Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2019

Appeal PA-010262-1

Ministry of Finance

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NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "all financial analyses of the lease of the Bruce Nuclear Power Stations". The requester is a newspaper reporter. Under section 28 of the *Act*, the Ministry notified two parties, Ontario Power Generation Inc. (OPG) and the Canadian Nuclear Safety Commission (the CNSC) as affected parties because their interests may be affected by the disclosure of the information contained in the records, seeking their views on the disclosure of the records. Following its receipt of the submissions of the affected parties, the Ministry decided to grant partial access to some of the records, and to deny access to others in full, claiming the application of the following exemptions contained in the *Act*:

- Cabinet records - sections 12(1)(b), (c), (e) and the introductory wording;
- advice or recommendations – section 13(1);
- relations with other governments – section 15(b);
- third party information – section 17(1); and
- economic or other governmental interests – section 18(a), (c), (d) and (e) of the *Act*.

Along with its decision, the Ministry provided the requester with a detailed Index describing the records and the exemptions applied to each of them. The requester, now the appellant, appealed the Ministry's decision to deny access.

During the mediation stage of the appeal, the Ministry agreed to the disclosure of certain portions of the records, specifically, pages 1 to 4 of Record 12, pages 1 and 4 of Record 25, and pages 1 to 6 of Record 27. The Ministry indicated that the undisclosed portions of these records continue to be subject to the exemptions claimed in the Index. The Ministry also advised the mediator that all remaining records continue to be subject to the exemptions previously claimed in the Index. Finally, the appellant determined that he wished to pursue access to all of the remaining records in this appeal and raised the possible application of section 23 of the *Act* (the public interest override). As no further mediation was possible, the matter was moved to the adjudication stage of the process.

I decided to seek the representations of the Ministry, OPG and the CNSC, initially. All of these parties made representations in response to the Notice of Inquiry which I provided to them. The Ministry indicated that it was no longer relying on sections 12(1)(c) and (e), given the prospective nature of these exemptions. I shared the submissions received from the Ministry, OPG and CNSC, with the exception of a small portion from the Ministry's representations, with the appellant who also provided extensive submissions. The appellant's representations were then shared with the Ministry and OPG, who made additional submissions by way of reply.

The 42 records, or parts of records, remaining at issue consist of financial analyses, spreadsheet models, a safety analysis, Minister's briefings and Cabinet presentations, as described in the Index provided to the appellant along with the Ministry's decision letter.

DISCUSSION:

CABINET RECORDS

Introductory Wording to Section 12(1)

It has been determined in a number of previous orders that the use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-11, P-22 and P-331].

It is also possible that a record which has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1). This could occur where an institution establishes that disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-506].

The Ministry takes the position that Records 1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 17, 19, 21, 22, 25, 26, 28, 29, 30, 31 and 32 qualify for exemption under the introductory wording of section 12(1). In the Index originally provided to the appellant, the Ministry had not claimed section 12(1) for Records 3, 4 and 5. However, because section 12(1) is a mandatory exemption, I am obliged to consider its application to these records, in addition to those for which it was originally claimed.

In its initial representations, the Ministry argued that Records 1, 3, 4, 5, 6, 7, 8, 9 and 10:

> . . . contain information that is reflected in the document submitted to Cabinet June 21, 2000 (Record 31) and/or the document submitted to the Minister of Finance as part of briefing for the Cabinet discussion (Records 32 and 30) and/or the Premier's briefing on June 22, 2000. [which reflected in Record 29]
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> . . .
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> Record 1 through 10 were prepared by SuperBuild's Financial Advisory Team. These records contain analysis of OPG's relevant to the Bruce Transaction. This analysis was used to prepare Cabinet documents and pertained to Cabinet's decision of whether or not to authorize OPG management to enter into the Bruce Transaction and the terms of any proposed transaction.
>
> It is public knowledge that SuperBuild's Financial Advisors were retained to review strategic directions for OPG and Hydro One, including a possible disposition, in whole or in part. It is reasonable to infer that Cabinet would be briefed on the considerations and conclusions presented by the advisors in order to make its decisions, and in that way the release of these documents would

> permit the drawing of accurate inferences regarding the substance of deliberations of Cabinet.

The Ministry goes on to submit that Records 12, 17, 19, 21, 22, 25 and 26 are also exempt from disclosure under the introductory wording to section 12(1) on the same basis, as the information which they contain was included in the records that were submitted directly to Cabinet (Record 31), the briefing of the Minister of Finance (Records 28, 30 and 32) or the Premier's briefing (Record 29). It goes on to suggest that:

> It has been established in previous Orders of the IPC that the Premier has a unique leadership and control role in setting the priorities and supervising the activities of Cabinet and to the extent that records reflect consultations bearing on policy making and priority setting functions within the sphere of the Premier's authority as first minister, those records may be seen to reflect the substance of deliberations of the whole Cabinet (See Order #PO-1725).

Similarly, it argues that the information contained in Records 12, 17, 19, 21, 25 and 26 also found their way into what it describes as "the Cabinet documents in Records 28 to 32". It concludes this portion of its submissions by stating that:

> Disclosing those Records would reveal the substance of matters that were put before Cabinet for deliberation and would thereby permit the drawing of accurate inferences with respect to those deliberations.

In his representations, the appellant submits that the Ministry has failed to provide specific information as to how the disclosure of the contents of these particular records would tend to reveal the substance of Cabinet's deliberations. He suggests that it is unreasonable for the Ministry to require that I *infer* that Cabinet would be briefed on the considerations and conclusions which are reflected in the information contained in the records. It points out that in Order P-1019, it was found that "where the record does not specifically connect the information with specific issues to be discussed by Cabinet or one of its committees, it cannot reasonably be said that the disclosure of this information would reveal the substance of deliberations of such a body."

The appellant takes issue with the quality of the Ministry's representations on whether the information contained in these records actually reflects the substance of the Cabinet's deliberations, as is required by the introductory wording to section 12(1). It argues that the Ministry is obliged to provide me with sufficient evidence to make a finding that the record in question is "explicitly tied to Cabinet deliberations".

In its Reply representations, the majority of which must be treated confidentially as they describe the contents of the records themselves in some detail, the Ministry addresses the concerns raised by the appellant. In its Schedule A to these submissions, the Ministry sets out precisely what information contained in Records 1, 3, 4, 5, 6, 7, 8, 9, 10 and 12 is also contained in the

submissions made to Cabinet (Record 31), the Minister's briefing (Records 28, 30 and 32) or the Premier's briefing (Record 29).

Findings

I have reviewed each of the records which the Ministry has claimed to be exempt under the introductory wording to section 12(1), as well as the submissions of the Ministry and the appellant. On this basis I find that certain records fall within the ambit of the language in the introductory wording as their disclosure would reveal the substance of the deliberations of Cabinet. I specifically find that Record 31 was provided to Cabinet on June 21, 2000 and formed part of its deliberations on that date. The contents of Records 28, 29, 30 and 32 also relate directly to the information that was put before Cabinet in Record 31. As a result, I find that the disclosure of these records would reveal the substance of the deliberations of Cabinet with respect to the Bruce transaction.

Record 1 is a draft memorandum from SuperBuild's Financial Advisory Team and carries the heading "Strictly Private and Confidential For Advice to Cabinet for Purposes of Decision". The Ministry has not provided me with any information to indicate that this document was, in fact, ever provided to Cabinet or one of its committees. It is clear, however, that much of the information contained therein found its way into the records which were ultimately presented to Cabinet or for the briefing of the Premier and the Minister for their use in Cabinet's deliberations. In my view, the disclosure of the contents of Record 1 would reveal the substance of what was deliberated by Cabinet at its meeting on June 21, 2000. As such, Record 1 falls within the ambit of the introductory wording to section 12(1) and is, accordingly, exempt under that section.

Similarly, Records 3 and 4 also contain detailed financial analyses of monetary issues surrounding the proposed lease agreement which were incorporated into the contents of the records actually provided to Cabinet. I find that the disclosure of the information contained in these records would also reveal information which reflects the substance of the deliberations of Cabinet. As such, these records are also exempt under the introductory wording to section 12(1).

Records 5, 6, 7, 8, 9, the first two pages of Record 10 and the presentation in Record 12 contain advice and analysis from SuperBuild's Financial Advisory Team and OPG's financial advisors on the terms of the lease under consideration by Cabinet. In my view, the disclosure of this analysis and the recommendations which were made by the advisors would reveal the content of the Cabinet deliberations. The issues identified and discussed by the advisors in these records are precisely the issues under consideration by Cabinet, as reflected in Record 31. I find that these records therefore qualify for exemption under the introductory wording to section 12(1).

Records 17, 19, 21, 22, 25 and 26 are documents prepared by OPG which provide analyses of the lease payments contemplated by the agreement, as well as valuations and pricing information relating to the proposed transaction. Based on my review of the documents either put before Cabinet (Record 31) or prepared to brief the Minister and the Premier (Records 28, 29, 30 and 32), I find that the disclosure of the information contained in Records 17, 19, 21, 25 and 26

would reveal information which formed the basis for the deliberations of Cabinet that took place on June 21, 2000. The summaries of the transaction reflected in these records and the analysis of the financial implications of it were precisely the subject matter of that particular Cabinet meeting. As a result, I find that the disclosure of this information would allow for the drawing of accurate inferences into the actual substance of those deliberations. Accordingly, I find that Records 17, 19, 21, 22, 25 and 26 are also exempt from disclosure under the introductory wording of section 12(1).

As a result of my findings with respect to the application of the introductory wording to section 12(1), it is not necessary for me to consider whether the records are also exempt under section 12(1)(b). To summarize I find that Records 1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 17, 19, 21, 22, 25, 26, 28, 29, 30, 31 and 32 are exempt from disclosure under the introductory wording of section 12(1).

ADVICE OR RECOMMENDATIONS

The Ministry submits that Records 2, 11 and 42 are exempt from disclosure under the discretionary exemption in section 13(1), which reads:

> 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.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, 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.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

In Order P-434 Assistant Commissioner Tom Mitchinson made the following comments on the "deliberative process":

> In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office (Orders P-1147 and P-1299).

Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act*. [Orders 94, P-233, M-847, P-1709]

The Ministry submits that Records 1 to 11 (including Records 2 and 11) were prepared by SuperBuild's Financial Advisory Team, composed of employees of SuperBuild's Financial Advisory Team to comment on the valuation methodology and analysis submitted by OPG regarding the proposed transaction. The Ministry argues that the Financial Advisory Team was retained to provide *advice* to SuperBuild and the Ministry and that this advice took many forms. It submits that:

> The disclosure of Records 1 through 11 would reveal advice to government and recommendations within the deliberative process of government decision-making and policy-making. OPG was willing to share highly confidential, commercial information with MOF staff and the advisory team. The Advisory Team in turn analyzed the information and provided analysis and advice to SuperBuild and MOF regarding the Bruce Transaction. This free exchange of information and advice would be inhibited if information, advice recommendations, and analysis which was prepared with an understanding that it would be maintained in confidence for a specific audience and for a specific purpose are made public.
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> . . .
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> In addition, the MOF maintains that Record 42 is exempt from disclosure under section 13(1) of FIPPA. This spreadsheet analysis file was created by SuperBuild's Financial Advisory Team to aid in their review of OPG's valuation methodology and was used in conjunction with Records 1 through 11 to provide advice to Government regarding the Bruce Transaction and related issues to the

> Government. This model provides the basis for the Advisory Team's conclusions and recommendations to MOF relating to the Bruce Transaction.

Record 2 consists of an analysis of the financial details surrounding the sale of other nuclear assets throughout North America in the recent past. The document itself contains no "advice or recommendations" within the meaning of section 13(1) and as such, it cannot be found to fall within that exemption.

Record 11, however, sets out in great detail the specific advice and recommendations provided by the SuperBuild Advisory Team to its Executive Steering Committee. The advice and recommendations address very clearly the very issues under consideration in the negotiation and implementation of the lease agreement in question. In my view, Record 11 falls squarely within the ambit of the exemption in section 13(1) and none of the exceptions set out in sections 13(2) or (3) applies to it.

Record 42 is a collection of spreadsheets and computer-generated reports containing financial data relating to the proposed lease agreement. Various scenarios and assumptions are weighed in the data which is compiled in this record but it provides no specific recommendations with respect to a particular course of action. Accordingly, I find that section 13(1) has no application to Record 42.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry submits that Record 33 is exempt from disclosure under the discretionary exemption in section 15(b) of the *Act*, which reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution;

It argues that Record 33 was received from the Government of Canada by the Ontario Ministry of Energy, Science and Technology (MEST) and is clearly identified as confidential. It further submits that the disclosure of this record would "reveal the information from the Canadian Nuclear Safety Commission" regarding implications of subsection 46(3) of the *Nuclear Safety and Control Act*.

The CNSC was notified by the Ministry and the Commissioner's Office of this request and the subsequent appeal. It objects to the disclosure of Record 33 on the basis that it was provided in confidence to MEST and relates to a matter of mutual interest to both parties.

For a record to qualify for exemption under this section, the Ministry must establish that:

1. the records reveal information received from another government or its agencies; **and**

2. the information was received by the Ministry; **and**

3. the information was received in confidence.

[Orders 210 and PO-1927-I]

I find that CNSC qualifies as an "agency" of the Government of Canada for the purposes of section 15(b) and that the first part of the test under the exemption has been met. Secondly, I find that the information was received by the Ministry from the CNSC, thereby satisfying the second part of the test under section 15(b).

Based on my review of the submissions of the CNSC and the Ministry, as well as the contents of Record 33, I have no difficulty in finding that it was received by the Ministry in confidence. The subject matter of the document itself, as well as the notation on the record that it is "Protected Commercial Confidential Information" speak to the conclusion that Record 33 was received in confidence by the Ministry.

As all three parts of the section 15(b) test have been satisfied, I find that Record 33 is exempt from disclosure under this exemption.

THIRD PARTY INFORMATION

The Ministry and the OPG take the position that all of the remaining records at issue in this appeal are exempt from disclosure under the mandatory exemption in section 17(1). As I have found above that some of the records are exempt under the exemptions in sections 12(1), 13(1) and 15(b), I will only determine whether the remaining documents, described as Records 2, 13, 14, 15, 16, 18, 20, 23, 24, 27 and 34 to 42, are properly exempt under the third party exemption in section 17(1). For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or OPG 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 Ministry 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 (a), (b) or (c) of subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "**detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)]

Part 1: Type of Information

The appellant asks that I consider the decision in Order P-400 where it was held that "generalized references to government programs do not constitute 'financial' or 'commercial' information." Accordingly, the appellant suggests that I "take a critical look at the information contained in the Records when making this determination."

Generally, OPG and the Ministry submit that the records listed above contain "financial" or "commercial" information as that term has been defined in previous orders. In Order P-493 and many subsequent decisions, the term "commercial information" has been defined as information which relates solely to the buying, selling or exchange of merchandise or services. It has also been found that the term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

Similarly, the term "financial information" has been found to refer to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs.

[Orders P-47, P-87, P-113, P-228, P-295 and P-394]

OPG has not made any representations on the application of section 17(1) to Record 2. The Ministry simply states that Record 2 "contains confidential financial information from OPG including valuations." Based on my review of Record 2, I find that it contains financial information relating to the sale of other nuclear assets throughout North America and that the first part of the section 17(1) test has been met with respect to this record.

Record 13 is a letter from OPG dated June 28, 2000 titled "Financial Impact of Bruce Decontrol". OPG submits that Record 13 "contains detailed financial analysis, including commercially sensitive business plan information". The Ministry argues that Record 13 includes "internal OPG valuations, key financial modelling assumptions, and model results." I find that Record 13, which sets out the financial implications of a number of scenarios for the leasing or sale of the Bruce facility, contains financial information within the meaning of section 17(1).

Record 14 is a facsimile dated June 21, 2000 from OPG to an official with SuperBuild responding to a number of questions posed by the SuperBuild staff person. The covering page of the facsimile has been disclosed. The remaining page of Record 14 contains detailed information about the financial situation surrounding one of the options being considered for the future of the Bruce facility. I find that it contains both financial and commercial information about OPG as those terms have been defined in previous orders.

Record 15 is facsimile dated June 21, 2000 from the OPG to the same SuperBuild staff person who was the recipient of Record 14 setting forth in some detail the OPG's anticipated closing adjustments with respect to the Bruce transaction. I find that this record also contains financial and commercial information within the meaning of section 17(1).

Record 16 is a memorandum from OPG dated June 15, 2000 setting out a number of scenarios describing the financial impact of the decontrol of the Bruce facility. The Ministry submits that the modelling and assumptions upon which the scenarios are based contain confidential commercial and financial information relating to OPG's future financial transactions. I find that Record 16 contains both financial and commercial information within the meaning of section 17(1).

The Ministry objects to the disclosure of the "slide presentation" in Record 18 which was made to the OPG Board of Directors on June 1, 2000 on the basis that it contains financial and commercial information which is exempt from disclosure under section 17(1). Based on my review of the contents of the slide presentation, I find that it contains financial and commercial information as contemplated by section 17(1).

Similarly, Record 20 is a slide presentation made by OPG to the Ministry of Energy, Science and Technology (MEST) on May 17, 2000. It too contains information which qualifies as commercial and financial information for the purposes of section 17(1).

Records 23 and 24 are also slide presentations prepared by OPG on May 9, 2000 outlining various financial aspects of the proposed transaction relating to the sale or lease of the Bruce facility. I find that these records also contain financial and commercial information.

The Ministry and OPG have agreed to the disclosure of the first six pages of Record 27 but object to the disclosure of page seven as it "describes a list of critical business issues which would prejudice OPG's future commercial negotiations. I find that page seven of Record 27 does not contain information which meets the definition of commercial or financial information and this page is not, therefore, exempt from disclosure under the mandatory exemption in section 17(1).

Records 34 to 42 are spreadsheets containing detailed information pertaining to the financial implications of the proposed lease arrangement. I find that each of these documents contain both financial and commercial information as that term has been defined in previous orders of this office. The first part of the section 17(1) test has been satisfied with respect to these records.

Part 2 – Supplied in Confidence

The OPG has made submissions with respect to this aspect of the section 17(1) test. It submits that:

> The Minister is the sole shareholder of OPGI. The information at issue was supplied to the Ministry for the purposes of informing the shareholder of the proposed transaction and ultimately to seek the consent of the shareholder. Normal commercial practice dictates that such financial and commercial information be held in confidence by the relevant parties and not disclosed to the public. The information at issue was communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential. This is evidenced by the fact that the potential bidders on the Bruce were identified using code names and much of the information was delivered to the Ministry under the express guise of confidence.

In support of its contention that the information contained in the records was supplied to the Ministry in confidence, it indicates that:

> On September 24, 1999, the Honourable Jim Wilson, Minister of Energy, Science and Technology, in his capacity as Shareholder, and the Chairman of OPG signed an agreement in which OPG agrees to provide information to the shareholder. The agreement contains confidentiality provisions and states:
>
> > The Shareholder acknowledges that the information provided to it pursuant to this agreement may include technical, commercial, financial or other commercially sensitive information, the disclosure of which may prejudice significantly the competitive position of the Corporation or result in undue loss or gain to parties

> other than the Corporation. The Corporation will identify such information as commercially sensitive at the time it provides the information to the Shareholder and will provide such information in confidence. The Shareholder will hold such identified information in confidence to such extent as may be permitted by law.

The Ministry also submits that its staff treated the records at issue in this appeal in a confidential fashion, taking care to ensure their security. It argues that Records 1 to 11 were prepared by the SuperBuild Advisory Team to provide advice to Ministry officials and ultimately Cabinet and that this information was derived from information provided by OPG. It also submits that Records 12 to 27 were various presentations made by OPG staff to the Ministry. It notes that, with the exception of Records 13 and 16, all were marked as "Confidential" in accordance with the terms of the agreement between MEST and OPG. It also indicates that the spreadsheets which comprise Records 34 to 42 were supplied by OPG to the Ministry with an expectation that they would be treated confidentially.

With respect to the issue of whether the records were "supplied in confidence" to the Ministry, the appellant argues that:

> First, it appears that the above referenced agreement [for the sharing of information between OPG and MEST, in its capacity as an OPG shareholder] relates to the supply of information between MEST (as shareholder) and OPG. This does not appear to bind the Ministry of Finance and no confidentiality agreement is referred to between the Ministry of Finance and OPG. This apparent breach of "confidentiality" is not explained.
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> Second, the contract language referred to in the Ministry of Finance's submissions specifically contemplates the "[OPG] will identify such information as commercially sensitive at the time it provides the information to [MEST] and will provide such information in confidence." We query how much of the information was explicitly identified as "commercially sensitive" pursuant to the terms of the contract and note that not all of the records in question are documents provided by OPG to MEST – and therefore, not all are subject to this allegedly "confidential" supply.
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> Finally, it is submitted that the closing language in this section which reads "The Shareholder will hold such identified information in confidence to such extent as may be permitted by law" contemplates the fact that the information may be disclosed under the *Act*.

The appellant also questions whether the security measures described by the Ministry for the treatment of these records was in any way out of the ordinary. He also questions whether the Ministry has provided adequate representations on the question of whether the expectation of confidentiality was in fact present with respect to all of the records.

In its reply representations, the Ministry notes that the confidentiality agreement entered into between OPG and the Minister of Energy, Science and Technology in September 1999 bind the provincial Crown as a whole and was not intended to relate only to the MEST. It argues that the agreement was entered into between the Crown and OPG and includes, therefore, the Ministry of Finance as well as MEST.

I have reviewed the contents of the submissions of the parties and the records themselves with respect to the question of whether they have been supplied to the Ministry with a reasonable expectation of confidentiality. In my view, the agreement between OPG and the Minister of Energy, Science and Technology demonstrated the intention of the parties that information which was shared between OPG and the provincial Crown, including staff of the Ministry and MEST would be treated in a confidential fashion. In the main, the records to which the Ministry has applied section 17(1) have been marked by OPG as being confidential, in accordance with the terms of that agreement.

I find that Records 13, 14, 15, 16, 18, 20, 23, 24 and 34 to 42 were supplied to the Ministry or to MEST by OPG with a reasonably-held expectation that they would be treated confidentially. Despite not being marked as "confidential", I find that Records 13 and 16 formed part of an on-going series of confidential communications regarding the transaction in question and, in fact, contain information which was also included in the other records so marked. In my view, the Ministry and the OPG have demonstrated that these records fell within the ambit of the confidentiality agreement between the OPG and the provincial Crown and that it was reasonable to expect that they would be treated as such.

Record 2 contains information relating to other nuclear asset sales in North America and was prepared by the SuperBuild Advisory Team for MEST. In the absence of any information from the Ministry or the OPG as to whether this information was supplied to the SuperBuild Advisory Team by OPG, I find that Record 2 does not satisfy the second part of the section 17(1) test. As a result, this exemption does not apply to it.

Part 3 – Harms

With respect to the third part of the test under section 17(1), OPG submits that

> It must be emphasized that the information at issue reflects various aspects of a long and highly complex negotiation process. Release of the information at issue would result in significant prejudice to the competitive position of OPGI and an undue loss to OPGI and the government together with a corresponding gain to OPGI's competitors. OPGI is currently in the process of seeking interest in the decontrol of several of its facilities, as mandated in its generation license from the Ontario Energy Board. The release of financial and commercial information would compromise OPGI's ability and competitive edge to negotiate future business relationships in furtherance of its mandated decontrol, providing third

> parties with the ability to predict OPGI's negotiation and valuation schemes and therefore prejudice OPGI's ability to maximize value.

The Ministry submits that:

> Disclosure of specific financial information relating to OPG could prejudice its current competitive position and its relationships with other parties. Release of information relating to the broad corporate strategies and projected financial and commercial activities of OPG could reasonably be expected to significantly prejudice the company's competitive position. In a previous order relating to Ontario Hydro [OPG's predecessor], the Commission found that the harms test in these provisions was met regarding the disclosure of the amount of electricity purchased by Hydro from a named company at a landfill site. Hydro and the third party were able to establish that competitors, such as the requester, could formulate "an evaluation" of the reliability of the power plant; the "actual production capability" of the power plant would be known; and the requested information "represented the complete picture of all sales" by the affected party which, together with information on purchase rates already in the public domain, would make it possible to derive a total revenue picture. (Order #P-531)
>
> The release of the commercial and financial information related to negotiated payments, valuations, valuation assumptions, range of values, negotiating strategies, negotiated terms and conditions, bid comparisons and critical negotiation issues would compromise OPG's ability and competitive edge to negotiate future business relationships as it decontrols additional generating stations. Release of this information would also provide third parties with the ability to predict OPG's negotiating strategies and valuation methodologies and adversely impact OPG's ability to maximize value. Release of information regarding pricing practices and tax issues could provide competitors with an unfair advantage, and lead to lower profits for OPG, adversely affecting the value of OPG.

The appellant takes the position that neither the Ministry nor the OPG have provided me with the kind of "detailed and convincing" evidence which is required to substantiate a finding that the records are exempt under section 17(1). It also argues that the Ministry's submissions appear to relate primarily to the sale or lease of the Bruce facility and that the disclosure of this information may not translate into prejudice with respect to the sale of other facilities in the OPG inventory.

In its reply submissions, the Ministry points out that much of the information contained in the records relates to the financial and commercial activities of all of OPG, not just its nuclear operations or those originating at the Bruce facility.

I have reviewed the contents of Records 13, 14, 15, 16, 18, 20, 23, 24 and 34 to 42 and find that the disclosure of the information which they contain could reasonably be expected to prejudice

the competitive position of OPG. Each of these records include detailed analysis of a series of assumptions and scenarios for the sale or lease of the Bruce facility. The records describe in great detail all of the financial ramifications of the proposed transaction, along with a number of alternative scenarios. The financial and commercial activities of OPG, past, present and future, are set out in great detail, along with its corporate strategies for maximizing the return on the lease or sale of the Bruce facility.

In my view, the disclosure of this information could reasonably be likely to prejudice significantly the competitive position of OPG with respect to future sales of not only its other nuclear facilities, but also its other generating infrastructure. The valuations and calculations of potential earnings contained in these records would be of great interest to potential purchasers of such facilities and could be used to the detriment of OPG in its future negotiations. Despite the paucity of the submissions of the OPG and the Ministry, I am satisfied that the harm contemplated by section 17(1)(a) could reasonably be likely to result from the disclosure of the information contained in Records 13, 14, 15, 16, 18, 20, 23, 24 and 34 to 42. As all three parts of the section 17(1) have been satisfied with respect to these records, I find that they are exempt from disclosure under this exemption.

By way of summary, I find that Records 13, 14, 15, 16, 18, 20, 23, 24 and 34 to 42 are exempt from disclosure under section 17(1) while Record 2 and page seven of Record 27 are not.

ECONOMIC OR OTHER INTERESTS

The only records remaining at issue are Record 2 and page 7 of Record 27. The Ministry has claimed the application of sections 18(1)(a), (c) and (d) of the *Act* to them. These sections read:

> 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;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18(1)(a)

In order to qualify for exemption under section 18(1)(a), the Ministry must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; and

2. belongs to the Government of Ontario or an institution; and

3. has monetary value or potential monetary value.

[Order 87]

In my discussion above under section 17(1), I found that Record 2 contained information which qualified as "financial information" for the purposes of section 17(1). For the same reasons, I find that Record 2 also contains "financial information" for the purposes of section 18(1)(a).

In my discussion of section 17(1), however, I found that page seven of Record 27 does not contain any information which qualifies as commercial or financial information. In accordance with those findings, in my view, page seven of Record 27 does not contain any information which falls within the ambit of a trade secret, or financial, commercial, scientific or technical information for the purposes of section 18(1)(a). This exemption has no application to page seven of Record 27, therefore.

Based on the submissions of the Ministry with respect to the application of section 17(1), the information in Record 2 was compiled by the SuperBuild Advisory Team in the course of its review of the proposed Bruce facility transaction. This document was provided to the Ministry by the Advisory Team. As a result, I find that the information belongs to the Ministry for the purposes of section 18(1)(a).

The Ministry has not made any specific representations as to whether the information in Record 2 has monetary or potential monetary value. Based on my review of the contents of this document, I find that does not have any intrinsic or potential monetary value. Accordingly, I find that section 18(1)(a) has no application to Record 2.

Sections 18(1)(c) and (d)

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

To establish a valid exemption claim under section 18(1)(d), the Ministry must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario (Orders P-219, P-641 and P-1114).

Again, the Ministry has not provided me with any specific information or submissions as to how Record 2 or page seven of Record 27 qualify for exemption under these sections. The Ministry has made extensive generic representations on the interpretations placed on these exemptions by this office in its past orders. In my view, however, these submissions are not applicable to the kind of information reflected in Record 2 and page seven of Record 27. In addition, the application of the section 18(1) exemptions to the records was not clear on their face, as was the case with those records which I found to be exempt under section 17(1). As a result, I find that Record 2 and page seven of Record 27 do not qualify for exemption under sections 18(1)(c) or (d).

PUBLIC INTEREST OVERRIDE

The appellant submits that section 23 of the *Act* operates to "override" the application of the exemptions in sections 13, 15, 17 and 18 and that the records to which those exemptions have been applied should be ordered disclosed. Section 23 provides:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 ,21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

I note that those records which I have found to be exempt under section 12 cannot be subject to the application of the "public interest override" provision of section 23. Accordingly, I will limit my discussion of this section to include only Record 11, which I found to be exempt under section 13(1), Records 13, 14, 15, 16, 18, 20, 23, 24, and 34 to 42, which I have found to be exempt under section 17(1) and Record 33, which is exempt under section 15(b).

General Principles in Applying Section 23

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, 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.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

The Ministry's Submissions on Section 23

The Ministry submits initially that the burden of proof regarding the applicability of section 23 in the particular circumstances of an appeal lie with the individual seeking its application. It also suggests that simply because a request is made by a member of the media, this is not necessarily indicative of a public interest in the subject matter of the request. [M-773 and M-1074]

The Ministry relies on the decision of Assistant Commissioner Tom Mitchinson in Order PO-1746. In that decision, the Assistant Commissioner evaluated the possible application of section 23 to records which addressed a potential commercial transaction involving Ontario Hydro. The Ministry relies on the following findings by Assistant Commissioner Mitchinson in support of its contention that there is no compelling public interest in the disclosure of these records as they represent a commercial transaction rather than one involving nuclear safety. The Assistant Commissioner held that:

> The business transaction being contemplated by Hydro requires careful and detailed negotiations which, for the reasons outlined by OPG, demand confidentiality, in the public interest. Similar to the decisions in Order P-1210 and PO-1740, the information withheld from disclosure in the present appeal does not relate to issues of public safety or health in the context of the operation of nuclear facilities. As I stated in Order P-1210:
>
> > ... when the monetary-based purposes of the section 18(1)(c) exemption claim were balanced against the broad public interest in nuclear safety and public accountability for the operation of nuclear facilities [in Order P-1190], these compelling public interests clearly outweighed the purpose of the exemption claim. I feel that the circumstances of this appeal are fundamentally different. Most importantly, nuclear safety is not an issue, nor have any issues been raised which question the proper operation of nuclear facilities.
>
> I also accept that the regulatory framework for the sale of nuclear facilities, including the public role played by the Atomic Energy Control Board, provides a significant degree of public accountability.

The Ministry goes on to argue that the Provincial Auditor has been involved in the overseeing of this transaction and has been granted access to all of the relevant documents maintained by the Ministry and OPG on matters relating to public expenditures and revenues. It indicates that the

Provincial Auditor will report back to Cabinet's Standing Committee on Public Accounts with respect to its views on the proposed transaction and his report will also be made public. The Ministry also submits that any public safety concerns about a potential operator of the Bruce nuclear facility will be addressed by the oversight of the CNSC.

The Appellant's Submissions on Section 23

The appellant submits that a public interest exists in the disclosure of the records. He argues that:

> In light of the fact that the decontrol and privatization of nuclear facilities and the financial implications of doing so relate to issues of public safety and fiscal accountability, it is clear that the Records relate to a matter that "arouses strong interest or attention" in the public and thus, disclosure should prevail even in the event that the Records should technically not be disclosed under ss. 13, 15, 17 and 18 of the *Act*.
>
> It is submitted that, in order to make effective political choices on the issue of privatization of the nuclear industry, the public must be made aware of the cost of this process, including the relative benefit provided by leasing the nuclear facility in question. Privatization will impact every person in Ontario both individual and corporate. There has been considerable debate and controversy surrounding the decision to privatize and the economic effects of that decision.
>
> However, privatization is not just an economic issue, it is an ideological decision that, presumably involves trading off a system of operating nuclear facilities in a non-profit manner for the benefits of providing the same services in a for-profit, competitive arena. The only effective method of allowing the public to assess the pros and cons of this decision so members of the public can make informed comment and decisions about privatization including how they might vote in the next election is to have a transparent process where the perceived financial benefits of following this course of action are made known to the public.

The appellant also takes issue with the submissions of the Ministry regarding the oversight of the transaction by the Provincial Auditor. It submits that the Provincial Auditor's review will not provide any public disclosure of the information in the records; it is not clear from the Ministry's submissions whether the Auditor will even be granted access to the information in these records. The appellant further submits that the Auditor's review will not aim at assisting the public in forming opinions about the ideological issues surrounding privatization, being focussed solely on whether the lease "offers value for money for Ontario taxpayers".

In addressing the second part of the section 23 test, whether the compelling public interest outweighs the purpose of the exemptions, the appellant makes the following submissions with respect to section 15(b):

> . . . the CNSC record was shared by the original recipient (i.e. MEST) with the Ministry of Finance apparently without controversy. Further, in that particular document, the CNSC's interpretation of the legislation in question in the manner of a matter of public interest in that it involves an interpretation of the federal legislation that could make the privatization untenable at law.
>
> In this regard, the Requester queries whether the lease was structured in a particular manner in order to artificially avoid the concerns raised by the CNSC in Record 33. There can be no doubt that disclosing government documents suggesting that the lease does not comply with the relevant legislation is in the public interest. Further it is of equal importance to allow the public access to Record 33 in order to allow Ontarians the opportunity to make informed decisions on the manner in which these concerns were handled by the government.

The appellant also submits, with respect to section 17(1), that previous decisions of the Commissioner's office respecting records addressing concerns about nuclear safety found that section 23 could apply to require the disclosure of such information. The appellant reiterates that "the public interest in the disclosure of such information is sufficiently compelling to outweigh, in a clear fashion, the purpose of the exemption in section 17(1)."

Findings with Respect to Section 23

Based on my review of the contents of the records which I have found to be exempt under sections 13(1), 15(b) and 17(1), I find that they do not contain information which relates to issues about the safety or operation of the Bruce nuclear facility. Rather, these records pertain strictly to the financial and commercial aspects of the proposed transaction, as well as other alternative dispositions of the Bruce facility. As such, I find that the public interest in the disclosure of this information relates only to the oversight of the financial implications of the proposed lease agreement. Accordingly, the compelling public interest found in records relating to nuclear safety in many previous orders is not present in this appeal.

That is not to say, however, that a public interest in the disclosure of these records does not exist. The question of the efficacy of the proposed lease arrangement has been the subject of a great deal of public comment, in the Legislature and in the press. The appellant has been instrumental in bringing this matter to the attention of the people of Ontario and keeping this issue at the forefront of the debate over privatization generally. I must reiterate, however, that the records which are subject to sections 13(1), 15(b) and 17(1) themselves do not address the issues surrounding the appropriateness of privatization. Rather, they are concerned solely with the financial arrangements and the maximization of return for OPG and the Government of Ontario.

In my view, there exists a compelling public interest in the issues surrounding the sale or other disposition of the assets of the former Ontario Hydro which are now owned by OPG, including the Bruce facility. The disclosure of the information concerning the transaction and its financial ramifications for OPG and its shareholder, the Government of Ontario, would be of sufficient public interest to meet the requirement that it be "compelling". Thanks in no small part to the

efforts of the appellant, the public has been made aware of much of the facts behind the Bruce transaction and this has resulted in a high degree of public interest in this issue.

In my view, in the unique circumstances of this case, there exists in fact a public interest in the non-disclosure of the information contained in the records. The question of privatization has been resolved, at least for the present time, by the implementation of the *Energy Competition Act, 1998* which mandated the privatization of a large portion of the assets of the former Ontario Hydro. Its successor, OPG, is now required to divest itself of a majority of its assets and is obliged to get the best price and best commercial advantage possible. I find that the disclosure of the information in these records would make achieving that goal more difficult.

I further find that while there exists a compelling public interest in the disclosure of the information contained in the records, there also exists a concomitant, significant public interest in their non-disclosure. In my view, the public interest in disclosure is made somewhat less than compelling owing to the existence of a concurrent public interest weighing against the disclosure of these records. Accordingly, I find that the public interest in disclosure fails to satisfy the requirement that it be "compelling". As such, it is not necessary for me to weigh whether this less-than-compelling public interest "clearly outweighs" the purpose of the section 13(1), 15(b) and 17(1) exemptions as this exercise is required only in those cases where the public interest favouring disclosure is found to be compelling in nature. Accordingly, I find that section 23 has no application to Records 11, 13, 14, 15, 16, 18, 20, 23, 24, 33 and 34 to 42.

ORDER:

1. I order the Ministry to disclose Record 2 and page seven of Record 27 to the appellant by providing him with a copy by **June 21, 2002.**

2. I uphold the Ministry's decision to deny access to the remaining records.

3. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant.

May 30 2002

Donald Hale
Adjudicator