

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4151

Appeals PA19-00339 and PA20-00116

Ontario Power Generation

May 31, 2021

Summary: A journalist asked Ontario Power Generation (OPG) for a copy of an environmental assessment report for a specific property. OPG identified the report and issued a decision granting the journalist partial access to it. It withheld some information pursuant to section 18(1)(c) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). After giving notice to third parties OPG determined may have an interest in the disclosure of the report, it added section 17(1) as a basis for withholding the information at issue in the report. The appellant and a third party both appealed OPG's decision. In this order, which addresses both appeals, the adjudicator finds that the section 18(2) exception to the section 18(1)(c) exemption applies such that the withheld information is not exempt from disclosure. She also finds that the section 17(1) exemption does not apply and orders OPG to disclose the withheld information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 18(2).

OVERVIEW:

[1] Ontario Power Generation (OPG) received a request under the *Act* from a journalist for the copies of various records related to a former generating station at a specified address, known as the Hearn Generating Station. The journalist's original request was for multiple records, including copies of appraisals, environmental site assessments, lease agreements, agreements of purchase and sale, emails, and correspondence related to the property where the former generating station was located.

[2] The journalist subsequently narrowed the scope of his request to "a copy of Phase II Environmental Site Assessment (ESA) of the Hearn Generating Station from July of 1999." OPG located the responsive record, a 352 page environmental assessment report (the Report), and issued a decision granting the journalist partial access to it. It withheld some of the information in the Report pursuant to the discretionary exemption at section

18(1)(c) of the *Act* (economic and other interests).¹ The journalist appealed OPG's partial access decision, becoming the appellant in Appeal PA19-00339.

[3] OPG also notified a number of third parties that it determined may have an interest in the disclosure of some of the information in the Report. Three of those third parties appealed the disclosure of the information in the Report to the IPC. Two of those third parties subsequently withdrew their appeals, either during the mediation or inquiry process.²

[4] The third party that withdrew its appeal during the mediation phase of the appeals process was previously known as the company that authored the Report (the Environmental Company).³

[5] The other third party, now the third party appellant in Appeal PA20-00116, continued to object to the disclosure of the same information that OPG withheld pursuant to section 18(1)(c) on the basis that the mandatory exemption for third party information at section 17(1) of the *Act* also applied.

[6] During the mediation phase of the appeals, OPG maintained its position that section 18(1)(c) applied to the withheld information. It also raised the mandatory exemption in section 17(1) of the *Act*. The appellant advised the mediator that he would like to proceed with his appeal and he also raised the issue of public interest override at section 23 of the *Act*.

[7] A mediated resolution was not possible and both appeals were transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*. I sought representations from OPG, the appellant and the third party appellant. The representations I received were shared in accordance with *Practice Direction Number 7* of this office's *Code of Procedure* (the *Code*). Some portions of OPG's representations were withheld from the appellant as those portions met the confidentiality criteria in the *Code*.

[8] Given that the same information in the Report is at issue in Appeals PA19-00339 and PA20-00116, I have decided to write a joint order that addresses both appeals. In this joint order, I dismiss the OPG and third party appellant's claims that sections 17(1) and/or 18(1)(c) apply to the withheld information and I order that OPG disclose the withheld information to the appellant.

ISSUES:

- A. Does the mandatory exemption for third party information at section 17(1) of the *Act* apply to the withheld information?

¹ The Report is 352 pages. OPG has withheld 298 of those pages in whole, or in part. Approximately 48 of the pages that have been withheld are blank.

² These were Appeals PA19-00581 and PA20-00013.

³ OPG informed this office in an email to the Adjudication Review Officer on December 29, 2020 that the third party appellant in PA20-00013 (now withdrawn) was previously known as the company that authored the Report.

- B. Does the discretionary exemption for economic and other interests at section 18(1)(c) of the *Act* apply to the withheld information?

DISCUSSION:

Preliminary matter

[9] In its initial representations OPG asserts that the information it withheld in the Report is not responsive to the appellant's request. Specifically, OPG states that the withheld information concerns "adjacent properties to the Hearn Property and the Hearn Generating Station specified in the request that were originally held by OPG at the time the [the Report] was prepared" and that were not a part of the sale of the Hearn property. OPG submits that these adjacent properties are now held by third parties, or leased to a third party affiliate of OPG.

[10] In response, the appellant confirmed that he is not interested in any samples for properties that were not a part of the property that was surveyed in the Report in 1999.

[11] In reply, OPG confirms its position that the withheld information is not responsive to the appellant's request as those portions of the Report "concern adjacent properties to the Hearn Property and the Hearn Generating Station held by third parties." It denies that it has withheld any information that pertains to the Hearn Property and the Hearn Generating Station, which it says is the subject of the appellant's request.

[12] I have reviewed the Report, and the appellant's request, and am unable to accept OPG's assertions that the portions of the Report it has withheld are not responsive to the appellant's request. I understand OPG to be saying that some portions of the property referred to in the Report are no longer part of what is known as the "Hearn Property" or the "Hearn Generating Station," and that as a result, those portions of the Report are not responsive to the request.

[13] I do not accept OPG's assertions that the withheld information is not responsive. The appellant's request, as revised and set out in the mediator's report referred to above, was for "a copy of Phase II Environmental Site Assessment (ESA) of the Hearn Generation Station from July of 1999." The title of the Report at issue is the "Phase II Environmental Site Assessment R.L. Hearn Generating Station Property" and it is dated July 1999. In my view, the appellant specifically requested a copy of the entire Report. I am not persuaded by OPG's argument that because some portions of the property referred to in the Report were not a part of the sale of the Hearn property at a later date, those portions are not responsive to the request. The appellant requested a specific Report, OPG located that Report. The fact that the ownership of some portions of the property referred to in the Report may have changed does not impact the responsiveness of the whole Report.

[14] As such, I find that the withheld portions of the Report are responsive to the appellant's request and I will now consider whether sections 17(1) or 18(1)(c) of the *Act* apply to those withheld portions.

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

[15] OPG and the third party appellant both assert that section 17(1) applies to the withheld information in the Report. Section 17(1) states:

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;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[16] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁴ 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.⁵

[17] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a 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), (c) and/or (d) of section 17(1) will occur.

Part 1: Type of Information

[18] OPG and the third party appellant both say that the withheld information is scientific

⁴ *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 Co.*).

⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

or technical information. This type of information, as listed in section 17(1), has been discussed in prior orders of this office as follows:

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.⁶

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.⁷

Representations

[19] The third party appellant submits that the Report contains scientific information. Specifically, it says that the Report is the result of the observation and testing undertaken by the Environmental Company to be able to confirm the presence or absence, type, concentration and areal extent of soil and groundwater contamination of the property that was then the site of the Hearn Generating Station.

[20] The third party appellant says that the testing was performed by the Environmental Company in accordance with the Ministry of Environment's 1997 "Guidelines for use at Contaminated Sites in Ontario" for assessing, re-developing and remediating contaminated property in Ontario. It submits that the Report documents the environmental soil and water sampling process used by the Environmental Company and the results of the laboratory analytical testing of the samples it took.

[21] OPG also submits that the withheld information is scientific or technical information, though it did not make any further specific representations on this issue.

[22] The appellant did not dispute that the information is scientific or technical information.

[23] Based on my review of the Report, I agree with the third party appellant and OPG that the withheld information qualifies as scientific or technical information. Specifically, the information at issue is comprised of scientific and technical details relating to levels of contamination in the soil and groundwater at the property that was the subject of the Report, including what areas the testing was conducted in, how it was done, and what the results indicated. The withheld information in the Report details laboratory results and includes the Environmental Company's analysis and opinions regarding those results. As such, I am satisfied that the withheld information is scientific or technical information, as defined above.

⁶ Order PO-2010.

⁷ Order PO-2010.

Part 2: supplied in confidence

Supplied

[24] The requirement that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁸

[25] 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.⁹

Supplied in confidence

[26] In order to satisfy the “in confidence” component of part two, a party resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹⁰

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

- a. whether the information was communicated to the institution on the basis that it was to be kept confidential;
- b. treated consistently by the third party in a manner that indicates a concern for confidentiality;
- c. not otherwise disclosed or available from sources to which the public has access;
- d. prepared for a purpose that would not entail disclosure.¹¹

The parties’ representations

[28] OPG says that the withheld information was supplied to it in confidence. Specifically, it submits that one of the other third parties it notified regarding the potential disclosure of the Report advised that the Report was supplied to OPG in confidence.¹² OPG makes no further submissions regarding whether the Report was supplied in confidence and offers no further evidence about the circumstances in which it came to possess the Report.

[29] The third party appellant says that the Report “specifically was undertaken by OPG to assess the contamination of the Property.” It submits that it expects that the type of information contained in the Report, as it pertains to the third party appellant, would not be disclosed and would continue to be considered confidential.

⁸ Order MO-1706.

⁹ Orders PO-2020 and PO-2043.

¹⁰ Order PO-2020.

¹¹ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

¹² This was the third party from Appeal PA19-00581 (withdrawn), not the Environmental Company. The Environmental Company was the third party appellant in Appeal PA20-00013 (also withdrawn).

[30] The appellant did not make any submissions about whether the information at issue in the Report was supplied in confidence.

Analysis and Findings

[31] Based on my review of the Report, and all of the evidence before me, I understand that it was prepared by the Environmental Company, the successor of which withdrew its objection of the disclosure of any of the information in the Report.¹³

[32] The first page of the Report indicates that it was prepared by the Environmental Company and "submitted to" OPG. The introduction, which starts on page 1 of the Report, indicates that the Environmental Company was retained by OPG to prepare the Report. As a result, I find that the Report, including the withheld information in it, was supplied by the Environmental Company to OPG.

[33] However, I find that there is insufficient evidence for me to base a finding that any of the information in the Report was supplied in confidence. First, I am not persuaded by OPG's assertion that another third party appellant, who was not the author of the Report and who has since withdrawn its appeal, advised OPG that the Report was supplied in confidence. I see no basis upon which I could conclude that this third party, who is not mentioned in the Report, would have more reliable information than OPG about the circumstances under which the Report was supplied to OPG.

[34] I also find no assistance in the third party appellant's assertion that it expects that the type of information contained in the Report would not be disclosed and would continue to be considered confidential. While I accept that the third party appellant would prefer this information not be disclosed, its submissions do not offer evidence about whether the withheld information in the Report was supplied to OPG on the basis that it was to be kept confidential.

[35] I have reviewed the Report and note that there is only one page marked "confidential" and it is a page that OPG has already consented to disclose. No other information in the Report indicates that the Report was supplied to OPG with the intention that it would remain confidential. Furthermore, I note that the fact that the company that authored the Report has withdrawn its objection to the disclosure of the report suggests to me that the withheld information in the Report has not been treated consistently by the third party that supplied the information in a manner that indicates a concern for confidentiality.

[36] For all of the reasons stated above, I am not convinced that at the time the withheld information was supplied to OPG there was any communication between the parties with respect to expectations of confidentiality. It is also not clear to me that the withheld information has consistently been treated as confidential. Therefore, I find that the third party appellant and OPG have failed to satisfy the second requirement of the section 17(1) test for the portions of the Report OPG withheld pursuant to that section.

[65] As stated above, in order for section 17(1) to apply, the appellant must satisfy all three parts of the test. Given my conclusion regarding the second part of the three-part

¹³ This was Appeal PA20-00013 (now withdrawn).

test, it is not necessary for me to consider whether there is a reasonable expectation of harm.

B: Does the discretionary exemption at section 18(1)(c) apply to the records?

[37] OPG asserts that section 18(1)(c) applies to the withheld information. The appellant disagrees, but also maintains that even if OPG establishes that the section 18(1)(c) applies, the withheld information falls within the scope of the section 18(2) exception and must be disclosed for that reason.

[38] The relevant sections of section 18 of the *Act* specify the following:

(1) 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; ...

(2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

(a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or

(b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.

[39] Section 18(2) is a mandatory exception to the application of an exemption for discrete types of records, namely results of product or environmental testing. Therefore, even if OPG is able to establish that disclosure of the withheld information could reasonably be expected to result in the harms contemplated by sections 18(1)(c), it would be required to disclose this information if the records fall within the scope of section 18(2) and the circumstances outlined under paragraphs (a) or (b) of that section are not present.¹⁴

[40] In order for section 18(2) to apply, a record must contain the results of product or environmental testing carried out by or for OPG. Previous IPC orders have specified that the “results of product or environmental testing” includes raw data that may need to be further reviewed, analyzed, interpreted and reported.¹⁵

The parties’ representations

[41] In its initial representations, OPG confirms its position that the withheld information is not responsive to the request and says that, only in the alternative, it relies on the exemption in section 18(1)(c) of the *Act*.

[42] With regard to section 18(1)(c), OPG says the withheld information, if disclosed,

¹⁴ Orders P-1562 and PO-1980.

¹⁵ Order P-1562.

would be reasonably expected to affect the value of the adjacent properties and potentially the Hearn Property, their "saleability and potential uses," and the ability to deal with the adjacent properties and the Hearn Property. It submits that the withheld information, if disclosed, could also negatively impact its economic relations with other parties, and could also be misconstrued or taken out of context by others which could have a significant financial impact on OPG. OPG says that if the withheld information was in the public domain, it would be reasonably expected to interfere significantly with OPG's ability to deal with real estate on a commercial basis in the future. OPG provided affidavit evidence in support of these claims.¹⁶

[43] The appellant asserts that regardless of the assertions OPG makes about the impact the release of the withheld information might have, the Report is an environmental study and as such, the withheld information in it falls under section 18(2) of the *Act* and must be disclosed. The appellant submits that there is no debate that the Report is about contamination levels in the soil, which he says clearly falls under the category of "environmental testing."

[44] In reply, OPG submits that the mandatory exception of section 18(2) of the *Act* only applies to the responsive portions of the Report. It submits that it complied with section 18(2) of the *Act* when it provided access to information in the Report that pertained to appellant's request. OPG notes that the IPC has previously determined that non-responsive portions of a record at issue concerning environmental testing to which section 18(2) otherwise applies may be severed and withheld from disclosure.¹⁷

Findings and Analysis

[45] For the reasons that follow, I find that the Report, and the withheld information in it, contain the results of environmental testing carried out for OPG. I also find that none of the circumstances in subparagraph (a) or (b) apply and that as a result, the withheld information cannot be exempt pursuant to section 18(1)(c).

[46] In the introduction to the Report, the Environmental Company specifies that it was retained by OPG to conduct an environmental site assessment at the Hearn Generating Station property to determine its "environmental status." The Environmental Company refers to the site assessment as an investigation, which included testing for potential environmental issues and chemicals of concern with regard to the soil and the groundwater. Based on my review of the contents of the Report, and specifically the withheld information, I am satisfied that both contain the results environmental testing carried out by the Environmental Company for OPG.

[47] My finding in this regard is supported by OPG's reply representations where it states that it complied with section 18(2) of the *Act* when it provided the appellant access to the balance of the information in the Report, and that it withheld the remaining information on the basis that that information was not responsive to the appellant's request. I have already concluded that the appellant's request was for the entire Report, and I now find that the entire Report contains the results of environmental testing carried out by the

¹⁶ The contents of that affidavit were withheld because they met the confidentiality criteria in *Practice Direction Number 7* of the *Code*.

¹⁷ OPG cites Order PO-1980 in support of this assertion.

Environmental Company for OPG.

[48] In summary, I find that the mandatory provision of section 18(2) applies to the withheld information, and that none of the exceptions provided by subparagraphs (a) or (b) are applicable. Therefore, I find that OPG is precluded from relying on section 18(1)(c) as a basis for denying the appellant access to the withheld information. To be clear, my finding in this regard should not be interpreted as meaning that the withheld information would necessarily qualify for exemption under section 18(1)(c). Such a finding is irrelevant given the application of section 18(2) of the *Act*.

ORDER:

1. I do not uphold OPG's decision to withhold the information at issue from the appellant.
2. The third party appellant's appeal is dismissed.
3. I order OPG to disclose the withheld information to the requester by **July 6, 2021** but not before **July 2, 2021**.
4. In order to verify compliance with order provision 1, I reserve the right to require OPG to provide me with a copy of the records disclosed to the appellant.

Original signed by _____
Meganne Cameron
Adjudicator

_____ May 31, 2021