

Information and Privacy Commissioner of Ontario

IN THE MATTER OF Appeal No. PA14-543
under the
Freedom of Information and Protection of Privacy Act, RSO 1990, c F 31

REPRESENTATIONS OF THE APPELLANT

OVERVIEW

1. The critical lesson from the Fukushima nuclear disaster is that transparent decision-making is essential to ensure that institutions responsible for nuclear emergency planning are truly protecting the public. The public bears the risk of a nuclear accident and has a right to understand the basis for Ontario’s nuclear emergency plans. The government’s secretive approach to its review of the planning basis for emergency plans and its sweeping application of the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31 (“*FIPPA*”) significantly undermines public accountability and improperly shields this decision-making process from public scrutiny.

PART I – STATEMENT OF FACTS

A. BACKGROUND

1) History of the appeal

2. Greenpeace Canada submitted the following request to the Ministry of Energy (“Ministry”):

According to other documents in the public domain, Wilson Lam and Rachna Clavero of the Ministry of Energy agreed at a meeting on February 11, 2014 to undertake “a short project to provide technical

recommendations to us (Emergency Management Ontario & Ontario Power Generation) related to the scientific basis of the PNERP.” Please provide all documents, briefing notes and power point presentations related to this project between February 1st and May 30th 2014.¹

3. The Ministry identified ten records in response to this request. It denied the release of every record in its entirety, pursuant to sections 12, 13(1), 14(1)(i) and 16 of *FIPPA* and subsection 5.1(3) of *Emergency Management and Civil Protection Act*, RSO 1990, c E9 (“*EMCPA*”).² The key document being withheld is a report on “the review of the scientific basis for provincial nuclear emergency response plan (PNERP) planning assumptions.”³

2) What is the nature of the information being withheld?

a) *What is a planning basis?*

4. The planning basis refers to the scale or scope of accident chosen as the foundation for the Provincial Nuclear Emergency Response Plan (“PNERP”). Other jurisdictions refer to the planning basis as a reference accident.⁴ The choice of planning basis will determine the level of risk protection provided to the public and what protective measures are prepared.⁵ The planning basis does not refer to a site-specific accident scenario or explain how an accident could occur at a particular nuclear facility.⁶

¹ Affidavit of Shawn-Patrick Stensil dated December 10, 2015 at para 6, Submission of the Appellant, Vol 1, Tab 1 (“Stensil Affidavit”)

² Stensil Affidavit, paras 7-8

³ Index of Records for FOI # ENERGY 14-41; Stensil Affidavit, para 9

⁴ Stensil Affidavit, para 14

⁵ Stensil Affidavit, paras 13-17

⁶ Stensil Affidavit, para 15

b) What is a source term?

5. Source terms are calculations of the overall hazard to the public after a nuclear accident. They combine the magnitude of the accident, the timing of radioactive releases and the mix of substances being released into the environment.⁷ A source term is usually expressed in becquerels of each radionuclide released over a given time period and is used to calculate the dose of radioactivity to a member of the public as a result of a nuclear accident.⁸

6. Source terms are based on hypothetical accident scenarios.⁹ The scientific assumptions used to calculate source terms are key variables in determining the planning basis and the corresponding geographic extent and scope of the emergency plan.¹⁰

B. HISTORY OF TECHNICAL REVIEWS OF PLANNING BASIS

7. Historically, the Ontario government commissioned arms-length committees to make recommendations to government on the appropriate planning basis for its off-site nuclear emergency plan.¹¹

8. Provincial Working Group #3 recommended in 1984 that detailed evacuation plans be created for a 10 km primary zone around each nuclear facility. This report was released to the public.¹²

⁷ Stensil Affidavit, para 18

⁸ Affidavit of Frank Greening dated December 15, 2015 at para 21, Submission of the Appellant, Vol 2, Tab 2 (“Greening Affidavit”)

⁹ Greening Affidavit, paras 21-22

¹⁰ Stensil Affidavit, para 21

¹¹ Stensil Affidavit, paras 30-31

9. Provincial Working Group #8 re-examined the planning basis after the Chernobyl nuclear disaster in 1986 and recommended that the primary zone be expanded from 10 to 13 km around each nuclear facility. This report was released to the public.¹³

10. The Ministry of the Solicitor General and Correctional Services made a cabinet submission on the proposed changes to the planning basis on September 30, 1993. The cabinet submission was not publicly available until it was released under paragraph 12(2)(a) of *FIPPA*.¹⁴

11. Ontario Hydro opposed the recommendation to expand the planning basis.¹⁵ The government asked the Royal Society of Canada and Canadian Academy of Engineering (“RSC”) to review the planning basis in 1996. The RSC recommended that detailed emergency plans be created for accidents assessed to be more probable than 1E-7 (one accident per 10 million years of reactor operation).¹⁶ The RSC relied on Ontario Hydro’s 1995 risk assessment for the Pickering A nuclear station, which estimated that the likelihood of major releases within the first twenty-four hours was lower than 1E-7. The RSC’s report was released to the public.¹⁷

¹² Stensil Affidavit, para 32; Report of Provincial Working Group #3 – Nuclear Emergency Plan dated April, 1984, Submission of the Appellant, Vol 1, Tab 1A (“Working Group #3 Report”)

¹³ Stensil Affidavit, paras 33-34; Report of Provincial Working Group #8 – The Upper Limit of Detailed Nuclear Emergency Planning dated June 30, 1988, Submission of the Appellant, Vol 1, Tab 1B (“Working Group #8 Report”)

¹⁴ Stensil Affidavit, paras 37-38; Cabinet Submission – Nuclear Emergency Planning and Preparedness dated September 30, 1993, Submission of the Appellant, Vol 1, Tab 1C (“Cabinet Submission”)

¹⁵ Stensil Affidavit, para 39

¹⁶ Royal Society of Canada and Canadian Academy of Engineering – Report to the Ministry of Energy and Environment Concerning Two Technical Matters in the Province of Ontario’s Nuclear Emergency Plan dated November, 1996 at para 4.2, Submission of the Appellant, Vol 1, Tab 1D (“RSC Report”)

¹⁷ Stensil Affidavit, paras 40-42

C. SUITABILITY OF PNERP 2009

12. The more recent risk assessments for Pickering A, Pickering B, Bruce B and Darlington all found that major radioactive releases within the first twenty-four hours were more likely than $1E-7$.¹⁸ The Pickering B risk assessment predicted that Release Category 1 accidents (large releases within the first twenty-four hours of an accident with the potential for acute radiation effects and widespread contamination) would occur with a frequency of $2.9E-6$.¹⁹ The Pickering A risk assessment predicted Release Category 1 accidents would occur with a frequency of $4.69E-6$.²⁰ These results are far above the RSC threshold of $1E-7$. According to RSC criteria, off-site emergency plans should be in place for accidents of this scale.²¹ However, despite the significant increase in risk identified in the risk assessments, there is no evidence that the province has considered the implications of those results for its emergency plan.²²

PART II – POINT IN ISSUE

13. It is the Appellant's position that the ten records identified by the Ministry should be disclosed in their entirety.

PART III – SUBMISSIONS

A. SECTION 12 DOES NOT APPLY

14. The Ministry's application of section 12 to a review of the scientific basis of the emergency plan and the slide deck is overly broad and improperly shields

¹⁸ Stensil Affidavit, para 47

¹⁹ Stensil Affidavit, para 48

²⁰ Stensil Affidavit, para 49

²¹ Stensil Affidavit, paras 48-49

²² Stensil Affidavit, para 50

the records from public scrutiny. The Ministry has improperly conflated the scientific analysis performed by Ministry staff²³ with the political decision-making that will eventually occur at Cabinet about the planning basis.

15. Section 12 provides:

12(1) 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 implemented²⁴

16. 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.²⁵ It is not necessarily determinative if a record is placed before Cabinet.²⁶

²³ See, for instance, Representations of the Ministry of Energy dated June 8, 2015 (“Ministry Representations”), paras 14, 15, 16, 17

²⁴ *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31 (“*FIPPA*”), s 12(1)(b), (c)

²⁵ *PO-2725* (21 October 2008), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>> (“*PO-2725*”), p 3

²⁶ *PO-2725*, p 5

17. The section 12 exemption is linked to discussions between Ministers with a tradition of collective ministerial responsibility or Cabinet prerogative.²⁷ 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 Office of the Fire Marshall and Emergency Management (“OFMEM”), OPG²⁸, and the Nuclear Emergency Management Coordinating Committee (“NEMCC”)²⁹, which includes members of OPG, Bruce Power, Atomic Energy of Canada Limited and municipal staff.³⁰

18. 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.

19. Provincial Working Group #8’s report is 157 pages. It explains the assumptions used to calculate maximum doses of radioactivity³¹, the methodology for calculating source terms³², the extent of any reliance on Probabilistic Risk Assessment methodology and its limitations, including the necessary reliance on expert judgment when no data is available³³, public opinion about emergency planning and the level of risk³⁴, its reasoning for the recommendation to plan for

²⁷ PO-2707 (11 August 2008), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>, p 13; P-604 (31 December 1993), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>, pp 8-9

²⁸ Ministry Representations, paras 1-2, 14

²⁹ Ministry Representations, paras 3, 13

³⁰ Stensil Affidavit, para 51

³¹ Working Group #8 Report, pp 81-85

³² Working Group #8 Report, pp 88-89, 129-136

³³ Working Group #8 Report, pp 101-102, 112-113

³⁴ Working Group #8 Report, pp 102-103

accidents predicted to occur less than once per million years of accident operation³⁵ and its probabilities calculations for severe accidents³⁶. 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.³⁷

20. 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.³⁸ 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.³⁹ 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.⁴⁰

³⁵ Working Group #8 Report, p 111

³⁶ Working Group #8 Report, pp 118-129

³⁷ Working Group #8 Report, pp 164-165

³⁸ Cabinet Submission, p 236

³⁹ Cabinet Submission, p 233

⁴⁰ Cabinet Submission, p 240

21. 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 an International Atomic Energy Agency presentation and a CNSC Update on the CNSC Action Plan⁴¹, both of which appear to be in the public domain.⁴²

22. The ruling in PO-3199 should be followed. The records 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.⁴³ 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.⁴⁴

23. Likewise, paragraph 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.⁴⁵

⁴¹ Index of Records for FOI # Energy 14-41, Rec# 7C and 7D

⁴² Overview of Nuclear Emergency Preparedness and Response, Iodine Prophylaxis - Module XXI, Submission of the Appellant, Vol 2, Tab 1I; CNSC Integrated Action Plan – On the Lessons Learned from the Fukushima Daiichi Nuclear Accident dated August, 2013, Submission of the Appellant, Vol 2, Tab 1J

⁴³ *PO-3199* (14 May 2013), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>> (“PO-3199”), para 11

⁴⁴ *PO-3199*, paras 43, 45

⁴⁵ *FIPPA*, s 12(1)(b); P-1570 (26 May 1998), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>> (“P-1570”), p 4; *PO-2725*, p 10

24. Paragraph 12(1)(c) similarly does not apply.⁴⁶ None of these documents were prepared for Cabinet.⁴⁷ The preliminary reports and slide decks are too far removed from the eventual Cabinet decision to be covered by this provision.

B. APPLICATION OF SECTION 13

1) Subsection 13(1) does not apply

25. The records do not fall within the scope of subsection 13(1).⁴⁸ Subsection 13(1) is designed to protect the neutrality of the public service with respect to advice or recommendations to government decision-makers.⁴⁹ However, these records do not include “recommendations”, which reveal a suggested course of action that will ultimately be accepted or rejected by the person being advised, or “advice”, which include policy options or a public servant’s identification and consideration of alternative decisions.⁵⁰ In any event, if any portion of the records does constitute advice or recommendations, which is contested, the Ministry has not fulfilled its obligation to disclose the rest of the information under subsection 10(2).⁵¹

26. The Ministry admits that the records contain technical and scientific calculations.⁵² Any conclusions in the review would be objective information and could not be characterized as policy advice to government. The IPC has distinguished between the opinion of the author of a report, which is not covered by the exemption

⁴⁶ *FIPPA* s 12(1)(c)

⁴⁷ *PO-2002* (22 March 2002), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>, para 20

⁴⁸ *FIPPA*, s 13(1)

⁴⁹ *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 36, [2014] 2 SCR 3 (“*Ontario (Minister of Finance)*”) at para 43

⁵⁰ *Ontario (Minister of Finance)*, para 46; *PO-3505* (30 June 2015), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>, paras 12-13

⁵¹ *FIPPA*, s 10(2)

⁵² Ministry Representations, paras 14-15, 17-19

in subsection 13(1), and a recommendation by an Assistant Deputy Minister with respect to the scope of a proposed regulation.⁵³ Even if the report draws attention to potential issues or implications of a decision, it does not qualify as advice or recommendations under subsection 13(1).⁵⁴

2) Subsection 13(2) requires disclosure of the records

27. The records fall within the exemptions in subsection 13(2) and should be disclosed. These exemptions ensure that subsection 13(1) is not interpreted too broadly thereby undermining the purpose of *FIPPA* to allow access to government information unless a limited and specific exemption applies.⁵⁵ The application of subsection 13(2) should complement the goal of protecting the neutrality of the public service by ensuring that scientific and factual analyses are subject to public scrutiny before policies are formulated on improper foundations.

28. Paragraph 13(2)(a) provides that objective information should be disclosed.⁵⁶ It outlines scientific and technical assumptions and calculations. The records are properly characterized as objective, albeit controversial, information.⁵⁷

29. The records could also properly be classified as a “similar record” to an environmental impact statement under paragraph 13(2)(d). An environmental impact statement measures the predicted environmental effects of a proposed project.

⁵³ *P-1570*, p16

⁵⁴ *PO-2554* (2 March 2007), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>, p 23; *PO-2725*, p 17; *PO-3315* (6 March 2014), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>, pp 8- 9

⁵⁵ *FIPPA*, ss 1(2)(i), (ii), 13(1), 13(2)

⁵⁶ *Ontario (Minister of Finance)*, para 30

⁵⁷ See, for instance, Working Group #3 Report, Working Group #8 Report, RSC Report

The technical review reports are similar because they aim to calculate predicted environmental impacts from hypothetical nuclear accidents and correspondingly choose which scale of accident should properly form the planning basis.

30. Finally, paragraph 13(2)(k) applies.⁵⁸ The Ministry's technical review was conducted by Ministry staff who agreed to undertake the project for OFMEM and OPG for the purpose of studying and reporting on the planning basis for the PNERP. The Ministry staff made a preliminary presentation to NEMCC and then filed the final report with OFMEM and OPG.

C. SECTIONS 14 AND 16 DO NOT APPLY

31. The withheld records cannot reasonably be expected to pose a risk to a facility or public safety under sections 14(1)(i) or 16 of *FIPPA*. The Ministry only addresses the risk of source term data. It does not raise any argument regarding the rest of the information that would compose the technical review of the planning basis. The reports of Provincial Working Group #3 Report, Provincial Working Group #8 and the RSC clearly show that disclosure of the technical review would not endanger the security of a facility or prejudice national security. Those documents were all released to the public.⁵⁹

32. In any event, Frank Greening explains why the Ministry's claim that source term data poses a risk should be rejected.⁶⁰ For the purposes of emergency

⁵⁸ *FIPPA*, s 13(2)(k); *PO-2681* (5 June 2008), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>

⁵⁹ Working Group #3 Report; Working Group #8 Report; RSC Report

⁶⁰ Ministry Representations, para 26

planning, what matters with respect to source term information is the duration and amount of radioactivity released, not how or why a particular pipe ruptured.⁶¹ Source terms are based on hypothetical accident scenarios. Any site-specific detail about how or why the accident occurred is distinct from the numerical results of source term calculations.⁶²

33. PO-2960-I and PO-3019 should not be followed. The evidence in this case establishes that source term data, and the rest of the information in the planning basis review, cannot reasonably be expected to raise a threat to a facility or public safety. As well, the IPC relied in part on a CNSC decision in April, 2008 to refuse access to source term data⁶³ and the CNSC has changed its approach to releasing information since that time:

- CNSC President Binder explained that unlike the United States Nuclear Regulatory Commission, the CNSC did not currently release some information because of the IPC's reasoning that it falls under sections 14(1)(i) and 16 of *FIPPA*. The IPC's decision originally relied on an earlier CNSC decision.⁶⁴ This reasoning has become circular and should be re-examined.
- CNSC released a study examining hypothetical severe accidents and the effectiveness of mitigation measures, which includes some source term information.⁶⁵

⁶¹ Greening Affidavit, para 24

⁶² Greening Affidavit, para 22

⁶³ *PO-2960-I* (31 March 2011), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>, p 13, *PO-3019-F* (7 December 2011), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>, pp 8-9

⁶⁴ Letter from Dr. Binder to Frank Greening dated May 14, 2013, Submission of the Appellant, Vol 2, Tab 2C

⁶⁵ CNSC Study of Consequences of a Hypothetical Severe Nuclear Accident and Effectiveness of Mitigation Measures dated November 2, 2006, Submission of the Appellant, Vol 2, Tab 1K

- CNSC Commissioner Velshi encouraged the province at the Darlington licence hearing on November 4, 2015 to consult with public interest groups early on the planning basis.⁶⁶
- CNSC released the *Bruce A Probabilistic Risk Assessment (BAPRA) Detailed Review*, which includes source term information, in response to a federal *Access to Information* request.⁶⁷

D. PUBLIC INTEREST IN DISCLOSURE OF THE RECORDS

1) There is a compelling public interest in disclosure of the records

34. The scientific review of the basis for emergency planning is exactly the type of information that should be the subject of rigorous, thorough public debate. The public's safety is at stake. The compelling public interest in disclosure of the records clearly outweighs the purposes of the exemption.⁶⁸

35. Disclosure of the technical review of the planning basis will allow the public to assess whether Ontario is truly prepared for a major nuclear emergency.⁶⁹ There is currently no evidence that Ontario, or OPG, has considered the significant increase of risk of a major nuclear accident identified in all of the recent risk assessments.⁷⁰ The Cabinet Submission on September 30, 1993 correctly pointed out that considerable divergence can exist among technical experts on what assumptions can appropriately be used to develop a planning basis.⁷¹

⁶⁶ CNSC Public Hearing Transcript dated November 4, 2015, Submission of the Appellant, Vol 2, Tab 1P ("Darlington Transcript")

⁶⁷ *Bruce A Probabilistic Risk Assessment (BAPRA) Detailed Review* dated November 2, 2006, Submission of the Appellant, Vol 2, Tab 1L

⁶⁸ *PO-2725*, p 36

⁶⁹ Stensil Affidavit, para 241

⁷⁰ Stensil Affidavit, para 50

⁷¹ Cabinet Submission, p 238

36. Frank Greening explained why source terms should be revealed. It would be insufficient for an oil company planning to transport 100,000 tons of oil through a protected waterway to conduct a secretive accident analysis and report that the worst possible accident scenario would result in the death of 1000 salmon per year for three years without any further detail. A proper analysis of the company's claim would require information on the volume of oil spilled in the accident scenario, which is essentially the spill source term. The company's claim could be verified by calculating the concentration of hydrocarbons in the local environment and the probable effect on fish.⁷²

37. The IPC has repeatedly stressed the significance of disclosure of information regarding nuclear safety and emergency planning. The IPC held in P-956 that nuclear emergency planning is a matter of "considerable importance to the general public". The nuclear disaster in Chernobyl illustrates the significance of emergency planning issues. The province's ability to prepare for a nuclear emergency is quintessentially an issue which should be the subject of informed public debate.⁷³

38. Likewise, in P-1190, the IPC found a compelling public interest in disclosure based on the broad public interest in nuclear safety and public accountability for the operation of nuclear facilities.⁷⁴ The IPC rejected Ontario Hydro's decision to withhold Peer Evaluation Program reports which evaluated the safety of nuclear plants against United States Institute of Nuclear Power Operations

⁷² Greening Affidavit, paras 22-29

⁷³ P-956 (19 July 1995), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>, p 6

⁷⁴ P-1190 (27 May 1996), online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>> ("P-1190"), p 8

standards. It was clearly insufficient for Ontario Hydro to assure the public that reviews of nuclear operations were conducted against “the highest possible standards” without providing enough information for the public to assess the adequacy of the program. Ontario Hydro should not withhold documents whose very purpose is to address the public’s concerns about nuclear safety.⁷⁵

a) Lessons from the Fukushima nuclear disaster

39. The Ministry’s secretive approach to the planning basis review is a pressing public concern in light of the lessons from the Fukushima nuclear disaster. Public scrutiny of the technical review is essential to ensuring that public servants are fulfilling their obligations to independently review emergency plans and that “regulatory capture” has not undermined the safety of the public.

40. The National Diet of Japan found that the cause of the Fukushima nuclear accident was collusion between the government, regulator and the nuclear operator, resulting in faulty rationales for decisions:

The TEPCO Fukushima Nuclear Power Plant accident was the result of collusion between the government, the regulators and TEPCO, and the lack of governance by said parties. They effectively betrayed the nation’s right to be safe from nuclear accidents. Therefore, we conclude that the accident was clearly “manmade.” We believe that the root causes were the organizational and regulatory systems that supported faulty rationales for decisions and actions, rather than issues relating to the competency of any specific individual.⁷⁶

⁷⁵ *P-1190*, p 6, upheld at *Ontario Hydro v Ontario (Information and Privacy Commissioner)*, [1996] OJ No 4636 (Div Ct), leave to appeal refused [1997] OJ No 694 (CA)

⁷⁶ The National Diet of Japan – The Official Report of the Fukushima Nuclear Accident Independent Investigation Commission – Executive Summary at p 6, Submission of the Appellant, Vol 2, Tab 1T

41. At a conference regarding emergency planning in April, 2013, Toshimitsu Homma of the Japan Atomic Energy Agency explained that “there was an implicit assumption that such a severe accident could not happen and thus insufficient attention was paid to such an accident by authorities”.⁷⁷

42. Greenpeace International similarly found that institutional failure or regulatory capture caused the Fukushima nuclear disaster.⁷⁸ John Downer questions the reliability of risk assessments in the nuclear industry and the industry’s tendency to “disown” nuclear disasters.⁷⁹

b) Broad public support for disclosure of emergency planning information

43. There is also broad support for further disclosure of information on emergency planning from other regulatory and government bodies:

- CNSC Commissioner Velshi asked the province to “very seriously” consider engaging with Greenpeace Canada and the Canadian Environmental Law Association (“CELA”) on the planning basis for the emergency plan, as opposed to engaging after the plan had already been developed and any decision would be a *fait accompli*. Commissioner Velshi noted that more than 80% of interventions at the Darlington nuclear station licence renewal hearing expressed concerns about the planning basis for the emergency plan.⁸⁰
- The Regional Municipality of Durham passed a motion on November 4, 2015 asking the government of Ontario to provide non-confidential data and studies used in considering Ontario’s off-site nuclear emergency plans. The municipality asked Ontario

⁷⁷ Stensil Affidavit, para76

⁷⁸ Greenpeace International – Lessons from Fukushima dated February, 2012, Submission of the Appellant, Vol 2, Tab 1S

⁷⁹ John Downer – Disowning Fukushima: Managing the Credibility of Nuclear Reliability Assessment in the Wake of Disaster, 2014 at pp 646-647, 661-662, Submission of the Appellant, Vol 2, Tab 1U

⁸⁰ Darlington Transcript, p 497

to consider the feasibility of expanding the 10 km primary zone for emergency planning.⁸¹

- The City of Toronto executive committee voted on December 1, 2015 to review its emergency plan and highlighted the public's concern about the emergency plans.⁸²

c) FIPPA is the only avenue to gain access to the records

44. There is no other public process that will allow scrutiny of the planning basis review. Despite Minister Meilleur's commitment to engage the public in nuclear related matters⁸³, Greenpeace Canada and CELA were invited to one NEMCC meeting to express concerns about the emergency plan and there has been no further public engagement. NEMCC has even refused to disclose its decision regarding how it will further engage the public.⁸⁴ The Ministry has now revealed in its representations that there will be no meaningful review of the planning basis and the technical review will not be disclosed.⁸⁵

2) The public interest in disclose outweighs the purpose of the exemptions

45. The compelling public interest in disclosure of the records, especially in light of the lessons learned from the Fukushima disaster, weigh in favour of disclosure. The Ministry's representations improperly give little consideration to the public interest in disclosure of the records.

⁸¹ Regional Municipality of Durham – Minutes of Regional Council dated November 4, 2015, Submission of the Appellant, Vol 2, Tab 1Q

⁸² City of Toronto Executive Committee Consideration – Darlington Nuclear Generating Station Renewal dated December 1, 2015, Submission of the Appellant, Vol 2, Tab 1R

⁸³ Letter to Theresa McClenaghan et al. from Madeleine Meilleur dated October 21, 2013, Submission of the Appellant, Vol 2, Tab 1N

⁸⁴ Stensil Affidavit, paras 64-67; Meeting Minutes – Nuclear Emergency Management Coordinating Committee dated October 22, 2014, Submission of the Appellant, Vol 2, Tab 1O

⁸⁵ Ministry Representations, paras 16, 18; Stensil Affidavit, paras 52-53

46. If the records are found to fall within subsection 13(1), any interest in the neutrality of the public service is outweighed by the concerns about regulatory capture.⁸⁶

47. Likewise, along with the significant evidence that release of the planning basis review documents will not raise security concerns⁸⁷, the Swiss government's approach to emergency planning demonstrates that a transparent process is feasible and that the public interest in disclosure of planning basis review documents can be protected. The Swiss government decided to review its emergency plans after Fukushima, model severe accidents, determine which protective measures should be prepared and publish these results on the internet.⁸⁸

48. Finally, the Ministry's argument that disclosure of the information would not be meaningful should be rejected. Shawn-Patrick Stensil⁸⁹ and Frank Greening⁹⁰ have significant expertise in the nuclear industry and could seek out any further expertise to interpret the data if necessary.

E. THE *EMERGENCY MANAGEMENT AND CIVIL PROTECTION ACT* DOES NOT APPLY

49. Subsection 67(1) of *FIPPA* provides that *FIPPA* prevails over a confidentiality provision in other legislation unless there is clear language to indicate

⁸⁶ Stensil Affidavit, paras 24-29

⁸⁷ See, for instance, Greening Affidavit

⁸⁸ Inspection federale de la securite nucleaire dated April 12, 2013, Submission of the Appellant, Vol 2, Tab 1W

⁸⁹ Stensil Affidavit, paras 2-5

⁹⁰ Greening Affidavit, paras 1-8; Curriculum Vitae of Frank Greening, Submission of the Appellant, Vol 2, Tab 2A

otherwise.⁹¹ The language in section 5.1 of the *EMCPA* is not clear enough to override *FIPPA*.⁹² Subsection 5.1(4) also provides for a person's right of appeal under section 50 of *FIPPA*.⁹³

50. In any event, subsection 5.1(2) does not apply to the planning basis review documents. It contemplates identifying facilities and other elements of infrastructure as risks or hazards.⁹⁴ There is no dispute that nuclear facilities pose a risk and the information being sought relates to the technical basis for emergency planning arising from an already identified risk.

PART IV – ORDER REQUESTED

51. The appellant requests that the ten records be disclosed in their entirety. In the alternative, the records should be disclosed to the extent possible pursuant to subsection 10(2) of *FIPPA*.⁹⁵

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 18th of December, 2015.

Jacqueline Wilson
Counsel for the Appellant

⁹¹ *FIPPA*, s 67(1)

⁹² *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, paras 33-34

⁹³ *Emergency Management and Civil Protection Act*, RSO 1990, c E9 (“*EMCPA*”), s 5.1(4)

⁹⁴ *EMCPA*, s 5.1(2)

⁹⁵ *FIPPA*, s.10(2)