this issue. However, it states that under the provincial nuclear emergency response plan, OPG must cover the costs of nuclear emergency response planning and preparedness and thus has a financial interest in minimizing the expansion of nuclear emergency response plans. The appellant submits that this factor does not appear to have been considered by OPG in exercising its discretion. It further states that it has seen no evidence that OPG considered in exercising its discretion lessons from the 2011 Fukushima nuclear disaster in Japan, an event which supports increased transparency and empowering citizens to review and challenge potentially faulty regulatory assumptions.

Analysis/Findings

[50] I am satisfied that in denying access to the records, OPG exercised its discretion under section 16 in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations.

[51] The appellant's arguments about OPG's exercise of discretion appear similar to those made in Order PO-3019-F. In that order, Senior Adjudicator Higgins stated:

In assessing OPG's re-exercise of discretion, I have carefully considered the detailed statements and representations provided to me by both OPG and the appellant, as summarized above. I appreciate the appellant's position that OPG's explanation of its exercise of discretion "completely fails to address the issue of whether disclosure would, in fact, serve the public interest by allowing for informed public debate on nuclear safety

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

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

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

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

[52] I find the reasons in Order PO-3019-F on the exercise of discretion to be persuasive, and I adopt them here. In my view, it is also evident from the OPG’s submissions in this appeal that it considered the public interest in disclosure of the information at issue, as well as the interests of public safety and national security, all of which are relevant considerations.

[53] Accordingly, I uphold OPG’s exercise of discretion to withhold the records under section 16.

[54] As I have concluded that the records are exempt under section 16, it is not necessary for me to review whether sections 14(1)(i) or 20 also apply to them. Finally, since I have concluded that the records are exempt by reason of section 16, I cannot consider the application of the public interest override in section 23, as this section does

not apply to records found to be exempt under section 16.¹¹

ORDER:

I uphold OPG's decision to deny access to the records under section 16 and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

December 7, 2018 _____

¹¹ Section 23 states:
An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.