

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3415

Appeal PA12-430

Ontario Power Generation

October 28, 2014

Summary: The appellant made a request to Ontario Power Generation (OPG) for access to copies of agreements made between OPG and one named corporation, and between OPG and two other named corporations, jointly, for the preparation of detailed construction plans, schedules and cost estimates for two potential nuclear reactors at OPG's Darlington site. Although, initially, OPG denied access to both agreements in full, by the time of this order the only information remaining at issue was the redacted portions of one article in the agreements, dealing with target pricing. OPG continued to deny access to this information on the basis of the exemptions at sections 17(1)(a) and (c) (third party information) and sections 18(1)(a), (c) and (e) (economic and other interests of Ontario) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). In this order, the adjudicator finds that the remaining information at issue is exempt under section 18(1)(c), and that the public interest override in section 23 does not apply. She therefore upholds OPG's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1), 23.

BACKGROUND:

[1] On June 22, 2012, Ontario Power Generation (OPG) issued a news release announcing it had signed agreements with three named corporations to prepare detailed construction plans, schedules and cost estimates for two potential nuclear reactors at its Darlington site. As described in the news release, the two agreements, one made between OPG and one named corporation, and the other between OPG and

two other named corporations, jointly, require the corporations to develop reports that will be used to help inform the government of Ontario's decision on whether to proceed with new nuclear generation at Darlington.

[2] Shortly after OPG's announcement, the appellant made a request to OPG under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of the two agreements referred to in the June 22, 2012 release.

[3] OPG notified the three corporations (the affected parties) of the request pursuant to section 28 of the *Act*. After considering the submissions of the affected parties, OPG issued a decision to the appellant denying access to both agreements in their entirety. In its decision, OPG cited the exemptions at sections 17(1)(a) and (c) (third party information) to withhold the agreements in full. OPG also claimed that sections 18(1)(a), (c) and (e) (economic and other interests of Ontario) apply to portions of the agreements.

[4] The appellant appealed OPG's decision to this office.

[5] During the mediation stage of the appeal process, OPG issued two revised access decisions with the consent of all affected parties, resulting in the release of portions of the agreements. OPG also provided the appellant with an index for the agreements, which enabled him to narrow the scope of his request. As a result of these developments, only four discrete items in both agreements remained at issue by the end of the mediation stage. During mediation the appellant also claimed a public interest in disclosure of the remaining portions of the agreements; the application of the public interest override at section 23 of the *Act* was accordingly added as an issue in the appeal.

[6] As no further mediation was possible, the appeal was transferred to the adjudication stage for a written inquiry under the *Act*. I began my inquiry by seeking representations from OPG and the affected parties. After I had sent Notices of Inquiry to these parties, OPG, with the agreement of the affected parties, issued a revised decision granting full access to three of the four items at issue in the agreements, and partial access to the fourth item. OPG maintained its exemption claims for the withheld information, now consisting only of the redacted portions of Article 4 of Schedule B to the agreements ("Rules with Respect to Target Pricing"). I received representations from OPG and the affected parties in support of OPG's decision to withhold this information.

[7] As the appellant confirmed his interest in pursuing access to the withheld information, I then invited his representations on the issues. I provided the appellant with complete copies of the other parties' submissions, except for confidential portions of one affected party's representations, in accordance with section 7 of the IPC's *Code*

of Procedure and Practice Direction 7. The appellant did not submit representations in response.

[8] Finally, I wrote to OPG and the affected parties to seek their views on the impact, if any, on the issues in this appeal of certain developments that had arisen since the filing of the appellant's request and appeal: namely, the government of Ontario's announcement, in December 2013, of its decision not to proceed with the construction of new nuclear units at Darlington¹; and a May 2014 Federal Court decision invalidating OPG's licence in relation to this project.² I received submissions from OPG and the affected parties in response.

[9] For the reasons that follow, I uphold OPG's decision to withhold the information remaining at issue on the basis of section 18(1), as well as its exercise of discretion under this section. I also find that section 23 does not apply in the circumstances of this appeal.

RECORD:

[10] The only information remaining at issue in this appeal consists of the redacted portions of Article 4 of Schedule B to the agreements ("Rules with Respect to Target Pricing").

ISSUES:

- A. Does the mandatory exemption at section 17 apply to the information?
- B. Does the discretionary exemption at section 18(1) apply to the information?
- C. Did OPG exercise its discretion under section 18? If so, should I uphold the exercise of discretion?
- D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemption at section 18?

¹ Announced in the government of Ontario's most recent Long-Term Energy Plan ("Achieving Balance," December 2013), updating its previous Long-Term Energy Plan ("Building Our Clean Energy Future," November 2010) that had called for the construction of two nuclear units at Darlington. December 2013 Long-Term Energy Plan available online:

http://www.energy.gov.on.ca/en/files/2014/10/LTEP_2013_English_WEB.pdf.

² 2014 FC 463.

DISCUSSION:

A. Does the mandatory exemption at section 17 apply to the information?

[11] The three affected parties claim that section 17 applies to the withheld information, on the basis it is commercial and financial information of the affected parties that was supplied in confidence to OPG, the disclosure of which could reasonably be expected to give rise to one or more of the harms set out at section 17(1). OPG indicates it supports the representations of the affected parties on this issue.

[12] Because of my findings on the application of section 18 to the withheld information, it is unnecessary for me to address the parties' claims concerning the application of section 17 to the same information.

B. Does the discretionary exemption at section 18(1) apply to the information?

[13] OPG takes the position that the information at issue is exempt pursuant to sections 18(1)(a), (c) and (e) of the *Act*. These sections state:

A head may refuse to disclose a record that contains,

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

[14] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.³

³ Toronto: Queen's Printer, 1980.

[15] I will begin by considering the application of section 18(1)(c) to the withheld information.

General principles

[16] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁴

[17] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.⁵

[18] For section 18(1)(c) to apply, the institution must provide detailed and convincing 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.⁶

[19] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.⁷

Representations

[20] The information at issue in this appeal appears in the agreements under the heading "Rules with Respect to Target Pricing."

[21] OPG describes the withheld information as rules respecting its target pricing model, a commercially valuable contracting strategy developed by OPG that was included in the agreements as a request to the affected parties to provide target prices as part of their submissions. As one of the affected parties notes in its representations,

⁴ Orders P-1190 and MO-2233.

⁵ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁷ See Orders MO-2363 and PO-2758.

the agreements from which the withheld information is drawn are not agreements for the development of new nuclear; rather, they are agreements for the preparation of plans and estimates for the potential development of new nuclear, reflecting only the first phase of a two-phase competitive procurement process undertaken by OPG.

[22] OPG provides affidavit evidence of its Director, Nuclear Regulatory Affairs, Nuclear Projects (and acting Director, Darlington New Nuclear Project Management and Support) on the potential harms from disclosure of the information at issue in this appeal. This individual explains that the information produced by the affected parties pursuant to the agreements will form the basis of OPG's advice and recommendations to the government of Ontario concerning new nuclear generation at Darlington. He describes the rules respecting target pricing as a metric for assessment of the affected parties' target pricing submissions. The terms and conditions respecting target pricing would be an element used to develop cost estimates for the new nuclear project, and "target pricing together with the resulting cost estimates would be central points of discussion in any future negotiations respecting new nuclear undertaken by or on behalf of the Province of Ontario." He states that disclosure of the withheld information would permit the drawing of inferences about the basis of the advice to be given to the government on new nuclear, and would impede OPG's ability to provide this advice without external interference.

[23] OPG submits that the affidavit evidence demonstrates that the withheld information reveals a commercially sensitive target pricing contracting strategy, whose disclosure would permit the drawing of inferences that would give rise to the harms contemplated by section 18(1). As new build project costing will be a critical piece in the development of OPG's recommendations, inferences respecting the estimated cost would negatively affect OPG's ability to freely and frankly inform and advise the government on new nuclear generation.

[24] In its additional representations described below, OPG also submits that the target pricing model forms the basis for negotiating optimum pricing in the best interests of Ontarians, and that release of this information would put OPG at a significant disadvantage in its negotiations with counterparties other than the affected parties with whom it has shared this information. OPG notes that remaining competitive with other generators is critical to its ability to supply electricity at low cost in Ontario.

Additional representations

[25] After receiving their initial representations, I wrote again to OPG and the affected parties to solicit their views on the impact, if any, on their section 17 and 18 claims – and particularly on the harms components of these exemption claims – of certain developments that had arisen since the appellant filed his request for information and his appeal to this office. In particular, I asked the parties to comment on the effect of

the government of Ontario's decision, set out in its December 2013 Long-Term Energy Plan, not to proceed with construction of new nuclear at Darlington,⁸ and a May 2014 decision of the Federal Court to invalidate the OPG's licence in relation to this project.⁹

[26] OPG and all the affected parties provided responses clarifying that the project for new nuclear at Darlington has not been cancelled but rather deferred, with the government maintaining the option to proceed with the project at any time. OPG provided references to parts of the most recent Long-Term Energy Plan, in which the government set out its intentions to defer rather than to cancel the new build project, to maintain the site licence granted by the Canadian Nuclear Safety Commission for the new build project, and to maintain the option to build new nuclear reactors in the future.¹⁰

[27] OPG and all the affected parties also note that while the Federal Court issued a judgment quashing OPG's licence to prepare the Darlington site, that decision is now being appealed by OPG and other parties to the Federal Court of Appeal.

[28] Given this, the parties maintain their positions on the potential harms arising from disclosure of the withheld information. In particular, OPG submits that as the government has maintained its option to proceed with the new build project, OPG must continue to assess the project to provide recommendations to the government on new nuclear generation, and must remain ready to begin negotiations if the project is re-initiated. For these reasons, OPG submits, the withheld information remains commercially sensitive and exempt pursuant to section 18.

Analysis and findings

[29] Based on my review of the information at issue and the parties' representations, I accept that disclosure of the withheld portions of the rules respecting target pricing could reasonably be expected to prejudice the economic interests or the competitive position of OPG and of the government of Ontario more generally. I therefore find the information is exempt pursuant to section 18(1)(c) of the *Act*.

[30] Although this exemption does not require that the information sought to be withheld be of a particular category or type, all the parties maintain that the information has commercial and financial value, and the appellant has not provided any representations to rebut this position. I accept that this information reveals the details of OPG's target pricing contracting strategy, commercially sensitive information that the parties to the agreements seek to withhold from those outside the agreements. I also accept that disclosure of this information could reasonably be expected to prejudice the economic and competitive interests of OPG, and of the government of Ontario more

⁸ See footnote 1.

⁹ See footnote 2.

¹⁰ Pages 5, 15, 16, 29 and 30 of the December 2013 Long-Term Energy Plan. See footnote 1.

broadly, in the ongoing negotiations for the potential development of new nuclear at Darlington.

[31] The rules for target pricing reflect OPG's preference for certain terms and conditions for target pricing and risk-sharing that may be incorporated in an eventual nuclear project agreement, which has yet to be negotiated. OPG enters into such negotiations on behalf of its sole shareholder, the government of Ontario, further to OPG's core mandate of efficient and cost-effective electricity generation in a manner that mitigates the government's financial and operational risk.¹¹ I accept OPG's submission that disclosure of its target pricing contracting strategy could reasonably be expected to disadvantage OPG in future negotiations with other parties, impeding its ability to obtain optimum results and prices in future agreements entered into on behalf of the government. I am satisfied that these harms to OPG's competitive position, and ultimately to its ability to carry out its mandate of ensuring the supply of low-cost electricity in Ontario, are the sorts of harms contemplated by the exemption at section 18(1)(c).

[32] I also accept OPG's submission that disclosure of its target pricing model may permit the drawing of inferences about the cost estimates of the new build project, and that new build project costing is a key consideration in the advice and recommendations OPG will provide to the government on whether to proceed with new nuclear generation at Darlington. The appellant has not provided any submissions casting doubt on OPG's assertions in this regard. I accept that the project is ongoing, that OPG will continue to provide advice and recommendations to the government on supply options, including new nuclear, and that it is in the best interests of Ontarians that OPG be able to provide this advice freely and frankly and without undue interference. I accept the OPG's submissions that the impact of disclosure of this information on its ability to provide this advice could reasonably be expected to lead to the harms described in section 18(1)(c).

[33] As I have found the information at issue is exempt under section 18(1)(c) of the *Act*, it is unnecessary for me to consider the application of the other claimed exemptions at sections 18(1)(a) and (e).

[34] I will now consider OPG's exercise of discretion under this section, and the appellant's public interest override claim.

¹¹ See August 2005 Memorandum of Agreement between Her Majesty the Crown in Right of Ontario and Ontario Power Generation. Available online: <http://www.opg.com/about/finance/Documents/memorandum.pdf>.

C. Did OPG exercise its discretion under section 18? If so, should I uphold the exercise of discretion?

[35] The section 18(1)(c) 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.

[36] 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.

[37] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² This office may not, however, substitute its own discretion for that of the institution.¹³

Representations and findings

[38] OPG provides a letter from its Senior Vice-President, Business & Administrative Services, the delegated head of OPG for the purposes of the *Act*, documenting the head's exercise of discretion in deciding to withhold the information at issue pursuant to section 18.

[39] In it, the head describes having considered the purpose of the section 18 exemptions and their application to the commercially sensitive information at issue in this appeal. He canvasses the potential harms from disclosure, described above, and notes that his duty is to protect OPG's commercial and financial interests for the benefit of OPG and ultimately the ratepayers of Ontario. At the same time, he indicates that he considered his obligations as the head of OPG for the purposes of the *Act*, and the public interest in access to information to promote transparency and accountability in government, including in the expenditure of public funds. He also considered whether disclosure of the withheld information will increase public confidence in the operation of OPG. He states that after consideration of all these factors, he concluded that the information ought to be withheld under section 18.

¹² Order MO-1573.

¹³ Section 54(2).

[40] I am satisfied that OPG properly exercised its discretion under this section. The head took into account relevant considerations, including the purposes of the *Act* to promote access weighed against the specific interests sought to be protected by section 18, and he did not take into account irrelevant considerations. There is no evidence of bad faith or an improper purpose on the part of the head in exercising his discretion under this section. The appellant provided no representations challenging the head's exercise of discretion, and I find no basis in the record or on my review of the representations for doing so. I therefore uphold the head's exercise of discretion under this section.

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemption at section 18?

[41] During the mediation stage of the appeal process, the appellant raised the possible application of the public interest override at section 23 of the *Act*.

[42] 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.

[43] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[44] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.¹⁴

Representations and findings

[45] OPG submits that it considered whether the public interest override applies to the information at issue in this appeal, and determined that the public interest lies in withholding, rather than disclosing, the information. It reiterates that the information contains OPG's approach to target pricing, work product resulting from which will inform future discussions and negotiations concerning the ongoing project for new nuclear at Darlington. OPG submits that Ontario taxpayers are best served when it can

¹⁴ Order P-244.

provide advice to the government and enter into negotiations free of the potential harms of disclosure of the specific information at issue in this appeal.

[46] One of the affected parties also made representations in support of the public interest in non-disclosure of the information at issue. The affected party notes that the information does not constitute a term or condition of the agreement from which it is drawn, or of any concluded agreement for the development of a nuclear project (which has yet to be negotiated). It submits that the public interest is served by withholding information that is subject to ongoing negotiations, and for which there is a competitive interest, as confidentiality allows the parties to engage in negotiations that will result in an agreement that benefits the public.

[47] The affected party also notes that other portions of the agreements, including other portions of Article 4 to Schedule B, that reflect negotiated terms and conditions of the agreements have been disclosed to the appellant; as a result, a significant amount of the information sought by the appellant has been released. It submits that disclosure of the remaining information would offer nothing to the general public to assist it in assessing the merits of the proposed nuclear development at the Darlington site.

[48] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.¹⁵ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.¹⁶ Any public interest in *non*-disclosure that may exist also must be considered.¹⁷ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling.”¹⁸

[49] On my review of the record and the parties’ representations, I am satisfied that any public interest in disclosure of the particular information at issue in this appeal does not rise to the level of a compelling public interest. The records alone do not provide evidence of an obvious compelling public interest in disclosure of the remaining information. The appellant has provided no representations in support of his claim of a public interest in disclosure. OPG has released other portions of the agreements that reflect negotiated terms and conditions for the preparation of plans and estimates for the potential new build project. In the circumstances, I do not have evidence establishing that disclosure of the details of OPG’s target pricing strategy, in particular,

¹⁵ Orders P-984 and PO-2607.

¹⁶ Orders P-984 and PO-2556.

¹⁷ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

¹⁸ Orders PO-2072-F, PO-2098-R and PO-3197.

would serve to enlighten the public about the merits of new nuclear development or other aspects of the project that may be matters of compelling public interest.

[50] For these reasons, I find the public interest override has no application to the information at issue in this appeal.

[51] As section 23 does not apply, I uphold OPG's decision to withhold the information pursuant to section 18(1).

ORDER:

I uphold OPG's decision to withhold the information at issue, and I dismiss this appeal.

Original signed by: _____
Sherry Liang
Senior Adjudicator

October 28, 2014