Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3926

Appeal PA16-229

Ontario Power Generation

February 8, 2019

Summary: The appellant submitted a request to Ontario Power Generation (OPG) under the *Act* for a copy of a Master Services Agreement, amongst other things. OPG granted the appellant partial access to the record, claiming that portions were excluded under section 65(6) (labour relations). In the alternative, OPG claimed the application of a number of exemptions, including section 18(1) (economic and other interests). The appellant appealed OPG's decision. In this order, the adjudicator finds that OPG cannot claim the application of an exclusion to portions of a record and considers the application of section 65(6) to the Master Services Agreement as a whole. The adjudicator finds the record is not excluded from the scope of the Act. In addition, the adjudicator finds that section 18(1) does not apply to exempt the information at issue from disclosure and orders OPG to disclose it to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy*, R.S.O.1990,C.F.31, as amended, sections 18(1)(c), 65(6)2 and 65(6)3.

Orders and Investigation Reports Considered: Orders PO-2632 and PO-3572

Cases Considered: *Ministry of the Attorney General and Toronto Star* 2010 ONSC 991; *Weber v. Ontario Hydro* [1995] 2 SCR 929, 1995 CanLII 108.

OVERVIEW:

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

> A copy of the Master Service Agreement between OPG and [a named company] which is effective February 1, 2016.
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> All ancillary service level agreements effective February 1, 2016.
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> Delivery model that is part of the Feb 1, 2016 agreement.
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> All change orders effective October 1, 2015 and after this date.
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> Any and all documents related to any projects currently awarded to [the named company] and those that will be awarded in future, i.e. the project services scope that is part of the Feb 1, 2016 agreement, the sole source language/agreements re: projects and copies of Schedule J and Schedule I.
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> All costs paid by OPG related to [the named company] downsizing exercise of [the named company's] employees.

[2] After locating responsive records, OPG notified the company named in the request (the affected party) to seek its views on the disclosure of them. The affected party submitted representations.

[3] Upon review of the affected party's representations, OPG issued an access decision to the parties, granting the appellant partial access to the records. OPG advised the parties it applied the discretionary exemptions in sections 14 (law enforcement), 16 (prejudice defence of Canada) and 18(1) (economic and other interests) and the mandatory exemption in section 17(1) (third party commercial information) of the Act to withhold portions of the records. OPG also advised the parties that certain portions of the records were excluded from the scope of the Act pursuant to section 65(6) (employment or labour relations).

[4] The appellant appealed OPG's decision to withhold some of the information from disclosure.

[5] During mediation, OPG obtained the affected party's consent to disclose additional information to the appellant. OPG subsequently issued a revised access decision, granting the appellant additional access to information previously withheld under sections 17(1) and 18(1) of the *Act*.

[6] The appellant confirmed their interest in pursuing access to the information withheld from disclosure.

[7] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry into the issues under appeal. The adjudicator originally assigned to the appeal began the inquiry by inviting OPG and the affected party to respond to a Notice of Inquiry, which set out the facts and issue under appeal. Prior to submitting representations, the

appellant and OPG requested a hold on the appeal pending the outcome of further discussions between the parties. The adjudicator placed the appeal on hold.

[8] The appellant later advised the adjudicator that they wished to proceed with the appeal, but with a narrowed scope. The appellant confirmed they wished to pursue access to specific sections of the Master Services Agreement (the agreement) only. Given the narrowed scope of the appeal, only the exclusion in section 65(6) and the exemptions in sections 17(1) and 18(1) remain at issue.

[9] The adjudicator reactivated the appeal and sent OPG and the affected party a revised Notice of Inquiry to reflect the narrowed scope of the appeal. OPG submitted representations in response to the Notice of Inquiry and confirmed that it no longer claims section 17(1) to withhold portions of the record. The affected party did not submit representations.

[10] The adjudicator then invited the appellant to submit representations in response to the issues under appeal and the non-confidential portions of OPG's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations. OPG then submitted representations in response to the appellant's representations.

[11] The appeal was transferred to me to complete the inquiry. In the discussion that follows, I find that the section 65(6) exclusion has no application to the agreement; therefore, the *Act* applies to it. In addition, I find that section 18(1)(c) does not apply to exempt the information at issue. I order OPG to disclose the information at issue to the appellant.

RECORD:

[12] The information at issue is contained in a Master Services Agreement in respect of IT services dated October 8, 2015. OPG denied the appellant access to this information on the basis that it is excluded from the scope of the *Act*, pursuant to section 65(6). In the alternative, OPG claims that the information at issue is exempt from disclosure under section 18(1).

[13] Specifically, the information at issue comprises

1. The withheld portions of section 3.06
2. The withheld portions of section 3.07
3. Section 3.08
4. Paragraphs (f) and (g) of Section 15.04
5. The withheld portions of section 16.01 paragraphs 3(e) and 4(f)

6. The withheld portions of section 20.16 paragraphs (1) and (2)

ISSUES:

A. Does section 65(6) exclude the agreement from the scope of the *Act*?

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

DISCUSSION:

Issue A: Does section 65(6) exclude the agreement from the scope of the *Act*?

[14] OPG claims that section 65(6)2 or 65(6)3 applies to the information at issue. The relevant portions of section 65(6) state,

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
> >
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

OPG only applied section 65(6) to portions of the agreement. However, as indicated in the Notice of Inquiry dated July 18, 2017, the IPC has consistently held that the exclusion in section 65(6) of the *Act* (and the equivalent section in the municipal *Act*) are record-specific and fact-specific.[1] Therefore, in order to qualify for an exclusion, the record is examined as a whole. I will address this issue in more detail in my discussion of sections 65(6)2 and 3 below.

[15] If section 65(6) applies to the agreement and none of the exceptions found in section 65(7) applies, the agreement is excluded from the scope of the *Act*.

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[1] See Orders M-797, P-1575, PO-2531, PO-2632, MO-1217, PO-3456-I and many others.

[16] For the collection, preparation, maintenance or use of a record to be *in relation to* the subjects mentioned in paragraphs 2 or 3 of section 65(6), it must be reasonable to conclude there is *some connection* between them.[2]

[17] The term *labour relations* refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation or to analogous relations. The meaning of *labour relations* is not restricted to employer-employee relations.[3]

[18] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[4]

[19] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

Section 65(6)2

[20] For section 65(6)2 to apply, OPG must establish the following:

1. The agreement was collected, prepared, maintained or used by an institution or on its behalf;

2. This collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and

3. These negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[21] OPG submits there is "no question" that it maintains and uses the commercial agreement between itself and the affected party. Therefore, OPG submits the first part of the test is satisfied.

[22] With regard to the second requirement, OPG submits that the information at issue addresses matters arising from the labour relations agreements between the appellant, on the one hand, and either OPG or the affected party, on the other. OPG states that the appellant represents employees who work at the affected party's

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[2] *Ministry of the Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) (Div. Ct.). (*Toronto Star*)
[3] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] OJ No. 4123 (CA). See also Order PO-2157.
[4] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 OR (3d) (CA), leave to appeal refused [2001] SCCA No. 507.

business and perform many of the services described in the agreement. OPG states that the appellant also represents certain employees at OPG. The two collective agreements (between the appellant and certain of the affected party's employees and the appellant and certain OPG employees) are interrelated and reflect OPG and the affected party's shared interests in this workforce.

[23] OPG submits the information at issue addresses its and the affected party's respective rights and obligations in respect of its workforce, which extend beyond what is provided for in OPG and the affected party's respective collective bargaining agreements with the appellant. OPG submits that the information at issue specifically relates to labour relations issues and constitutes the means by which OPG and the affected party allocated their rights, obligations and liabilities regarding this workforce.

[24] Finally, OPG submits the information at issue relates to labour relations negotiations on two fronts. First, OPG submits the information at issue is substantially connected to labour negotiations between itself and the affected party. Second, OPG submits the information is also substantially connected to anticipated negotiations for a new agreement between itself and the affected party when the current agreement expires. OPG states it has initiated work on the strategy for the next agreement and disclosure of the information at issue would provide the appellant with a window into OPG's bargaining position that it would otherwise not have, to OPG's prejudice.

[25] The appellant submits that while certain sections of the agreement contain information related to labour relations, these sections are not substantially connected to negotiations and anticipated negotiations in relation to OPG's work force and do not constitute labour relations or employment-related information in which OPG has an interest as an employer. The appellant submits that the agreement may contain terms that have an effect on labour relations or employment-related matters, but these are not *about labour relations* within the meaning of section 65(6) of the *Act*.

[26] The appellant submits that OPG does not meet the second and third requirements of section 65(6)2. The appellant states that the agreement has a term of five years. As such, the appellant submits OPG should not be permitted to stretch the meaning of "anticipated negotiations" in section 65(6)2 to claim that portions of the agreement were collected, prepared or used for the future negotiations of a new contract.

[27] Finally, the appellant submits that the information at issue is not connected to anticipated negotiations relating to labour relations. The appellant states that the agreement is not about labour relations, but is a contract for services. The appellant submits that the fact that the agreement contains some provisions relating to employees does not establish that the record as a whole relates to labour relations and employment.

[28] In response, OPG submits that the information at issue is "directly relevant to the scope of [the affected party's] bargaining power in upcoming negotiations." In addition,

OPG submits the information at issue could be used to thwart the current allocation of obligations and liabilities between the affected party and OPG in respect of its particular workforce.

Analysis and Findings

[29] As stated above, section 65(6)2 of the *Act* applies to records collected, prepared, maintained or used by an institution *in relation to* negotiations or anticipated negotiations *relating to* labour relations between the institution and bargaining agents.

[30] In this appeal, I find the agreement was collected, prepared, maintained or used by OPG because it is a party to that agreement. Therefore, I find OPG established the first of the three requirements for the application of the section 65(6)2 exclusion.

[31] However, I am not satisfied the second and third requirements for the application of the section 65(6)2 exclusion have been met. For the second requirement to be satisfied, I must find there is *some connection* between the collection, maintenance, preparation and use of the record and the negotiations or anticipated negotiations to labour relations. The record at issue is a Master Services Agreement between OPG and the affected party for the provision of infrastructure-related services, related technology, expertise, personnel and products in response to a specific OPG Request for Proposals (RFP). Based on the evidence before me, I do not accept that OPG has established there is *some connection* between the collection, maintenance, preparation and use of the agreement and anticipated negotiations relating to labour relations, as OPG claims.

[32] Based on my review of the record, I am not satisfied there is *some connection* between the record and labour relations or employment-related matters. In *Ministry of the Attorney General and Toronto Star*[5], the Ontario Divisional Court defined *relating to* in section 65(5.2) (ongoing prosecution) of the *Act* as requiring *some connection* between the records and the subject matter of that exclusion. In that case, the Divisional Court overturned this office's finding that a *substantial* connection is required for the exclusion to apply. OPG submits there is a connection between the portions of the agreement at issue and anticipated negotiations related to labour relations.

[33] However, as stated above, the IPC has consistently held that the exclusions in section 65(6) are record-specific and fact-specific. Therefore, to qualify for an exclusion, the record must be examined as a whole.[6] Based on my review, I find the record as a whole does not have a sufficient connection to anticipated negotiations relating to labour relations or employment-related matters. In addition, I find the record itself does

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[5] *Toronto Star*, *supra* note 2.
[6] Order PO-3572. See also Orders M-797, P-1575, PO-2531, PO-2632, MO-1218 and PO-3456-I.

not have a sufficient connection to labour relations or employment-related matters.

[34] In making this finding, I rely on Order PO-3572, in which the adjudicator considered the application of section 65(6) to spreadsheets containing the full expense budgets for the University of Ottawa for the 2012/2013 and 2013/2014 budget years. In her analysis, the adjudicator consider whether the "collection, preparation, maintenance or use of the record *as a whole* is sufficiently connected to an excluded purpose."[7] The adjudicator also considered the application of *Toronto Star* and the *some connection* principle it articulated. The adjudicator found,

> This office has held that even where a record is collected, prepared, maintained or used for a non-excluded purpose, it may still qualify for exclusion where there exists the required degree of connection to an excluded purpose – as, for example, when a record originally created for a non-excluded purpose is later used or maintained for an excluded purpose.[8] This office has also recognized that where there are multiple purposes for a record's collection, preparation, maintenance or use, the question of whether the excluded purpose is a predominant or primary purpose is relevant.[9]
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> These orders do not assist the university, however, because in each of these cases, the question remains whether the collection, preparation, maintenance or use of the record as a whole is sufficiently connected to an excluded purpose. Where there are multiple purposes for the collection, preparation, maintenance or use of a record, this office has considered whether the record, as a whole, is collected, prepared, maintained or used primarily for an excluded purpose, or primarily for other, non-excluded purposes.
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> … Before *Toronto Star*, this office applied a more stringent test of connection between a record's collection, preparation, maintenance or use and an excluded subject matter; the superseded test was still applied to the record as a whole. As is evident in the orders before and after *Toronto Star*, this office examines the degree of connection between an excluded subject matter and the collection, preparation, maintenance or use of the record as a whole. These exclusions do not apply where only part of a record is connected in this way. [emphasis in original]

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[7] *Ibid*. at para. 39.
[8] Orders PO-2105-F, M-1107, MO-1654-I, MO-2428 and others.
[9] Orders MO-1354-I, MO-2332, PO-3549 and others.

The adjudicator reviewed the spreadsheets before her and considered whether the collection, preparation, maintenance or use of each record, as a whole, had some connection to labour relations negotiations. She found the spreadsheets did not and concluded that the records were not excluded from the *Act* pursuant to section 65(6)2.

[35] I adopt this analysis for the purposes of this order. In its representations, OPG submits that the "provisions of the [agreement] in issue" relate to labour relations negotiations and anticipated labour relations negotiations between itself and the appellant. However, as stated above and in the Notice of Inquiry[10], the record must be examined as a whole. Based on my review of the agreement, I find OPG prepared, maintained or used the record to contract with the affected party for services relating to the RFP rather than in relation to labour relations negotiations or anticipated labour relations negotiations. I agree that the information at issue relates to employment-related matters; however, I find that the record does not relate to labour relations or employment-related matters as a whole.

[36] In addition, I am not satisfied OPG maintains or uses the agreement as a whole for anticipated negotiations that relate to labour relations or employment-related matters. While certain portions of the record may be referred to or relied upon in future negotiations, I am not satisfied the agreement as a whole, which relates to a number of different services and products to be provided by the affected party, is being used or maintained for anticipated labour relations or employment-related negotiations.

[37] Finally, I note OPG makes a number of submissions regarding the harms that may result in disclosure of the records. Specifically, OPG notes the disclosure would provide the appellant with insight into OPG's bargaining position that it would otherwise not have, to OPG's prejudice. These harms are not part of the analysis of whether section 65(6)2 applies to exclude a record from the scope of the *Act* and I will not consider them here. I will consider these arguments in Issue B, below.

[38] Therefore, given the nature of the record, I find that section 65(6)2 does not apply to exclude it from the scope of the *Act*.

Section 65(6)3

[39] For section 65(6)3 to apply, OPG must establish

1. The record were collected, prepared, maintained or used by an institution or on its behalf;

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[10] I refer OPG to page 5 of the Notice of Inquiry dated July 18, 2017, in which the adjudicator confirmed that the record must be examined *as a whole*.

2. This collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. These meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The phrase "in which the institution has an interest" means more than a *mere curiosity or concern*, and refers to matters involving the institution's own workforce.[11]

[40] OPG submits it collected, prepared, maintained or used the records. OPG submits the agreement arose from discussions and communications between itself and the affected party. OPG refers to Order PO-2632, in which the IPC recognized that individual terms or components of an agreement may fall within the ambit of paragraph 65(6)3 even where the overriding purpose of the agreement as a whole is not solely related to labour relations. OPG submits Order PO-2632 found that the institution's interest in a labour relations or employment-related matter need not rise to the level of a legal interest so long as it is more than a *mere curiosity or concern*. OPG submits the information at issue addresses potential labour relations or employment-related issues, including pensions and benefits, termination and severance employees and indemnification regarding claims made involving members of the workforce. OPG states that it has a significant interest in these issues as an employer. OPG notes that Order PO-2632 found that section 65(6)3 applied to certain portions of a predecessor agreement to the record before me addressing employee transfer and pension and benefits. OPG submits the same subjects are addressed in the information at issue in this appeal and I should follow Order PO-2632 in this regard.

[41] The appellant concedes that the record satisfies the first two parts of the section 65(6)3 test. However, the appellant submits the record does not meet the third requirement. The appellant submits that the labour relations or employment aspects of the record are incidental to the primary purpose of the record, which is to establish a wide-ranging services agreement between OPG and the affected party.

[42] In addition, the appellant submits that I should distinguish this appeal from Order PO-2632, in which it was the appellant as well. The appellant submits that the records at issue in Order PO-2632 consisted of appendices that addressed potential labour relations or employment-related issues surrounding a main service agreement. The appellant submits that this appeal does not involve detailed records containing specific information; instead, the appellant pursues access to sections of the agreement itself and not supporting documentation to these sections. The appellant submits OPG should grant it some access to the information at issue.

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[11] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra* note 4.

[43] In response, OPG reiterates that the adjudicator in Order PO-2632 applied the exclusion in section 65(6)3 to provisions of a predecessor agreement to the record at issue. In addition, OPG submits that the form in which the information sought is provided (e.g. as part of an agreement or otherwise) is irrelevant so long as the record or part of the record is excluded from the scope of the *Act*. In this case, OPG submits it met the test to establish that the information at issue is not subject to the *Act*. Finally, OPG states it has already provided the appellant with some access to the record and only withheld those sections that are not subject to the *Act* pursuant to section 65(6)3.

Analysis and Findings

[44] I begin my analysis by noting that the principle of binding precedent or *stare decisis* does not apply to require administrative tribunals to follow their own previous decisions. As stated by the Supreme Court of Canada in *Weber v. Ontario Hydro*[12],

> The first significant difference between courts and tribunals relates to the difference in the manner in which decisions are rendered by each type of adjudicating body. Courts must decide cases according to the law and are bound by stare decisis. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate. In labour arbitration, the arbitrator is not bound to follow the decisions of other arbitrators, even when similar circumstances arise…

Therefore, I am not bound to follow the findings in Order PO-2632, but will consider them and more recent jurisprudence from this office below.

[45] In Order PO-2632, the adjudicator found that the exclusion in section 65(6)3 applied to exclude portions of two agreements that relate to employee severance, indemnification and termination as well as two appendices to those agreements from the scope of the *Act*. Specifically, the adjudicator found the following:

> It may be, as the appellant has argued, that the overriding purpose of the Agreements is to give effect to a commercial transaction in which the Company is to provide technology and business services to OPG. However, I find that it does not necessarily follow that the Agreements, or individual records or components of the Agreements, do not fall within the exclusion in section 65(6) as a consequence of that overriding purpose. Moreover, although not all records containing information related to labour relations or employment-related matters are excluded as a matter of course, those records or components of records with a "substantial

[12] [1995] 2 SCR 929, 1995 CanLII 108 at para. 14.

> connection" to the labour relations or employment-related matters may be so excluded.
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> …
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> Based on the information before me, my review of the Agreements and the representations of the parties, I am satisfied that OPG has established that the meetings, consultations, discussions or communications in which it made use of the appendices addressing issues related to pensions and benefits, and employee transfer, as well as certain other portions of the larger agreements, are about labour relations or employment-related matters in which it has an interest. The only reason these particular appendices exist is because of the employment relationship its employees have with OPG.[13]

[46] Order PO-2632 was issued in January 2008. Since that time, the Ontario Divisional Court, in *Toronto Star*,[14] overrode the *substantial connection* test. In addition, more recent orders of this office stand for the proposition that a record is examined as a whole to qualify for an exclusion.[15] For example, in the recent Order PO-3572, the adjudicator states,

> This office has *consistently* take the position that the exclusions at section 65(6) of the *Act* (and the equivalent section in *MFIPPA*) are record-specific and fact-specific.[16] This means that in order to qualify for a exclusion, the record is to be examined as a whole. The question of whether the exclusion applies to a whole record, based on the inclusion in the record of an excluded portion, has been addressed in previous orders. In those orders, this office has applied the record-specific and fact-specific analysis to consider whether the record, as a whole, qualifies for the claimed exclusion.
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> This approach was recently affirmed in Order MO-3163. In that case, the adjudicator considered an internal police training video that contained, as examples of inappropriate officer behaviour, two discrete clips for which the police claimed certain exclusions. The evidence did not support a finding that the collection, preparation, maintenance or use of the video, as a whole, was connected in some way to proceedings or anticipated proceedings or to labour relations or employment-related matters of interest to the police. The question of whether the clips contained in the

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[13] Order PO-2632 at page 14.
[14] See paragraph 32 above.
[15] See Order PO-3689, PO-3572, PO-3456-I and others.
[16] See Orders M-797, P-1575, PO-2531, PO-2632, MO-1218, PO-3456-I and many others.

> video would themselves qualify for exclusion in another context was not before the adjudicator. Instead, the record at issue was the training video, including the clips, and it was examined as a whole. As the record did not qualify for any of the claimed exclusions, the police were required to make a decision on access to it. In making a decision on access, the police would have recourse to the statutory exemptions available in *MFIPPA* to deny access to all or parts of the record as appropriate. [emphasis added]

[47] These two developments in the interpretation of *relating to* in section 65(6) and the application of the exclusions in the *Act* since Order PO-2632 was issued suggest that the order is now outdated. Given these circumstances, I decline to follow Order PO-2632 in this case. Furthermore, I find that following the current approach of the IPC to examine records as a whole when considering the application of an exclusion would serve to support consistency of decision-making, which is seen as a valuable objective in judicial commentary on tribunal adjudication.[17]

[48] Therefore, while OPG encourages me to consider the application of the exclusion to the information at issue, I will examine the record as a whole.

[49] Based on my review of the record, I am satisfied the agreement was collected prepared, maintained or used by OPG. In addition, I am satisfied the collection, preparation, maintenance or usage of the record was in relation to meetings, consultations, discussions or communications between OPG and the affected party. Therefore, I find the record meets the first two requirements for the application of section 65(6)3.

[50] However, I am not satisfied that the agreement meets the third requirement for section 65(6)3. For the third requirement to be satisfied, I must find that the meetings, consultations, discussions or communications in which OPG made use of the record were about labour relations or employment-related matters.

[51] For reasons similar to those in my discussion of section 65(6)2 above, I find that the meetings, consultations, discussions or communications relating to the Master Services Agreement, as a whole, were not *about* labour relations or employment-related matters in which OPG has an interest. Instead, the record is a contract between the affected party and OPG relating to a specific RFP for services and products. While there are discrete provisions in the record that relate to labour relations or employment-related matters, I find the record and the meetings, discussions, consultations or communications relating to the record were not *about* labour relations or employment-related matters as a whole. Therefore, I find the third part of the three part test for the

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[17] See Order PO-3617, which refers to *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1SCR 952 at 968.

application of section 65(6)3 is not satisfied and section 65(6)3 has no application to the record at issue.

[52] In conclusion, I find the exclusion in section 65(6) does not apply to the record at issue. As it is subject to the general right of access in the *Act* under section 10, I will consider OPG's exemption claim made for the information that remains at issue below.

Issue B: Does the discretionary exemption in section 18(1)(c) apply to the information at issue?

[53] As an alternative claim to section 65(6), OPG claims the application of the discretionary exemption in section 18(1)(c) of the *Act* to withhold the information at issue. Section 18(1)(c) states,

> A head may refuse to disclose a record that contains,
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> > information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

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

[54] The purpose of section 18(1)(c), in particular, is to protect the ability of institutions to earn money in the marketplace. Section 18(1)(c) recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[19]

[55] For section 18(1)(c) to apply, OPG must provide sufficient evidence to demonstrate there is a reasonable expectation of harm. OPG must demonstrate a risk of harm that is well beyond the merely possible or speculative. However, it does not need to 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.[20]

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[18] Toronto: Queen's Printer, 1980.
[19] Orders P-1190 and MO-2233.
[20] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-54.

[56] The failure to provide evidence to demonstrate a reasonable expectation of harm will not necessarily defeat OPG'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 the harms in the *Act*.[21]

[57] 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.[22]

Representations

[58] As stated above, OPG made a number of submissions regarding the harms that may result from the disclosure of the records when it addressed the application of section 65(6). Specifically, OPG notes the disclosure would provide the appellant with insight into OPG's bargaining position that it would otherwise not have, to OPG's prejudice. OPG submits that the provisions at issue represent the contractual allocation of obligations and liabilities between the affected party and OPG in respect of its particular workforce. OPG submits that if these provisions are disclosed, there is "a serious risk" that the appellant will seek to negotiate provisions in its collective agreements with OPG and/or the affected party to thwart that allocation to OPG's prejudice and the appellant's benefit. OPG also submits that the information at issue could be leveraged in binding arbitration in the event of a negotiation dispute.

[59] OPG states it regularly engages in procurement processes and negotiations with service providers. OPG states it engages in extensive negotiations with winning proponents even after a competitive RFP process and before signing the final contract. OPG notes that the IPC has recognized it is in the public interest for OPG to be in a position to negotiate the most favourable terms possible in any contractual negotiation of partnership.[23]

[60] OPG submits it will be prejudiced in future negotiations for the same or similar services if the information at issue is disclosed. OPG states it entered into the Master Services Agreement with the affected party after a competitive two-step RFP process, negotiations and execution of the agreement. OPG states that multiple parties expressed interest during the first step and two proponents entered step 2 negotiations. OPG states this process took over two years to complete and many provisions of the final agreement were the subject of "extensive negotiations" between itself and the

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[21] Order MO-2363.
[22] See Orders PO-2363 and PO-2758.
[23] OPG refers to Orders P-1210, P-1190 and PO-2632.

affected party.

[61] OPG submits the information at issue is the result of a "hard-fought negotiation process". In particular, OPG submits that the provisions in sections 3.06, 3.07, 3.08, 15.04(1)(f), 15.04(1)(g), 20.16(1) and 20.16(2) of the agreement were not part of the draft contract terms included in the RFP that led to the negotiation and execution of the agreement. OPG states that a version of sections 16.01(3)(e) and 16.01(3)(f) appeared in the RFP version of the contract terms but were heavily negotiated and substantively revised before the execution of the agreement. Therefore, OPG submits that the information at issue reflects negotiating positions and other OPG requirements that OPG keeps confidential.

[62] In addition, OPG states that the information technology industry is constantly evolving. Accordingly, while it made commercial sense for OPG to agree to these terms in 2015, OPG states it is more likely that it will want to take a different negotiating position with respect to at least some of these issues when the next agreement is negotiated. Therefore, OPG submits that the information is commercially sensitive and release would put OPG at a "significant disadvantage" when the next IT service agreement is negotiated.

[63] OPG notes that the agreement has a five-year term. Given the requirements of a procurement process for such a significant contract, OPG states it has begun working on a strategy for the next agreement and negotiations for it will likely occur in 2018 and 2019.

[64] OPG also states that the information at issue is directly relevant to labour relations issues and will prejudice OPG in its upcoming negotiations for the next IT service agreement, if it is disclosed. OPG submits that several terms contained in the record relate to OPG and the affected party's respective rights and obligations in respect of its workforce, including pensions and benefits, termination, severance and indemnification. OPG states that these terms extend beyond the collective agreements between itself, the affected party and unions in almost all cases.

[65] OPG submits that the redacted portions of sections 3.06, 3.07 and 3.08 relate to workers and their rights and benefits, such as severances, pensions and benefits, and lay out the specifics of how these issues are to be dealt with when a triggering event occurs.

[66] Finally, OPG refers to Order PO-2632, which found that section 18(1)(c) did not apply to the withheld portions of a predecessor agreement to the agreement at issue in this appeal. OPG submits the present commercial context "differs considerably" from the evidence before the adjudicator in Order PO-2632. In Order PO-2632, the adjudicator found that OPG did not provide sufficient evidence of specific, ongoing or potential negotiations that could be affected by the disclosure of the records at issue. Here, OPG submits it has provided evidence of anticipated negotiations that are expected to occur in the near future regarding the same subject matter covered by the

records at issue. In these circumstances, OPG submits that "the prejudice that disclosure would pose to OPG's economic interests is more palpable and easily foreseeable."

[67] The appellant submits OPG has not provided sufficient evidence to demonstrate a reasonable expectation that disclosure of the information at issue will result in the harms in section 18(1)(c). The appellant submits OPG made a bald assertion that the information is commercially sensitive and that release would put it at significant disadvantage for the future negotiations, but provided minimal and vague evidence to support its claim. The appellant also submits that OPG failed to provide evidence to demonstrate how other parties could use the information at issue to threaten OPG's economic interests.

[68] In reply, OPG submits it provided specific and detailed evidence regarding anticipated negotiations and how disclosure of the information at issue could reasonably be expected to prejudice the economic interests or competitive position of OPG.

Analysis and Findings

[69] Based on my review of the information at issue and the parties' representations, I find that OPG has not provided me with sufficient evidence to establish that disclosure of the information at issue could reasonably be expected to prejudice its economic interests or competitive position. Specifically, I am not persuaded that disclosure of the information at issue could reasonably be expected to compromise or prejudice OPG's bargaining position in relation to future or anticipated negotiations relating to either a new IT services agreement or future collective agreements with the appellant.

[70] First, I note that OPG states in its representations that,

> The information technology industry is constantly evolving and whereas it ultimately made commercial sense for OPG to agree to these terms in 2015, *it is more likely that OPG will want to take a different negotiating position with respect to at least some of these issues when the next agreement is negotiated*. The information is therefore commercially sensitive and release would put OPG at a significant disadvantage when the next IT service agreement is negotiated. [Emphasis added]

Based on my review of this evidence, I find it is not reasonable to expect that disclosure of the current terms could result in harm to OPG's negotiating position when the next IT service agreement is negotiated. As OPG itself asserts, the information technology industry is constantly evolving and it is likely that OPG will take a different negotiating position with at least some of the issues considered in the provisions at issue. Given these circumstances, it is unclear how the disclosure of the information at issue could reasonably be expected to harm OPG's economic interests or competitive position in these future negotiations. In any case, OPG does not offer further evidence to connect its claim that the disclosure could reasonably be expected to harm its economic interest

or competitive position with the fact that it will be taking a different negotiating position in future negotiations.

[71] In addition, I reviewed OPG's confidential and non-confidential representations on harms in its arguments for the application of the exclusion in section 65(6), where OPG argues that disclosure could reasonably be expected to interfere with its labour negotiations. I find OPG has not provided sufficient evidence to demonstrate that it is reasonable to expect that its economic interests or competitive position will be harmed as a result of the disclosure of the information at issue. While OPG submits that the information at issue is relevant to future negotiations, it does not provide sufficient evidence explaining how other parties to these future negotiations could use the specific information at issue to harm OPG's economic interests or competitive position.

[72] OPG submits that the disclosure of the information at issue would provide the appellant with a window into OPG's bargaining position that it would otherwise not have, to OPG's prejudice. While OPG provides further explanation in its confidential representations, I am not satisfied OPG provided sufficient evidence to connect the disclosure of the information at issue with the harms it submits could reasonably be expected to result to OPG's economic interests or competitive position.

[73] As stated above, OPG indicated that it will likely take a different negotiating position in future negotiations for the next IT services agreement from that reflected in the record at issue. Given these circumstances, it is unclear how the disclosure of the existing provisions in the record could reasonably be expected to result in harm to OPG's competitive position or economic interests in future labour negotiations with the appellant. In any case, I find OPG has not provided me with sufficient evidence to demonstrate that disclosure of the information at issue could reasonably be expected to harm its competitive position or economic interests in respect of these negotiations. In my view, OPG's arguments in this regard are speculative and lacking in detail.

[74] Finally, OPG submits there is "a serious risk" that the appellant will seek to negotiate provisions in its collective agreements with OPG's and the affected party's employees to thwart the contractual allocation of obligations and liabilities between OPG and/or the affected party if the information at issue is disclosed, to OPG's detriment and the appellant's benefit. Again, however, in the absence of further evidence or explanation, I find OPG's assertion of harm to be speculative and too remote to support its section 18(1)(c) exemption claim. OPG did not provide sufficient evidence to demonstrate how the appellant could use the specific information to harm OPG's economic interests or competitive position.

[75] In conclusion, I find section 18(1)(c) does not apply to the information at issue. As no mandatory exemptions apply to this information, I will order OPG to disclose it to the appellant.

ORDER:

I order OPG to disclose the information at issue to the appellant by **March 15, 2019** but not before **March 11, 2019**.

Original signed by: February 8, 2019

Justine Wai
Adjudicator