Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3946

Appeal PA14-330

Ontario Power Generation

April 25, 2019

Summary: The appellant filed a request under the *Act* to OPG for access to source term information for three nuclear stations. After locating responsive records, OPG denied the appellant access to them, in full, claiming the application of the exemptions in sections 14 (law enforcement), 16 (defence) and 20 (danger to safety and health) of the *Act*. The appellant appealed OPG's decision and raised the possible application of sections 10(2) (severability of the record), 11 (obligation to disclose) and 23 (public interest override). During the inquiry, OPG claimed that the doctrine of issue estoppel applies to this appeal because IPC Order PO-2960-I dealt with the specific question at issue in this appeal. In this order, the adjudicator finds the appellant is estopped from appealing OPG's decision and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders MO-3511, P-1392, PO-1907, PO-2858-I, PO-2960-I and PO-3019-F.

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*, 1998 CanLII 6467 (BC CA); *British Columbia (Worker's Compensation Board) v. Figliola*, 2011 SCC 52.

OVERVIEW:

[1] The appellant filed a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Ontario Power Generation (OPG) for access to the following

information:

> the "source term" information for all Ex-Plant Release Categories included in the most recent probabilistic risk assessments for the Darlington as well as the Pickering A and B nuclear stations.

[2] After locating responsive records, OPG issued a decision denying the appellant access to the requested records, citing the exemptions in sections 14 (law enforcement), 16 (defence) and 20 (danger to safety and health). OPG noted, "This information will not be released due to security concerns."

[3] The appellant appealed OPG's decision to the IPC on the basis that

> This information is not security sensitive, but OPG is claiming sections 14 and 16 of the [*Act*]. I dispute OPG's claim that this information is security sensitive. To the contrary, this information provides information necessary to confirm the adequacy of Ontario's nuclear emergency plans to protect the public.
>
> What's more, some elements of the information requested have been released through the recent environmental assessment of OPG's proposal to extend the life of the Darlington nuclear station. Despite this, OPG withheld its source term information for the Darlington nuclear station in its entirety. This demonstrates that [OPG's] claim that all of the information is security sensitive is incorrect.

The appellant also stated, "it is in the public interest that this information be released."

[4] During mediation, the appellant raised the possible application of sections 10(2) (severability of the record), 11 (obligation to disclose) and 23 (public interest override) as issues in this appeal.

[5] Mediation did not resolve the issues and the appeal proceeded to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. The adjudicator with carriage of the appeal initially sought and received representations from OPG.

[6] In its representations, OPG claimed that the doctrine of issue estoppel applies. The OPG submitted the IPC already issued three final decisions (namely, Orders PO-2858-I, PO-2960-I and PO-3019-F) in relation to another appeal involving the same request and parties. In particular, OPG noted that Order PO-2960-I "specifically dealt with whether the s. 14(1)(i) and s. 16 exemptions applied to the Source Term Information." Accordingly, the adjudicator added the possible application of issue estoppel as an issue in this appeal.

[7] The adjudicator then sought and received representations from the appellant in

response to OPG's representations, which were shared with the appellant in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*.

[8] The appeal was then transferred to me to complete the inquiry.

[9] The appellant then submitted unsolicited additional supplementary representations in support of its position that the information at issue should be disclosed to it. I invited OPG to submit representations in response to the appellant's supplementary representations, which were shared with OPG in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. OPG submitted representations. I then sought and received further representations from the appellant in response to OPG's representations.

[10] In its representations, the appellant argues that I should vary the appeal process pursuant to Rule 20.01 of the IPC's *Code of Procedure* and accept its new evidence. I provided OPG with an opportunity to respond to the appellant's arguments on varying the appeal process. OPG responded. I reviewed both parties' representations and decided to consider the appellant's supplementary representations for the purposes of this order. However, given my findings below, I find it is not necessary to address this matter further.

[11] In the discussion that follows, I find the appellant is estopped from appealing OPG's decision because it arises from a request nearly identical to a previous request involving the same parties which resulted in a final decision issued by this office. I dismiss the appeal.

RECORDS:

[12] The information at issue consists of the source term information withheld from three reports.

DISCUSSION:

Is the appellant estopped from appealing OPG's access decision in this appeal?

[13] In its representations, OPG claims the appellant is estopped from appealing the decision subject to this appeal in light of the findings in Order PO-2960-I. OPG submits that previous orders of this office[1] have determined that the IPC may dismiss an appeal pursuant to section 52(1) of the *Act* without conducting an inquiry where the appeal

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[1] Orders P-1392 and MO-1907, although incorrectly referred to as "PO-1907" in OPG's representations.

involves the same parties, issues and records previously considered.

[14] Section 52(1) of the *Act* 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.

[15] The OPG submits the doctrine of issue estoppel applies to this appeal because the IPC issued three final decisions (specifically, Orders PO-2858-I, PO-2960-I and PO-3019-F) in relation to another appeal involving the same request and parties.

[16] The leading decision that considers the doctrine of issue estoppel is the Supreme Court of Canada's (the Supreme Court's) decision, *Danyluk v. Ainsworth Technologies Inc.*[2]. In that decision, the Supreme Court stated,

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry…. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
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> Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice.[3]

The Supreme Court also confirmed the doctrine of issue estoppel applies to administrative tribunals.[4]

[17] *Danyluk* sets out a two step analysis for the application of issue estoppel. First, the decision maker must determine whether the moving party (in this case, OPG) has

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[2] 2001 SCC 44 (*Danyluk*).
[3] *Ibid*. at paras 18-19.
[4] *Ibid*. at para 22.

established the three conditions to the operation of issue estoppel. These 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.

Once these three conditions are met, the decision maker must determine "whether, as a matter of discretion, issue estoppel ought to be applied" (emphasis in original).[5] The Supreme Court confirmed that these rules should not be applied "mechanically". Rather, "the underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."[6]

[18] The IPC has considered the doctrine of issue estoppel in a number of decisions. In Order MO-1907, which OPG referred to, the adjudicator excluded records from the scope of an appeal on the basis that the same records were the subject of a previous appeal involving the same parties. In her decision, the adjudicator stated:

> This appeal and Appeal No. MA-010272-2 involve the same institution (the Board) and the same appellant. Orders MO-1574-F and [MO-]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 municipal equivalent to section 52(1)], 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 the appeal.

The Parties' Representations

[19] OPG states the appellant made an identical request to the one subject to this appeal in 2008. OPG denied the appellant access to the responsive records and the appellant appealed the decision to the IPC. The appeal PA08-96 resulted in Orders PO-2858-I, PO-2960-I and PO-3019-F. OPG states that Order PO-2960-I specifically deals with whether sections 14(1)(i) and 16 apply to exempt source term information from disclosure.

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[5] *Ibid*. at para 33.
[6] *Ibid*.

[20] OPG submits the appellant requested source term information for all Ex-Plant Release Categories (EPRC) in 2008 (which resulted in Orders PO-2858-I, PO-2960-I and PO-3019-F) and in 2014 (which resulted in this appeal). OPG states that, in Order PO-2960-I, the adjudicator assessed whether source term information was the type of information that would meet the threshold of exemption under sections 14(1)(i) and 16 of the *Act*. OPG submits the adjudicator did not discuss the precise information before him and did not appear to base his decision on the actual values at issue in the records. For these reasons, OPG submits the same question was decided by the IPC in Order PO-2960-I.

[21] OPG submits Order PO-2960-I was a final decision on the substantive merits of the applicability of the exemptions in sections 14(1)(i) and 16 of the *Act*. OPG states the order was not judicially reviewed. Therefore, OPG submits Order PO-2960-I was final.

[22] With regard to the final condition for issue estoppel, OPG states the parties to this appeal are the same as those in Order PO-2960-I. Therefore, OPG submits the conditions of issue estoppel are satisfied and this appeal should not proceed.

[23] The appellant submits I should hear this appeal because the request deals with documents created after Orders PO-2960-I and PO-3019-F were issued. The appellant also submits the circumstances surrounding the disclosure of source term information have changed "dramatically" since those orders were issued.

[24] The appellant states Final Order PO-3019-F was issued in 2011. The appellant submits the request subject to this appeal relates to new source term information from probabilistic risk assessments for the Darlington, Pickering A and Pickering B nuclear plants created after that decision.

[25] The appellant submits an earlier decision does not raise issue estoppel if fresh information becomes available that demonstrates the earlier decision was wrongly decided. The appellant submits the underlying circumstances of Orders PO-2960-I and PO-3019-F have changed dramatically. The appellant states that, in 2013, the Canadian Nuclear Safety Commission's (CNSC) President explained that the CNSC did not release accident source term information because of the IPC's decision finding the information exempt under sections 14(1)(i) and 16 of the *Act*. In addition, the appellant states the adjudicator gave "significant weight" to the CNSC's decision to not disclose source term information in deciding it was exempt under sections 14(1)(i) and 16.

[26] However, the appellant submits that, since 2013, the CNSC has changed its approach to the release of source term information. The appellant submits the CNSC's new proposed requirements include "assist[ing] offsite authorities in emergency planning by providing a planning basis that includes release and source term

information."[7] The appellant also refers to an updated regulatory guide, which requires public disclosure of a summary of probabilistic risk assessment results unless the information is security sensitive.[8]

[27] The appellant also notes instances in which the CNSC released source term information, some of which includes information that would be responsive to the request that is the subject of this appeal.

[28] The appellant submits that, in light of this "dramatic change" to CNSC's approach to the release of source term information, including its release of information that forms part of this appeal, the IPC should examine the *Act*'s application in this case.

[29] In the alternative, the appellant submits that even if issue estoppel is found to apply, the IPC should exercise its discretion to hear the appeal. The appellant submits, "In light of the significant changes to the factual circumstances underlying disclosure of source term information, particularly the CNSC's approach to the release of source term information, and the lessons from the Fukushima disaster, it would cause unfairness or work an injustice if the IPC refused to consider the appeal."

[30] As noted above, the appellant submitted additional supplementary representations to support its position that the circumstances underlying Order PO-2960-I have changed. Specifically, the appellant submits, "several new documents have been released to the public which contain source term information and accident sequences." The appellant identifies the following four documents the CNSC and Ontario government have released to the public:

1. The CNSC released a letter to Ontario's Office of the Fire Marshal and Emergency Management in response to an *Access to Information Act*[9] (*ATIA*) request which provides the CNSC's guidance on the source term to be used to revise the Provincial Nuclear Energy Response Plan, the accident analysis and assumptions, and source term data. The appellant submits that the source term data was generated from the results of the 2011 Darlington Probabilistic Risk Assessment.

2. The CNSC released its *Technical Basis for Multi-Unit Severe Accident Source Term report in response to an ATIA* request, which provides source term information for Release Category 1 from the 2011 Darlington Probabilistic Risk Assessment. The appellant submits that this report provides detailed information on accident sequences.

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[7] Ontario Power Generation Pickering NGS – Release of License Hold Permit, CMD 14-H2.4, CNSC Staff Presentation dated May 7, 2014.
[8] CNCS's *REGDOC -2.4.2, Safety Analysis: Probabilistic Safety Assessment (PSA) for Nuclear Power Plants* dated May 2014.
[9] RSC 1985, c A-1.

3. The Ontario government released a document produced by Health Canada called *Argos Modelling of Accident A and Accident B Scenarios* as part of its consultation on the Provincial Nuclear Emergency Response Plan, which includes source term information used to model offsite impacts of nuclear accidents.

4. In September 2018, the CNSC released, in response to an *ATIA* request, its accident rating for an accident simulated during an emergency response exercise at OPG's Pickering Nuclear Generating Station. The appellant submits this rating includes source term information and the accident sequence leading to the release.

The appellant submits that these disclosures demonstrate that the disclosure of the source term information at issue poses no risk to public safety.

[31] In response to the appellant's new evidence, OPG states that the additional evidence the appellant submitted does not provide a new basis for requiring OPG to disclose the source term information. OPG submits that these new documents do not contain excerpts of the requested source term information. In addition, OPG submits that an individual cannot infer contents of the source term information due to the modelling and/or assumptions used to create the information contained in the documents identified above. OPG also states that the new information is not tied to any specific nuclear plant and the disclosure of hypothetical accident scenarios and source terms does not justify the disclosure of the source term information at issue, which contains highly detailed and sensitive information about OPG's nuclear facilities.

[32] OPG submits that the appellant's new information does not change OPG's position because it fails to reveal a change in circumstances that would compel disclosure of the source term information. OPG submits that none of the new information the appellant relies on is similar to or overlaps with the source term information. Further, OPG submits that none of this new evidence establishes that the CNSC made any changes to its regulatory requirements in releasing source term information.

[33] OPG addresses each of the documents identified in the appellant's supplementary representations. OPG submits that the source terms contained in three of the documents identified by the appellant were generated using modelling and assumptions that OPG views as unrealistic or very unlikely. As such, these source terms cannot be used to accurately infer the contents of the source term information at issue.

[34] OPG states that it prepared one of the tables in the third document identified by the appellant. OPG states that this table contains the source terms for Accident A, to support the CNSC staff in analyzing a "Doomsday Scenario." OPG states that these source terms were not based on any Probabilistic Safety Assessment but on the definition of a Large Release Frequency. OPG states that these source terms were publicly accessible in 2015 and there is no nexus between the source terms in this document that the source term information at issue.

[35] OPG states that the CNSC used one of OPG's Pickering Nuclear Generating Station emergency response drill exercises to generate the source terms in the fourth document. OPG states that it did not provide input to the CNSC on the information generated in this document. OPG states it "never" produces source term information for its drill exercises; rather, it provides "only vague generalities for the purposes of a given drill exercise are distributed to its participants." OPG submits that the source term information contained in this document does not correlate to the source term information at issue and does not warrant OPG's disclosure of the information at issue.

[36] I shared OPG's representations with the appellant and invited it to respond. The appellant submits that there is a significant amount of source term information already in the public domain, but OPG refuses to release the source term information at issue. The appellant claims there is "no danger to the public or to OPG's facilities from releasing source term information" and relies on the CNSC's disclosure of "similar and overlapping source term information" to support its position. The appellant reiterates the "changed factual circumstances" support its position that PO-2960-I and subsequent orders should not be followed.

Interim Order PO-2960-I

[37] Interim Order PO-2960-I relates to Appeal PA08-96.[10] The appellant in the appeal before me filed the request that was the subject of Appeal PA08-96. In the request that led to PA08-96, the appellant sought access to

> 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.

[38] In Order PO-2858-I, the adjudicator determined that the source term information alone is responsive to the request. The adjudicator ordered OPG to produce a further affidavit from a qualified individual to answer questions relating to the harms contemplated in sections 14(1)(i) and 16.

[39] Interim Order PO-2960-I then dealt with whether the source term information is exempt under sections 14(1)(i), 16 or 18(1)(a), (c), (d) or (e) (economic or other interests) of the *Act* and whether the public interest override in section 23 applies. The adjudicator found that sections 14(1)(i) and 16 apply to the source term information, but ordered OPG to re-exercise its discretion concerning its denial of access to the records.

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[10] As noted above, three orders were issued in respect of Appeal PA08-96. Interim Order PO-2960-I is the order that addresses the application of sections 14(1)(i) and 16 to the source term information in the probabilistic risk assessments.

[40] There were three responsive records at issue in Interim Order PO-2960-I. According to the decision, these records showed the source term data for each of the three facilities named in the request, broken down by numbered ERPC categories. However, the records did not contain descriptions explaining the meaning of each category.

[41] Section 16 of the *Act* 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 detention, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

The adjudicator in Order PO-2960-I stated, "It is evident from the context of this exemption that it is intended to protect vital public security interests."[11] Referring to his earlier Order PO-2500, the adjudicator further stated that section 16 must be approached in a "sensitive matter, given the difficulty of predicting future events affecting the defence of Canada and other countries."[12]

[42] Given this context, the adjudicator noted the burden of proof for section 16 is less onerous than for a number of other exemptions that require a reasonable expectation of harm.[13] The adjudicator referred to his Order PO-2500, which states:

> … in the case of "health and safety" related exemptions such as sections 14(1)(e) and 20, which use the words "could reasonably be expected to", the standard of proof is that the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, it must be demonstrated that the reasons for resisting disclosure are not frivolous or exaggerated.

Adopting this standard of proof, the adjudicator considered the additional evidence provided by OPG regarding the application of section 16.

[43] OPG provided additional affidavits from its manager responsible for nuclear safety and technology, the director of Health Canada's Radiation Protection Bureau and the Assistant Commissioner of National Security Criminal Investigations with the Royal Canadian Mounted Police (the RCMP) to support its section 16 exemption claim. I will not reproduce the information contained in the affidavits here. In summary, the three

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[11] Order PO-2960-I at page 4.
[12] *Ibid*.
[13] See, for example, sections 17 and 18 of the *Act*.

affiants claimed malicious individuals could use source term information to plan attacks on equipment and structures, leading to damage to property and the environment, injury and loss of life. All three affiants submitted that knowledgeable individuals could use the source term information to develop strategies in planning attacks against the infrastructure that is the subject of the request or similar infrastructure.

[44] In its representations with respect to the appeal leading to Order PO-2960-I, the appellant took issue with OPG's claims and submitted that the disclosure of the source term information would contribute to public debate regarding the risks posed by nuclear facilities and the options for reducing those risks. Further, the appellant submitted an affidavit sworn by a technical analyst who stated the source term information could be disclosed without assisting potential attackers.

[45] The adjudicator noted in Order PO-2960-I that the appellant's representations focused on the public interest in the disclosure of information relating to nuclear safety and the design, construction and operation of nuclear power plants. However, the adjudicator stated the analysis under section 16 is concerned with the public interest in *non-disclosure* of the information at issue to protect national security interests.

[46] The adjudicator stated, in determining whether the source term data is exempt under that section,

> … I must consider what the records themselves contain, what other information is publicly available that could be co-related to the information in the records and the implications of such a co-relation, and whether, taken together, that information constitutes a sufficient level of risk of injury to the suppression of sabotage or terrorism, which in my view are the two greatest risks in the circumstances of this case, to create a "reasonable expectation" of these harms, which, if present, would justify withholding the information.[14]

Reviewing the source term information before him, the adjudicator found it did not actually set out the particulars of the event sequence corresponding to each category number. However, the adjudicator found that this type of information is otherwise available and can be co-related to the information in the records.

[47] Given this context, the adjudicator found the OPG manager's statement that more detailed information regarding a particular event sequence would need to be included to give source term data meaning undermined the view that the description of the publicly available ERPCs would pose a security risk if combined with the information contained in the records.

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[14] Order PO-2960-I at page 12.

[48] However, the adjudicator noted that OPG's three affiants were "united in their view that the source terms on their own are sufficient to provide significant assistance to terrorists and others with nefarious intent."[15] For example, the director of Health Canada's Radiation Protection Bureau affirmed that the source term information is of interest to terrorist groups and other malicious individuals because it could enable a knowledgeable individual to target specific parts of a facility to maximize the release and impact of their attack.

[49] In addition, the adjudicator noted the appellant stated that source term information would provide information that would contribute meaningfully to the assessment of risk associated with the facilities referred to in the records. The adjudicator noted it was clear that one of the appellant's reasons for seeking access to this information related to safety concerns.

[50] The adjudicator also found it "relevant and persuasive"[16] that the CNSC had previously refused the appellant's request for access to a record containing source term data at issue for the Pickering B facility. The adjudicator noted this occurred during a CNSC license renewal hearing, at which the appellant was an intervenor. The CNSC had denied the appellant access to this information on the grounds that disclosure "may be prejudicial to the security interests of Canadians."[17]

[51] The adjudicator's conclusions in Order PO-2960-I read as follows:

> Having carefully reviewed the records, the representations and the description of EPRC 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.
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> 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

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[15] *Ibid.* at page 12-13.
[16] Order PO-2960-I at page 12.
[17] *Ibid*. page 13.

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

The adjudicator referred to previous IPC decisions[18] that 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. The adjudicator concluded that section 16 applies to exempt the records from disclosure, in their entirety.

[52] The adjudicator also found that section 14(1)(i) applied to the records for the same reasons that he found the records exempt under section 16.

[53] In Order PO-2960-I, the adjudicator ordered OPG to re-exercise its discretion in applying sections 14(1)(i) and 16 to the source term information. The adjudicator reviewed OPG's re-exercise of discretion in Order PO-3019-F and upheld it.

Analysis and Findings

[54] As stated above, in *Danyluk*, the Supreme Court confirmed the importance of finality in litigation and stated, "an issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner."[19] In considering whether issue estoppel applies, the Supreme Court directs a decision maker to "balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."[20] Based on my review of Order PO-2960-I, the parties' representations and the circumstances of this case, I find the doctrine of issue estoppel applies to this appeal.

[55] The first requirement for a finding of issue estoppel is that the same question has been decided. In Order PO-2960-I, the adjudicator considered whether source term information for all Ex-Plant Release Categories included in the probabilistic risk

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[18] See Orders PO-2072-F and PO-2500.
[19] *Danyluk*, *supra* note 2 at para 18.
[20] *Ibid*. at para 33.

assessments for the Darlington as well as the Pickering A and B nuclear stations is exempt under sections 14(1)(i) and 16 of the *Act*. The adjudicator found that the source term information was exempt from disclosure after considering the records, circumstances and the parties' representations.

[56] The request before me in this appeal is nearly identical to the one before the adjudicator in Order PO-2960-I. The only difference between the request at issue before me and the one at issue in Appeal PA08-96 is the inclusion of "most recent" in the current request to describe the probabilistic risk assessments. I find that this small difference does not alter the type of information that the appellant seeks access to. Based on my review, I find the same type of information, namely, source term information of the type set out in the request is responsive to the appellant's request. The only difference is the time period to which the information relates. In the circumstances of this appeal, I do not accept that the different time period changes the essence of the question to be decided. OPG claims the application of the exemptions in sections 14(1)(i) and 16 to the *source term information* for all Ex-Plant Release Categories included in the probabilistic risk assessments for the nuclear stations in question. Therefore, I find the question at issue before me was decided in Order PO-2960-I.

[57] The appellant submits I should hear this appeal because the request deals with documents created after Orders PO-2960-I and PO-3019-F (the final order in appeal PA08-96) were issued. In addition, the appellant submits that the circumstances surrounding the disclosure of source term information have changed "dramatically" since those orders were issued. Specifically, the appellant submits the CNSC and the Ontario government have since disclosed source term information, including information similar to that which would be responsive to his request, to the public. The appellant submits I should re-examine the *Act*'s application in this case, given the CNSC's "dramatic change" of position and the fact the adjudicator gave the CNSC's position regarding the disclosure of source term information "significant weight" in Order PO-2960-I.

[58] I have reviewed the appellant's representations and Order PO-2960-I. I do not agree that Order PO-2960-I placed "significant weight" on the CNSC's decision to withhold source term information from the appellant during a license renewal hearing. Based on my review of the order, the CNSC's decision was one of a number of factors the adjudicator considered in his analysis. It is clear the adjudicator considered the type of information, the representations of the parties and the description of Ex-Plant Release Categories in the Pickering B Risk Assessment Summary Report in making his decision. The adjudicator stated he was 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." The adjudicator considered all the evidence before him, not just the CNSC's decision, prior to deciding that source term information is exempt under sections 14(1)(i) and 16. Moreover, I have reviewed both parties' representations and am not convinced that the

type of information the CNSC has released to the public is the same type of information as the information before me. Therefore, while the CNSC's position may have changed since Orders PO-2960-I and PO-3019-I were issued, I do not find this change warrants a re-examination of the findings in Order PO-2960-I.

[59] In its supplementary representations, the appellant identified recent instances in which the Ontario government and the CNSC have disclosed source term information to the public. The appellant submits that these new disclosures support its position that Order PO-2960-I should not be followed and that there is no risk to the disclosure of the source term information at issue. I invited OPG to address the appellant's supplementary representations. OPG states that the recently disclosed information does not correlate to or reveal the source term information at issue. OPG also states that none of the information the appellant identifies in its supplementary representations is similar to or overlaps with the source term information. As such, OPG submits the appellant's new evidence does not warrant a change in OPG's position.

[60] I agree with OPG. I reviewed the parties' representations and do not find there has been a dramatic factual change in circumstances as the appellant submits in its supplementary representations. While the appellant alleges that the same type of source term information has been disclosed publicly, OPG has provided evidence to demonstrate this is not the case. OPG states that none of the information that has been disclosed publicly is similar to, overlaps or correlates with the source term information before me and considered in Order PO-290-I. Therefore, while some source term information may have been disclosed by the CNSC and the Ontario government since the beginning of this inquiry, I do not find that these recent disclosures warrant a reexamination of the findings in Order PO-2960-I.

[61] In conclusion, I find the question at issue in this appeal, namely, whether source term information for all Ex-Plant Release Categories included in the most recent probabilistic risk assessments for the Darlington and Pickering A and B nuclear stations is exempt from disclosure under sections 14(1)(i) and 16, was decided in Order PO-2960-I.

[62] I also find the decision which is said to create the estoppel was final. The appellant does not dispute this fact. Furthermore, as OPG submits, Order PO-2960-I was a final decision on the applicability of sections 14(1)(i) and 16 of the *Act* to source term information. The decision was neither subject to a reconsideration request nor a judicial review application. Therefore, I find Order PO-2960-I was a final decision and the second condition for issue estoppel is satisfied.

[63] Finally, I find the third requirement for the application of issue estoppel is satisfied. The parties to Order PO-2960-I are the same as those before me in this appeal.

[64] Therefore, I find the doctrine of issue estoppel applies to this appeal.

Discretion

[65] Even though I have found that issue estoppel applies, I may exercise my discretion to hear the appeal. In Danyluk, the Supreme Court referred to *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*, in which the Court of Appeal of British Columbia stated,

> Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.[21]

Of particular relevance to this appeal, the Supreme Court further stated in Danyluk that "the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers."[22]

[66] The appellant submits, "in light of the significant changes to the factual circumstances underlying disclosure to source term information, particularly the CNSC's approach to the release of source term information, and the lessons from the Fukushima disaster, it would cause unfairness or work an injustice if the IPC refused to consider the appeal."

[67] OPG did not make submissions on whether I should exercise my discretion to consider the appeal despite the application of issue estoppel.

[68] In *Penner v. Niagara (Regional Police Services Board)*,[23] the Supreme Court considered the discretionary application of issue estoppel. In its decision, the majority stated as follows:

> Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme.[24]

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[21] *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*, 1998 CanLII 6467 (BC CA) at para 32.
[22] *Danyluk*, *supra* note 2 at para 62.
[23] 2013 SCC 19. (*Penner*)
[24] *Ibid*. at para 28.

However, the Supreme Court stated that even if issue estoppel applies, "a court retains discretion to not apply issue estoppel when its application would work an injustice."[25] The Supreme Court stated,

> The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme…. As this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."[26]

[69] Regarding the factors to consider in the discretionary application of issue estoppel, the Supreme Court stated,

> Broadly speaking, the factors identified in the jurisprudence [such as *Danyluk*] illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regarding to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.[27]

Upon consideration of these factors as well as the circumstances of the appeal, the parties' representations and the information at issue, I am not satisfied it would be unjust to apply the doctrine of issue estoppel in this case.

[70] Based on my review of the circumstances, I find no evidence to demonstrate that the prior proceedings were unfair to the appellant. In *Penner*, the Supreme Court directs the decision-maker to consider factors including "procedural safeguards, the availability of an appeal, and the expertise of the decision maker"[28] in considering the opportunity the parties had to participate in, and the fairness of, the administrative proceeding. The Supreme Court stated these considerations "address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed."[29] Upon review of the circumstances of Order PO-2960-I and the parties' representations, I find no evidence that the adjudication of Order PO-2960-I

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[25] *Ibid*. at para 29.
[26] *Ibid*. at para 31.
[27] *Ibid*. at para 39.
[28] *Ibid*. at para 41.
[29] *Ibid*. at para 41.

was unfair to any of the parties to the appeal. Further, as discussed above, the parties to the appeal had an opportunity to participate in the inquiry of Appeal PA08-96. In addition, the parties had an opportunity to have the decision reviewed, either through the reconsideration process identified in section 18 of the IPC's *Code of Procedure* or the judicial review process. Therefore, I find there is no evidence to establish that the prior proceedings were unfair to the appellant.

[71] The second manner in which the application of issue estoppel may be unfair relates to the fairness of using the results of the prior proceedings to preclude the subsequent proceedings. In this regard, the Supreme Court stated,

> … even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings….. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an object that is also important in the administrative law context.[30]

Applying this analysis to the circumstances of this appeal, I am not satisfied the appellant demonstrated an injustice may arise from using the results from Order PO-2960-I to preclude this appeal. The appellant claims an injustice may result due to the "significant changes to the factual circumstances underlying disclosure to source term information, particularly the CNSC's approach to the release of source term information, and the lessons from the Fukushima disaster". The appellant does not offer any other arguments regarding the injustice or unfairness that may result from my finding it is estopped from appealing OPG's decision. In any case, based on my review of Order PO-2960-I, the information and the exemptions at issue, I find the appellant's reasons are not sufficient for me to decide to proceed with the appeal despite the application of the doctrine of issue estoppel.

[72] Therefore, I find that issue estoppel applies to preclude this appeal, which arises from essentially the same question decided in Order PO-2960-I, and I do not exercise my discretion to hear the appeal.

Additional comments

[73] I acknowledge that the information before me is not identical to the information before the adjudicator in Order PO-2960-I because it relates to a different time period. Regardless, based on my review of the circumstances, including the fact that the type

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[30] *Ibid*. at para 42.

of information at issue in both appeals is the same, I find the appellant is attempting to relitigate and overturn Order PO-2960-I by means other than those provided by the *Act* and the common law for that purpose. As stated above, the appellant had the opportunity to file a request for reconsideration or an application for judicial review. The appellant did not do so. In my view, the appellant is attempting to re-open a matter that was decided in Order PO-2960-I.

[74] In Order MO-3511, the adjudicator considered the City of Oshawa's arguments that the issue of custody or control in the related Order MO-3281 was wrongly decided. The City of Oshawa did not request a reconsideration or seek judicial review of Order MO-3281. In any case, the City of Oshawa argued that the adjudicator should reverse or, at a minimum, not follow Order MO-3281. However, upon review of *Danyluk* and other decisions relating to the doctrine of *res judicata* (of which issue estoppel is a subspecies), the adjudicator found it was not open for the City of Oshawa to argue that Order MO-3281 was wrongly decided after having failed to request a reconsideration or bring an application for judicial review. The adjudicator's main conclusion was either that the issue of control is *res judicata* on the basis of issue estoppel, or that the City of Oshawa's arguments are an abuse of process and/or collateral attack.

[75] With regard to abuse of process and/or collateral attack, the adjudicator in Order MO-3511 referred to the Supreme Court's decision *British Columbia (Workers' Compensation Board) v. Figliola*,[31] which states,

> The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route….
>
> … we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)* [*v. C.U.P.E., Local 79*, 2003 SCC 63]. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.
>
> Arbour J. found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against

[31] 2011 SCC 52. (*Figliola*)

collateral tack strictly applied. Because the effect of the arbitrator's decision was to relitigate the conviction for sexual assault, the proceeding amounted to a "blatant abuse of process".

Even where res judicata is not strictly available, Arbour J concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice" (para. 37). She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

> **[Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.**[32] [Emphasis added]

[76] Following the analysis in *Figliola* and Order MO-3511, I find that allowing the appellant to proceed with this appeal would amount to an abuse of process. In this order, I have concluded that issue estoppel applies to preclude this appeal, which arises from a request that is substantially similar to the one that resulted in Order PO-2960-I. I made this finding because: (1) the issue of whether source term information of the kind at issue is exempt from disclosure under sections 14(1)(i) and 16 was already decided in Order PO-2960-I, (2) Order PO-2960-I was a final decision and (3) the parties before me are the same as those before the adjudicator in that decision.

[77] Even if issue estoppel does not apply because the information before me is not identical to the information considered in Order PO-2960-I, I find the appellant's approach in this appeal amounts to a collateral attack on PO-2960-I or is an abuse of process. As stated above, the appellant had an opportunity to seek a reconsideration or file a judicial review of Order PO-2960-I. It did not do so. Instead, the appellant argues in a subsequent inquiry arising from a nearly identical request that the findings in Order PO-2960-I are wrong. Adopting the principles outlined in Order MO-3511 and *Figliola*, I find the appellant is not entitled to make these arguments.

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[32] *Figliola*, *supra* note 29 paras 27, 31-33.

[78] In conclusion, I find that the doctrines of issue estoppel, collateral attack and/or abuse of process preclude the appellant from circumventing the findings in Order PO-2960-I and relitigating its case. I dismiss the appeal.

ORDER:

The appeal is dismissed.

Original Signed By: April 25, 2019

Justine Wai
Adjudicator