Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3607

Appeals PA14-324-2 and PA14-450

Hydro One

May 17, 2016

Summary: The appellant seeks access to information relating to the use of an identified property for outdoor storage for an eighteen-year period. Hydro One issued a decision, granting the appellant partial access to the responsive records. Hydro One claimed that portions of the records were exempt from disclosure under sections 17(1) (third party commercial information), 18(1)(c), (d) and/or (e) (economic interests of the institution) and 19 (solicitor client privilege). Hydro One also identified certain portions to be not responsive to the appellant's request. Finally, Hydro One issued a fee of $1556.80 for processing the request. Both the appellant and a third party (third party appellant) appealed Hydro One's decision. The third party appellant claimed that section 17(1) and 21(1) (unjustified invasion of personal privacy) applied to withhold further information from disclosure. In addition, the third party appellant claimed that the IPC does not have jurisdiction to engage in this inquiry as the *Building Ontario Up Act, 2015* amended *FIPPA* to remove Hydro One as an institution. In this decision, the adjudicator finds that the IPC has the jurisdiction to engage in this inquiry and upholds Hydro One's fee and application of sections 18(1)(c) and/or (d) and 19 to the records. The adjudicator also upholds Hydro One's decision to withhold some information as not responsive. Further, the adjudicator also finds that certain portions of the records are exempt from disclosure under section 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of *personal information*), 17(1)(a) and (c), 18(1)(c) and (d), 19, 23 and 57(1).

Orders and Investigation Reports Considered: PO-2200, PO-2476, PO-2991, PO-3415, PO-3543

Cases Considered: *R v Puskas* [1998] 1 SCR 1207

OVERVIEW:

[1] Hydro One received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for all records relating to the use of an identified property for outdoor storage for the period January 1, 1995 to October 1, 2013. The requester attached a property record and map identifying the property that is the subject of his request. The requester advised Hydro One that records should include, but are not limited to, lease agreements, extension agreements, proof of receipt of rental fees, tendering documents, emails, notes to file, letters, photos, appraisal reports, planning reports, environmental reports, consultation reports and other similar documents.

[2] In response to the request, Hydro One issued a notice of time extension to the requester, extending the date to respond to the request. Hydro One advised the requester that it would issue a fee estimate on or before the extended date, should the fee for processing the request exceed $25.00.

[3] Hydro One located 620 pages and 4 oversized pages of responsive records. Hydro One then notified a number of affected parties seeking their representations on the disclosure of 412 pages of the records and the 4 oversized pages relating to them pursuant to section 28 of the *Act*. Hydro One received representations from some of the third parties it notified.

[4] Hydro One issued access decisions to the requester and the third parties, granting the requester partial access to the records responsive to the request. Hydro One advised the requester and third parties that it applied the exemptions in sections 17 (third party commercial information), 18(1)(c), (d) and (e) (economic interests of the institution) and 19 (solicitor client privilege) of the *Act* to withhold portions of the records. Hydro One also advised that certain portions of the records would be withheld as not responsive to the request.

[5] In its decision, Hydro One also issued a final fee of $1556.80 and provided the appellant with a fee breakdown. Hydro One also advised the requester that the responsive records consist of correspondence, proposals, notes, minutes of meetings, agreements, appraisals, documents and maps.

[6] The requester, now the appellant, filed an appeal (PA14-324-2) of Hydro One's fee and access decisions.

[7] One of the third parties, now the third party appellant, also filed an appeal (PA14-450) of Hydro One's access decision. In its appeal letter, the third party appellant advised the IPC that Hydro One's notice letter was misdirected and, therefore, it did not have an opportunity to make representations. In its appeal, the third party appellant claimed that some of the information in the records should be withheld under sections 17, 19 and 21 (personal privacy) of the *Act*.

[8] The third party appellant provided the mediator with a copy of the 416 pages of

records that relate to it, highlighting the information it claims to be exempt under sections 17 and 21. The third party appellant advised the mediator that it does not claim the application of section 19 to any information beyond what Hydro One already claimed to be exempt under that section. The third party appellant consented to partial disclosure of the 416 pages of records relating to it. Following receipt of the third party appellant's consent, Hydro One proposed to disclose a redacted version of 416 pages of records to the appellant upon payment of a portion of the fee.

[9] The appellant did not accept Hydro One's proposal and continues to pursue access to all of the records (620 pages and 4 oversized pages). The appellant claims that Hydro One's fee is excessive and takes issue with Hydro One's access decision. The appellant advised the mediator that he pursues access to the information withheld under sections 17, 18 and 19 and the information identified as not responsive to his request. The appellant also raised the possible application of the public interest override in section 23.

[10] Mediation did not resolve the appeals and both files were moved to the inquiry stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. Upon review of the appeals, I decided to conduct a single inquiry for both.

[11] I began my inquiry by sending Hydro One and the third party appellant a Notice of Inquiry, setting out the facts and issues on appeal, and invited them to submit representations. Both Hydro One and the third party appellant submitted representations. I then invited the appellant to submit representations in response to the Notice of Inquiry and the non-confidential portions of Hydro One and the third party appellant's representations, which were shared with the appellant in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant did not submit representations.

[12] After a review of the records, I decided to notify a number of parties whose interests may be affected by the disclosure of the records (the affected parties). I sent a Notice of Inquiry to four affected parties seeking their position with regard to the disclosure of the records at issue. Two affected parties responded to the notification: the first advised that they take no position regarding the disclosure of the records and the second advised that section 17(1) of the *Act* applied to Records 382 to 620 and made representations in support of its position.

[13] In the discussion that follows, I uphold Hydro One's fee of $1556.80. I also uphold Hydro One's application of section 18(1)(c), (d) and/or (e) and 19 to the records at issue. I dismiss the third party appellant's claim that section 17(1) applies to withhold portions of the record, with the exceptions of portions of Records 5, 256 and 360. Further, I dismiss the third party appellant's claim of section 21 to the records. Finally, I find that there is no compelling public interest in the information that I find exempt under the *Act* and that section 23 of the *Act* does not apply.

RECORDS:

[14] As described in Hydro One's decision letter, there are 620 pages and 4 oversized pages of records at issue. These records consist of correspondence, proposals, notes, minutes of meetings, agreements, appraisal documents and maps.

PRELIMINARY ISSUE

Does the IPC have the jurisdiction to engage in this inquiry?

[15] On June 4, 2015, the Government of Ontario passed the *Building Ontario Up Act (Budget Measures), 2015* (*Building Ontario Up Act*), which amended various statutes in order to facilitate an Initial Public Offering (IPO) of a portion of the common shares in Hydro One. Accordingly, *FIPPA* was amended to no longer apply to Hydro One as of June 3, 2015, with the exception of the transitional provisions in sections 65.3(5) through (7).

[16] Schedule 13 of the *Building Ontario Up Act* amended section 65.3 of *FIPPA*, in part, as follows:

> 65.3 (2) This Act [i.e. *FIPPA*] does not apply to Hydro One Inc. and its subsidiaries on and after the date on which the *Building Ontario Up Act (Budget Measures), 2015* received Royal Assent.
>
> ….
>
> (5) Despite subsection (2), for a period of six months after the date described in that subsection,
>
> > (a) the Commissioner may continue to exercise all of his or her powers under section 52 (inquiry) and clause 59(b) (certain orders) in relation to Hydro Inc. and its subsidiaries with respect to matters that occurred and records that were created before that date; and
> >
> > (b) Hydro One Inc. and its subsidiaries continue to have the duties of an institution under this Act in relation to the exercise of the Commissioner's powers mentioned in clause (a).
>
> (6) The powers and duties of the Commissioner to issue orders under section 54 and clause 59(b) with respect to matters mentioned in subsection (5) continue for an additional six months after the expiry of the six-month period described in that subsection.
>
> (7) An order issued within the time described in subsection (6) is binding on Hydro One Inc. or its subsidiaries, as the case may be.

[17] As noted above, the *Building Ontario Up Act* received Royal Assent on June 4, 2015. Of particular relevance are the transitional provisions in subsections (5), (6) and

(7), which I will address below.

[18] In its representations, the third party appellant submits that, sections 65.3(2) and 65.3(5) of the *Act* allow the IPC to "continue" an inquiry that began before June 4, 2015 but does not allow the IPC to start an inquiry on or after June 4, 2015. The third party appellant submits that the *Act* is "entirely inapplicable to Hydro One for any requests not already the subject of an inquiry before June 4, 2015". In the case of these appeals, the third party appellant states that the Notice of Inquiry, which, in its submission, starts the inquiry, is dated June 8, 2015. Therefore, the third party appellant submits that the inquiry began after June 4, 2015 and so, the IPC lacks the jurisdiction to conduct it.

[19] The third party appellant notes that the legislature did not choose to have the transitional provisions in section 65.3(5) of the *Building Ontario Up Act* run from the date the appeal was filed. As a result, the third party appellant submits that only the continuation of ongoing inquiries is grandfathered.

[20] In light of these transitional provisions, the third party appellant submits that "it is not reasonable to interpret s. 65.3(5) as allowing new inquiries to be commenced at any time within the six months after the FIPPA Amendment came into force." If this were the case, the third party appellant submits that the IPC would then "be forced to rush parties' submissions to meet" the legislative deadlines. The third party appellant submits that the legislature "could not have intended such an unfair and disorderly result."

[21] The issue of this office's jurisdiction to conduct an inquiry when an institution is no longer covered by the *Act* was addressed in Order PO-2991 and I will review that order in some detail below.

Order PO-2991

[22] In Order PO-2991, Adjudicator John Higgins considered the impact of removing OMERS Administration Corporation (OMERS) from the regulations under the *Act* such that it was no longer an institution for the purposes of the *Act*. The appellant made two access requests to OMERS, to which OMERS initially replied with time extension notices and subsequent fee estimate letters. On June 28, 2010, the appellant paid the fee deposits for both requests.

[23] Regulation 261/10 came into force on July 1, 2010 and revoked the designation of OMERS as an institution under the *Act*. The appellant paid the outstanding balance of the fees on October 8, 2010, and OMERS issued a single decision letter for both requests on October 12, 2010, granting partial access subject to a number of severances based on two exemptions. The appellant filed two appeals with the IPC on October 19, 2010, on the basis that one of the exemptions claimed did not apply.

[24] During the appeal, OMERS raised the issue of the IPC's jurisdiction to conduct an inquiry into the appeals given the revocation of OMERS' status as an institution under

the *Act*. In his decision, Adjudicator Higgins concluded that the regulation removing OMERS as an institution had the effect of barring appeals to this office from OMERS' decision because the *decision* that was sought to be appealed was issued after OMERS was removed as an institution under the *Act*.

[25] In arriving at this determination, Adjudicator Higgins considered the Supreme Court of Canada's decision in *R. v. Puskas*[1], in which it considered *Criminal Code* amendments that eliminated the right of two criminal accused to appeal to the Supreme Court of Canada as of right if their acquittals or stay of proceedings were overturned by a Court of Appeal and new trials were ordered. In *R. v. Puskas*, the Court held that "a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled."[2]

[26] Applying this principle, Adjudicator Higgins found that:

> Therefore, before a right can be said to have vested, all conditions precedent required by the repealed or revoked legislation must have been completed before its repeal or revocation. As in Puskas, there are a number of conditions precedent that must be satisfied in order to appeal OMERS' decision to the IPC. The requester must have made a written request for access to an institution [section 24(1)(a) and (b) of the Act]; the requester must have paid the prescribed fees [sections 24(1)(c) and 57, as applicable]; and a decision must have been made by the head of an institution [section 50(1)]. Until all of these conditions precedent are satisfied, the right to appeal to the IPC does not vest.3 [Emphasis added]

Adjudicator Higgins noted that the Ontario Division Court reinforced the conclusion in *Puskas* in *Summit Golf and Country Club v. York (Regional Municipality)*[4]. In that case, the court upheld the Ontario Municipal Board's finding that Summit had no vested right to appeal the municipality's denial of Summit's tree removal permit, as the right of appeal had been repealed prior to the municipality's denial of Summit's application.

[27] Applying the principles above to the circumstances of the appeals before him, Adjudicator Higgins found that the revocation of OMERS as an institution under the *Act* did not interfere with vested rights "because the legal situation of the appellant was not sufficiently constituted when the regulation came into force."[5] The adjudicator found that the appellant's right of appeal arose from OMERS' access decision, but OMERS was no longer an institution subject to the *Act* when its decision was issued October 12, 2010. In that situation, the adjudicator found that the appellant did not have a vested right to appeal OMERS' decision to the IPC. Senior Adjudicator Higgins concluded that the regulation revoking OMERS' status as an institution under the *Act* had the effect of

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[1] [1998] 1 SCR 1207.
[2] *Ibid.* at para 14.
[3] PO-2991 at 10-11.
[4] 2008 CanLII 35930 (Div.Ct.).
[5] PO-2991 at 12.

barring appeals to the IPC from OMERS' decision because that decision was issued after OMERS ceased to be an institution under the *Act*.

Findings

[28] Adopting the principles articulated in Order PO-2991 to the circumstances of this appeal, I find that the IPC does have jurisdiction to engage in this inquiry. The appellant filed his request with Hydro One on April 25, 2014 and paid the prescribed fee. Hydro One's access decision was issued on August 24, 2014, well before the June 4, 2015 date in which Hydro One's status as an institution under the *Act* was revoked. Accordingly, there is no question that Hydro One was an institution at the time the request was made, at the time it issued its decision and at the time the decision was appealed by both the requester and third party appellant. In order words, "all conditions precedent"[6] were satisfied and the appellants' rights to appeal that decision were vested by the date Hydro One was no longer an institution under the *Act*.

[29] Furthermore, I note that the appeals were well into the IPC's appeals process before June 4, 2015, as the requester appellant filed his appeal on August 26, 2014 and the third party appellant filed its appeal on September 23, 2014. In fact, the mediation stage of the appeals was completed and the appeals had moved to the inquiry stage by June 4, 2015. In light of these facts, I find that both the requester and third party appellant's rights were vested by the date Hydro One was no longer an institution under the *Act*. Accordingly, I find that the issues in these appeals are properly before me. I am also satisfied that the transitional provisions in section 65.3 of the *Act* provide me with the authority to process the appeal, including exercising all of the powers set out in section 52 of the *Act*[7] and issue a binding order on Hydro One until June 3, 2016[8].

[30] On a final note, during the inquiry, the third party appellant submitted that, even if the IPC has jurisdiction to commence this inquiry, it ought to exercise its discretion to decline to do so. The third party appellant refers to the discretionary language of section 65.3(5)(a) of the *Act*, which states that the IPC "may" continue to exercise its inquiry powers. In the circumstances of this case, the third party appellant submitted that the IPC should decline to conduct an inquiry in light of the purpose of the amendment to the *Act* and the commercial nature of the records at issue.

[31] I considered the third party appellant's submissions and determined that I would continue to engage in this inquiry. I am aware of Hydro One's new role as a private sector company in the eyes of the *Act*. However, the legislature expressly provided this office with the authority to exercise various powers beyond the date the *Building Ontario Up Act* received Royal Assent. Further, I am cognizant of the goals of the *Act* itself, one of which is to provide individuals and the public a right of access to information held by institutions. I also note that these appeals have moved through both the Intake and Mediation stages of the IPC's appeals process.

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[6] Order PO-2991.
[7] For June 4 through December 4, 2015 – see section 65.3(5) of the *Act*.
[8] Sections 65.3(6) and (7) of the *Act*.

[32] Finally, as stated by Senior Adjudicator Frank Devries in Order PO-3543, the transitional provisions set out in sections 65.3(5) through (7) "clearly [establish] a 'winding' down or transitional period of time for which the obligations of *FIPPA* continue to apply to Hydro One."[9] Although the *Building Ontario Up Act* establishes that Hydro One is no longer an institution as of June 4, 2015, the transitional provisions maintain Hydro One's status as an institution for certain purposes and confirm the authority of the IPC to process appeals and issue orders in certain circumstances after that date. Given these circumstances, I concluded that I would continue to adjudicate this inquiry and consider the issues under appeal.

ISSUES:

A. Should the fee be upheld?

B. What is the scope of the request? What records are responsive to the request?

C. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

D. Do the discretionary exemptions at sections 18(1)(c), (d) and (e) apply to the records?

E. Does the discretionary exemption at section 19 apply to the records?

F. Did Hydro One exercise its discretion under sections 18 and 19? If so, should this office uphold the exercise of discretion?

G. Does the mandatory exemption at section 17(1) apply to the records?

H. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17 and 18 exemptions?

DISCUSSION:

Issue A: Should the fee be upheld?

[33] Where the fee to process an access request exceeds $25, an institution must provide the requester with a fee estimate.[10] Where the fee is $100 or more, the fee estimate may be based on either the actual work done by the institution to respond to the request or a review of a representative sample of the records and/or advice of an individual who is familiar with the type and content of the records.[11]

[34] The purpose of a fee estimate is to give the requester sufficient information to

[9] Order PO-3543 at para 66.
[10] Section 57(3) of the *Act*.
[11] Order MO-1699.

make an informed decision on whether or not to pay the fee and pursue access.[12] The fee estimate also assists requesters in deciding whether to narrow the scope of a request in order to reduce the fees.[13]

[35] In all cases, the institution must include a detailed breakdown of the fee and a detailed statement as to how the fee was calculated.[14] This office may review an institutions' fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

[36] In determining whether to uphold Hydro One's $1556.80 fee, I must consider whether it is reasonable. The burden of establishing the reasonableness of the fee rests with Hydro One. To discharge this burden, Hydro One must provide me with detailed information on how the fee was calculated in accordance with the applicable provisions of the *Act* and it must provide sufficient evidence to support its claim.

[37] Section 57(1) of the *Act* requires an institution to charge fees for access requests made under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> > (a) the costs of every hour of manual search required to locate a record;
> >
> > (b) the costs of preparing the record for disclosure;
> >
> > (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
> >
> > (d) shipping costs; and
> >
> > (e) any other costs incurred in responding to a request for access to a record.

[38] More specific provisions regarding fees are found in section 6 of Regulation 460. That section reads as follows:

> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
>
> > 1. For photocopies and computer printouts, 20 cents per page.
> >
> > 2. For records provided on CD-ROMs, $10 for each CD-ROM.

[12] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[13] Order MO-1520-I.
[14] Orders P-81 and MO-1614.

> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

[39] In its final access decision, Hydro One advised the appellant that it calculated a fee of $1556.80 for responding to his request. Hydro One advised that these costs relate to search, preparation, provision of records on CD-ROM, plus provision of photocopies of the four oversize records. In addition, Hydro One provided the appellant with the following fee breakdown:

Search	
30.5 hours at $30/hours	$915.00
Preparation	
21 hours and 2 minutes	
2 minutes per page at $30/hour	$631.00
CD ROM	$10.00
Photocopies	
4 pages at $0.20/page	$0.80
Shipping (waived)	$0.00
Total	**$1556.80**

[40] Hydro One submits that its fee ought to be upheld. It submits that it acted in accordance with the IPC's Guideline Document *Fees, Fee Estimates and Fee Waivers*, which states, where the fee is $100 or more:

> …the institution may choose to do all of the work necessary to respond to the request at the outset. If so, it must issue a final access decision. In this decision, the institution must advise the requester of the applicable fee estimate, and include a detailed breakdown of the fee estimate, based on actual work done.

Hydro One states that it chose to do all the work necessary to respond to the appellant's access request at the outset.

[41] Hydro One submits that the actual work required to respond to the access request was "significant" as the request was very broad. Hydro One states that the request required a search for records over a time period of approximately eighteen

years. In addition, Hydro One states that several members of its staff, including legal counsel and employees from its real estate department, spent a "significant amount of time responding to this request". Hydro One also states that there was a large number of responsive records.

[42] Additionally, Hydro One notes that the *Act* contemplates a *user pay* principle, meaning that the requester should bear certain administrative costs that are incurred by the institution in responding to the request. Hydro One also advises that it offered and remains willing to have the appellant narrow or clarify his request, which may result in a reduction of the fee.

[43] The appellant did not submit representations in response to the Notice of Inquiry.

[44] Based on the evidence before me and for the reasons set out below, I find that the final fee of $1556.80 is reasonable.

[45] I accept that Hydro One's search fee is based on the actual time required to locate the requested records in this appeal. In my view, it is reasonable to assume that a number of staff members required, in total, 30 hours to search for records responsive to the appellant's request. As stated above, the appellant submitted a request for access to "all records" relating to the use for outside storage for a particular property for the period January 1, 1995 to October 1, 2013. The appellant's request is very broad, not limited to particular types or classes of documents and spans over eighteen years. Given the nature of the appellant's request and the fact that Hydro One based its fee on the actual work performed, I accept that 30.5 hours of search time is reasonable under section 57(1)(a). Accordingly, I uphold the corresponding cost of $915.00, calculated at a rate of $30 per hour, in accordance with paragraph 3 of section 6 of Regulation 460.

[46] Section 57(1)(b) of the *Act* includes time for severing a record.[15] In its access decision, Hydro One indicates that the fee charged for the time spent severing the records and preparing them for disclosure was calculated in accordance with this principle. Paragraph 4 of section 6 of Regulation 460 allows for an institution to charge $7.50 for each 15 minutes spent on preparing and severing a record for disclosure. Given that, generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances[16] and 631 pages of records were located, the allowable fee charged for preparation of records would be $631.00. Therefore, I find that Hydro One's fee with respect to preparation time is reasonable and in accordance with the fee provisions in the *Act* and Regulation 460.

[47] Finally, the $10 fee for the CD containing the records and $0.80 fee for the 4 photocopies that Hydro One charged are reasonable. Paragraphs 1 and 2 of section 6 of Regulation 460 stipulate this amount for CDs and photocopies.

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[15] Order P-4.
[16] Orders MO-1169, PO-1721, PO-1834 and PO-1990.

[48] In conclusion, I find that Hydro One's fee for search, preparation of records, the CD and photocopies of $1556.80 is reasonable and calculated in accordance with the fee provisions in the *Act* and Regulation 460. Therefore, I uphold Hydro One's fee.

[49] I note that there are a number of records that Hydro One decided to disclose, in full, to the appellant and are not subject to the third party appeal. As a result, these records are not at issue in this appeal and I order Hydro One to disclose these records to the appellant upon payment of the fee.

Issue B: What is the scope of the request? What records are responsive to the request?

[50] According to its Table of Severances, Hydro One withheld portions of the following records as not responsive to the appellant's request: 183, 296, 316, 319-322 and 349.

[51] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
> >
> > ...
>
> (2) if the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[52] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[17] To be considered responsive to the request, records must *reasonably relate* to the request.[18]

[53] The appellant's original request reads as follows:

> Any and all documentation relating to the rental or use for outside storage on property known as [specified address] (see attached property record). Such outside storage as circled on the attached mapping. Such

[17] Orders P-134 and P-990.
[18] Orders P-880 and PO-2661

> documentation to include, but not be limited to, lease agreements, extension agreements, poof of receipt of rental fees, tendering documents, emails, notes to files….

The appellant identified a large number of categories and types of documents that he believes would be responsive to his request.

[54] Hydro One submits that the appellant's request provided "sufficient detail" for it to identify the records responsive to the request. As such, Hydro One states that it was not necessary for it to clarify the request with the appellant. Hydro One submits that it did not take a *literal* approach to the wording of the request nor did it "choose to define the scope of the request unilaterally". Instead, Hydro One submits that it responded to the letter and spirit of the appellant's request.

[55] In its Table of Severances, Hydro One identifies portions of the following records as not responsive to the appellant's original request: 183, 296, 316, 319-322 and 349. Based on my review, I find that these portions are not responsive to the appellant's request. As indicated by Hydro One, these portions contain information that does not relate to the rental or use for outside storage property at the address specified in the request. The severed information on Records 296 and 319-322 relate to other files or projects that were not identified in the appellant's request. The information severed from Record 183 consists of personal notes that do not relate to the request. Finally, the severed portions of Records 316 and 349 and marked as not responsive are not reasonably related to the appellant's request.

[56] Therefore, I uphold Hydro One's decision to withhold portions of Records 183, 296, 316, 319-322 and 349 as not responsive and will not consider them further in this order.

Issue C: Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

[57] Hydro One did not apply the personal privacy exemption in section 21(1) of the *Act* to any of the information at issue in this appeal. However, in its appeal, the third party appellant raised the application of the personal privacy exemption to some of the 416 pages of records it was notified of. The third party appellant provided the IPC with a copy of the records it received at notification and highlighted the portions of the records it submits contain personal information as defined by section 2(1) and is exempt under the personal privacy exemption.

[58] The term "personal information" is defined in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the information has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual exempt if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[59] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[19]

[60] Sections 2(3) and (4) of the *Act* also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[19] Order 11.

[61] To qualify as personal information, the information must be about the individual in a *personal* capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be *about* the individual.[20]

[62] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[21]

[63] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[22]

[64] The third party appellant highlighted what it submits to be personal information in the following records: 8, 10-11, 15, 18, 20, 22-23, 24, 30-34, 36, 37, 42, 45-46, 52, 55, 57, 58-60, 66-68, 69-71, 76-77, 81-84, 102-103, 104-107, 119, 124-125, 127-129, 131-132, 135, 140-141, 144, 152, 162, 164, 166, 184, 185, 187, 189, 190, 206-207, 215-217, 220, 257, 259, 261, 274-276, 284-285, 393-394, 403-404, 407, 408 and oversized records 1 to 3.

[65] The third party appellant submits that names and other identifying information relating to individuals constitute personal information and must be exempt from disclosure under section 21(1) of the *Act*. The third party appellant states that it objects to Hydro One disclosing the names and positions of all individuals identified in the records as well as information that could lead to the identification of any individuals, such as public identification that would constitute a breach of their privacy.

[66] Additionally, the third party appellant submits that the information it identified as personal information in the records relates to the employment history of identifiable individuals and shows what industry these individuals are working in. The third party appellant submits that "all of the highlighted information identifies the named individuals in a personal capacity because it discloses their personal employment history", which is a category of personal information as identified in paragraph (b) of section 2(1).

[67] Based on my review of the information the third party appellant identified as *personal information*, I find that while this information relates to identifiable individuals, it relates to these individuals in an official, business or professional capacity and does not reveal anything of a personal nature about these individuals. I note that the third party appellant included a table that identifies the records and describes the portions contained within the records it claims to be exempt under section 21. For the majority of these portions, the third party appellant has highlighted the identification of an employee and their business contact information.

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[20] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[21] Orders P-1409, P-980015, PO-2225 and MO-2344.
[22] Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

[68] Section 2(3) of the *Act* clearly states that "personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity" (emphasis added). The information the third party appellant identified as personal information consists mainly of professional/business addresses, phone numbers, emails, an individual's name, title and signatures. These names and signatures are included in documents relating to the individuals' profession or business and do not relate to them in a personal capacity. I also note that the third party appellant proposes to sever the cc line of letters and emails which indicates the individual that the correspondence is copied to, even though the individual is not copied in their personal capacity, but in their professional capacity. The information that the third party appellant identified as personal information is clearly information that relates to the individuals' work.

[69] As a result, I find that this information does not constitute personal information within the meaning of the *Act*. Further, I note that in certain instances, such as a number of severances on page 32, the name of the individual is highlighted by the third party appellant as exempt under the personal privacy exemption. I reviewed these portions of the record and note that paragraph (h) of section 2(1) states that personal information means an "individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual". In the case of the names that the third party appellant severed, none of these names appear with other personal information relating to that individual nor will the disclosure of the name reveal other personal information about the individual.

[70] Therefore, I find that the records do not contain the personal information of identifiable individuals as that term is defined in section 2(1) of the *Act*. Because I found that the records do not contain "personal information" as that term is defined in section 2(1) of the *Act*, it cannot qualify for exemption under section 21(1), which only applies to personal information. Accordingly, I will order Hydro One to disclose this information to the appellant.

Issue D: Do the discretionary exemptions at sections 18(1)(c), (d) and/or (e) apply to the records?

[71] According to its Table of Severances, Hydro One withheld portions of the following records under sections 18(1)(c), (d) and (e): 206-208, 212-213, 216, 219, 221-223, 224, 227, 229, 236, 240-244, 249, 253, 256-259, 260, 261-262, 264, 266-267, 268-269, 272, 273-274, 284, 292, 294-299, 302, 314-315, 317, 320, 322, 353, 359-360, 364-365, 391-393, 398-402, 403-404, 405 and 412. In addition, Hydro One withheld the following records, in full, from disclosure under sections 18(1)(c) and (e): 278-283, 324-342, 383-390, 413-620. Hydro One also withheld portions of the following records from disclosure under section 18(1)(e): 288, 291, 293, 318, 323, 348-351 and 362-363.

[72] The relevant portions of section 18(1) of the *Act* read as follows:

> A head may refuse to disclose a record that contains,

> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (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.

The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of an institution to the same extent that similar information of non-governmental organizations is protected under the *Act*.[23]

[73] For section 18(1)(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. The institution must demonstrate a risk of harm that is well beyond the merely possible or speculative. However, the institution does not need to prove that disclosure will in fact result in such harm. How much and what kind of evidence is required will depend on the type of issue and seriousness of the consequences.[24]

[74] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[25]

[75] 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.[26]

[76] Hydro One submitted combined representations on sections 18(1)(c), (d) and (e) and I shall proceed on that basis. 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

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[23] Toronto: Queen's Printer, 1980.
[24] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras 52-54.
[25] Order MO-2363.
[26] Orders MO-2363 and PO-2758.

interests or competitive positions.[27]

[77] I note that section 18(1)(c) 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.[28]

[78] Section 18(1)(d) of the *Act* is intended to protect the broader economic interests of Ontarians.[29]

[79] Finally, in order for section 18(1)(e) to apply, Hydro One must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations, the negotiations are being carried on currently, or will be carried on in the future, and

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted on or on behalf of the Government of Ontario or an institution.[30]

[80] Section 18(1)(e) applies to financial, commercial, labour, international or similar negotiations, and not to the development of policy with a view to introducing new legislation.[31]

[81] The terms *positions*, *plans*, *procedures*, *criteria* or *instructions* suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.[32] The IPC has adopted the dictionary definition of *plan* as a "formulated and especially detailed method by which a thing is to be done; a design or scheme."[33]

[82] Section 18(1)(e) does not apply if the information at issue does not relate to a strategy or approach to the negotiations but rather simply reflects mandatory steps to

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[27] Orders P-1190 and MO-2233.
[28] Order PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[29] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 OAC 108, [1999] OJ No. 484 (CA), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (SCC); see also Order MO-2233.
[30] Order PO-2064.
[31] Orders PO-2064 and PO-2536.
[32] Orders PO-2034 and PO-2598.
[33] Orders P-348 and PO-2536.

follow.[34]

Representations

[83] In its representations, Hydro One provided the following "contextual background" to consider in relation to the application of section 18 to the portions of the records it withheld from disclosure:

- Hydro One has a *secondary land use program* under which it makes available to the public the hydro corridors (i.e. land under transmission towers and lines) for rent at fair market value
- Hydro One is (to the date its representations were filed) wholly owned by a sole shareholder, that is, the province of Ontario
- The hydro corridor lands are primarily owned by Ontario and Ontario is essentially a partner with Hydro One in the secondary land use program
- Hydro One and Ontario's secondary land use program is a land licensing business enterprise that generates multi-million dollar revenues annually
- Hydro One is obligated to market the hydro corridor lands for rent at fair market value. Any revenues generated from licenses to lease hydro corridor lands are shared between Ontario and Hydro One. Hydro One directly applies its share of the revenues from the secondary land use program to the operation of its business for the benefit of its ratepayers.
- Licenses in the secondary land use program are renewed on a regular basis in accordance with the specific terms of the license agreement
- Rent valuations for the hydro lands are continually adjusted to reflect changes in values of the specific property and to ensure fair treatment to current and prospective tenants. Nevertheless, actual rent on any particular property is a product of negotiations no different than any other commercial transaction.

Given these factors, Hydro One submits that any information relating to rent values, how it determines rent values and how it negotiated rental licenses, is extremely sensitive and disclosure of that information would negatively impact the rental revenues for the secondary land use program and, therefore, the economic interests of it and Ontario.

[84] Hydro One states that it withheld the portions of the following records from disclosure under sections 18(1)(c), (d) and (e): 206-208, 212-213, 216, 219, 221-223, 224, 227, 229, 236, 240-244, 249, 253, 256-259, 260, 261-262, 264, 266-267, 268-269, 272, 273-274, 284, 292, 294-299, 302, 314-315, 317, 320, 322, 353, 359-360, 364-365,

[34] Order PO-2034.

391-393, 398-402, 403-404, 405 and 412.[35] Hydro One states that it withheld portions of these records because either: (1) the information discloses rental or unit pricing, (2) the information discloses calculations on how rental pricing is calculated or negotiated or (3) the information discloses the historical rent values paid over a specific time period.

[85] Hydro One states that the information redacted from the following records relates directly to rental or unit pricing: 206-208 (duplicated in Records 22-23), 212-213, 221-224, 227, 229, 236, 240-244, 253, 256-257, 259, 266, 272, 302, 315, 353, 359-360 and 402-404. Hydro One submits that all rental-pricing related information withheld from these pages is properly redacted. Hydro One states that the information was negotiated pursuant to a private arrangement between Hydro One as the licensee and another commercial party as the licensor.

[86] Hydro One submits that disclosure of the rental or unit pricing would affect future negotiations with both current and potential tenants. Further, it submits that disclosure of this information could reasonably be expected to prejudice the economic interests and/or the competitive position of both Hydro One and Ontario by negatively impacting rental revenues for the secondary land use program. It states that the secondary land use program is one vehicle by which Hydro One and Ontario raise "significant funds". As such, it submits that securing the best value for the rental licenses and the most favourable offers are two intended objectives for the secondary land use program.

[87] Related to the information withheld that contains rental pricing, Hydro One submits that any information that would disclose its calculations to determine rental pricing would inevitably disclose rental pricing. it identifies the following records as containing information relating to how Hydro One calculates or determines rental pricing: 216-219, 249, 260-262, 264, 268, 273-274, 284, 292, 294-299, 314, 320, 322, 364, 365, 391-393, 398-401, 405 and 412. It notes that the redactions on these pages are "very minimal and specifically relate to formulas applied to determine rental pricing or calculations to determine rental pricing." It states that it did not redact information relating to its processes. It submits that these particular redactions relate solely to the information necessary to Hydro One's maintaining a competitive position in renting the hydro corridor lands and the release of this information would be injurious to the economic interests and competitive position of it and Ontario.

[88] Finally, Hydro One withheld the payment history information from Records 258, 267 and 269. Hydro One states that the information redacted from these records reveal what rental payments were made from 2006 to 2015. It submits that this information

[35] I note that Record 22-23 are duplicates of Records 206-207, although they were not severed. However, as Hydro One raised the application of section 18 to Records 206-207, I will consider those exemptions to their duplicates. Similarly, I note that certain information that was highlighted by the third party appellant in Records 26 (both severances), 260 (first severance) and 365 (first severance) is duplicative of the information Hydro One withheld under section 18. As Hydro One raised the application of section 18 to the duplicate information highlighted by the third party appellant in Records 26, 260 and 365, I will consider the application of section 18 to this information.

would provide rental values and should therefore not be disclosed for the same reasons as above.

[89] In addition, Hydro One withheld the following records, in full, from disclosure under sections 18(1)(c) and (e): 278-282, 324-342, 383-390 and 413-620. Hydro One states that these records are either appraisal reports or contain information taken from appraisal reports. These appraisal reports were prepared for Hydro One by third party experts in real estate valuation and Hydro One states that it used these reports to determine land values for its rental pricing negotiations. Hydro One submits that these records informed it of the rent valuation and, if disclosed, would reveal insight into negotiations and strategies it uses in rental licensing deals.

[90] For further context, Hydro One submits that it first considers the technical proposal to determine the feasibility of the occupation for all current or potential tenants who wish to occupy hydro corridor lands. Then, Hydro One determines the fair rent valuation as rental pricing is a negotiated value. Hydro One states that its valuations and negotiated prices are based predominantly on these expert appraisal reports and it relies on these reports in its negotiations. Hydro One submits that Records 278-282, 324-342, 383-390 and 413-620 contain negotiation strategies and advice which, if disclosed, would be highly prejudicial to Hydro One and the economic interests of Ontario.

[91] Finally, Hydro One withheld the following records, in part, from disclosure under section 18(1)(e): 288, 291, 293, 318, 323, 325, 330-331, 348-351 and 362-363. Hydro One states that it withheld details relating to how it arrived at the negotiated rental offers from Records 288 and 291. Hydro One states that the information redacted from Records 293, 318 and 323 specifically relates to how the rental values were calculated, such as the formulas or calculations. Hydro One submits that if the information redacted from Records 293, 318 and 323 were disclosed it would directly reveal rental pricing.

[92] Hydro One states that the information redacted from Records 325 and 330-331 contains summary information from, or portions of, appraisal reports. For the reasons discussed above relating to appraisal reports, Hydro One submits that this information should not be disclosed. Hydro One also submits that the information redacted from pages 345-351 and 362-363 relates to the negotiations and strategies it applied to determine rental values and, if disclosed, could reveal rental pricing.

[93] In conclusion, Hydro One submits that it did not withhold more information than what was "absolutely necessary" to protect it economic interests and competitive market position. Hydro One asserts that it applied the section 18(1)(c), (d) and/or (e) exemptions appropriately to withhold portions of the records at issue.

[94] The third party appellant was not required to make submissions on the application of section 18 to the records and did not do so. The appellant did not make any submissions in response to the Notice of Inquiry.

Findings

[95] Based on my review of the information at issue and Hydro One's representations, I accept that disclosure of the withheld portions of the records under section 18(1) relating to the rent or unit prices, the calculations relating to that rental pricing and information that forms the basis of the rental valuation could reasonably be expected to prejudice the economic interests of Hydro One and the government of Ontario more broadly. I therefore find that the information Hydro One withheld under section 18 to be exempt pursuant to section 18(1)(c) and/or (d) of the *Act*.

[96] I refer to Assistant Commissioner Sherry Liang's findings in Order PO-3415, in which she accepted the Ontario Power Generation's (OPG) application of section 18(1)(c) to information relating to OPG's target pricing model. In upholding the section 18(1)(c) exemption to the target pricing model, Assistant Commissioner Liang found as follows:

> 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 operation risk. I accept OPG's submission that disclosure of its target pricing strategy could reasonably be expected to disadvantage the 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).36

I adopt Assistant Commissioner Liang's findings for the purposes of this appeal.

[97] Hydro One operates and manages the secondary land use program with the province of Ontario and the land licensing business enterprise generates income for both Hydro One and the province. Further, Hydro One is obligated to market the hydro corridor lands for rent at fair market value and the rent valuations are continually adjusted to reflect changes in the market. As such, and in the absence of any representations from the appellant suggesting otherwise, I accept Hydro One's contention that it is reasonable to expect that the disclosure information relating to the rent values, how these rental values are determined and the manner in which the rental licenses are negotiated could prejudice the economic interests and competitive position of Hydro One and the financial interests of the province.

[98] Based on my review of Hydro One's representations, I find that the disclosure of

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[36] Order PO-3415, para. 31.

the rental pricing or values, the calculations used to determine rental pricing, the payment history information and the appraisal reports could reasonably result in the harms contemplated in sections 18(1)(c) and/or (d). I make this finding on the basis of Hydro One's representations with regard to the impact that the disclosure of this information can reasonably be expected to have on its secondary land use program as a whole.

[99] The secondary land use program is used by Hydro One and Ontario to raise significant funds. As such, Hydro One and the province are clearly interested in securing the best value for the rental licenses and the most favourable offers. In light of these objectives, I find that it is reasonable to expect that the disclosure of the information redacted by Hydro One could be used as leverage by current and/or future licensees to negotiate lower prices, thereby prejudicing the economic interests and competitive position of Hydro One and the financial interests of Ontario. As such, I find that the disclosure of the rental pricing, the manner in which the pricing is calculated and negotiated would reasonably result in harm to Hydro One and Ontario's economic interests and competitive position. Therefore, I find that the records withheld under sections 18(1)(c), (d) and/or (e) are exempt from disclosure under sections 18(1)(c) and/or (d) of the *Act*.

[100] I note that the appraisal reports and the information in other parts of the record that contain information taken from the appraisal reports were withheld under sections 18(1)(c) and (e), not section 18(1)(d). However, for the reasons discussed above, I find that the disclosure of the appraisal reports and the information contained therein could reasonably be expected to result in prejudice to Hydro One's economic position and/or competitive interests. I accept Hydro One's submissions that these reports contain the valuation and rental pricing information that forms the basis of Hydro One's rental pricing negotiation and provides direct insight into negotiations and strategies applied by Hydro One in licensing deals. The appellant did not provide me with any submissions to rebut this position. I accept that the disclosure of this information could reasonably be expected to prejudice the economic and competitive interests of Hydro One and the government of Ontario more broadly in ongoing and future rental license negotiations in the secondary land use program.

[101] In addition, Hydro One withheld some information from disclosure under section 18(1)(e) only. However, the information withheld under section 18(1)(e) of the *Act* contains the same type of information, that is, information relating to rental pricing, valuation or negotiation strategies or information that was contained in the appraisal reports, that I have already found to be exempt under sections 18(1)(c) and/or (d) in other parts of the records. Therefore, to ensure consistency in my findings, I find that the information withheld under section 18(1)(e) alone is also exempt from disclosure under sections 18(1)(c) and (d).

[102] In conclusion, I uphold Hydro One's redaction of Records 206-208 (duplicated in Records 22-23 and 26), 212-213, 216, 219, 221-223, 224, 227, 229, 236, 240-244, 249 (including the third party appellant's first severance in Record 260), 253, 256-259, 260,

261-262, 264, 266-267, 268-269, 272, 273-274, 278-283, 284, 288, 291, 292, 294-299, 302, 314-315, 317, 318, 320, 322, 323, 324-342, 348-351, 353, 359-360, 362-363, 364-365 (including the third party appellant's first severance in Record 365), 383-390, 391-393, 398-402, 403-404, 405. 412 and 413-620 under section 18(1)(c) and/or (d), subject to my review of Hydro One's exercise of discretion to apply section 18.

Issue E: Does the discretionary exemption at section 19 apply to the records?

[103] Hydro One applied the discretionary solicitor-client privilege exemption in section 19 to the following records: 286, 309-310, 355-356 and 395-396. Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[104] Section 19 contains two branches. Branch 1 (subject to solicitor-client privilege) is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[105] Hydro One claims that Records 286, 309-310, 355-356 and 395-396 are subject to solicitor-client communication privilege. Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.37 The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.38 This privilege applies to a continuum of communications between a solicitor and client:

> …Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.39

[106] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[40] Confidentiality is an essential

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[37] *Decôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).
[38] Orders PO-2441, MO-2166 and MO-1925.
[39] *Balabel v. Air India*, [1988] 2WLR 1036 at 1046 (Eng. C.A.).
[40] *Susan Hosiery Ltd. v. Ministry of National Revenue*, [1969] 2 Ex. C.R. 27.

component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[41]

[107] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive the privilege.[42] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[43] Waiver has been found to apply where, for example: the record disclosed to another outside party; the communication is made to an opposing party in litigation; or the document records a communication made in open court.[44]

[108] In its representations, Hydro One submits that it is "clear" that these records were created for or are related to the sole purpose of obtaining or providing professional legal advice. Hydro One submits that the records contain instructions to or advice from legal counsel. Hydro One states that Records 286 and 395-396 contain handwritten notes from its General Counsel relating to legal advice sought in relation to the property that is the subject of the request. Further, Hydro One states that Records 309-310 and 355-356 contain communications in which staff specifically requested legal advice and also contain the legal counsel's corresponding advice.

[109] Neither the appellant nor the third party appellant address whether Records 286, 309-310, 355-356 and 395-396 are exempt under section 19 of the *Act*.

[110] In order for me to find that the Records 286, 309-310, 355-356 and 395-396 are subject to the common law solicitor-client privilege exemption, I must be satisfied that the records contain written communications of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.[45]

[111] Based on my review of Records 309-310 and 355-356, I am satisfied that a solicitor-client relationship existed between the individuals who were party to the correspondence. These parties were Hydro One staff and Hydro One's legal counsel.

[112] With regard to Records 286 and 395-396, I agree with Hydro One that these records contain notes from its General Counsel and contain legal advice in relation to the property that is the subject of the request. As I noted above, privilege may apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[46] In this case, while it is not clear that these documents formed a part of the

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[41] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[42] *S & K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[43] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[44] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.); Orders MO-1514, MO-2006-F, MO-2396-F and PO-1551.
[45] *Decôteaux v. Mierzwinski*, *supra* note 37.
[46] *Susan Hosiery Ltd. v. Ministry of National Revenue*, [1969] 2 Ex. C.R. 27.

communications between Hydro One staff and legal counsel, I find that these records consist of Hydro One's legal counsel's working papers and contain information that is directly related to the provision of legal advice to Hydro One staff.

[113] The next part of the analysis requires a determination of whether the records reflect a written record of confidential communications between a solicitor and his client and then whether each record is subject to privilege because they consist of seeking or providing legal advice. Based on my review of Records 286, 309-310, 355-356 and 395-396, I find that the disclosure of these records would reveal the nature of the confidential legal advice sought by Hydro One's staff, the confidential legal advice received from Hydro One's legal counsel or is otherwise a part of the *continuum of communications* between solicitor and client. All of the records contain information that is directly related to the provision of confidential legal advice. Therefore, I uphold Hydro One's denial of access to Records 286, 309-310, 355-356 and 395-396 under section 19, subject to my review of Hydro One's exercise of discretion to apply section 19.

Issue F: Did Hydro One exercise its discretion under sections 18 and 19? If so, should this office uphold the exercise of discretion?

[114] After deciding that records or portions thereof fall within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. Sections 18 and 19 are discretionary exemptions which means that Hydro One could choose to disclose the records, despite the fact that they may be withheld under the *Act*.

[115] In applying these exemptions, Hydro One was required to exercise its discretion. On appeal, the IPC may determine whether Hydro One failed to do so. In addition, the IPC may find that Hydro One erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to Hydro One for an exercise of discretion based on proper considerations.[47] However, section 54(2) states that I may not substitute my own discretion for that of Hydro One.

[116] As I upheld Hydro One's decision to apply sections 18 and 19, I must review its exercise of discretion to apply those exemptions.

[117] Hydro One submits that it exercised its discretion under sections 18 and 19 of the *Act* and the IPC should uphold its exercise of discretion. Hydro One submits that, in arriving at its decision to deny the appellant access to certain records, it considered the public's right of access to information weighed against the economic and competitive interests of Hydro One and Ontario and the importance of maintaining the confidentiality of privileged communications between itself and its legal counsel. Hydro One submits that it took into account relevant considerations and did not take into

[47] Order MO-1573.

account irrelevant considerations when exercising its discretion.

[118] The appellant did not submit representations in response to the Notice of Inquiry.

[119] Based on Hydro One's representations and my review of the information for which I have upheld the exemptions under sections 18 and 19, I am satisfied that Hydro One considered relevant factors in exercising its discretion, including the nature of the exemptions claimed and the public's right of access to information. Further, I note that the redactions made by Hydro One with regard to section 18 were minimal and specifically relate to the rental or unit pricing and the manner in which the rent is calculated and valued. I am satisfied that Hydro One exercised its discretion in good faith and I will not interfere with it on appeal. Accordingly, I uphold Hydro One's claim for exemption under sections 18 and 19 of the *Act*.

Issue G: Does the mandatory exemption at section 17(1) apply to the records?

[120] In its representations, Hydro One states that it accepts the section 17 exemptions as applied by the third party appellant with respect to Records 278-283, 383-390 and 413-620, in full, and Record 5, in part. As I have already found that Records 278-283, 383-390 and 413-620 are exempt from disclosure, in full, under section 18, I do not need to consider whether they are also exempt from disclosure under section 17(1). Therefore, I will only consider Hydro One's exemption of a portion of Record 5 under section 17(1).

[121] The third party appellant was notified by Hydro One of Records 1 to 412 and the four oversized records. Hydro One did not notify the third party appellant of Records 413-620 as it also claimed the discretionary exemptions in 18(1)(c) and (e) to these records. As a result, the third party appellant was not in a position to make representations on the application of section 17(1) to Records 413-620.

[122] During my inquiry, I invited four affected parties to make submissions with regard to the disclosure of the records at issue. Two of the affected parties did not respond. The third advised that they took no position regarding the disclosure of the records. Finally, the fourth affected party submitted that section 17(1) applied to Records 382 to 620, inclusively, and submitted representations to support their position.

[123] In its representations, the third party appellant indicates that it objects to the disclosure of portions of the following records: 2, 5, 6, 8-11, 13, 15-18, 20, 22-24, 26, 30-37, 41-42, 45-46, 52-61, 66-71, 76-78, 81-85, 102-107, 116, 118-121, 124-129, 131-132, 134-136, 140-141, 144, 152, 162, 164-168, 184-187, 189-191, 206-207, 209, 215-217, 219-220, 230, 232, 233, 235, 237, 245, 247, 256, 257, 259, 260, 261, 267, 274-276, 284-285, 292, 295, 304, 316, 318, 329, 330, 337-342, 360, 362-363, 364, 365, 384, 390, 393-394, 403-404, 406-407, 408-410, 412 and oversized records 1, 2 and 3. The third party appellant submits that sections 17(1)(a), (b) and (c) apply to exempt these records, or portions thereof, from disclosure.

[124] Although the third party appellant claims the application of sections 17(1)(a), (b) and (c) to portions of the records, it only made representations on the harms identified in sections 17(1)(a) and (c). I note that the third party appellant bears the burden of proving the application of section 17(1)(a), (b) and (c). I have reviewed the third party appellant's proposed section 17(1) severances and find that they would not be exempt from disclosure under section 17(1)(b). In the absence of any representations on its application to the records, I will not consider the application of section 17(1)(b) further in this order.

[125] One of the affected parties (the affected party) also raised the application of section 17(1) to Records 382 to 620.

[126] Section 17(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency

[127] Section 17(1) is designed to protect the confidential *informational assets* of businesses or other organizations that provide information to government institutions.[48] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[49]

[128] For section 17(1) to apply, the party or parties resisting disclosure, in this case the third party appellant, must satisfy each part of the following three-part test:

1. the record must reveal information that is trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

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[48] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing*)
[49] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[129] In the analysis that follows, I will consider each part of the test to the records that remain at issue. However, as I have found that Records 329, 324-342, 383-390, 395-396 and 413-620 are already exempt from disclosure, in full, under sections 18(1)(c), (d) and/or 19, I do not need to consider whether they are also exempt under section 17(1). As such, I will not consider the records that I have already found to be exempt from disclosure under sections 18(1)(c), (d) and/or 19 in this analysis.

[130] Similarly, I have already found some of the information severed in Records 26, 260 and 365 to be exempt from disclosure under section 18 of the *Act*. As such, I will not consider whether these portions are also exempt from disclosure under section 17(1) of the *Act*.

[131] In addition, I note that the affected party claimed section 17(1) to the following records that remain at issue: 382, 391-394 and 397-412. I have already found portions of sections 391-393, 398-400, 402, 403-405 and 412 to be exempt from disclosure under section 18. Further, I have reviewed these records and find that none of the records, with the exception of Record 382, relates to the affected party. In its representations, the affected party identifies these records as two emails, one which attached a draft appraisal report and a Hydro One Appraisal Request Form, and two appraisal reports. I found the second email and attachments and the two appraisal reports (Records 383-390) and two appraisal reports (Records 413-620) are exempt from disclosure under section 18. Therefore, from my review of the records, the only record that relates to the affected party is Record 382, which is an email. The other records (i.e. Records 391-394 and 397-412) do not appear to contain information that relates to the affected party. Therefore, I will only consider the affected party's representations on section 17(1) to Record 382.

[132] Hydro One did not submit representations with respect to the application of section 17(1) to the records. It states that "as the burden of proof in this case falls on the third party appellant… Hydro One makes no further representations in this regard."

[133] As stated previously, the appellant did not file any representations in response to the Notice of Inquiry.

Part 1: type of information

[134] The relevant types of information listed in section 17(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[50] The fact that a record

[50] Order PO-2010.

> might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[51]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[52]
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[53]

[135] The third party appellant submits that the information it claims to be exempt under section 17(1) contains commercial and financial information. The third party appellant describes the information withheld under section 17(1) as follows:

- Various correspondence relating to the Hydro One property
- Property management proposals
- Memoranda of insurance and schedules
- Various documents and correspondence that describe the rental amount paid to Hydro One, the rates Hydro One considered charging, the rent per acre amounts for the identified property and similar properties
- Various documents that identify the third party appellant's bank account; and
- Various documents that identify the purchase price and price per acre of purchases of properties similar to the property that is the subject of the appellant's request.

[136] The affected party submits that the Record 382 contains its technical, commercial and financial information.

[137] The third party appellant withheld references to organizations which it identifies as its suppliers in its non-confidential representations and the employees of those organizations from disclosure under section 17(1). In fact, in many instances, such as Records 30-34, 37, 46 and 57, the name or contact information of the organization and/or the employee is the only information withheld from the entire record. The third

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[51] Order P-1621.
[52] Order PO-2010.
[53] Order PO-2010.

party appellant claims that this information is commercial or financial information. While I accept that these records, as a whole, contain commercial and/or financial information, I am not convinced that the name of an individual (particularly where only the first name of an individual appears in a record) or the name of an organization itself would constitute commercial or financial information for the purposes of section 17(1).

[138] I find support for this position in Order PO-2200, in which former Assistant Commissioner Tom Mitchinson considered whether the name of a consultant in two versions of a briefing note constituted *commercial* or *financial information* for the purposes of section 17(1). In PO-2200, Assistant Commissioner Mitchinson found as follows:

> The only severed information is the name of the company retained to review the various leasing contracts between the Ontario government and the named company. While I accept the services provided by the consulting company are commercial in nature, I am not persuaded that the name of the company itself, which is no-doubt well known in its area of expertise, has the commercial connotation necessary to meet the requirement of part one of the section 17(1) test.[54]

The third party appellant has redacted, in many instances, only the names of particular organizations and their employees from disclosure under section 17(1). Given Assistant Commissioner Mitchinson's findings in Order PO-2200, I am not convinced that these names would constitute *commercial* or *financial information* within the meaning of section 17(1). However, as I later find that section 17(1) of the *Act* does not apply to this information due to the third party appellant's failure to demonstrate a reasonable expectation of the harms listed in section 17(1)(a) and/or (c), I do not need to make a final determination as to whether the names of an organization and its employees alone would constitute *commercial* or *financial information* within the meaning of section 17(1).

[139] With regard to the remainder of the information at issue, which includes a cover email from the affected party attaching an appraisal report, documents that identify the purchase price, the liability insurance amount and various correspondences during the negotiation of the agreement between Hydro One and the third party appellant, I find that this information is *commercial* or *financial information* within the meaning of section 17(1). I find that the information at issue does not contain *technical information*.

Part 2: supplied in confidence

Supplied

[140] I will first consider whether the information that remains at issue was supplied by the affected party or the third party appellant to Hydro One. If so, I will then consider

[54] Order PO-2200 at page 4.

whether it was supplied in confidence.

[141] The requirement that the information was *supplied* to the institution reflects the purpose of section 17(1) of protecting the informational assets of third parties.[55]

[142] Information may qualify as *supplied* if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[56]

[143] The contents of a contract involving an institution and a third party will not normally qualify as having been *supplied* for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than *supplied* by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[57]

[144] There are two exceptions to this general rule which are described as the *inferred disclosure* and *immutability* exceptions. The *inferred disclosure* exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[58] The *immutability* exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[59]

[145] In its representations, the third party appellant submits that it submitted some of the information at issue directly to Hydro One and the remainder of the information that was not directly supplied would fall within the *inferred disclosure* exception. The third party appellant submits that it prepared and provided all information it claims to be exempt under section 17(1) to Hydro One in the context of negotiations. The third party appellant submits that these negotiations were and remain confidential. The third party appellant submits that disclosing the information withheld under section 17(1) "would reveal not only the negotiating position of the parties, but also the minute details of confidential communications that have passed between them".

[146] The affected party submits that it supplied the information contained in Record 382 to Hydro One in confidence.

[147] Based on my review of the records, I find that Record 382 contains information that the affected party supplied to Hydro One or information that would, if disclosed,

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[55] Order MO-1706.
[56] Orders PO-2020 and PO-2043.
[57] This approach was approved by the Divisional Court in *Boeing*, *supra* note 48, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[58] Order MO-1706, cited with approval in *Miller Transit*, *supra* note 57 at para. 33.
[59] *Miller Transit*, *supra* note 57 at para. 34.

reveal information supplied by the affected party to Hydro One. In addition, I find that the information contained in Records 6, 190, 256 and 360 is information that was supplied by the third party appellant to Hydro One. Finally, I find that the information withheld in Record 5, namely the third party appellant's insurance policy number, to be supplied.

[148] I will not consider whether the names of the third party appellant's suppliers and their employees were supplied by the third party appellant to Hydro One in confidence as I will later find that they fail to meet part three of the section 17(1) test for exemption.

[149] With regard to the remainder of the information severed from disclosure, I find that the majority of the information to be the product of negotiations and that it, therefore, does not qualify as *supplied* within the meaning of section 17(1). In Order PO-2476, Adjudicator Steven Faughnan considered the application of section 17(1) to records relating to two agreements between Hydro One and two third parties. Adjudicator Faughnan considered whether the information relating to the area of a proposed lease, leasehold improvement costs, treatment of disbursements, monthly lease rates, liability insurance requirements, the name of a contractor, leasehold improvement options, fixed prices, expense treatment, unit costs, hourly rates and details about Hydro One's Secondary Land Use Program were exempt from disclosure under section 17(1) of the *Act*. Upon review of the records at issue, which consisted of a car parking license and correspondence related to that and a management agreement and covering correspondence, Adjudicator Faughnan held that all the information withheld represented mutually generated agreed upon essential terms of a contract and, therefore, could not be considered to have been *supplied* for the purpose of section 17(1).[60]

[150] I adopt Adjudicator Faughnan's findings for the purposes of this appeal. Specifically, I find that the following categories of information represent agreed upon terms of the contract between Hydro One and the third party appellant:

- liability insurance information contained in Records 5, 209, 237 and 304
- rental rates and amounts paid to Hydro One on Records 267, 292, 295, 316, 318, 362-363, 364, 365 (second severance) and 412
- amount due for a tax invoice in Record 20[61]
- amount of money spent to retrofit the land in Records 167-168

[60] This approach aligns with numerous other IPC orders and Divisional Court decisions such as *Miller Transit*, *supra* note 57.

[61] I note that the information the third party appellant proposes to sever from Record 20 is duplicated elsewhere in the records, for example Records 21 and 22. The third party appellant did not appeal the disclosure of the duplicative information in those records.

- information withheld on Records 216, 219, 232, 233, 235, 245 and 247, which cannot be described in more detail as its description is contained in the confidential portion of the third party appellant's representations

- the expiry date of an agreement on Record 259

Based on my review of the information listed above, I find that it was the product of negotiations between Hydro One and the third party appellant. For example, the amount of rent paid by the third party appellant to Hydro One to use the subject property is clearly a product of negotiations between Hydro One and the third party appellant.

[151] Furthermore, as the third party appellant states in its representations, there were certain requirements set out by Hydro One as a precondition to the agreement. For example, the third party appellant was required to buy a specified amount of liability insurance. Based on my review of the record and circumstances, I find that where a party is required to provide liability or other guarantees to an institution as a precondition to an agreement, the amount of that requirement is not *supplied*. The institution laid out the requirement as a precondition to the agreement and the third party may negotiate the terms of the requirement, but I find that the requirement or the amount of the liability insurance or similar type of guarantee is not information that was *supplied* to the institution.

[152] In addition, I note that Record 230 was supplied by Hydro One to the third party appellant and does not appear to contain information that was supplied by the third party to Hydro One. The third party appellant did not make representations on whether the information contained in this record specifically was supplied to Hydro One and, upon review, it appears to be a sample document sent by Hydro One to the third party appellant.

[153] With regard to the information the third party appellant describes as "the rental amounts Hydro One considered charging", I find that this information was not *supplied* by the third party appellant to Hydro One and is information that was generated by Hydro One. This information can be found in Record 260 (second severance) and 330.

[154] In addition, I find that the information described above does not fit within the *immutability* or *inferred disclosure* exceptions to the *supplied* requirement. The third party appellant submits that "some" of the information, if disclosed, would reveal or permit the drawing of accurate inferences with respect to certain information supplied by the third party appellant. However, the third party appellant does not identify which pieces of information would fit within the *inferred disclosure* exception and, based on my review, I find that none of the information described above would fit within either exception to the *supplied* requirement.

[155] Therefore, I conclude that the information the third party appellant seeks to withhold from Records 5, 20, 167-168, 209, 216, 219-220, 232, 233, 235, 237, 245, 247, 259, 260, 267, 292, 295, 304, 316, 318, 362-363, 364-365 and 412 was not

supplied by the third party appellant to Hydro One within the meaning of section 17(1). Since all three parts of the test must be met before the section 17(1) exemption applies this is sufficient to find that section 17(1) does not apply to these portions of the records. Therefore, I find that these portions of the records are not exempt from disclosure and dismiss the third party appellant's appeal with regard to these portions of the records.

In confidence

[156] In order to satisfy the "in confidence" component of part two, the third party appellant must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[62]

[157] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[63]

[158] Both the affected party and third party appellant submit that the information that I found to meet the *supplied* requirement (i.e. Records 5, 6, 190, 256, 360 and 382) were supplied to Hydro One explicitly and implicitly in confidence. I have reviewed these records and accept that they were supplied to Hydro One in confidence.

Part Three: Harms

[159] The parties resisting disclosure must provide sufficient evidence to 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.[64] However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of the

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[62] Order PO-2020.
[63] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC), 298 DLR (4th) 134.
[64] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

harms in the *Act*.[65]

[160] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for *detailed and convincing* evidence to support the harms outlined in section 17(1).[66]

[161] In its representations, the affected party makes a number of submissions on the harms that could reasonably be expected to result from the disclosure of the appraisal reports and, specifically, the fees charged in preparing the appraisal reports and comparable commercial property information. I have already found the appraisal information to be exempt from disclosure under section 18(1) and, based on my review of Record 382, I find that it does not contain the information that the affected party believes should be withheld from disclosure.

[162] Record 382 is a covering email attaching a draft report prepared by the affected party for Hydro One. The information contained in Record 382 is generic and does not reveal the contents of the appraisal. Given the generic nature of this record and the absence of representations with regard to the disclosure of the information contained in this record, I find that its disclosure cannot reasonably be expected to result in any of the harms outlined in section 17(1). Therefore, I find that Record 382 is not exempt from disclosure under section 17(1) and uphold Hydro One's decision to disclose it to the appellant.

[163] Records 5, 6, 190, 256 and 360 and the names of the third party appellant's suppliers and the names of their employees remain at issue. These names of organizations and individuals are redacted throughout the 415 pages of records that relate to the third party appellant.

[164] Firstly, I accept Hydro One and the third party appellant's redactions of the third party appellant's insurance policy number and bank account information. I find that this information is sensitive, commercial information belonging to the third party appellant and, if disclosed, could reasonably be expected to result in undue loss to the third party appellant and undue gain to its competitors. Therefore, section 17(1)(c) applies to exempt this information, contained in Records 5, 256 and 360, from disclosure.

[165] The third party appellant provided confidential and non-confidential representations on part 3 of the section 17(1) test. Since a significant portion of the third party appellant's representations on harms are confidential, I will summarize them in a generic manner. The third party appellant submits that the disclosure of the information that remains at issue can reasonably be expected to result in prejudice to its competitive position and interference with negotiation, thereby triggering section 17(1)(a). The third party appellant submits that the names of its suppliers and the names of their employees are properly redacted because the disclosure of this information would cause significant harm to its competitive position. With regard to the

[65] Order PO-2435.
[66] Order PO-2435.

names of the third party appellant's suppliers and their employees, the third party appellant made a number of confidential submissions relating to the manner in which its competitors would use the information to harm its competitive position. The third party appellant also submits that the information that remains at issue should not be disclosed as its competitors could unduly benefit from the disclosure of this information. Further, the third party appellant submits that the information that remains at issue will provide its competitors with crucial information that would enhance their ability to undermine the third party appellant's competitive position.

[166] In addition, the third party appellant submits that section 17(1)(c) applies to the information that remains at issue. The third party appellant submits that the information the remains at issue is "exactly" the type of informational asset that section 17(1) of the *Act* is intended to protect. The third party appellant submits that it is reasonable to expect that its competitors will use this information to undermine its position and this will result in severe and undue loss to itself, in terms of the future gains it could have made but also with respect to the loss of time and resources it already used to secure these types of agreements with Hydro One.

[167] I have reviewed the information that remains at issue, specifically the names of the third party appellant's suppliers and their employees and the information severed from Records 6 and 190, and find that the disclosure of this information would not reasonably be expected to result in the harms contemplated by sections 17(1)(a) or (c). The third party appellant makes a number of generic arguments with regard to the harm that disclosure will cause to its competitive position. It appears that the third party appellant is most concerned with the possibility that its competitors will be able to use the information that remains at issue to outbid the third party appellant in future negotiations with Hydro One. However, previous orders of our office have held that "the fact that disclosure of the proposal may result in a more competitive bidding process in the future does not result in significant prejudice to the affected party's competitive position or result in an undue loss to it."[67] Therefore, I find the possible increase in competition in a bidding or negotiation process is not a harm contemplated by sections 17(1)(a) or (c).

[168] Based on my review of the third party appellant's representations, I find that it has not provided me with sufficient evidence to demonstrate risk of harm that is *well beyond* the merely possible or speculative. While the third party appellant categorized its redactions, it did not provide me with sufficiently detailed evidence explaining how its competitors could use these types of information to undermine the third party appellant's competitive position or how the disclosure of this information would result in undue loss to it. This is particularly true of the names of the third party appellant's suppliers and their employees. Based on my review of this information, the records that contain this information and the third party appellant's representations, I am not satisfied that the disclosure of this type of information will result in significant prejudice to the third party appellant's competitive position, significant interference with its

[67] Order PO-3183.

negotiations or undue loss to the third party appellant or undue gain to its competitors. The harms that the third party appellant submits could reasonably be expected to result, referred to in its confidential representations are remote at best and the evidenced the third party appellant provided is not sufficient to demonstrate a reasonable expectation of the harms contemplated by sections 17(1)(a) or (c).

[169] Furthermore, I note that Records 6 and 190 are quite old. While age is not a determining factor, I find that the age of these records and the likelihood that the third party appellant's position in the marketplace is not the same as it was at the time these records were created suggests that the disclosure of this information could not reasonably be expected to result in the harms contemplated by sections 17(1)(a) and (c).

[170] In conclusion, I uphold the application of section 17(1)(c) to the following information: the insurance policy numbers exempted by Hydro One on Record 5 and the third party appellant's bank account information in Records 256 and 360. I find that the remainder of the records are not exempt under section 17(1) and dismiss the third party appellant's appeal relating to the disclosure of those portions of the records.

Issue H: Is there a compelling public interest in disclosure of the records that clearly outweighs the purposes of the sections 17 and 18 exemptions?

[171] 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.

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.

[172] 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.[68]

Compelling public interest

[173] In considering whether there is a *public interest* in disclosure of the records, 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.[69] Previous orders

[68] Order P-244.
[69] Orders P-984 and PO-2607.

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 make political choices.[70]

[174] A public interest does not exist where the interests being advanced are essentially private in nature.[71] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[72]

[175] The word *compelling* has been defined in previous orders as "rousing strong interest or attention."[73]

[176] Any public interest in non-disclosure that may exist must also be considered.[74] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of *compelling*.[75]

[177] During mediation, the appellant raised the possible application of the public interest override. However, when I invited the appellant to make submissions in response to the Notice of Inquiry, which included an invitation to make submissions on the application of the public interest override to the records exempt under sections 17 and/or 18, the appellant did not do so.

[178] In its representations, Hydro One submits that while there is a public interest in the activities of government entities, it demonstrated its commitments to the *Act* by agreeing to the disclosure of a significant portion of the records at issue and only redacted information where it was "absolutely necessary" to protect its interests. Hydro One further submits that while there is a general public interest in records relating to government activity, there should not be an absolute right of access to government-held information, particularly in the current case, where the disclosure of the records could prejudice the financial interests of Hydro One, Ontario and third parties.

[179] Hydro One submits that it tried to balance the *Act*'s competing interests, namely, its need as a business entity to preserve the confidentiality of certain information and its responsibility as a company with a large public sector investment to be sufficiently open and candid to permit an appropriate level of public oversight. Hydro One reiterates that it only withheld the part of the information required to protect its legitimate interests.

[180] Hydro One submits that there is no public interest in disclosure of the information that remains at issue in this appeal. It submits that the appellant has not

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[70] Orders P-984 and PO-2556.
[71] Orders P-12, P-347 and P-1437.
[72] Order MO-1564.
[73] Order P-984.
[74] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[75] Orders PO-2072-F, PO-2098-R and PO-3197.

established any compelling public interest in the information at issue and submits that there has been no impropriety in its dealings nor is there public outcry or demand for disclosure of these records.

[181] The third party appellant submits that there is no public interest in the disclosure of the records that remain at issue. The third party appellant asserts that the records relate to the negotiation of commercial licenses between what are now two private companies. As such, the interests at issue are essentially private in nature.

[182] In order for me to find that section 23 of the *Act* applies to override the exemption of the records I found to qualify under sections 17 and 18, I must be satisfied that there is a compelling public interest in the disclosure of those particular records, or portions thereof, that clearly outweighs the purpose of the third party information or the economic interests of an institution exemptions.

[183] As Hydro One did in its representations, I acknowledge the importance of institution accountability in commercial activities. However, in the absence of any representations from the appellant establishing a compelling public interest in the records that I found to be exempt from disclosure under sections 17 and 18, I do not find that there is a compelling public interest in the specific records, or portions thereof, that remain at issue in this case. The appellant has simply not provided any evidence to support his position that a public interest in the records that were withheld under sections 17 and 18 exists. Specifically, I find that there is not compelling public interest in the disclosure of the rental rates, calculations, appraisal reports and the third party appellant's banking and insurance policy information.

[184] Further, I find that disclosure of the records for which I have upheld the sections 17 and 18 exemptions would not add "to the information the public has to make effective use of the means of expressing public opinion or to make political choices."[76]

[185] In the circumstances, I find that there is no compelling public interest in the disclosure of the exempt portions of the records. Therefore, the public interest override provision in section 23 of the *Act* does not apply.

ORDER:

1. I uphold Hydro One's fee of $1556.80.

2. I uphold Hydro One's application of sections 18(1)(c), (d) and/or (e) and 19 to the records for which they are claimed as well as the duplicate information in Records 22-23, 26, 260 and 365.

3. I uphold Hydro One's decision to withhold portions of Records 183, 296, 316, 319-322 and 349 as not responsive.

[76] Order P-984.

4. I uphold the application of section 17(1)(c) to the following information: the insurance policy numbers in Record 5 and the third party appellant's bank account information in Records 256 and 360. I reject the third party appellant's claim of section 17(1) to the remainder of the information subject to its appeal.

5. I order Hydro One to disclose to the appellant all of the records at issue in this appeal, with the exception of the information I found to be exempt in Order Provisions 2, 3 and 4, by **June 21, 2016** but not before **June 15, 2016**, and subject to the payment of the fee.

Original Signed by: May 17, 2016

Justine Wai
Adjudicator