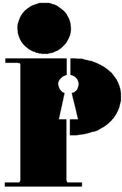

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2646

Appeal PA-050320-1

Ontario Power Generation

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

Ontario Power Generation (the OPG) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "the original agreement pertaining to the building of the first nuclear plant at Pickering between the Government of Ontario/Ontario Hydro and [a named company]/Government of Canada".

The OPG notified the named company (the affected party) of the request pursuant to section 26 of the *Act*, and the affected party responded by advising that it objected to the release of the records responsive the request. After considering the affected party's submissions, the OPG issued a decision in which it denied access to records responsive to the request based on the exemptions in sections 17(1)(a) and (c) (third party information) of the *Act*.

The requester (now the appellant) appealed the OPG's decision.

Mediation did not resolve this appeal, and the file was transferred to the inquiry stage of the process. The adjudicator previously assigned to this file sought representations from the OPG and the affected party, initially, by sending them a Notice of Inquiry identifying the facts and issues in this appeal. Both the OPG and the affected party submitted representations. In its representations the affected party consented to the release of certain portions of the records. In accordance with the affected party's consent, the OPG issued a supplementary decision letter and released those portions of the records to the appellant, and they are no longer at issue in this appeal.

The adjudicator then sent the appellant the Notice of Inquiry, along with a complete copy of the OPG's representations and a severed version of the affected party's representations. The appellant provided representations in response, in which the possible application of the public interest override in section 23 of the *Act* was raised. The adjudicator then shared the appellant's representations with the OPG and invited the OPG to provide representations on the possible application of section 23 to the records at issue in this appeal. The OPG did not provide representations in response.

The file was subsequently transferred to me to complete the adjudication process.

Upon my review of the file, I note that one of the records at issue in this appeal is an exact duplicate of another record at issue. In the circumstances, I will not address the exact duplicate record in this order.

RECORDS:

The records remaining at issue consist of the undisclosed portions of five agreements, which include the 1963 agreement between the Hydro-Electric Power Commission of Ontario, the affected party and the Province of Ontario (the 1963 Agreement), and four amending agreements dated in 1966, 1974, 1983 and 1987. Portions of each of these agreements have been disclosed to the appellant.

DISCUSSION:

THIRD PARTY INFORMATION

As identified above, the OPG denied access to the records remaining at issue on the basis of the exemptions in sections 17(1)(a) and (c) of the *Act*. Those sections 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; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the affected party 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 paragraph (a) and/or (c) of section 17(1) will occur.

I will now review the records remaining at issue and the representations of the parties to determine if the three-part test under sections 17(1)(a) and/or (c) has been met.

Part 1: type of information

The affected party takes the position that the portions of the records which remain at issue contain financial and commercial information for the purpose of the first part of the three-part test. These terms have been discussed in prior orders as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The affected party states:

> [The affected party] seeks to exempt information describing or revealing the financial terms of the agreements. The information in the agreements for which exemptions are sought describe how the construction … was to be financed …
>
> The redacted information reveals … financial and commercial information about [the affected party] …

The OPG did not provide representations on this part of the test.

The records at issue pertain to a commercial arrangement entered into by the affected party, the OPG's predecessor and the Government of Ontario, and relate to the affected party's commercial activities. On my review of these records, I am satisfied that this information constitutes "commercial information" within the meaning of that term in section 17(1) of the *Act*.

Therefore the requirements of Part 1 of the section 17(1) test have been established.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the OPG and the affected party must establish that the information was "supplied" to the OPG's predecessor by the affected party "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be "supplied" to an institution reflects the purpose in section 17(1) of protecting the informational assets of third parties (Order MO-1706).

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020, PO-2043).

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706).

In Order MO-1706, Adjudicator Bernard Morrow addressed the issue of whether information contained in a contract entered into between a third party and an institution, but which was agreed to with little negotiation, could be considered to be "supplied" by the third party. He stated:

> ... [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of [the] section… The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

This approach was also taken by Assistant Commissioner Brian Beamish in Order PO-2435 in which he decided that certain third party *per diem* amounts, referred to in an agreement, were not "supplied" by the third party. He stated:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into [an agreement] with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation.

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

Representations

In support of its position that the information remaining at issue was "supplied" in confidence, the affected party states:

> The redacted information reveals confidential … information about [the affected party], and consists of information from which confidential information about [the affected party] can be inferred. Revealing the financial terms of the [agreements] would allow a knowledgeable observer to calculate or determine … [the affected party's] commercial revenues over the term of the agreement. …. In addition, disclosure of this information would allow knowledgeable competitors … to calculate operating profits and returns to [the affected party] from [the project].
>
> In addition to the financial terms themselves, disclosure of [certain redacted information]… would allow inferences to be drawn about [the finances of the affected party] …

The affected party also states that disclosure of two identified terms in the agreement would reveal the period of time over which it received payments and accrued returns from the project. It then states:

> [The affected party] would have revealed and supplied calculations of its operating profits and returns on capitals costs [and other identified information] to OPG's predecessors in the course of the negotiation of the financial terms of the … [a]greements. Those financial projections would have been supplied in confidence in order to substantiate [the affected party's] negotiating position.
>
> [The affected party] has consistently treated the financial information in the … [a]greements in strict confidence and has not made such information public. To [the affected party's] knowledge, OPG and its predecessors also maintained the financial terms of the … [a]greements and the information supplied during negotiations in confidence.

The affected party then identifies the reasons why the agreements did not contain a confidentiality clause, but states that the affected party negotiated the agreements with an expectation that the financial terms would remain confidential. The affected party then states:

> As such, the information for which redactions are sought qualifies as information "supplied in confidence, either implicitly or explicitly" to OPG's predecessors pursuant to s. 17(1) of [the *Act*], based on the inferences which can be drawn from the information. Regarding the redacted information as information about [the affected party] supplied in confidence is most consistent with the purpose of section 17 [of the *Act*], which is to protect the "information assets" of third parties and to limit disclosure of confidential information about a third party that could be exploited by a competitor. (*Boeing Co. v. Ontario*, [2005] O.J. No 251; Orders PO-1805; 2018; 2184; 2020, 2043.)

The OPG's only representations on this point state:

> … the records at issue are maintained in an access restricted records location for confidential records and not available to the public.

Finding

As identified above, the records at issue are all agreements. The portions of these agreements which remain at issue contain terms specific to these agreements.

Much of the affected party's representations set out above identify its concern that the disclosure of the information in the agreements will allow others to calculate the commercial impact the agreement had on the affected party (its revenues, operating profits and returns resulting from the contract). Clearly, information of this nature, which results from the contract, is not information "supplied" by the affected party for the purpose of section 17(1). As a result, even if information of this nature could be calculated from the disclosure of the records, this disclosure does not reveal information "supplied" to the OPG's predecessor.

The affected party also seems to take the position that the "inferred disclosure" exception applies. As set out above, this exception to the usual conclusion that the terms of a negotiated contract were not "supplied" applies where disclosure of the information in a contract "would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution". The affected party states that it would have revealed and supplied calculations of its operating profits and returns on capitals costs to OPG's predecessors in the course of the negotiation of the financial terms of the agreements, and that those financial projections would have been supplied in confidence in order to substantiate it negotiating position. Its later references to its concerns that inferences about confidential information could be drawn from the disclosure of the records, appear to include references to this information.

I have carefully examined the portions of the records which remain at issue, all of which are contained in the agreements entered into by the parties, and which contain clauses and terms agreed to by the parties. On my review of those terms, and in the absence of any additional information from the affected party about the information which it states was provided to the OPG's predecessor to substantiate the terms of the agreements, I am not satisfied that the disclosure of information in the agreements would "permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution". I have not been provided with specific information regarding what this "non-negotiated confidential information" is, nor how the disclosure of the remaining portions of the records would reveal this information.

The affected party seems to acknowledge that the agreements were negotiated. Based on my review of the agreements, their contents appear to reflect the meeting of the minds that generally takes place during the negotiation process. I am not satisfied that their constituent terms fall into the "inferred disclosure" or "immutability" exceptions. Accordingly, I find that the agreements are contracts between the parties that were subject to negotiation, and that no information in the agreements, including the withheld portions, was "supplied" as that term is used in section 17(1).

Accordingly, I find that that affected party has failed to meet the requirements of Part 2 of the section 17(1) test, as the information contained in the portions of the agreements remaining at issue was not supplied to the OPG's predecessor. As all three parts of the three-part test set out in section 17(1) must be met, I find that the records do not qualify for exemption under section 17(1).

As a final matter, the affected party provided representations identifying the harms that it believes will result from the disclosure of the records (namely, harms to its competitive position, or interference with contractual or other negotiations). In Order MO-1393, Adjudicator Sherry Liang examined whether a lease agreement qualified for exemption under section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (similar to section 17(1) of the *Act* at issue in this appeal). She found that the lease agreement was not "supplied" for the purpose of the second part of the three part test in that section. She then wrote:

> … I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the "intimate details of our operation (costs and constraints) to our direct competition." There may indeed be harm to the affected party from the disclosure of the information. Nevertheless, section 10(1) of the *Act* does not shield this information from disclosure unless it is clear that it originated from the affected party and is therefore to be treated as the "informational assets" of the affected party and not of the Town. In these circumstances, the record is not exempt from the *Act*'s purpose of providing access to government information.

I agree with these comments made by Adjudicator Liang. As noted above, all three parts of the test under this exemption must be established. Having found that the information in the records was not supplied to the OPG's predecessors, I find that section 17(1) does not apply to it.

As I have found that the records are not exempt from disclosure under section 17(1), it is not necessary for me to determine whether the public interest override found in section 23 of the *Act* applies to these records.

ORDER:

1. I order the OPG to disclose the records at issue to the appellant by sending him a copy by **April 7, 2008** but not before **March 30, 2008**.

2. In order to verify compliance with provision 1, I reserve the right to require the OPG to provide me with a copy of the records which were disclosed to the appellant.

Original signed by: February 28, 2008
Frank DeVries
Adjudicator