

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4348

Appeal PA19-00449

Ontario Power Generation

January 31, 2023

Summary: The appellant seeks access to copies of Ontario Power Generation (OPG) communications related to the former Hearn 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 13(1) (advice and recommendations), 19(a) (solicitor client privilege) and 18(1)(a) (information belonging to the institution) and (c) (prejudice to the institution's economic interests). In this order, the adjudicator upholds OPG's decision to apply sections 13(1) and 19(a) of the *Act* but does not uphold its decision to apply sections 18(1)(a) and (c) to any of the information at issue and orders OPG to disclose the remaining information it withheld pursuant to those sections to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 19(a), 18(1)(a) and (c), and 24.

OVERVIEW:

[1] Ontario Power Generation received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for communications related to the former Hearn Generating Station. After clarification between the institution and requester, the request was articulated as follows:

I am requesting copies of any communications between the dates of Oct. 1, 2017 and Nov. 22, 2018- including emails on government and private

accounts, memos, reports, notes to file or other types of message - sent or received by any of the following OPG officials that in any way mention the possible or actual sale of the site of the former Hearn generating station: [named OPG officials]. Please include OPG Government Relations staff as well.

[2] OPG notified the third parties it concluded may have an interest in the disclosure of the information (the affected parties). It then issued a decision to grant the requester partial access to the responsive records. It withheld some of the information in the records pursuant to the discretionary exemptions at sections 13(1) (advice or recommendations), 18(1) (economic and other interests) and 19(a) (solicitor-client privilege) of the *Act* and the mandatory exemption at section 17(1) (third party information) of the *Act*.

[3] The requester, now the appellant, appealed OPG's access decision to the Information and Privacy Commissioner of Ontario (the IPC). During the course of mediation, the mediator had discussions with the parties about the issues on appeal. The appellant raised the issues of reasonable search and the potential application of the public interest override.

[4] OPG provided the appellant with an Index of Records and clarified that it was not relying on the section 17(1) exemption but was relying on sections 18(1)(a) (information belonging to the institution) and (c) (prejudice to the institution's economic interests), 19(a) and 13(1) of the *Act* to withhold portions of the responsive records. OPG also provided an explanation for portions of the records it identified as non-responsive and responded to the appellant's concerns about its search for responsive records.

[5] No further mediation was possible and the matters were transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry pursuant to the *Act*. I commenced an inquiry and sought representations from OPG and the appellant.¹ Following the receipt of the parties' representations I invited affected parties that may have an interest some of the information at issue to respond to issues set out in a Notice of Inquiry and make representations about whether that information should be disclosed. None of the affected parties provided representations.

[6] During the inquiry process the appellant also advised the IPC that they are not interested in pursuing access to a computer file pathway. As a result, the information OPG withheld on page 12 is no longer at issue.²

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

² To be clear, OPG may withhold the information it withheld on this page pursuant to section 18(1), as referred to in paragraph 6 of this decision, however, it must disclose the remaining information on the page to the appellant, if it has not already done so.

[7] In this decision, I uphold OPG's decision to apply sections 13(1) and 19(a) of the *Act* to the information it withheld pursuant to those sections.³ However, I find that sections 18(1)(a) and (c) do not apply to any of the information at issue and I order OPG to disclose the remaining information it withheld pursuant to those sections to the appellant. I also decline to order OPG to search for any additional records.

RECORDS:

[8] There are 40 pages of records that remain at issue. They are comprised of emails and attachments which include reports and briefing notes.

ISSUES:

- A. Does the discretionary exemption at section 13(1) (advice and recommendations) apply to the information at issue?
- B. Does the discretionary exemption at section 19 (solicitor-client privilege) apply to the information at issue?
- C. Do the discretionary exemptions at sections 18(1)(a) or (c) (OPG's economic interests) apply to the information at issue?
- D. Did OPG exercise its discretion under sections 13(1) and 19? If so, should the IPC uphold the exercise of discretion?
- E. Did OPG conduct a reasonable search for responsive records?

DISCUSSION:

Preliminary Matter

[9] In its representations, OPG states that some of the information at issue is not responsive to the appellant's request. OPG has severed these portions of the records and submits that the information it identified as not responsive to the request should not be disclosed to the appellant.⁴

[10] Specifically, OPG submits that the information it has identified as not responsive

³ I note that the appellant raised the issue of the possible application of the public interest override in section 23 to the information withheld in the records. I have found certain information is exempt under section 13(1) and 19(a). The information withheld under section 19(a) is not subject to the public interest override but I have considered the possible application of section 23 to the information withheld under section 13(1).

⁴ See Appendix A for a list of the information OPG claims is not responsive.

concerns an issue with, and the sale of, a property that is adjacent to the former Hearn Generating site (the Hearn Property) and was not a part of the sale of that property. I have reviewed the information OPG says it not responsive to the appellant's request and I do not agree with its characterization of the information.

[11] I note that the appellant requested copies of communications that "that in any way mention the possible or actual sale of the site of the former Hearn generating station" [emphasis added]. Previous IPC orders have been clear that to be considered responsive to a request, records must "reasonably relate" to the request.⁵ 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.⁶

[12] After considering the appellant's request, the general context from all of the records at issue and the parties' representations, I find that all of the remaining information that OPG identified as "not-responsive" is indeed responsive to the appellant's request for the reasons that follow.

[13] First, I note that in some cases OPG has severed lines of information in emails with the subject line "Re: Hearn Sale." In my view, the information that has been severed is connected to the subject line of the email, at least in some way, in all cases. As such, I find that the severed information is responsive because it appears in an email with a subject line that is responsive and relates to that subject line.

[14] Furthermore, I note that some of the information OPG has indicated is not-responsive is information that refers to the Hearn Property but not necessarily the sale. In my view, historical information about the Hearn Property that is included in emails that specifically relate to the sale is responsive.

[15] Finally, in response to OPG's assertion that information that concerns an issue with, and a sale of, a property that is adjacent to the Hearn Property and that was not a part of the sale of the Hearn Property is not responsive, I direct OPG to the second paragraphs of both pages 75 and 91 of the records, which set out exactly how the "adjacent property" is related to the sale of the Hearn Property. Without revealing the specific content of the withheld information, I note these paragraphs clearly specify that the sale of the adjacent property is "connected" to the sale of the Hearn Property. As such that information is responsive to the appellant's request.

[16] For these reasons, 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 any of the exemptions claimed by OPG apply such that it may withhold the information at issue from the appellant.

⁵ Orders P-880 and PO-2661.

⁶ Orders P-134 and P-880.

Issue A: Does the discretionary exemption at section 13(1) (advice and recommendations) apply to the information at issue?

[17] OPG denied the appellant access to the communications at pages 38, 39 and 141, in full, and those at pages 137 to 140, 142 and 162, in part, pursuant to the discretionary exemption at section 13(1) of the *Act*.

[18] Section 13(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁷

[19] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[20] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[21] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁸

[22] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[23] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁹

[24] The relevant time for assessing the application of section 13(1) is the point when

⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

⁸ See above at paras. 26 and 47.

⁹ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 13(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.¹⁰

[25] The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).¹¹ This is the case even if the content of the draft is not included in the final version.

[26] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information,¹²
- a supervisor's direction to staff on how to conduct an investigation,¹³ and
- information prepared for public dissemination.¹⁴

OPG's representations

[27] OPG says that pages 38 and 39 are excerpts of a briefing document prepared by OPG for the Ministry of Energy, Northern Development and Mines (the ministry), regarding the status of the sale of the Hearn Property. OPG says that these pages contain advice relating to a specific topic regarding to the sale. I am unable to further describe the content of the additional information provided by OPG in its representations without revealing the content of the information at issue in the records.

[28] With regard to pages 137 to 141, OPG submits they are part of an email exchange between OPG and the ministry that attach briefing notes containing advice to the ministry on a specific matter, which I cannot describe further in this decision.¹⁵ It says that a portion of the communication at page 142 contains references to the advice in pages 137-141 of the records. Finally, the ministry says that page 162 is a duplicate of page 142.

[29] OPG asserts that the communications referred to above set out alternative courses of action to be accepted or rejected in relation to a decision connected to the sale of the Hearn Property.

¹⁰ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

¹¹ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

¹² Order PO-3315.

¹³ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

¹⁴ Order PO-2677

¹⁵ I note that the communication at page 162 is a duplicate of page 142.

[30] The appellant's representations did not specifically address whether the records at issue contain advice or recommendations, as contemplated by section 13(1) of the *Act*.

Findings and analysis

[31] For the reasons that follow I accept the OPG's characterization of the information it withheld pursuant to section 13(1) and find that all of the withheld information contains advice and recommendations pursuant to section 13(1).

[32] Specifically, I find that pages 38 and 39 are slides that set out various courses of action, offer alternative options and list the "pros" and "cons" of those actions and/or options. Based on my review of the withheld information I find that it is not factual information, but is rather an evaluative analysis of a particular situation. Based on my review of the content of these pages I am satisfied that section 13(1) applies.

[33] Similarly, I find that the information OPG withheld in pages 138 and 139 contains advice about how to address a particular situation, including options and considerations for moving forward. The remaining information on pages 137, 140 to 142 contains portions of that advice, or would otherwise reveal the content of the advice. Having reviewed each severed portion of pages 137-142, I confirm that revealing the information that OPG has withheld would reveal advice and/or recommendations subject to section 13(1).¹⁶

[34] Based on my review of the information at issue I am satisfied that the information OPG has withheld is not factual information. I find that it is the type of information that section 13(1) is intended to capture.

[35] OPG denies that the mandatory exceptions listed in sections 13(2) and (3) of the *Act* apply to the information identified as being protected from disclosure under section 13(1) of the *Act* and I agree.

[36] As such, I find that the withheld information on pages 38, 39, 137-142 and 162 is subject to the discretionary exemption at section 13(1).

[37] Finally, as noted above, the appellant raised the issue of the possible application of the public interest override in section 23 of the *Act*. Section 23 specifies that section 13(1) does not apply where a compelling public interest in the disclosure of a record clearly outweighs the purpose of the exemption.

[38] Although invited, the appellant did not submit representations on the compelling public interest in the information at issue or whether the public interest would clearly outweigh the purpose of the section 13(1) exemption. I have considered the possible application of section 23 to the information withheld under section 13(1) and, based on

¹⁶ I confirm that page 162 is a duplicate of page 142, and therefore the same finding applies.

my own review of that information, I find that it does not apply.

[39] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.¹⁷ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.¹⁸

[40] I find that revealing the information OPG withheld pursuant to section 13(1) would not achieve these results. While there may be some public interest in the withheld information, I do not believe is sufficiently compelling to override the purpose of the section 13(1) exemption in this case. In my view, the information that has been withheld pursuant to section 13(1) is precisely the type of information that section 13(1) is designed to protect from disclosure and I am not satisfied that the public interest would be served by revealing it.

[41] However, section 13(1) is a discretionary exemption and later in this decision I will consider whether OPG properly exercised its discretion to withhold the information at issue.

Issue B: Does the discretionary exemption at section 19(a) (solicitor-client privilege) apply to the information at issue?

[42] OPG says that section 19(a) applies to the communications at pages 30-31, 52, 85 to 89, 113 to 116 and 138.¹⁹ Section 19(a) states the following:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege, [...]

[43] The section 19(a) solicitor-client privilege exemption is based on common law. At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege, and litigation privilege. In this case, OPG relies on the solicitor-client communication privilege.

[44] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.²⁰ This privilege

¹⁷ Order P-1398.

¹⁸ Orders P-984 and PO-2556.

¹⁹ OPG also applied section 19(a) to all of the information on pages 38 and 39 and some of the information on pages 140 and 141. Since I have already concluded that section 13(1) applies to that information, I do not need to consider it again.

²⁰ Orders PO-2441, MO-2166 and MO-1925.

protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.²¹ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.²²

[45] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.²³

[46] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.²⁴ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.²⁵

The OPG's representations

[47] OPG says the following about the information it withheld pursuant to section 19(a) that remains at issue:

- Pages 30-31, 52, 85 to 89 contain correspondence with OPG's external counsel made for the purpose of obtaining advice regarding the sale of the Hearn Property and issues related to that sale,
- Page 138 contains briefing material prepared by OPG for the ministry that contains legal advice regarding the sale of the Hearn Property and related issues, and
- Pages 113 to 116 are comprised of three copies of the same internal email from OPG's in-house legal counsel containing legal advice on a specific topic.

[48] OPG submits that the information identified above satisfies the requirements for protection under section 19(a) of the *Act*. It says that the withheld information is comprised of communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving legal advice, or is a communication of a confidential nature that contains such legal advice.

[49] OPG denies that it waived solicitor client privilege by disclosing information subject to that privilege to the ministry because the ministry has a common interest with OPG as its sole shareholder. Furthermore, OPG asserts that at no time did it demonstrate an express or implied intention to waive solicitor-client privilege in this

²¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

²² *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

²³ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

²⁴ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

²⁵ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

matter.²⁶

[50] The appellant's representations did not specifically address whether the information at issue contains information subject to solicitor client communication privilege, as contemplated by section 19(a) of the *Act*.

Finding and analysis

[51] Having reviewed the records at issue, I accept OPG's characterization of the information it withheld pursuant to section 19(a). I find that all of the withheld information is subject to solicitor-client communication privilege for the reasons set out below.

[52] The withheld portions of pages 30-31, 52, 85 to 89 are all communications between OPG employees and OPG's legal counsel. In some cases, employees from the ministry are also included. It is clear to me from the content of the emails that each is a communication between a solicitor and client that was made for the purpose of seeking and/or obtaining legal advice. Based on my review of the records, I accept OPG's assertions that the ministry has a common interest with OPG and that the solicitor-client communication privilege it claims was not waived by sharing the information with the ministry. To be clear, there are no other outside parties included in the email chains and I am satisfied that all of the information OPG withheld is subject to the common law solicitor-client communication privilege exemption in section 19(a) of the *Act*.

[53] With regard to page 138, I note I have already determined that some of the severed information on this page is subject to the discretionary exemption for advice and recommendations pursuant to section 13(1) of the *Act*. I find that that remaining paragraph is subject to the solicitor-client privilege exemption at section 19(a) of *Act* because it would reveal the content of legal advice that OPG received from its legal counsel.

[54] I have reviewed the severed portions of pages 113 to 116 and accept OPG's submission that the withheld information is comprised of three copies of the same internal email from OPG's in-house legal counsel containing legal advice on a specific topic. I am satisfied the severed email is a confidential communication made for the purpose of providing legal advice. I find that it is part of the continuum of communications aimed at keeping the solicitor and client informed so that legal advice can be sought and/or obtained and it is therefore subject to the common law solicitor-client communication privilege in section 19(a) of the *Act*.

[55] I find no evidence to indicate OPG shared any of the information it applied section 19(a) to with anyone other than those included in the email chains, and as a

²⁶ OPG also made representations about legal billing information that it says would be subject to solicitor-client communication privilege. I did not include these representations because none of the information that OPG claimed section 19(a) applied to contained legal billing information.

result I am satisfied that the severed information is comprised of confidential communications made for the purposes of obtaining or providing legal advice and are therefore subject to the common law solicitor-client communication privilege exemption in section 19(a) of the *Act*. Later in this decision I will consider whether OPG properly exercised its discretion to withhold that information.

Issue C: Do the discretionary exemptions at sections 18(1)(a) or (c) apply to the information at issue?

[56] OPG denied the appellant access to pages 64, 106, 110-111, in full, and pages 63, 75, 84, 91, 92, 136, in part, pursuant to section 18(1)(a) and (c).²⁷

[57] The relevant paragraphs 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 whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[58] The purpose of section 18 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.²⁸

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

Section 18(1)(a): information belonging to the institution

[60] For section 18(1)(a) to apply, OPG must show the following: (1) the information fits within one or more of the types of protected information, (2) it belongs to the Government of Ontario or OPG, and (3) it has monetary value or potential monetary value.

²⁷ I have already concluded that the information OPG withheld on pages 38, 39, and 139 to 141 is subject to either the discretionary exemption at section 13(1) or 19(a). As a result, I do not need to also consider whether section 18(1)(a) or (c) applies to that information.

²⁸ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

Part 1: Type of information

[61] OPG says, and I agree, that the information at issue is commercial information. Previous IPC orders have defined commercial information as follows:

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small. ²⁹The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.³⁰

[62] All of the information OPG withheld pursuant to section 18(1)(a) contains information that relates the sale of the Hearn Property and various issues surrounding that transaction. In my view, the information at issue clearly fits the definition of commercial information above and as a result, I find that part one of the section 18(1)(a) test has been satisfied.

Part 2: belongs to

[63] The term “belongs to” refers to ownership by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. 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.³¹

[64] Examples of the latter type of information may include trade secrets, business to- business mailing lists³², 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 courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.³³

[65] OPG asserts that the withheld information “belongs to” it and repeats the definition of that term, as outlined above, in its representations. It does not, however,

²⁹ Order PO-2010.

³⁰ Order P-1621.

³¹ Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO2226 and PO-2632.

³² Order P-636.

³³ Orders PO-1736 and PO-2010.

make specific representations on why it believes the information at issue fits that definition. OPG's representations state that the various information "belongs to" OPG, but no additional argument or evidence is provided in support of those assertions.

[66] In my view, OPG has not provided sufficient evidence to establish that the information it withheld on pages 63-64, 75, 84, 91, 92, 106, 110-111, 136, 139 and 140 "belongs to" OPG, as far as section 18(1)(a) of the *Act* is concerned. I have reviewed all of the information, which relates to negotiations for the sale of a property and various issues surrounding that sale, and I am unable to conclude that this information belongs to OPG in a proprietary sense.

[67] In my view, OPG is applying the term "belongs to" in a manner far broader than the *Act* prescribes. I refer OPG to IPC Order P-1281 where an Assistant Commissioner concluded the following:

...the fact that a government body has authority to collect and use information, and can, as a practical matter, control physical access to information, does not necessarily mean that this information "belongs to" the government within the meaning of section 18(1)(a) [the provincial equivalent of section 11(1)(a)]. While the government may own the physical paper, computer disk or other record on which information is stored, the *Act* is specifically designed to create a right of public access to this information unless a specific exemption applies. The public has a right to use any information obtained from the government under the *Act*, within the limits of the law, such as laws relating to libel and slander, passing off and copyright, as discussed below.

If the Ministry's reasoning applied, all information held by the government would "belong to" it and, presumably, the rights to use information belonging to government could be restricted for this reason alone...

[68] As noted in Order PO-1763, the term "belongs to" refers to "ownership" by an institution and requires some proprietary interest. I find that is not the type of information at issue in this appeal. The information at issue here is largely comprised of OPG's discussions regarding the potential sale of a property, and as noted above, a range of issues related to that sale, communicated to and discussed with other experts and legal professionals. I am unable to conclude that OPG has any proprietary interest in this information and I find that the information does not "belong to" OPG for the purposes of section 18(1)(a).

[69] 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 it is not exempt from disclosure under section 18(1)(a) of the *Act*.

Section 18(1)(c): prejudice to economic interests or competitive position

[70] 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.³⁴

[71] 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.

[72] 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*.³⁵

[73] The institution must show that the risk of harm is real and not just a possibility.³⁶ 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 the request and the seriousness of the consequences of disclosing the information.³⁷

[74] 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.³⁸

The parties' representations

[75] 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

³⁴ Orders P-1190 and MO-2233.

³⁵ Orders MO-2363 and PO-2435.

³⁶ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

³⁷ *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.

³⁸ Orders MO-2363 and PO-2758.

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.

[76] OPG also made some representations specific to the individual records at issue. It says that the information on pages 63-64 and 75 relates to an issue with a property adjacent to the Hearn Property and that the communications at pages 106, 110-111, and 136 concern potential costs regarding the Hearn Property. OPG says that all of this information could reasonably be expected to prejudice OPG’s economic interests or competitive position. It says that if disclosed, this information could reasonably be expected to affect the value of the Hearn Property and adjacent properties, their saleability and potential uses, and could 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 and others.

[77] OPG submits that the disclosure of the information on pages 84, 91 and 92 could reasonably be expected to interfere significantly with OPG’s competitiveness and ability to negotiate the sale of real estate on a commercial basis or legal services in the future for similar matters in the future.

[78] The appellant denies that section 18(1)(c) applies to any of the information at issue. They argue that the province has fully sold the Hearn Property. The appellant says that because OPG no longer has an ownership stake in the property, the confidentiality rights it asserts do not exist.

[79] In reply, OPG denies that it is asserting “ongoing confidentiality rights” as a basis for exempting the information at issue. OPG reiterates its initial representations that the disclosure of the information at issue could affect the value of adjacent properties (which it says are still held by OPG “and others”).

[80] The appellant provided a brief sur-reply in which they argue that a government agency can not forever use former ownership of a site as a shield against release of information about the terms of its sale. The appellant says that OPG has not provided any evidence of any impending sale of other properties or actual harm that could be suffered as a result of simple sale term disclosure for the Hearn property. The appellant argues that in circumstances where the Province owns a substantial amount of property, refusing to release basic details of a sale simply by citing ownership of undisclosed neighbouring properties is not within the spirit of the *Act*. Furthermore, 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.³⁹

³⁹ https://www.thestar.com/news/city_hall/2018/11/22/opg-sells-hearn-waterfront-site-for-16-million.html.

Findings and analysis

[81] For the reasons that follow, I find that section 18(1)(c) does not apply to any of the information at issue.

[82] 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/or

...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.⁴⁰

[83] In my view, OPG's representations lack the context and specific evidence that would allow me to accept its assertions about how the disclosure of the information at issue could reasonably be expected to result in the harms it describes.

[84] To begin, I reject OPG's arguments that the disclosure of the information on pages 84, 91 and/or 92 could reasonably be expected to interfere significantly with OPG's competitiveness and ability to negotiate commercial real estate sales or obtain legal services for similar matters in the future. As noted in the Notice of Inquiry provided to OPG at the beginning of this inquiry, the fact that disclosure of contractual arrangements may result in 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.⁴¹ In my view, this reasoning applies to the information on pages 91 and 92. Furthermore, I note that given the uniqueness of the property and the circumstances of the sale, I am not inclined to believe that releasing this information would affect OPG's ability to negotiate commercial real estate transactions or obtain competitive fees for legal services in the future. Finally, I note that the information OPG has withheld on page 84 contains no figures or dollar amounts that could cause the type of harm OPG alleges.

[85] In general, I agree with the appellant's assertion that OPG provided insufficient evidence of an actual harm that could reasonably be expected to occur if the information on these pages, or pages 63-64, 75, 106, 110-111 and/or 136, were disclosed. In particular, I note that pages 63 to 64, 75 discuss an issue that arose during the course of the sale of the Hearn Property. However, it is clear that the sale concluded. In circumstances where OPG did not provide any detailed evidence about any future sales, actual or prospective, I find that section 18(1)(c) does not apply to the information on these pages.

⁴⁰ Reproduced from paragraph 5 of OPG's reply representations. See also: OPG's representations at paragraphs 27 and 28, and paragraphs 4 and 5 of OPG's Confidential Affidavit, sworn August 19, 2020.

⁴¹ Orders MO-2363 and PO-2758.

[86] With regard to the information withheld on pages 106, 110-111, and 136, I note that it all relates to an issue that was specific to the Hearn Property, which has now sold. OPG says that if disclosed, the value of the Hearn Property and adjacent properties could be affected and OPG's economic relations with others could be impacted. Absent any detailed or specific evidence regarding these claims, I am unable to accept OPG's assertions. First, as noted by the appellant, the sale of the Hearn Property has completed. The records also indicate that an adjacent property was to be sold to another party. That party was invited to participate in this inquiry but declined to submit any representations about the disclosure of the information. Based on all of the evidence before me, I am unable to infer any harm that could reasonably be expected to occur if the remaining information OPG has withheld were disclosed. In my view, the content of the records does not align with the representations submitted by OPG and as a result, I find that section 18(1)(c) does not apply to the withheld information.

[87] For the reasons set out above, and because of the lack of contextual or 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 from the disclosure of the information at issue. Therefore, I find that section 18(1)(c) does not apply to the information at issue and order OPG to disclose the remaining withheld information that is not subject to sections 13(1) or 19(a) to the appellant.

Issue D: Did the institution exercise its discretion under sections 13(1) and 19(a)? If so, should the IPC uphold the exercise of discretion?

[88] The sections 13(1) and 19(a) exemptions are discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[89] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[90] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴² The IPC cannot, however, substitute its own discretion for that of the institution.⁴³

⁴² Order MO-1573.

⁴³ Section 54(2).

[91] Some examples of relevant considerations include the purposes of the *Act* and the principles that:

- information should be available to the public,
- individuals should have a right of access to their own personal information,
- exemptions from the right of access should be limited and specific, and
- the privacy of individuals should be protected.

[92] Not all of these factors will necessarily apply, and additional considerations may be relevant.⁴⁴

[93] OPG submits that it exercised its discretion to withhold information pursuant to sections 13(1) and 19(a) in good faith, in light of the purposes of the *Act* and its exemptions.

[94] In exercising its discretion, OPG says it considered and applied the relevant factors and disclosed as much of the requested information as possible. OPG says when it applied the exemptions, it did so only to specific and limited information. OPG says that the information it withheld would, if disclosed, reveal privileged legal advice and/or the advice and recommendations of a ministry.

[95] OPG says it also considered whether the requester had a compelling need to receive the withheld information. OPG noted that the requester has not sought access to their own personal information, nor did they provide a sympathetic basis for receiving the information. Thus, OPG considered these factors as weighing in favour of the application of the exemptions.

[96] OPG says it exercised its discretion under sections 13(1) and 19(a) appropriately and in a manner that is consistent with the relevant factors.

[97] I find that the reasons provided by OPG for exercising its discretion to withhold the information at issue are appropriate. I see no evidence that OPG took into account irrelevant considerations, or that it failed to take into account relevant considerations.

[98] As a result, I uphold OPG's exercise of discretion and find that the information is exempt from disclosure pursuant to the discretionary exemptions at sections 13(1) and 19(a) of the *Act*.

Issue E: Did the institution conduct a reasonable search for records?

[99] The final matter at issue in this appeal is whether OPG conducted a reasonable search for responsive records. At mediation, the appellant asserted that additional

⁴⁴ Orders P-344 and MO-1573.

responsive records should apply and this issue was included in the Notice of Inquiry provided to OPG and the appellant at the beginning of this inquiry.

[100] As noted in the Notice of Inquiry provided to the parties at the beginning of this inquiry, if a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*. If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[101] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;⁴⁵ that is, records that are "reasonably related" to the request.⁴⁶

[102] OPG submits that it has conducted a reasonable search for records as required by section 24 of the *Act*. It asserts that the appellant's request was clear and specific. It submits that it followed its well-established search practices and procedures which included extensive consultations with OPG business unit specialists and a comprehensive search by OPG Information Technology Security, to ensure all communications reasonably related to the requested subject matter were identified.

[103] The confidential affidavit provided by OPG with its representations affirmed these representations regarding OPG's search for records.

[104] The appellant was invited to provide representations in response to OPG's submissions regarding its search for responsive records, but did not do so. The appellant's representations were silent on the issue of any outstanding responsive records that they believed should still exist.

[105] Previous IPC orders have stated that although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.⁴⁷ Absent any specific information from the appellant about what type of records they believe still exist, I find that the information OPG provided about its search for responsive records is reasonable and I decline to order it to search for any additional records.

⁴⁵ Orders P-624 and PO-2559.

⁴⁶ Order PO-2554.

⁴⁷ See, for example, Order MO-2246.

ORDER:

1. I uphold OPG's discretion to apply sections 13(1) and 19(a) of the *Act* to those portions of the records identified as such by OPG in the copy of the records it provided to the IPC.
2. I do not uphold OPG's decision to withhold the balance of the withheld information remaining at issue in the copy of the records OPG provided to the IPC and I order that the remaining information be disclosed to the appellant by **March 7, 2023**.
3. I reserve the right to require OPG to provide me with a copy of the pages of records as disclosed to the appellant in accordance with order provision 2, above.

Original signed by: _____
Meganne Cameron
Adjudicator

_____ January 31, 2023

APPENDIX A

Page Numbers	Section Claimed
8	Non-responsive, in part
11	Non-responsive, in part
12	Section 18(1), in part
13-14	Non-responsive, in part
16	Non-responsive, in part
21	Non-responsive, in part
30-31	Section 19
38	Sections 13, 18(1) and 19
39	Sections 13, 18(1) and 19
52	Section 19 Non-responsive, in part
56-57	Non-responsive, in part
59-60	Non-responsive, in part
63	Section 18(1), in part Non-responsive, in part
64	Section 18(1) Non-responsive
73	Non-responsive
75	Section 18(1), in part Non-responsive, in part

84	Section 18(1), in part Non-responsive, in part
85	Section 19
86	Section 19 Non-responsive, in part
87-89	Section 19
91	Section 18(1), in part Non-responsive, in part
92	Section 18(1), in part
106	Section 18(1) Non-responsive, in part
110-111	Section 18
113	Section 19
114-115	Section 19, in part
116	Section 19
136	Section 18, in part
137	Section 13(1)
138	Sections 13(1) and 19
139	Sections 13(1) and 18, in part
140	Sections 13(1), 18(1) and 19, in part Non-responsive, in part
141	Sections 13(1), 18(1) and 19

142	Section 13(1)
162	Section 13(1), in part