

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4347

Appeal PA19-00448

Ontario Power Generation

January 31, 2023

Summary: The appellant seeks access to copies of sale-related documents regarding the site of the former Hearn Power Generating Station. OPG granted the appellant partial access to the responsive records it identified. It withheld some portions of the responsive records pursuant to the discretionary exemptions in sections 18(1)(a) (information belonging to the institution) and (c) (prejudice to the institution's economic interests). In this order, the adjudicator finds that the information at issue is not exempt under sections 18(1)(a) or (c) and orders OPG to disclose the responsive records to the appellant.

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

OVERVIEW:

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

I am requesting the sale agreement and any ancillary documents for OPG's sale of the Unwin Ave. property known as the Hearn Generating site. I believe the address is 440 Unwin but my request includes any adjacent property included in the sale. My request includes documents related to the sale price and any terms or conditions of that sale. While OPG might claim commercial sensitivities, the sale is concluded and OPG is solely owned by the citizens of Ontario. I believe those factors, and the

provisions in the act, compel disclosure by OPG. Date range October 1, 2017 to November 30, 2018. These documents should include:

1. The Agreement of Purchase and Sale between OPG and [an affected party] for the Hearn Generating Station with amendments;
2. Lease Agreement between OPG and [an affected party] for the Hearn Generating Station with Amendments;
3. Appraisals on the Hearn Generating Station; and
4. Actual signed transactional documents.

[2] OPG identified the records that were responsive to the request and notified the parties it determined may be affected by the disclosure of the responsive records (the affected parties). It issued a decision granting the requester partial access to some of the responsive records. OPG withheld some information pursuant to sections 17(1) (third party information) and 18(1) (economic and other interests) of the *Act*.

[3] The requester, now the appellant, appealed OPG's access decision. During the course of mediation, the mediator had discussions with both parties regarding the issues on appeal. OPG provided an index identifying the records at issue, specifically records 2, 11, 13-15, 18-20, 24-25 and 31-34 and clarified that it was relying on section 18(1)(a) and (c) of the *Act* and section 17(1) to withhold the information at issue. It also said that the discretionary exemption at section 16 (Prejudice or defence of Canada) applied to record 2.

[4] The appellant advised the mediator that they sought access to all of the responsive records and also raised the issue of the public interest override. No further mediation was possible and the matter was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry and sought and received representations from OPG and the appellant.¹ In its representations, OPG specified that it was no longer resisting disclosure of records 2, 20 and 24.

[5] Following receipt of all of the representations from OPG and the appellant, I issued Order PO-4151 in a similar appeal file relating to the Hearn Generating Station. As such, I wrote to OPG to inquire whether it wished to reconsider its decisions in this inquiry after reviewing Order PO-4151. OPG advised that it was no longer relying on section 17(1) and provided a revised index.

[6] I wrote to the affected parties to advise them of the OPG's revised access decision. I provided a Notice of Inquiry and invited them to make representations on

¹ Some portions of OPG's representations were withheld from the appellant, as they met the IPC's confidentiality criteria in Practice Direction Number 7 of the *Code of Procedure*.

whether the information at issue should be disclosed. I informed the affected parties that if I did not receive a response from them, I may order that the records be disclosed. One of the affected parties notified consented to the disclosure of the information that related to it. The other affected parties declined to participate in the inquiry and did not submit representations. As a result, I removed section 17(1) from the scope of this appeal.

[7] During the course of the inquiry, the appellant advised that he is not seeking access to OPG's HST number, its bank account information (i.e. the specific account information necessary to complete a wire transfer), or instructions for completing a wire transfer. As a result, the information OPG withheld in records 31, 33 and 34 is no longer at issue.²

[8] The only remaining issue is whether sections 18(1)(a) and (c) apply to the information OPG withheld in records numbers 11, 13-15, 18-19, 25, and 32. These records are comprised of the sale-related documents identified in the Mediator's Report provided to the parties and the Index OPG provided to the IPC.

[9] In this order, I find that sections 18(1)(a) and (c) do not apply to the information at issue and I order that OPG disclose the records to the appellant.

DISCUSSION:

Preliminary Matter

[10] In its initial representations OPG submits that records 11, 14, 15 and 18 contain copies of agreements with third parties regarding an issue concerning a property adjacent to the former Hearn Generating Station site that OPG says was not part of the sale of that property. As such, OPG says that records 14, 15 and 18 are not responsive to the appellant's request.

[11] Previous IPC orders have been clear that to be considered responsive to a request, records must "reasonably relate" to the request.³ The IPC has specified that institutions should interpret requests generously, in order to best serve the purpose and spirit of the Act. Furthermore, IPC orders have stated repeatedly that, generally, if a request is unclear, the institution should interpret it broadly rather than restrictively.⁴

[12] After considering the appellant's request, the general context from all of the records at issue, and the parties' representations for this inquiry, I find that records 11,

² I note that OPG may withhold the information within the red boxes that it severed on pages 31, 33 and 34, but must still disclose the remaining information in these records to the appellant. I also note that in record 31 OPG has withheld page 5, which contains "Schedule A." OPG decided to disclose identical information on page 4 of Record 34. As a result, I find that OPG must also disclose page 5 of record 31.

³ Orders P-880 and PO-2661.

⁴ Orders P-134 and P-880.

14, 15 and 18 are all responsive to the appellant's request.

[13] The appellant's request, which is produced in full above, was for copies of all records "relating" to the sale of the property "known as the Hearn Generating site." The appellant provided an address and was clear that the request included any adjacent properties that were part of the sale, as well as any "ancillary documents" or records related to the terms and conditions of the sale.

[14] In my view, the appellant's request is broad in nature and clearly crafted to include as much information as possible about the sale of the property "known as the Hearn Generating site," which I will refer to throughout this decision as the Hearn Property.

[15] I have reviewed records 11, 14, 15 and 18 and I find that, based on the content of those records, they are related to the appellant's request. To be clear, each of the records clearly references the sale of the Hearn Property. For example, the information that OPG says is not responsive to the appellant's request in record 11 is a schedule to the agreement the appellant requested. In my view, the schedule is part of the agreement and is therefore, responsive to the request.

[16] Similarly, records 14, 15 and 18 are all related and/or amending agreements regarding the sale of the Hearn Property. These records all fall within the scope of the appellant's request and are, therefore, responsive records. Following the IPC orders referred to above, I find that the portions of the records that OPG says are not responsive reasonably relate to the appellant's request and I will consider below whether the section 18(1)(a) or (c) exemptions apply such that the OPG may withhold them.

Issue A: Do the discretionary exemptions at section 18(1)(a) or (c) (economic and other interests) apply to the records?

[17] The OPG relies on sections 18(1)(a) and (c). The relevant portions of section 18(1) state:

A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value; [...]

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[18] 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*.

Section 18(1)(a): information that belongs to government

[19] For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,
2. belongs to the Government of Ontario or an institution, and
3. has monetary value or potential monetary value.

[20] The types of information listed in section 18(1)(a) have been discussed in prior orders. In this case, OPG says that the information at issue is either commercial or financial information.

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.

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. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.

[21] Next, the information must “belong to” the institution. For information to “belong to” an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[22] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists, customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.

[23] Finally, the commercial or financial information that belongs to the institution must have “monetary value.” To have “monetary value”, the information itself must

have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.

[24] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section. Nor does the fact, on its own, that the information has been kept confidential.

Findings and analysis

[25] As detailed above, the withheld information is comprised of portions of agreements and other related communications regarding the sale of the Hearn Property. I find that all of the withheld information is commercial information as that term is contemplated by section 18(1)(a) because it relates to the buying and selling of the Hearn Property and issues surrounding that transaction. Therefore, I find that part one of the section 18(1)(a) test has been satisfied.

[26] However, I find that OPG's claim fails because the information in question does not "belong" to it in the sense that this term is used in the *Act*.

[27] Previous orders have been clear that records consisting of mutually-generated agreements, the product of negotiations, do not constitute the intellectual property of and, therefore, do not "belong to" an institution in the sense contemplated by this exemption.⁵ These orders have stated that information that is produced in the course of negotiations and included in mutually generated agreements belongs as much to the parties on the other side of those agreements as it does the institution and is not the type of information "in the nature of a trade secret" that the courts would protect from misappropriation.⁶ I adopt these findings for the purposes of this appeal and apply them below.

[28] I find that none of the information at issue "belongs to" OPG in the manner contemplated by section 18(1)(a) of the *Act*. Specifically, I find that each of records 11, 13, 14, 15, 19, and 25 is a type of agreement and as such, the content is mutually generated by the parties to those agreements.

[29] Additionally, I note that record 15, which described as a "Letter Agreement," contains technical reports comprised of over 250 pages, which are listed at "Schedule A" to the agreement. The author of these reports was invited to participate in this inquiry and advised the IPC that it had no objection to the disclosure of the reports.⁷ As the author of the reports, it is my view that the affected party that consented to their

⁵ See, for example, Order MO-3207, paragraphs 95 to 100 of Order PO-2632, and paragraphs 96 to 101 of Order PO-3311.

⁶ See paragraphs 107 to 109 of Order PO-3475.

⁷ I note that the author of the reports asked that attention be directed to page 269 of record 15 and emphasized that it is not responsible for any reliance on the reports by any third party.

disclosure could also be said to have an ownership stake in that information. As such, I find that the reports do not “belong to” OPG in the sense contemplated by section 18(1)(a).

[30] Record 18 is the “Closing Agenda” for the sale of the Hearn Property. It sets out the various duties of the parties to the sale. The OPG has not established how record 18, which relates to the various parties to the sale, would belong to the OPG.

[31] Similarly, record 32 is a “Direction of Funds” OPG sent to the purchaser setting out terms of payment for the sale of the Hearn Property. For the same reasons set out above, the OPG has not established that the information in this record belongs to it as its purpose was for OPG to communicate with the purchaser. I find that section 18(1)(a) does not apply.

[32] In view of my finding that this specific information does not meet part 2 of the test, and because all three parts must be met, I find that none of the information is exempt from disclosure under section 18(1)(a) of the *Act*.

Section 18(1)(c): prejudice to economic interests

[33] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁸

[34] Section 18(1)(c) is broader than section 18(1)(a) and requires only that disclosure of the information could reasonably be expected to prejudice the institution’s economic interests or competitive position.

[35] An institution resisting disclosure of a record on the basis of sections 18(1)(c) cannot simply assert that the harms mentioned in those sections are obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁹

[36] The institution must show that the risk of harm is real and not just a possibility.¹⁰ However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of

⁸ Orders P-1190 and MO-2233.

⁹ Orders MO-2363 and PO-2435.

¹⁰ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

the request and the seriousness of the consequences of disclosing the information.¹¹

[37] 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.¹²

OPG Representations

[38] OPG says that section 18(1)(c) applies to the withheld information. It provided a confidential affidavit in support of this assertion. In the affidavit, an OPG employee attests that the withheld information, if disclosed, "could affect the value of the Hearn Property, its saleability and potential uses and the ability to deal with the property." The affiant also states that releasing the withheld information could also negatively impact OPG's economic relations with other parties or be misconstrued or taken out of context by others resulting in a financial impact on OPG. Furthermore, the affiant says that the disclosure of some specific records could "inform on the value of the adjacent property and the Hearn Property and that it would reasonably be expected to affect the value of the properties, their saleability and potential uses" and/or negatively impact OPG's economic relations with other parties.

[39] OPG also made some representations specific to the individual records at issue. It says that record 11 is a copy of a purchase and sale agreement between OPG and a third party for the Hearn Property that references confidential documents connected to the sale. OPG asserts that the references to the confidential documents meet the criteria for exemption in section 18(1)(c) of the *Act* because their disclosure could reasonably be expected to prejudice OPG's economic interests or competitive position. OPG says that the references to the confidential documents could provide information about the value of the Hearn Property and, if disclosed, "would reasonably be expected to affect the value of the Hearn Property, its saleability and potential uses." OPG repeats the harms outlined in the affidavit referenced above that its employee says would be reasonably expected to occur if the information were released.

[40] Next, OPG says that records 13 and 19 are copies of a sublease agreement that was previously in place between OPG and a third party "for the Hearn Property." OPG says the agreement specifies the annual rent amount and the rate at which the rent was set to increase over the term of the sublease. OPG submits that if the amount was in the public domain, it would be reasonably expected to interfere significantly with OPG's competitiveness and its ability to negotiate commercial lease arrangements in the future.

¹¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

¹² Orders MO-2363 and PO-2758.

[41] Finally, with regard to records 14, 15, and 18, OPG submits that these records contain copies of various agreements concerning a property adjacent to the Hearn Property that was not a part of that sale. It repeats its assertions regarding the harms it says would reasonably be expected to occur as set out in the confidential affidavit described above.

[42] OPG made no specific representations regarding whether section 18(1)(c) applies to records 25 or 32.

Appellant representations

[43] The appellant provided brief representations in response to the OPG's. They stated that the sale of the Hearn Property has completed. The appellant submits that the OPG appears to be claiming ongoing confidentiality rights that cannot exist since the OPG no longer owns the Hearn Property.

OPG Reply

[44] In reply, the OPG denies that it is asserting "ongoing confidentiality rights" as the basis for exempting the information at issue from disclosure. It submits that the information at issue is exempt from disclosure under the *Act*, regardless of any "ongoing confidentiality rights" or whether OPG "has or has not retained an ownership stake" in the Hearn Property.

Appellant sur-reply

[45] The appellant submits that a government agency cannot forever use former ownership of a site as a shield against having to release of information about the terms of a sale. Furthermore, the appellant denies that OPG has shown evidence of any impending sale of other properties, or any actual harm that could be suffered as a result of the disclosure of the sale terms for the Hearn Property. The appellant submits that OPG's refusal to release the information at issue because it owns undisclosed neighbouring properties is not within the spirit of the *Act*.

[46] The appellant claims that the Ontario government has previously disclosed the sale price and other sale conditions to journalists and argues that this disclosure undermines OPG's arguments.¹³

[47] Finally, the appellant says that "commercial real estate is not a weather vane that swings based on news stories" and that if OPG is going to sell, or otherwise dispose of a neighbouring property, it will set a price and entertain offers independent of any news story.

¹³ http://www.thestar.com/news/city_hall/2018/11/22/opg-sells-hearn-waterfront-site-for-16-million.html

Findings and analysis

[48] For the reasons that follow I find that section 18(1)(c) does not apply to records 11, 13, 14, 15, 18, 19, 25 or 32.

[49] OPG's main argument, which it repeats throughout its representations and affidavit evidence, is that disclosing the information at issue could reasonably be expected to affect the value of the Hearn Property and

...adjacent properties (which are still held by OPG and others), their saleability and potential uses, as well as also negatively impact on OPG's economic relations with other parties and could also be misconstrued and/or taken out of context by others which could have a significant financial impact on OPG.¹⁴

[50] I am unable to accept any of these assertions. In my view, OPG's claims about the harms it says would reasonably be expected to occur if the information was disclosed are vague and fall short of the type of evidence required to withhold information pursuant to section 18(1)(c). As noted above, an institution must provide detailed evidence about the risk of harm. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident.¹⁵ I am not convinced by OPG's arguments, nor is it clear to me that the harms described by OPG would reasonably be expected to occur should the information at issue be disclosed.

[51] First, with regard to OPG's claim that disclosure of the information could affect the value of the Hearn Property, or the adjacent properties, either held by OPG or others, I have not been presented with evidence or sufficient argument to explain this assertion. Based on my understanding of the records at issue and the parties' representations, OPG sold the Hearn Property prior to the commencement of this inquiry. OPG has not specified any interest it retained in that property, nor did it provide evidence of an interest it has in any adjacent properties. As such, I am unable to evaluate its claim that disclosing the information at issue could reasonably be expected to negatively affect OPG by affecting the value of the Hearn Property or any adjacent properties. In summary, it is not clear to me that OPG has retained an interest in any of those properties that it says would be affected by the disclosure of the information at issue.

[52] Furthermore, as noted in the introduction to this decision, I invited various affected parties to participate in this inquiry. One of those parties was the purchaser of the Hearn Property and another was a party with an interest in an adjacent property. Both of these affected parties declined to participate in the inquiry and did not provide

¹⁴ Reproduced from paragraph 5 of OPG's reply representations. See also: OPG's representations at paragraphs 29 and 30 and paragraphs 4 and 5 of OPG's Confidential Affidavit, sworn August 14, 2020.

¹⁵ Orders MO-2363 and PO-2435.

representations although invited. As a result, I am not inclined to accept OPG's assertion that the disclosure of the information at issue could reasonably be expected to negatively impact the value of the Hearn Property or the adjacent properties.

[53] I make similar findings with regard to OPG's assertion that the disclosure of the information at issue could reasonably be expected to affect the saleability and potential uses of the Hearn Property or the adjacent properties. Absent clear evidence of OPG's interest in any of these properties, or further explanation of the assertions, I am unable to see how their saleability or potential use has anything to do with OPG.

[54] I also reject OPG's assertions that the disclosure of the information at issue could reasonably be expected to negatively impact on OPG's economic relations with other parties. OPG has not indicated what other parties it is referring to or why its economic relations would reasonably be expected to be affected. I am not able to infer this from my review of the records, nor any of the surrounding circumstances. As noted above, an institution must show that the risk of harm is real and not just a possibility.¹⁶ In order to find that there is a risk of harm to OPG, I need to understand where that risk is coming from, and why. In this case, neither is clear.

[55] I note a similar issue with regard to OPG's claim that the information at issue could also be misconstrued and/or taken out of context by others which could reasonably be expected to have a significant financial impact on OPG. In order to accept this assertion, I would need further information about how the information could be misconstrued and/or why that could be reasonably expected to have a negative financial impact on OPG. While OPG does not have to prove that the disclosure of the information will, in fact, result in harm, it does need to explain what the harm is and why it is likely to happen. I find OPG has not done so here.

[56] In making these findings I have considered the specific representations OPG made about the records at issue, as well as the records themselves, and the surrounding circumstances. I note OPG's assertion that revealing the amount of rent and annual percentage increases in the agreements in records 13 and 19 would be reasonably expected to interfere significantly with OPG's competitiveness and ability to negotiate commercial lease arrangements in the future. I also note that the Notice of Inquiry sent to OPG at the beginning of the inquiry process specified that 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.¹⁷

[57] In my view, the rent and annual increase amounts withheld by OPG are negotiated terms, similar in nature to those described in the previous orders. As a result, OPG should have addressed the previous orders referred to in the Notice of

¹⁶ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹⁷ Orders MO-2363 and PO-2758.

Inquiry and explained why the current situation is different. Furthermore, I note that the Hearn Property is unique in its history, location and individual characteristics. In the absence of any additional specific evidence, I find that it is unlikely that the release of information about the former amount of rent that OPG charged for a property it has not owned for several years could reasonably be expected to negatively impact its ability to negotiate commercial leases in the future.

[58] Given the lack of specific evidence relating to the particular information at issue, I am not satisfied that the harms asserted by OPG could reasonably be expected to result. Therefore, I find that section 18(1)(c) does not apply to the information at issue.

[59] As I am not upholding OPG's exemption claim under sections 18(1)(a) or (c), it is not necessary to consider OPG's exercise of discretion or whether the public interest override in section 23 of the *Act* applies to the information at issue in this appeal.

[60] In conclusion, I find that the information at issue is not exempt from disclosure under sections 18(1)(a) or (c) and will order OPG to disclose the withheld information to the appellant.

ORDER:

1. I order OPG to disclose all of the records and information at issue to the appellant by **March 7, 2023**, with the exception of the information removed from the scope of this appeal referred to at paragraph 7 of this decision.
2. In order to verify compliance with Order Provision 1, I reserve the right to request that OPG provide me a copy of the records provided to the appellant.

Original signed by:
Meganne Cameron
Adjudicator

January 31, 2023