



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2195**

**Appeal PA-020353-1**

**Ministry of Finance**



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## **BACKGROUND:**

The Ontario electricity market was opened to competition on May 1, 2002. *The Energy Competition Act, 1998* embodies the framework for the creation of successor corporations to the former Ontario Hydro and the framework for the competitive electricity market. One of these successor corporations, Ontario Power Generation Inc. (OPG), was granted a transitional generating licence. This licence provides that, within 10 years following the date upon which the competitive energy market opens, OPG is required to have reduced its effective control over the Ontario marketplace to 35% of the supply options available to service Ontario.

As a first step towards its divestiture requirements, OPG initiated a competitive auction process for the privatization of its Bruce Nuclear Facility. A number of proposals were submitted and Bruce Power was eventually selected. OPG and Bruce Power then negotiated a master agreement and a lease agreement to formalize arrangements.

OPG has also announced plans to privatize additional generating stations in order to meet the conditions set out in its licence.

In June 2002, the Provincial Auditor submitted an audit of the Bruce lease agreement to the Standing Committee on Public Accounts. According to the representations provided by the Ministry of Finance in the course of this appeal, the audit concluded, "the auction process was appropriate and consistent with standard business practices, that the bidding process was competitive and that the highest bidder won the auction".

## **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 information relating to the lease of the Bruce Nuclear Facility. Specifically, the request included:

... copies of the Lease including any memoranda or other reports provided by OPG to the Ministry of Finance, which describes the rationale, mechanics and application associated with this transaction, and in particular, any descriptive or explanatory information pertaining to the fixed and variable payments from Bruce Power to OPG under the Lease.

The Ministry identified 27 responsive records and notified OPG pursuant to section 28 of the *Act*. OPG identified certain portions of the records that could be disclosed, and objected to the disclosure of the remaining records.

The Ministry then issued a decision letter to the requester, granting partial access to the records. Access to the remaining responsive records was denied in full or in part under sections 12(1) (cabinet records), 17(1) (third party information), and 18(1) (valuable information and economic and other interests of the government).

The Ministry provided the requester with an index setting out the exemptions claimed for each responsive record. The requester (now the appellant) appealed the Ministry's decision.

During mediation, the appellant agreed not to pursue access to Records 3 to 16. As a result, section 12(1) is no longer at issue in this appeal.

Mediation did not resolve the appeal so it was transferred to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Ministry and OPG, inviting submissions on the issues raised in the appeal. Both parties provided representations to me. I then sought submissions from the appellant. The appellant chose not to submit representations.

In its representations, the Ministry states for the first time that it is now prepared to disclose Records 21 and 22 in their entirety and additional portions of all remaining responsive records. OPG states in its representations that it does not object to the disclosure of these same records and portions of records.

Records 1 and 2 are identified in the index as the "Lease Agreement" and the "Master Agreement" respectively. However, it is clear from the Ministry's representations that the numbering for these two records has been reversed. Accordingly, my discussion of Record 1 in the body of this order refers to the "Master Agreement", not the "Lease Agreement".

## **RECORDS:**

There are eleven records that remain at issue in this appeal.

Record 1 is the "Master Agreement" involving the Bruce Nuclear Power Development.

Record 2 is the "Lease Agreement" involving the Bruce Nuclear Power Development.

Records 17 through 19 are correspondence from OPG to the Provincial Auditor dated January 14, 2002, December 6, 2001, and November 27, 2001, respectively.

Record 20 is a slide presentation by OPG to the Provincial Auditor dated July 24, 2001.

Records 23 and 24 are slide presentations relating to aspects of the lease.

Records 25 and 26 are letters dated February 1, 2002, and January 25, 2002, from OPG to the Ministry relating to financial aspects of the lease.

Record 27 is an e-mail message dated January 18, 2002, from OPG to a Ministry official and an employee of the Ministry of Energy, Science and Technology, relating to the lease.

Access to all of these records is denied in part.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

The Ministry and OPG rely on sections 17(1)(a) and (c) as one basis for denying access to all portions of records at issue in this appeal.

#### **General Principles**

Sections 17(1)(a) and (c) of the *Act* read:

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

For a record to qualify for exemption under sections 17(1)(a) or (c), the parties resisting disclosure (in this case 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]

## **Part 1: Type of Information**

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

### ***Commercial Information***

Commercial information is information that 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]

OPG submits that:

The information which OPG believes should not be disclosed refers to matters concerning OPG's strategic commercial position and/or matters relating to the Bruce transaction, including without limitation, negotiated payments, valuations, valuation assumptions, range of values, negotiating strategies, negotiated terms and conditions, bid comparisons, critical negotiation issues, pricing practices and methodology and tax issues. OPG submits that this information is clearly financial and/or commercial information.

The Ministry's representations support OPG's position.

Both parties provide a record-by-record outline identifying specific withheld portions and explaining how they satisfy the tests for “commercial” and “financial” information.

Having carefully reviewed the various records, I concur with the Ministry and OPG. Records 1 and 2 in this appeal are agreements negotiated by OPG and Bruce Power for the operation of the Bruce Nuclear Facility. Clearly, these agreements reflect a commercial relationship between the parties, and fall within the scope of “commercial” information as the term is defined in section 17(1) of the *Act*. Some portions of these records also contain “financial” information.

The other records all contain information relating to the lease agreements, many of which were created in the context of the audit conducted by the Provincial Auditor. I find that all of the withheld information in these records relates directly to the agreements themselves, and qualifies as “commercial” and/or “financial” information for the same reasons.

Therefore, part one of the section 17(1) exemption test has been established.

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

In order to satisfy part 2 of the test, the Ministry and/or OPG must show that the information was “supplied” to the Ministry “in confidence”, either implicitly or explicitly.

### ***Supplied***

OPG submits:

The government of the Province of Ontario (the “Province”) is the sole shareholder of OPG. The information at issue was supplied to the Province for the purpose of informing the shareholder and the Provincial Auditor of the details of the transaction.

The Ministry takes a similar position, claiming that the various records were provided to the Ministry in its role as shareholder. The Ministry refers to the Shareholder’s Agreement signed on September 24, 1999 by the Minister of Energy, Science and Technology in his capacity as shareholder and Chairman of OPG, and submits that this agreement includes a provision requiring the OPG to provide information to the shareholder.

I concur, and find that the various records were “supplied” by OPG to the Ministry, thereby satisfying the first requirement of the part two test. As the sole shareholder of OPG, the government of Ontario would be entitled to a copy of the various agreements entered into by OPG in the context of its privatization efforts, which would include Records 1 and 2 in this appeal. Some of the other records were provided to the Ministry in the context of the Provincial Auditor’s audit of the agreements (Records 17, 18, 19 and 20), and the rest in the context of ongoing discussions with OPG relating to specific aspects of the lease agreement (Records 23, 24, 25, 26 and 27).

Previous orders have found that, because an agreement is typically the product of a negotiation process, the content of a contract between an institution and a third party does not normally qualify as having been “supplied” for the purposes of section 17(1) of the *Act*. However, this line of orders does not apply to the agreements at issue in this appeal, where the Ministry is not a party. Records 1 and 2 were not subject to a negotiation process involving the Ministry; rather, they were provided to the Ministry after any negotiation between OPG and Bruce Power had been completed.

### ***In Confidence***

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that there was a reasonable implicit or explicit expectation of confidentiality on the part of the supplier at the time the information was supplied. This expectation must have an objective basis. [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:

- Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- 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.
- Not otherwise disclosed or available from sources to which the public has access.
- Prepared for a purpose that would not entail disclosure.

[Order P-561]

Both the Ministry and OPG submit that the undisclosed portions of the records contain information that was supplied by OPG in confidence to Ministry staff.

OPG submits:

... The information at issue was communicated to the province 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 Province under the express guise of confidence. As further evidence of the confidentiality of the information at issue provided to the Ministry for the purpose of the Provincial Auditor's Special Audit of the Bruce Nuclear Transaction, the publicly issued Auditor's Report dated June 6, 2002, did not disclose the information that OPG and the Ministry submits be withheld from public release.

The Ministry points to the following confidentiality provision in its Shareholder Agreement with OPG in support of its position that the information at issue in this appeal was supplied in confidence:

The Shareholder acknowledges that 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 [OPG] or result in undue loss or gain to parties other than [OPG]. [OPG] 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:

Records 17, 20, 21, 22 and 24 are explicitly marked confidential. [The Ministry] also was provided copies of these records with an expectation that the records would be held in confidence and the Ministry treated the Records as confidential.

...

Records 19 and 20 contain commercial and financial information related to the bidders, the transaction costs and the specific details of the bids. The [Ministry's] Request for Proposals, referred to previously, explicitly provided that financial or commercial information that was marked as confidential by a bidder would be treated as confidential. Accordingly, an expectation of confidentiality applied to documents prepared by the successful bidder in the course of carrying out its contract. Records 23 to 27 consist of material from OPG to [Ministry] staff regarding financial issues related to the Bruce Transaction (including valuations, model assumptions, model results, strategic options). These records should not be disclosed under clauses 17(1)(a) and (c) of [the Act] as they contain confidential commercial and financial information of OPG that was supplied to the Ministry with an expectation of confidentiality.

The Ministry also describes how the records were treated by staff at both the Ministry and OPG:

...Both [Ministry] staff and OPG staff treated these Records consistently in a manner that showed concern for their sensitivity. [Ministry] staff kept all Records obtained from OPG locked securely in cabinets when not in the office. Office doors were kept locked when staff was 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 [Ministry] and OPG staffs 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 the information, the Ministry submits that the expectation of confidentiality was reasonable and have an objective basis.

I find that the confidentiality component of part two of the test has been established for all portions of records that remain at issue in this appeal. Having considered the circumstances under which the records were supplied to the Ministry, in my view, it is reasonable to conclude that the Ministry and OPG expected that they would be treated confidentially. There is an explicit reference to confidentiality on certain records. Where no explicit reference is included, confidentiality can reasonably be implied based on the similarity of the exempt information or the confidentiality provisions of the Shareholder Agreement. The parties have established that



the information is treated consistently in a manner that indicates a concern for its protection, and although much of the information the Ministry has agreed to disclose was made available to the public through the audit conducted by the Provincial Auditor, it is significant that, according to OPG, this audit did not reveal the type of commercial and financial information being withheld in this appeal.

For all of these reasons, I find that all of the withheld portions of records contain information that was supplied by OPG to the Ministry in confidence, thereby satisfying part two of the section 17(1) test.

### **Part 3: Harms**

Under part 3, the Ministry and/or OPG must demonstrate that disclosing the information “could reasonably be expected to” lead to a specified result. To meet this test, the parties resisting disclosure must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient. [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.)].

With respect to the potential harms that could reasonably be expected to arise as a result of the disclosure of the information, the OPG submits:

Release of information at issue would result in significant prejudice to the competitive position of OPG and an undue loss to OPG and the Province, together with a corresponding gain to OPG’s competitors. Furthermore, the release of financial and commercial information would compromise OPG’s competitive edge to negotiate future business relationships in furtherance of its mandated decontrol, providing third parties with the ability to predict OPG’s negotiation and valuation schemes and therefore prejudice OPG’s ability to maximize value. Finally, release of financial and commercial information could compromise OPG’s ability to effectively execute the exiting Ancillary Agreements, and negotiate future amendments to these agreements with Bruce Power.

The Ministry submits:

...[t]he release of the commercial and financial information in Record 1 and Records 17 to 20 relate 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 the information would also provide third parties with the ability to predict OPG’s negotiation 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. Records 23 to 27 reflect assumptions about pricing, cash flows and proposed mitigation options that would provide competitors with information about OPG's financial planning process and forecasts. The release of the redacted information could reasonably be expected to compromise OPG's ability to negotiate future business relationships in furtherance of its mandated decontrol, by providing third parties with the ability to predict OPG's negotiation and valuation schemes, there by prejudicing OPG's ability to maximize value.

[The Ministry] maintains that valuations, tax information, cash inflows and outflows, business plan forecasts, assumed price curves, operating information etc. are the type of commercial information that clause 17(1)(a) is intended to exempt from disclosure since that type of confidential information could be used by competitors with insight into OPG's business, and permit accurate inferences regarding OPG's bidding strategies in the spot market for electricity and negotiations for long term, fixed price contracts, competitive prices, costs, etc. that could harm OPG's competitive position in electricity markets in Ontario and the United States. In addition, release of this information would harm negotiations for divestiture of additional OPG assets.

I accept the position put forward by OPG and the Ministry.

The undisclosed portions of Records 1 and 17-20 consist of commercial and financial details of the lease arrangement for the operation of the Bruce Nuclear Facility, including estimates of revenue losses and gains and detailed financial information related to contractual arrangements with other commercial entities and information concerning unsuccessful bidders for the Bruce lease. The undisclosed portions of Records 23 to 27 contain detailed information about strategic planning, market forecast information and future decontrol options for OPG. As *The Energy Competition Act*, 1998 makes clear, a new operational structure for the Bruce Nuclear Facility is only the first step in the process of privatizing the electricity market in Ontario. OPG has a mandate to negotiate further similar business arrangements in future and, in my view, disclosing information that would provide competitors with insight into OPG's business operations and strategies could reasonably be expected to result in competitive harm to OPG (section 17(1)(a)) and undue loss to OPG in the context of these future dealings (section 17(1)(c)). [Order PO-1675].

Accordingly, I find that OPG and the Ministry have provided the necessary detailed and convincing evidence to establish a reasonable expectation of harm under sections 17(1)(a) and (c), thereby satisfying the third and final part of the test.

In summary, I find that the withheld portions of Records 1, 17-20 and 23-27 qualify for exemption under sections 17(1)(a) and (c) of the *Act*, and should not be disclosed.

In light of my finding under section 17(1), it is not necessary for me to consider the section 18(1) exemption claim.

As indicated earlier, the Ministry has agreed to disclose certain records in full and others in part. It is not clear to me whether these records have in fact been disclosed, so I will include a provision requiring the Ministry to do so.

**ORDER:**

1. I order the Ministry to disclose Records 21 and 22 in their entirety, and the portions of Records 1, 2, 17-20 and 23-27 identified and described in the Ministry's representations. Disclosure is to be made by **November 12, 2003**.
2. I uphold the Ministry's decision to deny access to the portions of Records 1, 2, 17-20 and 23-27 highlighted on the copy of these records provided by the Ministry with its representations.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

October 21, 2003 \_\_\_\_\_