

**ORDER PO-2068**

**Appeal PA-010366-2**

**Ministry of the Environment and Energy**

## **NATURE OF THE APPEAL:**

The Ministry of Environment and Energy (the Ministry) (now the Ministry of Energy) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "All records on special rate deals with large electricity customers under the competitive market (these would in part be records compiled as part of the Electricity Act, 1998, Regulation entitled Transition, Generation Corporation Rate Options)."

The Ministry did not issue a decision letter within the statutory 30-day period and, as a result, the requester filed a "deemed refusal" appeal. The Ministry subsequently issued a decision letter and the deemed refusal appeal file was closed.

The Ministry identified 27 responsive records, and notified a number of affected parties to seek their views regarding disclosure. Based on the results of the notification process, the Ministry decided to grant partial access to the records, with severances made pursuant to one or more of the following exemptions in the *Act*:

- section 12(1) - Cabinet records;
- section 17(1) - third party information; and
- section 18(1) - economic or other harm to the Ministry.

Specifically, 12 records were disclosed in full; four records were disclosed in part; 10 records were denied in their entirety; and one record was withheld on the basis that it was not responsive to the request.

The requester (now the appellant) appealed the Ministry's decision to deny access.

During mediation, attempts were made to notify three affected parties who were either not notified by the Ministry or did not respond to the Ministry's notification, to determine whether they would consent to disclosing information pertaining to them. One affected party objected to disclosure and the other two did not respond.

Mediation was not successful in resolving all of the issues in this appeal, so the file was transferred to the adjudication stage of the process. I sent a Notice of Inquiry to the Ministry and the eight affected parties, initially, which outlined the facts and issues and requested representations. The affected parties included the Ministry of Finance (MOF) and Ontario Power Generation Inc. (OPG). The Ministry and six affected parties, including MOF and OPG, provided me with representations in response. One other affected party advised that it would not be providing representations, and the eighth affected party did not respond to the Notice.

I then sent a modified Notice of Inquiry to the appellant, together with a copy of the non-confidential portions of the representations of the Ministry, MOF and OPG. The appellant advised this office that he would not be submitting representations.

## **RECORDS:**

Fifteen records remain at issue, including one record that the Ministry claims is not responsive to the request. Records denied in full are Records 1-4, 11, 14, 23, 24, 25 and 27; and records

denied in part are Records 6, 8+9, 10 and 26. The records consist of correspondence, presentation notes, background and meeting notes, memos, presentation slides, a sample electricity invoice and lists of companies receiving special rates. The records are described in an index provided to the appellant with the Notice of Inquiry as an attachment to the Ministry's representations.

## **DISCUSSION:**

### **RECORDS NO LONGER AT ISSUE**

In their representations, some affected parties consented to disclosing certain records relating to them. In some instances, the Ministry has also withdrawn its exemption claims for these same records.

Specifically, the affected party connected to Record 3 consents to disclosing the following portions of that record: a letter dated July 7, 1999 from the affected party to MOF; and an October 6, 1999 series of presentation slides entitled "Surplus Power: History, Status, Issue, Proposal." The Ministry has withdrawn any exemptions for these portions of Record 3, so they should be disclosed to the appellant. The rest of Record 3, which is another series of presentation slides, is not covered by the affected party's consent and remains at issue in this appeal.

Similarly, the affected party connected to Record 10 consents to disclosing the remaining responsive portions of this record, and the Ministry has withdrawn any exemption claims for it. Accordingly, the undisclosed portions on page 2 of Record 10 should be provided to the appellant.

Record 6 consists of correspondence between an affected party and the Ministry/MOF. As described in the Ministry's index (which has been provided to the appellant), Record 6 consists of correspondence about the "Elimination of Surplus Power Rate Tariff in Restructured Electricity Market", and most of the text of this correspondence has already been disclosed to the appellant. Record 6 includes a three-page letter from the affected party to the two Ministers. A heading at the end of this letter indicates that the affected party sent the letter on behalf of a list of other companies that would appear to share an interest in the subject matter of the correspondence. When I sent my Notice of Inquiry to this affected party, I specifically asked it to provide representations on its own behalf and on behalf of the listed companies that it purported to represent on page 3 of the letter. The affected party responded by consenting to disclosure of the remaining portions of Record 6, but also suggested that I notify the other listed companies directly. I have decided, in the circumstances, that it is not necessary for me to notify these other companies. It is clear from the face of Record 6 that the affected party submitted its letter to the Ministry as a representative of a group of customers with a shared interest in the content of the letter. The affected party presumably had the consent of these companies to act on their behalf in submitting the letter, and, in my view, absent any indication from the affected party that these arrangements have changed, I am prepared to infer that the affected party continues to speak on their behalf. In this regard, it is significant to note that the Ministry has

withdrawn its section 17(1) claim for Record 6, and that most of its content has already been disclosed to the appellant. Accordingly, Record 6 should be disclosed to the appellant.

## **RESPONSIVENESS**

The Ministry takes the position that Record 25 is not responsive to the appellant's request.

Previous orders have established that in order to be responsive a record must be "reasonably related" to the request. In Order P-880, former Adjudicator Anita Fineberg stated:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

Former Adjudicator Fineberg's approach has been followed in many subsequent orders, including Orders PO-1730 and M-1154, which elaborate on the responsibilities of both institutions and requesters in ensuring that the scope of a request is clearly communicated and understood.

The Ministry submits:

Record 25 takes the form of an e-mail and attachment generated as a result of a meeting held on November 15, 2000. The notes were prepared by [an affected party]. The subject matter of the notes concerns transition rate option implementation, which is a much broader issue than that addressed by the access request. This subject matter is not captured by the access request which is for "special rate deals with large electricity customers under the competitive market". The ministry therefore maintains its position that Record 25 is not responsive to the request. ...

In his request, the appellant makes it clear that he is seeking access to "[a]ll records" on special rate deals with large electricity customers, and he specifies that these records would include, in part, "records compiled as part of the Electricity Act, 1998, Regulation entitled Transition, Generation Corporation Rate Options." In my view, the appellant clearly intended his request to be comprehensive in scope.

Having reviewed the content of Record 25, I find that it is "reasonably related" to the appellant's request. As the Ministry indicates, Record 25 consists of notes of a meeting to discuss transition rate option implementation. The notes contain proposals on how the Regulation under the *Electricity Act, 1998* (which is specifically cited in the appellant's request) could be

implemented. The Ministry identifies in its representations that the Regulation in question is Ontario Regulation 318/00, and explains that it “provides for transitional rate assistance from Ontario Power Generation (“OPG”) to a small number of large customers who had previously entered into commercial arrangements with OPG to receive flexible rates.” In my view, discussions about implementation of transition rates would, by necessity, apply to or include any “special rate deals”, as identified in the appellant’s request.

Therefore, I find that Record 25 is responsive to the appellant’s request. Accordingly, I will order the Ministry to notify the affected party in Record 25 and make a decision on access.

### **THIRD PARTY INFORMATION**

In its representations, the Ministry withdraws its section 17(1) exemption claim for Records 2 and 11, and the undisclosed portions of Records 8+9. Because section 17(1) is a mandatory exemption and the affected parties with an interest in these records have not consented to disclosure, I will include them in my section 17(1) discussion.

The Ministry continues to take the position that Records 1, 4, 14, 23, 24, 27, the remaining portions of Record 3, and the undisclosed paragraph on page 1 of Record 26 qualify for exemption under section 17(1).

Section 17(1) of the *Act* reads, in part, as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

...

In Order PO-2018, Adjudicator Sherry Liang described the purpose of section 17(1) as follows:

Section 17(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. It has been described as designed to “protect the ‘informational assets’ of businesses or other

organizations which provide information to government institutions" (see Order PO-1805).

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of information which, while in the possession of government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (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 my 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**

Previous orders have defined “commercial” and “financial” information as follows:

### ***Commercial Information***

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. 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. [Order P-493]

### ***Financial Information***

The term refers 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]

The Ministry submits that all of the records for which it claims section 17(1) contain “commercial information”, and that Records 3, 14 and 27 also contain “financial information”, as those terms have been defined by this office. In the Ministry’s view, these records contain information relating to the buying and selling of electricity, which is a commercial service, and in some instances also contain pricing practices and operating costs, which qualify as financial information. The Ministry agrees with and relies on representations provided by some of the affected parties in support of the section 17(1) exemption claim.

The affected parties connected to Records 1 and 3 submit that these records contain commercial information. The affected party connected to Record 1 also submits that this record contains financial information.

OPG, which is the affected party connected to Records 4, 14, 23 and 24, submits that these records contain commercial information. The Ministry and MOF make similar submissions regarding the fourth paragraph on page 2 of Record 27, which contains cost and pricing information relating to OPG.

I have not received any representations on Part 1 of the section 17(1) test from either the Ministry (which has withdrawn the section 17(1) claim) or any of the affected parties in Records 2, 8+9 or 11. I have received no representations from any party on Record 27, with the exception of the fourth paragraph on page 2 described above.

Having reviewed all of the records that are subject to the section 17(1) exemption claim, I find that, with the exception of the paragraph on page 1 of Record 26 and all portions of Record 27 other than the portions of the fourth paragraph on page 2 referred to by the Ministry/MOF, they all contain commercial information. The information in these records relates solely to the

buying, selling or exchange of services, specifically the provision of electricity. Therefore Part 1 of the section 17(1) test has been established for Records 1, 2, 4, 11, 14, 23, 24, the cost and pricing information in the fourth paragraph on page 2 of Record 27, the remaining portions of Record 3, and the undisclosed portions of Records 8+9.

Record 26 consists of a draft regulation and a covering memorandum. The Ministry claims the section 12(1) exemption (Cabinet records) applies to the entire record, but also that section 17(1) applies to one paragraph in the covering memorandum that, in the Ministry's view, contains commercial information. OPG supports the Ministry's position on this paragraph. Having carefully reviewed the contents of this paragraph, I do not accept this position. The information in this paragraph does not "relate solely to the buying, selling or exchange of merchandise or services." Rather, it describes the anticipated transfer of certain information between the Ministry and OPG in the context of the draft regulation attached to the covering memorandum. I find that this paragraph does not contain "commercial information" or any of the other types of information listed in section 17(1). Because all three parts of the section 17(1) test must be established, I find that the identified paragraph on page 1 of Record 26 does not qualify for exemption and, subject to any finding I make under section 12(1), it should be disclosed.

Record 27 is a two-page internal memorandum from staff at MOF, together with a fax cover sheet indicating that the memorandum was sent to a senior official at the Ministry for comment. The memorandum is dated May 11, 2000 and discusses the OPG market transition plan for a certain category of customers. Neither the Ministry nor MOF has argued that Record 27, with the exception of the identified portion of the fourth paragraph on page 2, contains any of the types of information listed in section 17(1). Having reviewed this record, I find that, with the one noted exception, none of the required types of information are present. Because all three parts of the test must be established, I find that Record 27, with the exception of the cost and pricing information in the fourth paragraph on page 2, does not qualify for exemption under section 17(1) and, subject to any finding I make under section 18(1) and section 12(1), it should be disclosed.

## **Part 2: Supplied in Confidence**

In order to satisfy Part 2 of the test, the affected parties and/or the Ministry must show that the information was supplied to the Ministry in confidence, either implicitly or explicitly.

### ***Supplied***

The "supplied" requirement of the Part 2 test reflects the purpose in this exemption, that being the protection of the informational assets of a third party. The authors of the William Commission report (*Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980)) made the following comments about this purpose:

. . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating*



*to commercial matters generated by government itself.* The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. (pp. 312-315) [my emphasis]

### ***In confidence***

The “in confidence” component of the test requires a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the supplier had an expectation of confidentiality with respect to the information; this expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may be either explicit or implicit. (Order M-169)

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

(Order P-561)

### ***Representations and Findings***

#### **Records 2,11 and the undisclosed portions of Record 8+9**

As stated earlier, I have no representations from any of the affected parties connected to Records 2, 8+9 or 11, and the Ministry has withdrawn its section 17(1) exemption claim for these records.

Although the various affected parties may have supplied these records, there is no indication in any of them that they were supplied with an explicit expectation that the Ministry would treat them confidentially. In the absence of any representations, I also have no basis to conclude that there was any implicit expectation of confidentiality. Accordingly, I find that the second

requirement for the section 17(1) test has not been established, and these records do not qualify for exemption under that section of the *Act*.

The Ministry has not claimed any other exemption for Records 2 and 11, so they should be disclosed to the appellant. I will consider the undisclosed portions of Records 8+9 in my discussion of the Ministry's section 12(1) exemption claim.

### Record 1

Record 1 consists of a series of presentation slides used by the affected party in a presentation to the Ministry on February 22, 1999. The Ministry and the affected party connected to Record 1 both submit that it was supplied in confidence to the Ministry.

It is clear from the face of Record 1 that it was authored by the affected party, and I accept that the affected party "supplied" this record to the Ministry in the context of its presentation.

The Ministry submits that the presentation was made to a select group of Ministry staff on a confidential basis, and that the content of the presentation relates to the commercial impacts of the administration of an identified agreement between the affected party and another party. The affected party makes similar representations in support of the Ministry's position. The affected party submits that its agreement with the other party is governed by a confidentiality clause, the text of which was provided to me as part of the affected party's representations. Based on the representations and my review of Record 1 and the confidentiality clause, I accept that disclosing this record would reveal the existence of the agreement between the affected party and the other party, which is precisely what the confidentiality clause is designed to prevent. In my view, there is a direct link between the presentation slides that comprise Record 1 and the affected party's agreement, and this is sufficient to establish a reasonable expectation of confidentiality on the part of the Ministry and the affected party at the time the slides were presented. Therefore, I find that the second part of the section 17(1) test has been established for Record 1.

### Record 3

The remaining portion of Record 3 is a series of presentation slides used by the affected party in a presentation to the Ministry on January 29, 1999. For the same reasons as Record 1, I find that the affected party "supplied" this record to the Ministry in the context of its presentation.

The affected party and the Ministry both submit that this portion of Record 3 refers to the affected party's participation in a specified program, and that an agreement was reached under this program between the affected party and another party. The affected party submits that this agreement contains a confidentiality provision restricting the affected party's ability to disclose its participation in the project. In addition, the Ministry and the affected party submit that the record contains the "actual electricity costs" for the affected party's facility, which is not known to the public or the affected party's competitors. They submit that this information was provided to the Ministry "for the sole purpose of assisting ministry staff in analyzing different options, briefing Cabinet and in drafting a regulation, on the implicit understanding that it would remain confidential and the ministry has maintained it in confidence."

Based on the parties' representations and my review of the content of Record 3, I accept that disclosing the January 29, 1999 presentation slides would reveal the participation of the affected party in the identified program, which would appear to contravene the confidentiality clause in the agreement governing this program. I also accept that the affected party's pricing practices and operating costs, as contained in these slides, is the type of information that would, in the circumstances, be provided to the Ministry on a confidential basis. Therefore, I find that the second part of the section 17(1) test has been established for the portion of Record 3 containing the January 29, 1999 presentation slides.

Records 4, 14, 23, 24 and 27

OPG is the affected party connected to Records 4, 14, 23, 24 and 27.

As noted above, the section 17(1) exemption was designed to protect information derived from non-governmental third parties. Ontario Hydro was a governmental organization, whereas OPG is a private entity. Based on date references contained in Records 4, 14 and 27, it is clear that they were created after Ontario Hydro was "de-merged" on April 1, 1999, and OPG came into existence. Records 23 and 24 are undated, but one can infer from their content and the parties' representations that they, too, were created after April 1, 1999. Accordingly, I find that these records contain the information of a non-governmental third party (OPG), and OPG is entitled in this case to avail itself of the protection afforded in section 17(1) (See also Order PO-1974). For this reason I will interpret any reference to "Ontario Hydro" in these records to apply to OPG.

OPG submits that the information in Records 4, 14, 23 and 24 was "supplied by OPG/Ontario Hydro to [the Ministry] for the purpose of getting Order in Council (OIC) approval to enter into the special rates with customers, or to assist the Ministry in preparing the TRO [Transition Rates Option] regulation." Although OPG does not specifically refer to Record 27, given the content of this record and its similarity to the other records in this category, I find that the arguments provided by OPG are relevant to the cost and pricing information on page 2 of Record 27 as well. OPG makes a number of submissions to substantiate its position that the information in these records was provided "explicitly in confidence," including the following:

- cover memos of packages seeking OIC approval are always marked confidential;
- OPG identified all the company-specific information to the Ministry as confidential;
- the information at issue is considered confidential and commercially sensitive by OPG and its customers, as demonstrated by the fact that OPG and customers enter into confidentiality agreements;
- this type of information has been "ring-fenced within OPG since June 30, 2000," to keep it confidential from OPG's sales staff and the general public;
- the Ontario Energy Board made ring-fencing of the type of information at issue a requirement of OPG's retail licence on September 22, 2000.

The Ministry's representations support OPG's position. The Ministry also provided me with a sample copy of a confidentiality agreement between OPG and its customers.

MOF also made representations on Records 24 and 27, since they originated in that ministry. MOF submits that it has:

...consistently treated this [cost and pricing] information in a manner consistent with its confidential nature. MOF staff kept all such information obtained from OPG locked securely in cabinets when not in the office. Office doors were kept locked when staff were not on the premises. Circulation of the documents was kept at a minimum. Electronically, information is stored in secure electronic drives with password restricted access. Access to all staff computers is password protected. The MOF and OPG staff have an understanding that all commercial and financial information is strictly confidential in nature and will not be disclosed by either party absent a legal requirement to do so. In light of the confidential nature of this information, the Ministry submits that the expectation of confidentiality was reasonable and has an objective basis.

The Ministry agrees with and relies on the MOF's position on Records 24 and 27.

Based on the various representations and my review of the records, I find that the second part of the section 17(1) test has been established for Records 4, 14, 23 and 24, and the cost and pricing information in the fourth paragraph on page 2 of Record 27. Records 14 and 23 were created by OPG and supplied to the Ministry in the context of the development of the TRO regulation. Records 4, 24 and 27, although created by the staff of the Ministry or MOF, contain information supplied by OPG in this same context. I also accept that the contents of these records relate to discussions taking place with a reasonably-held and objective basis of confidentiality, thereby satisfying the second requirement of Part 2 of the section 17(1) test.

### **Part 3: Harms**

To discharge the burden of proof under the third part of the test, the parties opposing disclosure must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information were disclosed. The Ministry and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" (see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and Orders PO-1745 and PO-1747).

#### Record 1

The affected party connected to Record 1 submits that its disclosure could reasonably be expected to prejudice its competitive position (section 17(1)(a)) and result in "undue loss or gain" (section 17(1)(c)). Referring to section 17(1)(a), the affected party submits that if the information is disclosed, there is a reasonable expectation that its ability to negotiate future agreements relating to similar projects will be compromised. Referring to section 17(1)(c), the

affected party submits that disclosure can reasonably be expected to result in its competitors learning of the effect that an increase in energy pricing will have on the long-term viability of its facility. It submits that its competitors will exploit this information, giving them an “undue benefit” and creating an “undue loss” for the affected party. The affected party also identified that certain portions of Record 1 are “particularly sensitive”. The Ministry supports the affected party’s position.

I accept the affected party’s position. In my view, disclosure of the contents of Record 1, for the most part, could reasonably be expected to compromise the affected party’s ability to negotiate future agreements of the type referred to in the record, and I accept the evidence of the affected party that this could prejudice significantly its competitive position in the industry in which it operates. Although small portions of the Record 1 presentation slides may not satisfy the harms requirement of section 17(1), I find that disclosure of these portions would not be meaningful, and the severance provisions of section 10(2) of the *Act* do not apply for that reason (see Order PO-1663 and PO-1735 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)).

Therefore, I find that Record 1 in its entirety qualifies for exemption under section 17(1)(a).

### Record 3

The affected party and the Ministry both submit that if Record 3 is disclosed there is a reasonable likelihood that it would result in commercial harm to the affected party’s business. They also submit that the pricing information contained in the record “could be misinterpreted without further clarification and knowledge of price formula and conditions.”

I accept the Ministry’s position regarding commercial harm. I find that disclosing the January 29, 1999 presentation slides, which contain information including the affected party’s pricing practices and operating costs that is not otherwise known to the public or the affected party’s competitors, could reasonably be expected to prejudice significantly the affected party’s competitive position, as provided by section 17(1)(a). I also find that the severance provisions of section 10(2) are not relevant, for the same reasons as I found for Record 1.

Therefore, I find that the January 29, 1999 presentation slides in Record 3 qualify for exemption under section 17(1)(a).

### Records 4, 14, 23, 24 and 27

OPG makes the following submissions on the harms component of section 17(1):

On May 1, 2002 Ontario’s competitive market for electricity is set to open. When the market opens consumers in Ontario will be able to purchase electricity from any electricity retailer licenced in Ontario. In preparation for an open market all licenced retailers, including OPG, are meeting with potential customers, including those listed in the information at issue in this appeal, in order to attempt to negotiate contracts for the sale of electricity in the new open market.

As noted earlier, the reason that the information at issue in this appeal was ring fenced, rather than being made public, is that market participants agreed that such information could: (1) damage the competitive position of individual customers and (2) give OPG's retail arm a competitive advantage over other retailers in preparing bids to customers.

Releasing this information could damage the named customers' competitive position because it details electricity use, which is a component of such companies' production costs. Revealing cost information could give competitors of the named companies whose electricity costs are not included in the information an advantage. It is therefore reasonable to expect that the release of the information could harm the competitive position of the named companies...

Releasing this information could negatively affected OPG's competitive position in negotiating future electricity supply contracts. It is reasonable to assume that customers may be reluctant to provide OPG with this kind of information in future, even under confidentiality, or ring-fence agreements. They will likely perceive a higher risk that the information will be made public. Without this kind of information, OPG cannot develop bids for the sale of electricity to customers. Since OPG's private sector competitors are under no obligations to release this kind of information, customers may decide not to purchase electricity from OPG, rather than risk the release of such information in future. It is, therefore, reasonable to conclude that if the information is released:

- OPG's competitive position would be damaged,
- the release would interfere with future negotiations for the supply of electricity with customers, and,
- OPG would suffer undue losses.

The Ministry makes similar submissions with respect to Records 4, 14, 23 and 24. It also submits that certain records consist of customer lists, and that in Order P-76 this office previously determined that customer lists are commercially sensitive information. MOF also provided supportive representations with respect to Records 24 and 27.

Record 4 is a "Background Note" relating to "Ontario Hydro's Load Retention and Expansion Rate." Page 1 of this record consists of a description of the Load Retention and Expansion Rate program itself, and pages 2-10 deal with specific agreements with affected parties under the terms of this program. Records 23 and 24 are described by the Ministry as, respectively, a "list of companies on special rates" and a "list of community dominant companies". These two records identify a number of companies, and contain facts regarding their business relationships with OPG, including pricing information for the various companies.

Having carefully reviewed these records and considered the various submissions, I accept that disclosing the information of the various companies identified in Records 23 and 24, together with the specific pricing information for some of these companies, could reasonably be expected to prejudice the ability of these companies to negotiate similar future pricing arrangements of

this nature, which would negatively affect their competitive position in the market place where they operate.

For the same reason, I find that disclosure of the detailed descriptions of the various Load Retention and Expansion Rate agreements contained on pages 2-10 of Record 4 could reasonably be expected to prejudice the competitive position of these companies. However, this reasoning does not extend to page 1 of Record 4. Page 1 does not identify any third party company involved in the Load Retention and Expansion Rate program. It simply describes the government policy that underlies the program and sets the context for the discussion on the specific agreements that follows. Disclosing page 1 of Record 4 could not prejudice the competitive position of any company participating in the Load Retention and Expansion Rate program, since no such company is identified on this page. In addition, I am not persuaded, based on the representations provided by the parties, that disclosure of this page could reasonable be expected to prejudice significantly the competitive position of OPG. The arguments put forward by the Ministry and OPG in this regard, in my view, are based on the ability to identify specific companies in commercial arrangements with OPG, and because page 1 of Record 4 does not contain identifying information, I find that the harms requirement of section 17(1) has not been established for this page.

Record 14 is a Sample Electricity Invoice dated April 6, 2000 of a named OPG customer. The record contains detailed information about the company's energy use under a special rates contract. I accept that disclosing this record in its entirety could reasonably be expected to prejudice the competitive position of the named company. However, in my view, if the customer's name, account number and other identifying information is severed from this record, disclosing the rest of the record could not reasonably be expected to result in any of the section 17(1) harms as it relates to this company. As far as OPG's interest is concerned, I find that OPG has failed to provide the detailed and convincing evidence necessary to establish a reasonable expectation of probable harm to its competitive position through the disclosure of actual billing information from April 2000, which is more than two years ago and relates to rates in existence after competition was introduced into the electricity market. Therefore, I find that only the information in Record 14 that would identify the customer company qualifies for exemption under section 17(1). The rest of the record does not qualify and should be disclosed to the appellants.

Both the Ministry and MOF submit that disclosure of cost and pricing information in Record 27 may "adversely impact the competitive and financial performance of OPG." They also submit that disclosure of Record 27 "would also provide competitors with insight into OPG's bidding practices which could harm its competitive position in the electricity market in Canada and the United States." Based on my review of the record and the parties' representations, I am satisfied that disclosure of the cost and pricing information contained in the fourth paragraph on page 2 of Record 27 could reasonably be expected to significantly prejudice OPG's competitive position, and that this information qualifies for exemption under section 17(1)(a).

In summary, I find that Records 1, 23 and 24, the January 29, 1999 presentation slides in Record 3, pages 2-10 of Record 4, the identifying information in Record 14, and the cost and pricing information in the fourth paragraph on page 2 of Record 27 qualify for exemption under section 17(1)(a) of the *Act*. I will attach a highlighted copy of Records 14 and 27 with the copy of this

order sent to the Ministry that identifies the portions of these records that qualify for exemption under this section.

### **ECONOMIC AND OTHER INTERESTS**

The Ministry claims section 18(1)(a), (c) and (d) as an alternative basis for denying access to Records 24 and 27. In that regard, the Ministry relies on the representations of MOF. I have determined that Record 24 qualifies for exemption under section 17(1)(a) so I will not consider it further here.

Turning to Record 27, the representations provided by MOF on section 18(1), in my view, are directed at the portions of this record that I have already determined qualify for exemption under section 17(1)(a), specifically “financial and commercial information relating to surplus power rates given by [OPG] to its customers”. Because this information is exempt under section 17(1), I will not consider it further here. As far as the rest of Record 27 is concerned, I find that it does not contain any of the types of information outlined in section 18(1)(a); nor have I been provided with detailed and convincing evidence to establish that disclosure of the rest of Record 27 could reasonably be expected to result in any of the harms identified in sections 18(1)(c) or (d). Therefore, I find that, with the exception of the portions of Record 27 I have found qualify for exemption under section 17(1), the rest of this record does not qualify for exemption under section 18(1)(a), (c) or (d) of the *Act*.

### **CABINET RECORDS**

The Ministry originally claimed that pages 3-8 of Records 8+9 and Record 26 qualify for exemption under, respectively, sections 12(1)(b) and 12(1)(f) of the *Act*. In its representations, the Ministry adds section 24 and 27 to the scope of the Cabinet record exemption claim, and relies on the representations of MOF for these two records. Again, because I have already determined that Record 24 qualifies for exemption under section 17(1)(a), I will not consider it further here.

The relevant provisions of section 12(1) read as follows:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

...

- (f) draft legislation or regulations.

#### ***Section 12(1)(b)***

The Ministry must establish the following two requirements in order for a record to qualify for exemption under this section:



1. the record must contain policy options or recommendations; and
2. the record must have been submitted or prepared for submission to Cabinet or its committees.

(Order 73)

Pages 3-8 of Records 8+9 consist of a slide presentation addressing “Industrial Prices Management Options.” Pages 1, 2 and 9 of this record have already been disclosed to the appellant. The Ministry submits that the remaining pages set out “the benefits and risks to 4 different options and conclude with a recommendation as to which option to choose.” The Ministry submits that the slide package was presented to a named Cabinet committee and that, based on this presentation, the committee provided direction regarding the drafting of a regulation.

Based on my review of the records and the Ministry’s representations, I am satisfied that pages 3-7 of Records 8+9 meet the requirements of section 12(1)(b) and must not be disclosed. Page 8 is simply a cover sheet to Page 9 (which has already been disclosed). This page clearly does not qualify for exemption under section 12(1)(b) and should be disclosed to the appellant.

***Section 12(1)(f)***

Record 26 consists of a draft regulation and a covering memorandum. I find that the draft regulation itself (pages 2-4) falls squarely within the scope of section 12(1)(f) and must not be disclosed.

Clearly, the covering memorandum is not a draft regulation. I have reviewed the information in this memorandum and, although it speaks to the same general subject matter, in my view, its disclosure would not reveal the actual content of the attached draft regulation. Accordingly, I find that page 1 of Record 26, which constitutes the cover memorandum to the draft regulation, does not qualify for exemption under section 12(1)(f) and should be disclosed.

Record 27 consists of a fax transmittal sheet and attached 2-page memorandum to and from senior MOF officials on the topic of OPG’s market transition plan. Clearly the transmittal sheet, which simply asks for comments, does not qualify for exemption under section 12(1)(f).

MOF submits that the attached memorandum discusses the components of the transition plan that formed the basis of a draft regulation. MOF relies on the fact that this memorandum was copied to the Minister’s staff person as evidence that it would be discussed with the Minister, and submits that the information in the memorandum would reveal the content of the draft regulation, either expressly or by implication. On this basis, MOF takes the position that disclosure of the memorandum would permit the drawing of accurate inferences with respect to subsequent Cabinet deliberations, and should be exempt under either section 12(1)(f) or the introductory wording of section 12(1).

Having carefully reviewed the contents of the memorandum and the draft regulation in Record 27, I do not accept this position. As MOF explains in its representations, the memorandum discusses the components of a transition plan that formed the basis of a draft regulation that ultimately led to the regulation approved by Cabinet and subsequently implemented. In my view, although the memorandum speaks to the same general subject matter as the draft regulation, its disclosure would not reveal the actual content of the regulation, and I find that the connection between the content of the memorandum and the draft regulation is too remote to bring the memorandum within the scope of section 12(1)(f), which is quite specific and narrowly defined.

***Introductory wording***

MOF also claims that Record 27 falls within the scope of the introductory wording of 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 an Executive Council (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 that 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 disclosing 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).

It is clear that the memorandum comprising Record 27 was not placed before Cabinet or any of its committees. There is also nothing in the content of the memorandum to indicate that it was prepared for the purpose of briefing the Minister of Finance and, in my view, the fact that one of the Minister's staff is copied on this memorandum is not, in itself, sufficient to establish that the contents of the memorandum would reveal the substance of any subsequent deliberations of Cabinet that might involve the Minister. I would describe the memorandum more in the nature of a briefing note that points out certain aspects of the OPG market transition plan, as developed by the Ministry, that may be of interest and relevance to MOF. Based on MOF's representations, I am not persuaded that the contents of this memorandum would reveal or permit accurate inferences to be drawn as to the substance of any deliberations of Cabinet or its committees, and for that reason I find that it does not qualify for exemption under the introductory wording of section 12(1) of the *Act*.

**ORDER:**

1. I order the Ministry to issue a decision to the appellant on Record 25 in accordance with sections 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request and without recourse to a time extension. I further order the Ministry to provide me with copies of any correspondence sent to the appellant.

2. I uphold the Ministry's decision to deny access to Records 1, 23 and 24 in their entirety; the January 29, 1999 slide presentation in Record 3; pages 2-10 of Record 4; pages 3-7 of Records 8+9; the portions of Record 14 containing information identifying the OPG customer; pages 2-4 of Record 26; and the cost and pricing information contained in the fourth paragraph on page 2 of Record 27. I have attached a highlighted version of Records 14 and 27 with the copy of this order sent to the Ministry, which identifies the portions that qualify for exemption and should **not** be disclosed.
3. I order the Ministry to disclose Records 2, 6 and 11 in their entirety; the undisclosed portions of page 2 of Record 10; and all portions of Records 3, 4, 8+9, 14, 26 and 27 not covered by Provision 2 of this order, to the appellant by **December 19, 2002** but not before **December 14, 2002**.
4. I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 3, only upon request.

Original signed by:  
Tom Mitchinson  
Assistant Commissioner

November 14, 2002