



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2632

Appeal PA-040353-1

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/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

Incorporated on December 1, 1998, Ontario Power Generation Inc. (OPG) is a commercial entity that is owned entirely by the Province of Ontario. Established to operate the electricity generating assets of the former Ontario Hydro, OPG employs over 11,000 people in communities across Ontario.

Between 2000 and 2001, OPG negotiated transactions with a number of corporate entities - under the aegis of a specific company, New Horizon System Solutions - for the purpose of contracting out the management and operation of OPG's business processes and technology services. These various transactions formed part of several larger contracts with New Horizon System Solutions (the Company), which were effective in March 2002.

NATURE OF THE APPEAL:

In July 2004, OPG received the following request on behalf of an association representing certain OPG employees under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

... a copy of all commercial agreements, including all attachments and records referred to within those agreements between [OPG] and [the Company].

OPG identified approximately 1895 pages of responsive records contained in four volumes (the Agreements), and issued an interim access decision to the requester, including a fee estimate for preparation and copying. OPG informed the requester that the mandatory exemption for third party information in section 17(1), as well as the discretionary exemption for valuable government information at sections 18(1)(a) and (c) of the *Act*, would likely be applied to deny access to information in the responsive records.

OPG also informed the requester that once a deposit on the fee was received, all third parties with an interest in the Agreements between OPG and the Company (the affected parties) would be notified pursuant to section 28 of the *Act*. Section 28 requires notification of parties whose interests may be affected by the disclosure of information that might be subject to the third party information exemption at section 17(1). Section 28 also provides an opportunity for an affected party to make submissions on the proposed disclosure before a final decision regarding access is made. For the purposes of this appeal, the Company is considered an affected party.

Of the 19 affected parties notified by OPG, 15 responded. Five of the affected parties consented to the full disclosure of information pertaining to them in the Agreements while 10 others, including the Company, provided submissions objecting to the release of some or all of the information pertaining to them.

OPG then issued a final access decision in November 2004 in which it granted partial access to the records and applied the exemptions in sections 17(1)(a) and (c), 18(1)(a) and (c) and 21(1) of the *Act* (personal privacy) to deny access to the remaining portions. The decision letter stated:

The record has been severed in accordance with the following provisions of the *Act*:

- Section 17(1)(a) [and] (c) as it contains third party information that could prejudice significantly the competitive position and result in undue loss to the third parties concerned.
- Section 18(1)(a) [and] (c) as it contains technical information regarding OPG security issues and the information could reasonable be expected to prejudice the economic or competitive position of OPG.
- Section 21(1) as it contains information of a personal and private nature, specifically individual signatures.

The requester (now the appellant) appealed OPG's decision with respect to access.

During mediation, the appellant paid the balance of the fee to secure the disclosure of the information to which access had been granted. The appellant indicated at that time that it was not interested in pursuing access to information withheld pursuant to the personal privacy exemption at section 21(1) of the *Act*.

This office initially sent a Notice of Inquiry to OPG and the 19 affected parties, seeking their representations with respect to the application of sections 17(1) and 18(1) of the *Act*. OPG and four affected parties, including the Company, submitted written representations. A fifth affected party contacted this office by telephone to indicate that it did not object to the disclosure of the records contained in the Agreement pertaining to it.

In responding to the Notice of Inquiry, OPG provided submissions regarding two additional issues: the possible application of the exclusionary provision in section 65(6)3 (labour relations and employment records) and the personal privacy exemption in section 21(1) of the *Act* to the Agreements. OPG asserted that section 65(6)3 applied to the Agreements to exclude them from the operation of the *Act* and, thereby, from the purview of this office. In the event the *Act* was found to apply to the records after all, and to supplement its earlier position regarding the exemption of the Agreements under sections 17(1)(a) and (c) and 18(1)(a) and (c), OPG also added the argument that section 21(1) applied to exempt all corporate credit card information which may be contained in the records.

The Company responded to the Notice of Inquiry as well, providing representations on the application of section 65(6)3. In addition, the Company argued, for the first time, that the *Act* did not apply to the Agreements because it did not apply to OPG at the time the records were created. It submitted that the *Act* could not, therefore, apply retrospectively.

The adjudicator formerly assigned to this file addressed issues related to sharing the representations submitted by OPG and the three affected parties through an informal discussion process between this office and the parties. This office sent a modified Notice of Inquiry to the appellant, along with a copy of the non-confidential representations of OPG, the Company and two other affected parties, drawing the appellant's attention to the inclusion of the new issues relating to the possible application of sections 21(1) and 65(6)3 of the *Act*. The appellant

provided representations in response to the issues set out in the Notice, and also made submissions on the potential application of the public interest override in section 23 of the *Act*, in the circumstances of this appeal.

The former adjudicator then sent a copy of the appellant's non-confidential submissions to OPG and the Company, along with a letter inviting representations in response to the appellant's submissions regarding the application of section 65(6)3, the "supplied in confidence" part of the section 17(1) exemption, and the possible application of the public interest override at section 23. Both OPG and the Company submitted reply representations.

After the appeal reached the orders stage, I assumed carriage of it from the former adjudicator.

It should be noted that in providing reply representations, both OPG and the Company requested that their representations not be shared with the appellant or other parties to the appeal. Since no sur-reply representations were sought from the appellant, there was no formal decision made by this office as to the confidentiality of OPG or the Company's representations under the *IPC Code of Procedure* or *IPC Practice Direction 7* (Sharing of Representations). However, in order to properly describe the arguments presented in reply in this order, I have decided that at least some of the non-confidential portions of these submissions must be reproduced, or summarized, in this order.

In addition, during the preparation of this order, it proved necessary to seek clarification from OPG regarding several exhibits. These exhibits are listed in the Index of Closing Documents for the Agreements, but do not appear in the Document Index produced by OPG for the purposes of this appeal, and copies of the exhibits were not submitted to this office. OPG has explained to my satisfaction that these particular exhibits did not form part of the Agreements at issue, and that any reference to them in the representations provided by OPG was inadvertent. Accordingly, since these exhibits did not exist as components of the Agreement, I have recorded these exhibits as non-responsive (to the request) in the attached Appendix.

SUMMARY OF FINDINGS:

The *Act* applies to the records at issue notwithstanding the timing of the transactions leading to the Agreements.

Section 65(6)3 applies to certain records and portions of records to exclude them from the operation of the *Act*. These records, or portions of records, do not fall within the ambit of any of the exceptions in section 65(7) which would operate to return them to the reach of the *Act*.

Those parts of the Agreements, including certain schedules and exhibits in their entirety, which I find contain "technical" information for the purposes of the first part of the section 17(1) test, are conceded by the appellant to be removed from the scope of the appeal and may be withheld. The removal of "technical" information from the appeal's scope renders further analysis of this category of information under the second or third parts of the test for exemption under section 17(1) unnecessary.

The remainder of the information withheld pursuant to section 17(1) of the *Act* does not meet the requirements of part two (“supplied in confidence”) and cannot, therefore, be exempt under this section of the *Act*.

Section 18(1)(a) applies to exempt three exhibits, only.

Some information severed from the records pursuant to the personal privacy exemption does not satisfy the definition of personal information in section 2(1) of the *Act* and it cannot, therefore, qualify for exemption under section 21(1). This includes the signatures of OPG corporate officers and directors. Other information contained in the records fits within the definition of personal information contained in section 2(1), such as the names of employees of OPG and the Company listed in certain schedules to the Agreements, along with their employment status. This information, and several other categories of information, qualifies as personal information, and has also been removed from the scope of the appeal at the behest of the appellant.

The public interest override in section 23 of the *Act* does not apply in the circumstances of this appeal.

RECORDS:

At issue are the withheld portions of the *Information Technology IT Service Agreement* (ITSA) and the *Energy Markets IT Services Agreement* (EMITSA) between OPG and the Company, contained in four volumes.

A specific and detailed listing of my findings respecting the application of the exclusion in section 65(6)3 and the exemptions at sections 17(1), 18(1) and 21(1), as well as the information conceded by the appellant to be outside the scope of the appeal, are set out in the Appendix attached to this order.

The listing and description of the records in the Appendix mirrors, for the most part, that provided in the Document Index prepared by OPG for the purposes of the appeal, with the exception that records to which access was granted in full are not included.

DISCUSSION:

PRELIMINARY ISSUES

NON-APPLICATION OF THE ACT DUE TO TIMING OF TRANSACTION

As noted in the introductory section of this order, the Company argues that the *Act* does not apply to the Agreements because OPG was not an institution covered by the *Act* at the time the Agreements were signed.

On April 1, 1999, the former Ontario Hydro was restructured into five successor companies, and removed from the list of institutions covered by the *Act*. During the time before and after this restructuring period, a number of new corporate bodies were created. OPG was one such

corporate entity. Although some of the newly created corporations were added by Regulation to the list of institutions covered by the *Act* at that time, OPG was not.

However, through the enactment of Ontario Regulation 424/03 on December 8, 2003, which amended the Schedule to Regulation 460, OPG was added to the list of institutions covered by the *Act*, along with all its subsidiaries.

The appellant's request is dated June 24, 2004. It seeks records relating to the Agreements between OPG and the Company, under which the latter administers and operates OPG's business processes and information technology services. The records originated in 2001 and 2002, as products of the negotiations between OPG and the Company.

The *Act* does not contain any special transition provisions in relation to institutions that are added to, or taken off, the Schedule to Regulation 460.

The only transition provision contained in the *Act* is section 69(1), which states:

This *Act* applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this *Act* comes into force.

Representations

In arguing that the *Act* does not apply to the records, the Company submits that the Agreements were negotiated, drafted and completed with the knowledge that OPG was not covered by the *Act*. In the Company's submissions, this factor influenced the manner in which the Company and its affiliates, the other affected parties, negotiated the Agreements and the manner in which they sought to protect their confidentiality and non-disclosure interests. The Company asserts that

...[in] carrying out its negotiations with OPG and concluding the transaction, [the Company] had a legitimate and legally sanctioned expectation of confidentiality, non-disclosure and freedom from the application of the *Act* to the records.

The Company contends that applying the *Act* "retroactively" to the records at issue in this appeal would be "both inequitable and contrary to law." In support of this assertion, the Company refers to the absence of a term in the Agreements seeking to specifically exclude the provisions of the *Act*, as would be expected in accordance with standard legal practice in contracts written for institutions covered by the *Act*. The Company submits that the issue was not addressed contractually precisely because the *Act* did not apply at the time of the transactions. Instead, the parties' expectations of confidentiality in the records were expressed through contractual confidentiality and non-disclosure clauses, in addition to the usual common law obligations.

Analysis and Findings

Following careful consideration of the Company's submissions and the broader context of this appeal, including the principles of statutory interpretation, I reject the Company's argument that

the *Act* does not apply to the records at issue. For the following reasons, I find that the *Act* applies to the records, notwithstanding the timing of the transaction.

The Company has framed its argument by stating that during contract negotiations and at all material times, OPG was exempt from the purview of the *Act*. The Company and its affiliates (the other affected parties) are said to have taken this fact into account in negotiating the transaction and, more specifically, in seeking to protect their confidentiality and non-disclosure interests. The crux of the Company's position is that it had a "legitimate and legally sanctioned expectation of confidentiality, non-disclosure and freedom from the application of the *Act*" that cannot now be repudiated.

In addressing these arguments, I must begin with the provisions of the *Act*. On my review, their meaning is plain and unambiguous. Section 2, the definition section of the *Act*, states that a record "means any record of information however recorded." Section 10(1) sets out a requester's right of access to records in the custody or control of the OPG, subject to the exemptions set out thereafter in the *Act*. The right of access does not include any provision for a distinction between different classes of records, depending on when they were created. Upon being added to the list of institutions covered by the *Act*, OPG was subject to all of its provisions, including section 10(1). It is worth emphasizing that the *Act* contains no transition or temporal provisions limiting the scope of records to which it applies once an institution is added to the Schedule. Accordingly, I find no support for the Company's position in the provisions of the *Act*.

The Company has suggested that it is both "inequitable and contrary to law" for the *Act* to apply to the records at issue. Whether or not the result is inequitable, however, the application of the *Act* to the records held by OPG is one result of a policy choice which the Legislature chose to make. The Legislature could also have chosen to limit the coverage of the *Act*, and treat some records differently from others based on the date on which they were created, but has not done so.

Furthermore, there is nothing unlawful about the result. As I have previously stated, the relevant provisions of the *Act* are plain and unambiguous. The Company described the application of the *Act* to the records as a "retroactive" application, suggesting that it is somehow impermissible. In my view, this is not a matter of retroactivity at all. The application of the *Act* to OPG records began at the time OPG was added to the Schedule in 2003. From that point on, the right of access applied to any records in the custody or under the control of the OPG. This is more akin to a prospective application, in my view.

Moreover, even if it could be said that the application of the *Act* to these records affects pre-existing expectations, as the Supreme Court of Canada has stated, "most statutes in some way or other interfere with or encroach upon antecedent rights." Further, the Court also held that "no one has a vested right to continuance of the law as it stood in the past..." [*Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)* [1977] 1 S.C.R. 271].

For these reasons, I am satisfied that the *Act* applies to the records at issue in the first instance regardless of the timing of the transaction. To the extent that the Company relies on an

expectation of confidentiality attributed to the timing of the negotiations, this may be considered in my analysis of the section 17(1) exemption for third party information.

MISUSE OF THE ACT

The Company also expresses the view that giving effect to this request would subvert the purposes of the *Act*. This viewpoint is expressed in the following manner:

Section 1 of the *Act* explicitly sets forth the purposes of the *Act*. Those purposes provide, in general, for a right of *public* access to information in control of governmental institutions.

There is nothing whatsoever in the *Act* providing for or, indeed, even suggesting the right to access by competing commercial entities or labour unions, especially in circumstances where it is clear that no broader *public* interest is being served.

Based on the foregoing, we respectfully submit that it is absolutely clear that the *Act* was not intended either to:

- Allow an Appellant for disclosure under the Act to employ the Act's provisions for the purpose of unfairly prejudicing the rights of a party dealing with an entity covered by the Act, in particular, if the same is intended merely to benefit the Appellant (eg., a Competitor, Union or Customer); or,
- Provide a "backdoor" for those seeking to gain access to Records which they would otherwise be prevented from obtaining at law and/or by contract.

... [Either] of such uses is a misuse of the *Act* and in direct flagrant violation of the very purposes for which the *Act* was established.

The Records are also covered by common law and contractual confidentiality obligations, which further restrict the right of access to those Records by Competitors, Customer or a Union. ...

None of a Customer, Competitor or a Union should be permitted to gain access through the "backdoor" to the Records in what amounts to a clear misuse of the Act and violation of the purposes for which the Act was established [emphasis in original].

As I understand this submission, the Company would have me decide the issues in this appeal taking into consideration the identity or intentions of the appellant, and the potential uses to which the information, if disclosed, may be put. In my view, this interpretation of the purposes of the *Act* suggested by the Company is untenable, and I reject it for the following reasons.

I would start with consideration of section 1 of the *Act*, which reads:

The purposes of this *Act* are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of government information should be reviewed independently of government; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Next, as noted under the previous discussion, section 10(1) creates an express and unambiguous right of access to records "in the custody or under the control" of an institution such as OPG, subject to exceptions, such as the exemptions outlined in sections 12 to 22 of Part II of the *Act*. The right of access established by section 10(1) serves as an introduction to the comprehensive scheme of access to records held by provincial government ministries and agencies that follows it in Part II of the *Act*. Together with the purposes section set out above, it provides for a basic right of public access, but also recognizes that this right is not absolute and must at times be balanced against various legitimate interests, including the protection of confidential third party information.

Nowhere in the *Act* is the word "public" defined, or restricted, to exclude certain categories of requesters, including those fitting the description of "Competitor, Union or Customer;" nor is there any valid reason to impose such restrictions on the right of access. Rather, I take it as a central tenet to carrying out the purposes of the *Act* that the right to access be exercised without regard to either the identity or the intention of the requester [see Order MO-2199].

Indeed, as former Assistant Commissioner Tom Mitchinson stated in Order PO-1998, "[a]ccess to information laws presuppose that the identity of requesters, other than individuals seeking access to their own personal information, is not relevant to a decision concerning access to responsive records."

In Order P-1001, former Inquiry Officer Anita Fineberg reviewed the decision of the former Ministry of Northern Development and Mines in response to a request for access to records related to facility-sharing arrangements between a named corporation and three Ministry laboratories. The Ministry decided to disclose certain records related to the corporation, denying access to others under sections 13(1), 17(1) and 18(1) of the *Act*. The requester appealed that decision. The affected party corporation also objected to its information being subject to

disclosure under the *Act*, relying on arguments similar to those cited by the Company in this appeal, by averring to the legal principle that "a party cannot do indirectly that which it cannot do directly."

Former Inquiry Officer Fineberg discussed the application of the *Act* to the affected party corporation in the following manner:

There are innumerable individuals, organizations, agencies and businesses that interact with government institutions on a daily basis. During the course of these interactions, information about these entities often comes into the possession of these institutions. In drafting its freedom of information legislation, the government determined that such information should be subject to the provisions of the *Act*, unless the exemptions contained in the statute applied. These exemptions are designed to not only protect the interests of government institutions, but also those of third parties (such as individuals, agencies and organizations) whose information may come into the custody or control of an institution as well. Based on the scheme of the *Act*, therefore, a third party, such as the Corporation, will have the opportunity to fully argue that its interests will be harmed by the release of such information.

...

For the reasons that I have outlined, I reject the Corporation's contention that the appellant should not be able to exercise his right under the *Act* to seek information from the Ministry about the Corporation. As indicated previously, **the issue for me to decide is whether the exemptions claimed by the Ministry and the Corporation have been properly applied so as to deny access to such information** [emphasis added].

I agree with these comments. Under the *Act*, the affected parties in this appeal have been given the opportunity to provide representations on the applicability of the exemption in section 17(1) to the information pertaining to them, and many of them have done so, including the Company. It is on this basis that the disclosure of third party information will be decided in this appeal.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General principles

OPG, supported by the Company, claims that the records, particularly the terms relating to pensions, employee transfers and severance, fall under section 65(6)3 of the *Act* which reads:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the jurisdiction of the Commissioner, or her delegate, to continue an inquiry into the substantive issue of whether or not a record is subject to any of the exemptions contained in the *Act*. If the requested record falls within the scope of section 65(6), it would be excluded from the scope of the *Act*, unless it is found to fall within the ambit of one of the exceptions in section 65(7). Section 65(6) is record-specific and fact-specific. If it applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction.

The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In order to satisfy the definition, more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related matter is required [Order MO-2024-I].

The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157]. The phrase "in which the institution has an interest" means more than a mere curiosity or concern, and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

For section 65(6)3 to apply, OPG must establish that:

1. the records were collected, prepared, maintained or used by OPG or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which OPG has an interest.

Representations

OPG submits that some records, particularly those parts of the Agreements relating to pensions, were prepared, maintained or used in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which OPG has an interest.

OPG's submissions rely upon three authorities in support of the argument that section 65(6)3 applies to exclude records from this inquiry: Order PO-2157, *Ontario Minister of Health and*

Long-Term Care v. Ontario (Assistant Information and Privacy Commissioner), 2003 O.J. No. 4123 (C.A.) and *Solicitor-General of Ontario et al. v. Mitchinson* (2001), 55 O.R. (3d) 355 (C.A.) [*Mitchinson*].

With respect to the nature of the interest in paragraph three of section 65(6), OPG refers to *Mitchinson*, submitting that the interest need not be a “legal” one, and that it is sufficient for the institution to establish that the records in question relate to its own workforce. OPG contends that the terms of the Agreements respecting pensions relate to OPG’s relationship to its employees who fall both within and outside the collective bargaining agreement. OPG also asserts that once these records were excluded from the *Act* by virtue of the operation of section 65(6)3, they remain excluded even if the criteria in section 65(6)3 ceased to apply.

Only two specific records (the Pension & Benefits Cost Allocation Agreement and the Deferred Employee Transfer Agreement) are mentioned by name by OPG. The other information, or components of the Agreements, to which OPG and the Company refer in a categorical manner in seeking to invoke on section 65(6)3, is not specifically identified.

The Company also provided submissions on the application of section 65(6)3 of the *Act* to the withheld portions of the records, stating that:

... the *Act* has no application to those portions ...relating to labour relations and employment-related matters. ... It is clear that the Redacted Information ... clearly and unequivocally relates to labour relations and employment matters in which OPG has an interest.

Furthermore, the entire purpose of the Redacted Information ... is to record, and give legal effect to, the discussions and communications between OPG and [the Company] relating to labour and employment matters such as employee transfers, employee severance arrangements and the like.

The appellant submits that although the records may satisfy the first two parts of the section 65(6)3 test, they do not meet the requirement expressed in the third part. The appellant argues that the labour relations or employment aspects are only incidental to the primary purpose of the records, which is to establish a “wide-ranging” services agreement between OPG and the Company consisting of a series of transactions between a public entity and a service provider, or providers. The appellant refers to the types of records that have been found to satisfy the third part of the test under section 65(6)3 in previous orders of this office and asserts that in all instances, the preparation and use of the records had “a substantial, and not merely peripheral or incidental, connection to labour and employment matters.”

While conceding that labour and employment matters may be affected by the Agreements, the appellant submits that the exclusion at section 65(6)3 of the *Act* is not intended to shield records of this nature from the operation of the *Act*. The appellant contends that access requests regarding asset sales or service agreements between institutions and third parties are more typically, and properly, carried out through an analysis of the exemptions in sections 17 and 18.

In support of this argument, the appellant cites Orders PO-2226, PO-2018, P-1105, P-385, and P-251.

When provided with an opportunity to respond to the appellant's submissions on the possible application of section 65(6)3, OPG argued in reply that certain portions of the Agreements relate to employee transfer and severance arrangements, as well as pension transfer amounts, and that they constitute "records" for the purposes of the *Act*. Furthermore, it is argued that these portions are substantially connected to employment-related matters, and should be excluded under section 65(6)3 notwithstanding that other portions are not.

In reply, the Company also seeks to rebut the appellant's argument that the records must primarily relate to labour relations or employment-related matters. In the Company's submission, it is sufficient that the records be "about" such matters; a "substantial and not merely peripheral or incidental" connection to such matters is not required. The Company also seeks to rebut the appellant's argument that the records need to be created in a labour-relations or employment context, adding that there is no such statutory or legislative requirement. Furthermore, the Company argues that because the access request itself was made by a Union, this constitutes evidence that the information sought by the appellants was, in fact, created in an employment and labour-relations context.

Analysis and Findings

To provide context for the jurisdictional exclusion found at section 65(6) of the *Act*, reference may be made to its underlying purpose, as described by those legislators who drafted it. Section 65(6) of the *Act* was enacted

As part of "An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations": Bill 7, 1st Session, 36th Legislature, 1995; "[a]lso, we propose to amend the *Freedom of Information and Protection of Privacy Act* ... to ensure the confidentiality of labour relations information": Hon. David Johnson (Chair of Management Board of Cabinet), Official Report of Debates, October 4, 1995.

Part 1 – collected, prepared, maintained or used

The first requirement is met if the records were collected, prepared maintained or used by OPG or on its behalf. I have considered the representations of OPG and the Company regarding the terms and components of the Agreements related to pensions, benefits, and severance, as well as appended records specifically identified. I have taken note of the appellant's concession that this requirement is satisfied. I have also reviewed all of the records.

I find that all of them have been collected, prepared, maintained and/or used by OPG, thereby meeting the first of the three requirements for the application of section 65(6)3.

Part 2 – in relation to meetings, discussions, communications

For the second requirement to be met, it must be established that OPG used the records in relation to meetings, discussions, or communications. Once again, I have considered OPG and the Company's representations, and I have noted the appellant's concession that this second requirement of the test for section 65(6)3 has been satisfied.

In Order P-1223, former Assistant Commissioner Tom Mitchinson indicated that the collection, preparation, maintenance or use of a record must have a "fairly substantial" connection with an activity listed in sections 65(6)1, 2 or 3 in order to meet this requirement. He went on to state:

In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was **for the purpose of, as a result of, or substantially connected to** an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity [emphasis added].

More recently, in Order MO-2024-I, Senior Adjudicator John Higgins discussed the nature of the term "in relation to" in the context of an appeal where access was sought to the amounts paid to a law firm by the City of Toronto for legal services. In that appeal, the City sought to rely on section 52(3)1 (the municipal equivalent of section 65(6)1) to exclude the records. Senior Adjudicator Higgins elaborated on the nature of the term "in relation to" in the following manner:

As noted above, the term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In that appeal, the evidence demonstrated that but for the proceedings, the record at issue would never have been created. However, the Senior Adjudicator found that, even in those circumstances, the relation between the record and the proceedings was too remote to satisfy the requirement in part two that the information be "in relation to" the proceedings.

I agree with the views of the former Assistant Commissioner and Senior Adjudicator Higgins, and I adopt this reasoning for the purposes of this order.

In the circumstances of this appeal, I am satisfied that all of the records were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications.

Part 3 – labour relations or employment-related matters in which OPG has an interest

It may be, as the appellant has argued, that the overriding purpose of the Agreements is to give effect to a commercial transaction in which the Company is to provide technology and business services to OPG. However, I find that it does not necessarily follow that the Agreements, or individual records or components of the Agreements, do not fall within the exclusion in section 65(6) as a consequence of that overriding purpose. Moreover, although not all records containing information related to labour relations or employment-related matters are excluded as a matter of course, those records or components of records with a “substantial connection” to the labour relations or employment-related matters may be so excluded.

Previous orders, for example, have established that an institution may have an interest in records containing information relating to benefits provided to former employees for the purposes of this part of the 65(6) test [Orders PO-2212 and PO-2536]. Furthermore, records that directly address other potential labour relations or employment-related issues surrounding the main Agreements under consideration have been found to satisfy the “in which the institution has an interest” criteria [see Order MO-1587]. In my view, this principle applies equally to the appendices containing the Pension & Benefits Cost Allocation Agreement and the Deferred Employee Transfer Agreement, which were prepared to clarify the signatories’ understandings with respect to their future pension obligations.

Furthermore, I accept that OPG, as an employer, has an interest in addressing and resolving issues relating to employee severance, indemnification and termination as part of the overall management of the Agreements entered into with the Company.

Section 65(6) is record-specific and fact-specific and this is relevant to my determination that certain components of the Agreements in this appeal - even individual terms - are “about” labour relations or employment-related matters in which OPG has an interest, for the purposes of section 65(6).

Based on the information before me, my review of the Agreements and the representations of the parties, I am satisfied that OPG has established that the meetings, consultations, discussions or communications in which it made use of the appendices addressing issues related to pensions and benefits, and employee transfer, as well as certain other portions of the larger Agreements, are about labour relations or employment-related matters in which it has an interest. The only reason these particular appendices exist is because of the employment relationship its employees have with OPG. For these reasons, I find that OPG’s interest in the particular records, or components thereof, goes well beyond “mere curiosity or concern” in that they directly address potential labour relations issues. As a result, I conclude that they are subject to the exclusion in section 65(6)3.

However, where there is no demonstrable connection between the contents of the records and any interest OPG may have in labour relations or an employment-related matter, the third requirement of section 65(6)3 is not met. While the remaining components of the records and Agreements may contain other terms that have an effect on labour relations or employment-related matters, I find that these are not “about labour relations” in the sense contemplated by the exclusion in section 65(6) and I find that the *Act* applies to them.

As I have found that the Pension & Benefits Cost Allocation Agreement and the Deferred Employee Transfer Agreement, as well as certain portions of the Agreements relating to employee severance, indemnification and termination, meet all three parts of the test, I conclude that these records are excluded from the *Act* under section 65(6)3, subject to my consideration of the exceptions in section 65(7).

Section 65(7) exception

As previously mentioned, records found to be excluded from the *Act* by the operation of section 65(6) may be brought back under the *Act* by the exception in section 65(7), which states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Representations

As regards the possible relevance of section 65(7), OPG initially stated simply that the exception “has no application in the present appeal, since the records requested are not an agreement between an institution and a trade union, one or more of its employees, or an expense account.”

However, the appellant takes the position that if section 65(6)3 is found to apply to the records, or portions of the records, these are subject to the *Act* owing to the operation of the exceptions at section 65(7)1 and 3. The appellant states:

The requesters are not directly a party to the records requested, the parties to which are all corporate entities. However, during the negotiations in which OPG

and [the Company] negotiated the purchase and sale of [the Company] and the subsequent service agreement between [them], it was deemed necessary to obtain the consent and approval of the employees of both OPG and [the Company]. The employees and the bargaining representatives of the requester were consulted frequently during these negotiations, and their rights and interests were affected by these negotiations.

Therefore, although the employees are not formally parties to the records, the records in effect form an agreement in which the employees' rights and interests are affected. ... [The] records form an agreement 'between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees'.

In reply, OPG argues that the application of section 65(7) of the *Act* proposed by the appellant is overreaching and strains the plain meaning of the exception. OPG submits that the exception's reference to agreements between institutions and its employees cannot be broadened to include the Agreements between OPG and third parties, notwithstanding that they may affect employees' rights and interests.

Analysis and Findings

The appellant submits that the exceptions in section 65(7)1 or 3 should be applied to any records excluded from the *Act* by the operation of section 65(6)3. As noted, these provisions have the effect of creating an exception to the exclusions in section 65(6): in instances where there is an agreement between an institution and a trade union, or one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees, the *Act* will apply.

It may be, as the appellant contends, that the employees of OPG and [the Company], and their bargaining representatives, were consulted during the negotiations leading up to the service agreements, which form the subject matter of this appeal. I also accept the submission that the rights and interests of OPG and the Company's employees, including those represented by the appellant, were affected by these negotiations.

However, I find that notwithstanding the consultation in which they may have been engaged leading up to the formation of these Agreements, the fact that the rights and interests of the employees represented by the appellant may be affected by the Agreements does not bestow upon them the status of parties, as required by the exception in section 65(7). Moreover, I agree with OPG that conferring such status on the appellant in the circumstances of this appeal is an unwarranted extension of the plain language of the provision.

The reality is that the appellant is not a named party to any of the Agreements or sub-contracts. Rather, the contracting parties are OPG and the Company, and/or various other third parties. Accordingly, none of the records qualify as an agreement between an institution and a trade union or employees, as required for the application of the exception to section 65(6) found in

paragraphs 1 or 3 of section 65(7). In the circumstances of this appeal, therefore, I find that the exceptions in section 65(7) have no application.

As section 65(6)3 applies to some of the records, namely Pension and Benefits Cost Allocation Amending Agreement and the Deferred Employee Transfer Agreement, and to certain other portions of the Agreements listed in the appendix provided with this order, these records are excluded from the scope of the *Act*.

I must now consider the exemptions claimed by OPG to deny access to those records to which the *Act* applies.

EXEMPTIONS

PERSONAL PRIVACY

OPG relies on section 21(1) of the *Act* to sever the signatures of individuals who signed the Agreements on OPG's behalf, as well as the home addresses of some of those same corporate officers or directors. Section 21(1) is also relied on to withhold the signature of individuals representing the affected parties who signed support contracts or incorporation documents related to the main Agreements, and the signature of the former Minister of Energy, Science & Technology, as the Ministry was then known. The basis of these severances is that this information qualifies as "personal information," as set forth in the definition of that term in section 2(1) of the *Act*.

The appellant submits that information that qualifies as personal information for the purposes of the *Act* may be removed from the scope of the appeal.

General principles

In order to determine whether the information in the Agreements withheld under section 21(1) is outside the scope of the request, I must first decide whether the records contain "personal information" and, if so, to whom it relates. This is the standard approach in considering the personal privacy exemption. In this appeal, this step is especially important since information qualifying as personal information is to be removed from the scope of the appeal pursuant to the appellant's consent that this should be so.

Accordingly, I will start with the definition of the term in section 2(1) of the *Act*, which reads:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Representations

In its representations, OPG referred to the definition of "personal information" contained in section 2(1) of the *Act*, and set out paragraphs (d) (address) and (h) (name with other personal information). OPG submits:

[The] records contain corporate credit card information. This information contains personal information which must not be disclosed pursuant to s. 21(1) of the *Act*.

... [E]mployees have, in confidence, provided the credit card company with their home addresses and OPG has not obtained their consent to the public release of such information.

OPG provided no representations in support of its decision to withhold, pursuant to section 21(1), the signatures of various OPG executive and senior management employees, those of the affected parties' representatives, or that of the former Minister, from the version of the records disclosed to the appellant.

As previously noted, the appellant concedes that personal information may properly be withheld pursuant to the personal privacy exemption in section 21(1). During mediation, the appellant advised that access to information that properly satisfies the definition in the *Act* would not be pursued. In its representations, the appellant further argues that not all of the information OPG has withheld under this exemption is *personal* information as that term is defined by the *Act* and past orders of this office. The appellant submits that only a limited portion of the records contain personal information relating to individuals not acting in an official capacity.

The appellant submits that the names of officers of a corporation writing in their official capacity [Orders 80, 113] or the names, telephone numbers and opinions given by individuals in their professional capacity [Order P-157] have been held to not constitute "personal information".

Analysis and Findings

In considering the question of whether the information relating to individuals in the records at issue is *personal* information for the purposes of the definition of section 2(1) of the *Act*, I am guided by previous orders of this office. In Order PO-2435, Assistant Commissioner Brian Beamish explained the guiding principles of such an analysis in the following manner:

... In determining whether information relating to a named individual is "personal information", the appropriate approach is to look at the *capacity* in which the individual is acting and the *context* in which their name appears. This was enunciated in Order PO-2225 where former Assistant Commissioner Tom Mitchinson considered the definition of "personal information" and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. The Assistant Commissioner posed two questions that help to illuminate this distinction:

Based on the principles expressed in these [previously referenced] orders, the first question to ask in a case such as this is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

....

The analysis does not end here. I must go on to ask: “*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*”? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

I agree with this approach and adopt it for the purposes of this appeal.

I have reviewed the records in their entirety as well as the information to which my attention has specifically been drawn by OPG or by the appellant, in particular. Based on this review, there are three different examples of information that may satisfy the definition of personal information in section 2(1) of the *Act*.

First, as OPG has indicated, the home addresses of several directors of OPG and the Company appear in the records. However, I note that even though I reviewed the records in their entirety, I was not able to locate any reference to home addresses provided for credit card purposes, as suggested by OPG. The only home addresses I could identify belong to three of OPG’s corporate directors and one of the Company’s directors. The former appear (in identical form) on two pages of the incorporating documents for OPG found at Tab 4 of Vol. 1, while the latter appears on incorporating documents for the Company at Tab 23 of the same volume.

While it may be that the addresses have been provided by the directors in the course of carrying out employment duties, I find that the home addresses of these individuals constitute their personal information for the purposes of paragraphs (d) (address of the individual) and (h) (individual’s name along with other personal information) of section 2(1). Accordingly, given the appellant’s indication that he is not interested in pursuing access to information found to qualify as personal information, I have removed the home addresses of the corporate directors from the scope of the appeal.

Notwithstanding this finding, based on my review of the version of the records sent to this office (on which withheld information is marked in yellow highlighter), OPG appears to already have disclosed the home addresses of the incorporating directors to the appellant. This particular information about the directors, where it appears on two different pages at Tab 4 and page 7 of Tab 23 of Volume 1 is not highlighted in yellow. This observation does not, however, change my finding that this information is no longer at issue in this appeal.

Second, I have identified two schedules in Volume 4 of the records that contain information that qualifies as personal information under section 2(1). Schedules 2.3.1 and 3.4(1) are appended to the Employee Transfer Agreement, which I have found to be excluded from the *Act* by the operation of section 65(6)3. However, these two schedules are not themselves among the excluded records, notwithstanding their association with the Employee Transfer Agreement. OPG has claimed section 17(1)(a) and/or (c) to deny access to both of these schedules, but has not cited section 21(1), even though each schedule contains a list of employee names and employee ID numbers, along with information relating to changes in their job status, including termination. I find that this information qualifies as personal information, in accordance with paragraphs (b) (information relating to employment history of individual), (c) (identifying

number assigned to individual) and (h) (individual's name along with other personal information) of the definition in section 2(1).

In light of the appellant's indication that personal information is not of interest, I will remove the names and employee ID numbers contained in Schedules 2.3.1 and 3.4(1) to the Employee Transfer Agreement in Volume 4 from the scope of this appeal.

I find, therefore, that the remaining information in those schedules is no longer *about* an identifiable individual or individuals, as required to meet the definition in section 2(1) of the *Act*. Accordingly, the remaining information cannot qualify for exemption under section 21(1). I must still consider whether it qualifies for exemption under the mandatory exemption for third party information at section 17(1), as OPG claims.

The final type of information to be considered under this heading is the signatures of OPG corporate officers, employees of the affected parties and the former Minister, which OPG has purported to withhold under section 21(1) of the *Act*. As with the other types of information discussed above, I must first determine whether or not these signatures constitute personal information for the purposes of the definition in section 2(1) of the *Act*.

For assistance in this determination, I considered that previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity. For example, information associated with an individual in her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621, MO-1550-F, PO-2225].

In Order MO-1194, former Assistant Commissioner Tom Mitchinson discussed this office's treatment of handwriting and signatures appearing in different contexts, as follows:

In cases where the signature is contained on records created in a professional or official government context, it is generally not "about the individual" in a personal sense, and would not normally fall within the scope of the definition. (See, for example, Order P-773, [1994] O.I.P.C. No. 328, which dealt with the identities of job competition interviewers, and Order P-194 where handwritten comments from trainers were found not to qualify as their personal information.) [emphasis added]

In situations where identity is an issue, handwriting style has been found to qualify as personal information. (See, for example, Order P-940, [1995] O.I.P.C. No. 234, which found that even when personal identifiers of candidates in a job competition were severed, their handwriting could identify them, thereby bringing the records within the scope of the definition of personal information).

Order M-585, [1995] O.I.P.C. No. 321, involved both handwritten and typewritten versions of a by-law complaint. Former Inquiry Officer John Higgins found that the typewritten version did not qualify as personal information of the

author, but that there was a reasonable expectation that the identity of the author could be determined from the handwritten version, and that it qualified as the complainant's personal information.

In my view, whether or not a signature or handwriting style is personal information is dependent on context and circumstances.

I agree with the context-driven approach of the former Assistant Commissioner in Order MO-1194. I am also mindful of Assistant Commissioner Beamish's exhortation in Order PO-2435 to ask if there is something about the specific information that, "if disclosed, would reveal something of a personal nature about the individual?"

In the circumstances of the present appeal, I do not accept that disclosure of the signatures of corporate officers would reveal something that is inherently personal in nature. Nor do I accept that disclosure of the signature of the former Minister of Energy, Science and Technology (as that position was then known) would reveal something of an inherently personal nature. The signatures appear in records created in an official government context, that is, the signing of contracts between OPG and the Company or other affected parties for the provision of information technology services. The signature of the former Minister appears on the incorporation documents. This is not an appeal where there is any question, concern, or relevance to the identity of the corporate officers, or the former Minister.

In the circumstances of this appeal, I find that the signatures contained in the records do not fall within the definition of personal information in section 2(1) of the *Act*. Accordingly, the signatures cannot be exempt under the personal privacy exemption in section 21(1). Since no other exemptions were claimed for this information, I will order OPG to disclose it.

THIRD PARTY INFORMATION

Introduction

OPG and five of the affected parties take the position that sections 17(1)(a) and/or (c) of the *Act* applies to exempt the records, or at least the information withheld from the records, from disclosure.

Section 17(1) of the *Act* is a mandatory exemption that applies to exempt the information of a third party if certain requirements are met. The relevant parts of section 17(1) state:

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;

Section 17(1) of the *Act* recognizes that in the course of carrying out public responsibilities, government bodies receive information about the activities of private businesses. The exemption 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.), leave to appeal refused (November 7, 2005), Doc. M32858 (C.A.)].

Although one of the central purposes of the *Act* is to shed light on the operations of government through the release of information to the public, 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-2371, PO-2384, MO-1706].

For section 17(1) to apply, OPG 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 OPG 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.

Exception to the section 17(1) exemption

An exception to this mandatory exemption is found in section 17(3), which states:

A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

In the present appeal, four of the affected parties have consented to the disclosure of the information pertaining to them. Accordingly, unless I find that the valuable government information exception in section 18(1) applies to the information, as claimed, I will order OPG to disclose the withheld information in those records to the appellant.

Part 1 - Information

The records are said, by OPG and the affected parties variously, to contain information that meets the definition of trade secret, scientific, technical, commercial, financial and/or labour

relations information in Part 1 of section 17(1). These types of information listed in section 17(1) have been described in a number of past orders as follows:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Orders M-29, PO-2010].

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Orders PO-1805, PO-2010].

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 [Orders P-493 and 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 [Order 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].

Labour relations information is information concerning the collective relationship between an employer and its employees [Orders P-653 and PO-2010].

I adopt these definitions for the purpose of this appeal.

Representations

OPG and Affected Parties

OPG's brief initial representations on this part of the section 17(1) test simply state that the records contain technical, commercial, financial and labour relations information. In its reply submissions, OPG elaborates on the nature of the information by referring to contractual terms such as pricing and rights of termination, as well as unique proposals contained therein, which it claims are not standard in the industry. OPG indicates that it defers further comment to the affected parties whose information is at issue and supports their representations against disclosure.

The Company submits that the withheld information qualifies as scientific, technical, commercial, financial or labour relations information for the purposes of section 17(1). As examples, the Company refers to the following categories: pricing information, contractual termination information, risk profile information, service level information, employee information, pension information and IT information. The Company provided a list of specific components and exhibits to the Agreements which cannot be reproduced for reasons of confidentiality.

The Company also submits that portions of the withheld information constitute trade secrets, including its "customized IT Tools for unique solution-making" and "unique architectural configurations/charts." The Company further submits that some of the pricing mechanisms in the Agreement are unique, confidential and proprietary, and that it has taken steps to protect the mechanisms from disclosure.

Two of the other affected parties provided representations on the type of information contained in the records which pertains to their companies' involvement with the agreement between OPG and the Company. Both contend that the records contain their confidential commercial and financial information. One of the affected parties submits that the Agreements contain its pricing for software products and discounts. One of the two also submits that the records contain technical information and their trade secrets in the form of an "innovative form of licensing" which permits their customers to "dynamically apply ... best-in-class technologies to their business challenges as required, and to define acquisition terms that are best suited to their needs."

One of the affected parties also submits that the records contain technical information related to maintenance and support for the licensed software, as well as licensing and product information, none of which is generally available to the public.

The Appellant

The appellant concedes that some of the information in the records qualifies as commercial or technical information, but submits that the records do not primarily contain trade secret, scientific or labour relations information.

The appellant takes the position that certain information may be removed from the scope of the appeal, if it is found to satisfy the requirements of part 1 of the section 17(1) test:

Where the records contain technical or commercial information, such as IP addresses and information technology security information, or credit card information, we submit that such records may be redacted under the *Act*.

However, the appellant submits that the records, and the redacted information in particular, in the schedules to the Agreements, do not include general or “protected commercial information” or any of the other types of information section 17(1) is intended to protect. The appellant states:

Schedule 3.6(1) of the Information Technology Services Agreement has been redacted so as to exclude any information about the key threshold amounts about services performance ... This information is not technical, security-related or commercial or otherwise excluded within the scope of s. 17 (or s. 18) of the *Act*.

The appellant argues that, other than the admitted commercial and technical information contained in certain exhibits to the ITSA and the EMITSA, OPG has not provided sufficient evidence to establish that any of the remaining information severed from the records meets the requirements of part one of the section 17(1) test. The appellant provides a “non-exhaustive” list of examples of records for which such evidence is lacking and states:

While it is the position of OPG that the records contain sensitive technical, commercial, financial and labour relations information, it has failed to provide “detailed and convincing evidence” to support its claims on each ground... No evidence was provided by the OPG in its submission with respect to labour relations, intellectual property, trade secret or scientific information (theories and theorems)...

Analysis and Findings

The appellant has said that it does not seek access to information “properly” qualified as, or found to constitute, commercial or technical information, for the purposes of part 1 of section 17(1) of the *Act*. This statement, taken together with the appellant’s contention that the information, and the redacted information in the Agreement schedules in particular, does not constitute “general commercial information” renders it necessary, in my view, to elaborate upon the meaning of “commercial information” established by previous orders of this office.

In Order P-493, relating to a decision of the Ministry of Municipal Affairs, former Inquiry Officer Anita Fineberg set down the foundation for this office’s definition of “commercial” information. She wrote:

Although previous orders have dealt with the issue of whether information is “commercial” information, no one definition has been adopted.

The Concise Oxford Dictionary (8th ed.) defines "commercial", in part, as follows:

"of, engage in, bearing on, commerce"

"Commerce" is defined, in part, as:

"exchange of merchandise or services ... buying and selling"

Black's Law Dictionary (5th ed.) defines "commercial" as:

relating to or is connected with trade and traffic or commerce in general; is occupied with business and commerce; generic term for most aspects of buying and selling.

In line with the narrow construction of the various categories of information contained in section 17, the term "commercial" should be interpreted as being distinct from the term "financial" or "trade secret".

In my view, commercial information is information which relates solely to the buying, selling or exchange of merchandise or services.

In other words, in order to give effect to, and assure the integrity of, the individual categories of information deemed to qualify for protection under this mandatory exemption, this office has chosen to demarcate and distinguish the types of information, notwithstanding the potential for their co-existence in the same record. In my view, the use of the words "relates solely" in the definition above is intended to reflect this demarcation, rather than import a qualification that the commercial (or any given particular) information be paramount over other types of information also found in the same record, in order to qualify under an individual category for the purposes of part 1.

Viewed in this light, and for the purposes of my analysis under part 1 of the section 17(1) test, I choose to make no distinction between commercial information as this office has defined it, and information the appellant may consider general or "protected" commercial information. For the sake of simplicity, I have determined that all information qualifying as commercial information will remain within the scope of this appeal and will be considered under the remaining parts of the test for exemption under section 17(1).

The records, when considered as a whole, represent a complex commercial arrangement, involving OPG and the affected parties. The individual records consist of agreements and other associated documents formalizing the business relationship between OPG and the Company regarding the latter's provision of information technology and business services to the former. The records also contain information about various contractual arrangements between OPG and the affected parties, to be continued by the Company. I find that the records relate directly to the Company selling these services to OPG which, in my view, meets the definition of "commercial information" for the purposes of part 1 of section 17(1).

The records also contain different types of information related to finance or money matters, such as total cost of the Agreements, budgeting and spending, which previous orders have found to constitute financial information. Accordingly, I find that the records in the present appeal contain financial information.

I am also satisfied that portions of the records contain technical information associated with the operation and maintenance of various information technology structures and processes, as well as hardware and software, that fall under the Agreements. There are also individual records, or components of records, which detail measures or processes intended to protect against system compromise. I find that this information satisfies the definition of technical information for the purpose of part 1 of the section 17(1) test.

The appellant's concession that certain information such as "IP addresses and information technology security information" may be removed from the scope of the appeal is noteworthy here. As a consequence of the appellant's position on this point, I have removed certain exhibits, schedules and components of the records from the scope of the appeal. In view of my findings in this section, those records, or portions thereof, identified specifically in the Appendix to this order as containing technical information of this nature, are no longer at issue.

In summary, I find that the requirements of Part 1 of the section 17(1) test have been established for the records at issue in that all of them contain commercial information, and some of the information also qualifies as financial and/or technical information for the purposes of the *Act*. This being the case, it is unnecessary for me to determine whether the records also contain scientific, trade secret, or labour relations information.

Part 2 – Supplied in Confidence

In order to satisfy Part 2 of the test under section 17(1), the Company and/or the other affected parties must have "supplied" the information at issue to OPG in confidence, either implicitly or explicitly.

"Supplied"

The requirement that the information be demonstrated as having been "supplied" reflects that the purpose of section 17(1) of the *Act* is to protect 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 are normally 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, PO-2453]. Another way of expressing this is that, except in unusual circumstances, agreed-upon essential terms of a

contract are considered to be the product of a negotiation process and are not, therefore, considered to be “supplied” [Orders MO-1706, PO-2371, PO-2384].

The Divisional Court has upheld the “reasonableness” of this office’s approach to this issue, finding that information in a negotiated contract had not been “supplied” to the institution in question [*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.)].

Supplied: representations

OPG and Affected Parties

OPG’s initial representations on this part of the section 17(1) test state only that the information was “supplied in confidence”. However, in its reply representations, OPG indicated that it is relying on Order P-807, in which Inquiry Officer Mumtaz Jiwan found that the contents of a contract were supplied in confidence to the Ministry of Health (as it was then known) because she accepted the third party laboratory’s submission that disclosure of the information would reveal unique proposals, terms and conditions developed solely for the Ministry’s use, and which were not standard in the industry. OPG submits that the Agreements between it and the Company also contain unique proposals which are not standard in the industry.

The Company acknowledges that previous orders from this office have held that completed agreements do not qualify as “supplied” by a third party for the purposes of the exemption because they represent the “mutually generated results of negotiations,” but cites Order PO-1894 as an example of a decision from this office that has found such information qualifies for exemption from disclosure. The Company submits that former Assistant Commissioner Tom Mitchinson found that the records at issue in Order PO-1894 had been “supplied” because they represented an ongoing relationship between the parties in which certain elements had not been fully performed. In the Company’s view, since the Agreements in the present appeal carry a 10 year term commencing in 2002, and because not all terms have been fully performed, these are records analogous to those at issue in Order PO-1894.

Both OPG and the Company identify certain records as being set apart from the rest on the basis that these were supplied (in confidence) to OPG by the Company’s parent company in a bid prior to the commencement of the transaction negotiations relating to these Agreements. The Company argues that certain records specifically listed in the representations were supplied to OPG by the parent company in the strictest sense of the term:

[W]hat would normally have resulted from negotiations did not, as [the] offer was a “take it or leave it” proposition which OPG accepted and which led to the negotiation and completion of the Transaction.”

The Company also submits that these exhibits set out its “proprietary methodology and describe in detail the methods and processes being used by [it] in connection with the services provided under the ITSA.” A list of the relevant records or portions of records was provided.

The Company provides a further list of components of the ITSA, and certain exhibits, that establish performance standards; it claims these records were

supplied ... to OPG after an extensive analysis of OPG's systems and production environment ... [using the Company's] proprietary intellectual property (consisting of IT tools, process methods through engineers skilled in this area) to baseline service performance, between 6 to 12 months – tools and methods. [The Company's] consultants then analyzed the results of their test environment, converting it into a series of service level metrics, configurations and other specific volumes set out in Schedule 3.6(1) which were then provided to OPG in confidence.

In the Company's submission, disclosure of the records would reveal, or permit accurate inferences to be drawn about, the confidential business model and strategy upon which the Company premised the delivery of the services to OPG. The Company refers to Orders PO-2020 and PO-2043 in support of this argument.

The representations of the other affected parties do not specifically address the “supplied” requirement of part 2.

Appellant

The appellant argues that information found to qualify under part one of the section 17(1) test may not have been “supplied” to OPG in the way the *Act* intended. Referring to Order PO-1805, issued by former Senior Adjudicator David Goodis, the appellant states:

OPG formerly owned and operated the services that were spun-off into a privatized corporate entity that became [the Company]. OPG therefore already had access to most of the record protected by Part One. As part of the series of transactions, OPG transferred ownership of the services to [the Company], and leased back the service provision. Therefore, [the Company] did not in effect “supply” OPG with information that it did not already have. The Commission came to this conclusion with respect to the former Ontario Hydro in Order PO-1805.

Referring to Order PO-2371, the appellant submits that records generated by negotiations are not “supplied” within the meaning of section 17(1), but are mutually generated, and this can be true even if the information provided by a third party is incorporated into the terms of a contract without significant modification.

The appellant seeks to distinguish Order PO-1894 (cited by the Company) on two grounds: first, the records at issue in that appeal involved proposals submitted by third parties in an ongoing bidding process where the records in this appeal represent final agreements between OPG and the Company. Second, the third party in the Ontario Hydro appeal was a prospective purchaser who was bidding in the “ongoing negotiations,” while in this appeal, the third party - the Company - is a party to a completed contract between it and OPG.

The Company's Reply representations

As previously noted, the Company had requested that no part of its reply representations be shared with the appellant or other parties to the appeal, but I concluded that some of these submissions must be articulated so as to provide adequate context for my analysis and findings.

The Company asserts that the appellant's characterization of the findings in Order PO-1894 is overly narrow. The Company states:

[C]ontrary to what the appellant is suggesting, it is not the particular form of document or its state of completion (e.g., draft, final) that is determinative of the issue but the *underlying relationship* evidenced by the document [emphasis in original].

The Company argues that the final form of a contract typically consists of information partially derived from negotiations and partially resulting from information provided (usually in confidence) by one party to the other. The Company asserts that in the present appeal, the Agreements are comprised of information that was either the outcome of negotiations with OPG or provided in confidence to OPG and, in either respect, it was "supplied in confidence" within the meaning of the *Act*. Moreover, the Company reaffirms its position that the information severed from the records is unique information developed specifically by it for OPG.

Analysis and Findings

In my view, the Agreements and constituent records remaining at issue under section 17(1) were negotiated and reflect all the parties' interests. For the reasons that follow, I find that the records were not "supplied" within the meaning ascribed to that term in section 17(1) of the *Act*.

Many previous orders have reached the conclusion that contracts between government and private businesses do not reveal or contain information "supplied" by the private business since a contract is thought to represent the expression of an agreement between two parties. Although the terms of a contract may reveal information about what each of the parties was willing to agree to in order to enter into the arrangement with the other party or parties, this information is not, in and of itself, considered to comprise the type of "informational asset" sought to be protected by section 17(1) [Order PO-2018].

In Order PO-2226, former Assistant Commissioner Tom Mitchinson considered the appeal of a decision regarding a request for access to various sale agreements entered into by the Ontario government and Bombardier Aerospace relating to de Havilland Inc. As in the present appeal, the records at issue in Order PO-2226, consisted of a complex, multi-party agreement with other smaller agreements that flowed from the main one, all of which were multi-faceted with customized terms and conditions. In that appeal, the former Assistant Commissioner was not persuaded by the evidence that the records were "supplied" to the Ministry or would reveal information actually supplied to the Ministry, and had the following to say about the complex multi-party agreement at issue:

[I]t is simply not reasonable to conclude that contracts of this nature were arrived at without the typical back-and-forth, give-and-take process of negotiation. I find that the records at issue in this appeal are not accurately described as “the informational assets of non-government parties”, but instead are negotiated agreements that reflect the various interests of the parties engaged in the purchase and sale of “the de Havilland business”.

Further, Adjudicator Steve Faughnan provided the following summary with respect to the interpretation of “supplied” in Order PO-2384:

As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, **agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation.** In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not “supplied”.

As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively “immutable” or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be “supplied” within the meaning of section 17(1) ... **The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed** [see also *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.), Orders PO-2433 and PO-2435] [emphasis added].

In Order PO-2435, the Ministry of Health and Long-Term Care argued that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish rejected that position and observed that the government’s option of accepting or rejecting a consultant’s bid is a “form of negotiation”:

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 release by [Management Board Secretariat (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 a [Vendor of Record] 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. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

I agree with the reasoning articulated in the orders excerpted above, and will apply it in my analysis of the records at issue.

As an aside, I would note that Order P-807, which received considerable attention from the Company and OPG in their representations, is an order dating back to 1994. In my view, the findings of that decision describing the test for the third party information exemption no longer reflect the approach taken by this office. To the extent that my findings in this order conflict with the findings of the Inquiry Officer in Order P-807, I would respectfully decline to follow it.

In the appeal before me, the Company opposes disclosure of certain terms in the Agreements, and even complete schedules and exhibits, arguing that these were previously “supplied” as part of a “take or leave it” proposition to OPG by the parent of the Company. It is argued that OPG’s acceptance of the parent company’s proposition led to the negotiations and, ultimately, the formation of the Agreements and associated records.

I would pause to note that some of the records mentioned by the Company in the confidential portion of its representations as being of the “take it or leave it” variety, as well as others, are removed from the scope of this appeal because they fit within the definition of “technical information” and, hence, are removed from the appeal’s scope at the appellant’s concession, while others are excluded from the *Act* by virtue of the operation of section 65(6)3.

Relevant to those records that remain at issue, the Company submits that the terms and exhibits relating to performance standards are just such “take it or leave it” records. As I understand it, the Company’s position on these particular records is that because their genesis predates the negotiations leading to the formation of the Agreements at issue, this fact renders them qualitatively distinct from other components that ultimately form part of these Agreements between it and OPG.

I reject the “take it or leave it” argument for the purposes of my analysis of the supplied component. I note that this submission mirrors that relied upon by the Ministry in Order PO-2435 regarding MBS-determined per diem rates for consultants, which was rejected by the Assistant Commissioner for the reasons reproduced above. In my view, this position represents an attempt to manufacture immunity from disclosure based on the timing or circumstances of a record’s creation, rather than its content, as the third party information exemption demands. Echoing the words of Adjudicator Faughnan in Order PO-2371, the exemption should protect information belonging to an affected party that cannot change through negotiation, not that which could, but was not, changed.

Similarly, I would reject the suggestion that immunity should be created for information relating to the Company’s, or other affected parties’, pricing. In my view, where this information appears

in the records (e.g., Schedule 4.1 of each of ITSA and EMITSA), it represents the clear contractual expectations of the parties regarding costing and payment for the performance of the terms of the Agreements and the associated service sub-contracts. If the pricing or rates submitted by the Company or other affected parties had been deemed by OPG to be too high, or otherwise unacceptable, OPG was in a position to accept or reject them. This is the form of negotiation envisaged by Assistant Commissioner Beamish in Order PO-2435. In my view, this information constitutes the key negotiated terms of the Agreements, and sub-contracts, and it was not, therefore, “supplied”.

The Company also argues that certain service and standards-related exhibits, for example, set out its “proprietary methodology and describe in detail the methods and processes being used by [it] in connection with the services provided under the ITSA.” The Company appears to be suggesting that disclosure of these exhibits would not only reveal unique and confidential proposals and methods which are not standard in the field, but also permit a form of reverse engineering of those methods. Furthermore, this argument, as I understand it, raises the spectre of the “inferred disclosure” exception, which was discussed by Adjudicator Bernard Morrow in Order MO-1706. This 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” [see also British Columbia Order 01-20].

In addressing this argument, I take note of Order PO-1805, which was raised by the appellant. In that order, former Senior Adjudicator David Goodis considered Ontario Hydro’s denial of access to records related to a nuclear facility risk assessment and peer review conducted by the World Association of Nuclear Operators [WANO]. In its representations, the appellant compared the position of WANO and Ontario Hydro [as it then was known] in resisting disclosure with OPG and the Company’s opposition in the present appeal as regards service level and performance standards exhibits said to be “supplied ... to OPG after an extensive analysis of OPG’s systems and production environment ... [using the Company’s] proprietary intellectual property (consisting of IT tools, process methods through engineers skilled in this area) ...”

In my view, the comparison is highlighted by former Senior Adjudicator Goodis’s review of the records at issue in Order PO-1805:

To summarize, the information in the records was created in the following manner: (i) WANO gathered information from Hydro through interviews with Hydro staff, observations of the facilities and reviews of Hydro documents; (ii) WANO reviewed and analysed this information, identified issues and problems, and developed insights into the causes of those problems; (iii) WANO, by way of the records, reported the results of its analysis to Hydro, including its findings and recommendations; and (iv) Hydro provided information which was added to the records in the form of its response to the issues and problems identified by WANO.

...

While WANO, in one sense, may be said to have supplied information relating to issues and problems identified by WANO in the course of its reviews, to the extent that this information constitutes technical information, it is derived from, and relates to, Hydro's nuclear facilities, and not the operations or undertaking of WANO or any other party.

None of the information contained in the report, including the identification of issues and problems, can properly be characterized as the informational assets of WANO. While WANO may bring some measure of independence and expertise to the peer review process, the exercise is essentially no different than that performed in the past by a combination of Hydro personnel and outside industry experts. **The fact that Hydro engages a contractor or other external agency to perform what is essentially the same function performed in the past by a blend of inside and outside experts cannot convert information derived from Hydro through that exercise into information supplied by a third party within the meaning of section 17(1).** If that were the case ... this would amount to a colourable attempt to avoid the strictures of the exemptions and defeat the letter and spirit of the right of access under [the] Act.

I agree with the appellant that Order PO-1805 is applicable in the circumstances of the present appeal. In my view, the mere fact that the affected party's employees have applied their skill and knowledge to analyze or process information that was originally derived from OPG does not mean that the affected party's proprietary IT tools or methods are thereby embedded in the records produced as a result, and vulnerable to disclosure. Furthermore, upon review of the performance and service standards, volumes and terms contained in the Agreements and exhibits, I do not accept that disclosure of them would permit accurate inferences to be made about the Company's confidential proprietary intellectual property so as to fit under the "inferred disclosure" exception. These standards do not contain or give away the informational assets of the Company, and I find that these were not "supplied" for the purposes of within the meaning of that term.

Another argument put forward by the Company, relying on Order PO-1894, is that the Agreements should not be disclosed because the terms have not expired and performance of the rights and responsibilities under them continues. In that appeal, the appellant sought access to a conditional Agreement of Purchase and Sale (and associated records), and the Ontario Realty Corporation's decision to deny access under sections 18 and 17(1)(a) was upheld by former Assistant Commissioner Tom Mitchinson. The Company suggests that the determining factor in that appeal was the ongoing nature of the relationship between the parties. I do not agree and, furthermore, I do not think Order PO-1894 assists the Company in the manner suggested. In my view, the logical extension of the Company's argument leads to the perverse result that any agreement or contract entered into by the government with a third party would be exempt from disclosure until the expiry of its term. Moreover, in my view, this introduces an unwarranted temporal or relational consideration into the issue that inappropriately diverts attention from the intended focus of the exemption's protection: confidential third party informational assets.

One of the affected parties opposes the disclosure of its software licensing agreement with OPG, and a number of associated attachments. As with the Agreements overall, and following the line of analysis I have adopted in this order, I reject the claim of exemption for this licensing agreement under section 17(1). It is suggested that the licensing agreement fits into the category of a “take it or leave it” document and I did consider the possible relevance of the “immutability” exception described by Adjudicator Faughnan in Order PO-2371. Having carefully reviewed the information in the software agreements and associated records, I find that these do not contain confidential informational assets or terms that are immutable or not susceptible to change. Rather, these software maintenance or licensing agreements are contracts between OPG and the affected parties that were subject to negotiation. Accordingly, I find that the information in the agreements was not “supplied” within the meaning of that term in section 17(1).

In summary, I find that the information severed from the records was not “supplied” to OPG by the affected parties within the meaning of section 17(1). Since all three parts of the test must be met before the section 17(1) exemption applies, my findings with respect to supplied are sufficient to dispose of the application of section 17(1) to the records.

However, I must now consider the possible application of the exemption for valuable government information which OPG has claimed in relation to some of these same records, as well as additional ones.

VALUABLE GOVERNMENT INFORMATION

OPG claims that the exemptions in sections 18(1)(a) and/or (c) apply to information severed from the Agreements or other associated records.

In its decision letter, OPG refers to the records as containing “technical information regarding OPG security issues,” the disclosure of which could reasonably be expected to prejudice the economic or competitive position of OPG. Although the wording of the letter mirrors section 18(1)(c) only, it is reasonably clear from the context that OPG is concerned with the type of information described in section 18(1)(a) as well.

Sections 18(1)(a) and (c) read:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

Broadly speaking, section 18 is designed to protect certain economic interests of institutions. The report titled *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) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Section 18(1)(c) takes into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For section 18(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, (C.A.)]. This contrasts with section 18(1)(a), which is concerned with the **type** of the information, rather than the consequences of disclosure (see Orders MO-1199-F, MO-1564).

Section 18(1)(a)

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, it must be established that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**
2. belongs to the Government of Ontario or an institution; **and**
3. has monetary value or potential monetary value [Orders 87, P-581].

Representations

In its representations, OPG lists records, primarily exhibits to the Agreements, that it says contain information that would qualify as trade secrets, financial, commercial, scientific, or technical information belonging to OPG and that has monetary value for purposes of section 18(1)(a) of the *Act* as interpreted in Order PO-2010.

OPG submits that it created the security systems at considerable expense, and has consistently maintained the confidentiality of these systems. Accordingly, OPG argues that the security-related information in the records has monetary value to OPG and would offer even more significant value to others, as "it would enable them to establish and operate a similar system without any investment of time and labour."

The appellant's submissions on section 18(1)(a) largely reiterate the submissions provided for part 1 of section 17(1) as regards the type of information. While conceding that some of the withheld information qualifies as "technical", "commercial" or "financial" information, the appellant asserts that OPG has not tendered sufficient evidence to establish the presence of trade secrets, intellectual property or scientific information.

On the second part of the test for exemption under section 18(1), the appellant submits:

The term "belongs to" refers to "ownership" by an institution. The institution must have a proprietary interest in the information. We submit that the majority of the records do not "belong to" OPG within the meaning of the *Act*, with the exception of records in which there is a clear proprietary interest, such as registered patents, copyright or trade marks, and trade secrets. OPG and [the Company] have not provided detailed and compelling evidence of the proprietary interest in particular records, such as notices of intellectual property rights registration. On the contrary, OPG and [the Company] have merely asserted proprietary interests in information and records that [were] merely in their possession, and not to which there was a specific, delineated property right.

As to part 3 of section 18(1), the appellant contends that OPG has only provided limited evidence of the monetary or potential monetary value of any of the information in the records and only with respect to the technical and security data contained in the records. As the appellant argues, touching on both of paragraphs (a) and (c) of section 18(1), the rest of the information does not have monetary or potential monetary value because there is no market for the commercial use or exchange of that information and disclosure of it could not prejudice the competitive position of OPG.

Analysis and Findings

Type of Information

The definitions of "commercial", "financial" and "technical" information to be satisfied under section 18(1) mirror the definition of those terms for the purposes of a section 17(1) analysis. As discussed in greater detail under my analysis of the third party information exemption in section 17(1), I found that the information at issue in the Agreements, and associated records, meets the definition of "commercial" information and also, in parts, "financial" and "technical"; accordingly, I find that the first part of the test for exemption under section 18(1)(a) is met.

Some of the records for which both the section 17(1) and 18(1) exemptions were claimed have already been removed from the scope of this appeal as a consequence of my analysis under the former, given the appellant's confirmation that "technical" information may be so removed. However, there are certain records for which section 17(1) was not claimed and section 18(1)(a) was, or for which the claim made under section 17(1) failed and only analysis under section 18(1)(a) remains.

Based on my finding regarding part 1 of the test for exemption under section 18(1)(a) regarding the type of information in the records remaining at issue, an additional group of exhibits to the Agreements is removed from the scope of the appeal on the concession of the appellant. These are Exhibits G, J, K and K.1 of Schedule 2.2(1) [ITSA] and Exhibits H.1, H.3-H.9, H.11 and N of Schedule 2.2(1) [EMITSA].

Aside from those exhibits, however, there are additional records withheld in whole or in part under section 18(1)(a): some titles in the Index of Closing Documents; small parcels of text in the Agreements, including definitions; hours and job rate figures; a budget, a quote representing one of the affected party's proposed pricing for services; and business continuity planning documents.

As an aside, I would note that OPG marked the affected party quotation with both section 17(1)(a) and (c) and section 18(1)(a). However, this particular affected party communicated to OPG its consent to the disclosure of the records pertaining to them during the request stage. Accordingly, the exception to section 17(1) in section 17(3) applies, and I need only consider the possible application of section 18(1)(a) to the quotation.

"Belongs to"

In Order PO-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], former Senior Adjudicator David Goodis reviewed the phrase "belongs to" as it appears in section 18(1)(a) of the Act, and summarized relevant past orders in the following manner:

The [former] Assistant Commissioner [Tom Mitchinson] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. (See, for example, *Lac Minerals Ltd. v. International*

Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein).

I adopt this reasoning for the purposes of my analysis in this order.

Based upon my review of the records, or portions of records, and considered in the context of the evidence submitted by OPG, I find that none of the information withheld from the Index, the Agreement terms, and the exhibits (the price quote, the labour hours and job rate figures and the budget) “belongs to” OPG in the sense contemplated by this exemption. I have not been provided with sufficient evidence to establish that these particular items, which were produced through negotiations and included in the mutually-generated Agreements, constitute the intellectual property of OPG or are a trade secret of OPG. In view of my finding that this specific information does not meet part 2 of the test, and because all three parts must be met, it cannot be withheld under section 18(1)(a).

However, I am satisfied that Exhibits G, G.1 and H.2 to Schedule 2.2(1) [EMITSA], which represent OPG’s business continuity planning under the Agreements, “belong to” OPG within the meaning of that term. In my view, this is precisely the type of confidential business information described by former Senior Adjudicator Goodis in Order PO-1763. I accept that OPG invested money and other resources in the development of its business continuity planning, and that “the law would recognize a substantial interest in protecting [it] ... from misappropriation by another party.” Accordingly, I find that these records meet part 2 of the test for exemption under section 18(1)(a).

Monetary Value

In Order M-654, former Adjudicator Holly Big Canoe stated the following with respect to part 3 of the test for exemption under section 11(a), which is the municipal equivalent of section 18(1)(a):

The use of the term “monetary value” in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information . . . [emphasis in original].

Reviewing the business continuity exhibits in the context of former Adjudicator Big Canoe’s comments and the representations of the parties, I am satisfied that the information in these particular records has an intrinsic value to OPG, that part of the intrinsic value of these exhibits lies in their confidential nature. Further, I find that it is important to maintain this confidentiality to preserve the value of the records for OPG. Finally, I am satisfied that the monetary value OPG enjoys in these records has not been diminished by the passage of time. In the circumstances, I find that Exhibits G, G.1 and H.2 to EMITSA meet the requirements for exemption under section 18(1)(a) of the *Act*.

My findings under this heading are sufficient to dispose of OPG's claim to withhold the Index titles, the affected party's quote, and the labour hour schedule in Exhibit I to Schedule 2.2(1) [EMITSA] under the valuable government information exemption because only paragraph (a) of section 18(1) was claimed for this information. However, some of the withheld information considered above is also subject to a claim of exemption under paragraph 18(1)(c), along with other information. It is to this analysis that I now turn.

Section 18(1)(c)

OPG seeks to withhold various words, definitions, terms, figures, and a budget which are contained in the records on the basis that they are exempt under section 18(1)(c).

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

Representations

OPG contends that the contractual terms, including pricing and rights of termination,

... are not well-known to other potential communications suppliers OPG may have occasion to deal with in the future. Disclosure of such terms would give future suppliers of OPG insight into OPG's "bottom line". Knowledge of OPG's previous negotiating positions would give OPG's future suppliers an unfair bargaining advantage when negotiating with OPG. Any information would assist a supplier to make a contract more favourable to its interests, diminishes [sic] OPG's value and would thereby prejudice both its economic and competitive position within the meaning of ss. 18(1)(c) of the Act.

In support of the above, OPG refers to Orders P-1210 and P-1190 to demonstrate that this office has recognized that there is an inherent public interest in OPG (through its predecessor Ontario Hydro) maintaining the ability to negotiate the best possible deal in any contractual negotiation or partnership. OPG submits that optimizing its contractual position in future negotiations becomes more difficult, if not impossible, if potential alternative suppliers have access to OPG's negotiating positions, its historic reserve prices and other information which OPG as purchaser of services has sought to keep confidential. Relying on Order PO-1894, OPG argues that it obtains the best value in contractual negotiations when prospective suppliers are restricted to market information.

OPG contends that its bargaining position with its unions could be prejudiced by disclosure of information in the records pertaining to termination rights since this could equip the union to bring about the termination of the Agreements. OPG submits, in the alternative, that disclosure of termination clauses could give the union advance notice of the end of the Agreements which would place it in a strong bargaining position, which would, in turn, prejudice OPG.

OPG also opposes disclosure under section 18(1)(c) on the grounds that the release of server or other information technology security details poses a serious risk to information technology security, including fraud and identity theft. However, in view of the prior removal of all such information from the scope of this appeal under section 17(1) or 18(1)(a), it is unnecessary to canvas these representations further.

One of the affected parties, a software supplier, submits that if the financial and commercial information of OPG's many suppliers is disclosed through this process and, thereby, publicly disseminated, suppliers will be disinclined to do business with OPG in the future, which is contrary to the interests of OPG, as contemplated by section 18(1)(c). OPG echoes the theme of compromise to its business interests.

In response to the claim of prejudice to OPG's economic interests, the appellant reiterates the representations provided under section 17(1)(c). The appellant states that aside from the conceded security information or protected intellectual property, disclosure of the majority of the information at issue will not materially prejudice OPG's economic interests due to its singular position in the Canadian market. This position rests on the assertion that

[the Company] is the only supplier of a specialized set of services to OPG, and OPG the only buyer of these services. Each corporation is effectively the only actor in their position in the Canadian market. As a result of this special market configuration, there is no reasonable expectation of loss of competitive position, and, on the contrary, a special emphasis on the need for adequate disclosure of the terms of a public entity's outsourcing arrangements in a non-competitive market.

The appellant also seeks to impugn OPG's suggestion that disclosure of the termination provisions would equip a union to undermine the Agreements or OPG's bargaining position. In the appellant's view, expressed in the representations provided for part 3 of the section 17(1) test, these harms are speculative and "even illogical (presumably, members of bargaining agents wish to remain employed)."

The appellant asserts that because section 18(1)(c) is "arguably a wider exception than section 18(1)(a)," compelling evidence of prejudice to economic interests or competitive position, must be provided. In the appellant's submission, OPG has failed to provide such evidence of prejudice to its future bargaining or contract negotiations and formation.

In reply, OPG submitted an affidavit from OPG's Chief Information Officer to rebut the appellant's suggestion "that there is no competitive marketplace for these services in Canada." The affidavit refers to six companies, including the Company, as key players in the information

technology outsourcing industry and indicates that each has a large enough presence to compete for OPG's outsourcing business. The affidavit concludes with the following statement:

The outsourcing of our IT has provided us with a mechanism to control costs, manage IT service delivery risk, and have ready access to highly trained technical resources. This is a mechanism that we plan to continue to use in future, and given the maturity of the outsourcing market, we see opportunities for even greater benefits. We need to be in a position to obtain the best quality service at the lowest possible price to keep our operating costs low and retain value for our shareholder.

Analysis and Findings

In Order PO-1747, Senior Adjudicator David Goodis stated:

The words 'could reasonably be expected to' appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated 'harms' [including section 18(1)(c)]. In the case of most of these exemptions, in order to establish that the particular harm in question 'could reasonably be expected' to result from disclosure of a record, the party with the burden of proof must provide 'detailed and convincing' evidence to establish a 'reasonable expectation of harm' [see Order P-373; *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)].

It bears emphasis that my analysis under section 18(1)(c) need only be carried out in relation to the limited amount of information remaining at issue. Mindful of the information remaining, I find that OPG has failed to provide me with sufficiently detailed evidence to establish a link between the disclosure of that information and a reasonable expectation of either of the harms section 18(1)(c) is intended to protect against.

More specifically, I am not persuaded that disclosure of the information could reasonably be expected to compromise or prejudice OPG's bargaining position in relation to possible outsourcing opportunities, negotiations with its unions, or its efforts to optimize contractual arrangements with its suppliers or potential partners.

In seeking to demonstrate the harm alleged to be attendant upon disclosure, OPG referred to several previous orders of this office, namely Orders P-1190, P-1210, and PO-1894. All of these were orders of former Assistant Commissioner Tom Mitchinson, the former two deal with access requests for records held by the former Ontario Hydro, the predecessor to OPG. As I understand it, OPG is arguing that the former Assistant Commissioner's recognition of an inherent public interest in Hydro negotiating the best possible deal establishes OPG's entitlement to deference in exercising discretion to withhold certain information under section 18(1)(c).

I would not dispute the finding that it is in the public interest that the Ontario government, its agencies and its institutions negotiate favourable contractual arrangements. However, I do not

think that the former Assistant Commissioner's findings on section 18(1) in the three orders turn on this assumption. Based on my own reading of these orders, the former Assistant Commissioner was persuaded by the specificity of the evidence relating to harm.

In Order P-1190, for example, Ontario Hydro was able to point to specific, and ongoing initiatives in which it was involved, and to demonstrate a reasonable expectation of harm with disclosure of peer evaluation reports which were critical in tone. The former Assistant Commissioner Mitchinson's analysis reads, in part, as follows:

... [Hydro] argues that unduly critical public releases may harm two initiatives in which it is currently engaged.

Hydro describes current negotiations with potential private sector partners regarding one of its nuclear plants, and submits that unduly critical public releases could reasonably be expected to raise concerns with these potential partners.

Hydro also points out that it is involved in ongoing international negotiations which could lead to a multimillion dollar contract. In Hydro's view, because the peer evaluation reports do not provide a balanced picture of safety at its nuclear power plants, these reports could be used by others in the industry in an attempt to gain a competitive advantage. According to Hydro, its United States competitors are not required to disclose comparable peer evaluation reports prepared by the INPO [Institute of Nuclear Power Operations].

I have intentionally been somewhat vague regarding the details of these ongoing negotiations, so as not to disclose facts which could have an impact on these discussions. Hydro has provided me with more detailed evidence than I have included in this order.

Similarly, in Order P-1210, Hydro's submissions on the reasonable expectation of prejudice with disclosure of records dealing with financial impact analyses respecting privatization were based on concerns related to current and potential negotiations. In that order, the former Assistant Commissioner carefully assessed the information sought by the requester and made the following finding:

Having reviewed the records and representations of both parties, I agree with Hydro's position that if its assets are eventually sold to private interests, disclosure of the information contained in Records 1 and 2 at this point in time could have a negative impact on potential sale revenues. In my view, Hydro has provided sufficient evidence to establish that disclosure of these two records could reasonably be expected to prejudice its economic interest with respect to ongoing and potential privatization initiatives, and I find that both records qualify for exemption under section 18(1)(c) of the Act.

In the appeal before me, the facts are quite different. In this case, the appellant does not seek draft documents, or a conditional agreement, as was the case in Order PO-1894. Here the

appellant seeks the final Agreements between OPG and the Company, and various affected parties. Moreover, in the orders cited by OPG, the institution tendered sufficient evidence about separate, ongoing negotiations that were susceptible to interference; the evidence of these specific negotiations persuaded the former Assistant Commissioner to find in each instance that disclosure of the particular records at issue could reasonably be expected to prejudice its economic interests or competitive position. In my view, Orders P-1190, P-1210 and PO-1894 are distinguishable because of these differing circumstances.

I find that the evidence and submissions tendered by OPG in support of its argument that the withheld information is exempt under section 18(1)(c) are speculative at best, and do not describe in sufficient detail how the disclosure of that particular information could reasonably be expected to result in the harm envisioned by section 18(1)(c).

In my view, OPG's arguments with respect to the use by its union of knowledge of the termination provisions as leverage in future negotiations or to undermine the Agreements are simply not sustainable. It is worth mentioning that portions of these specific provisions are excluded from the *Act* under section 65(6)3, while the remaining portions of the provisions will be disclosed because OPG's sole claim for exemption under section 17(1) was not made out. In fact, OPG has only claimed section 18 over a relatively small segment of Article 10 of ITSA, the termination provisions, and it is through the lens of this information that I reject OPG's submissions on section 18(1)(c).

I take a similar perspective on the inadequacy of the evidence presented about potential compromise to OPG's future contractual negotiations and positions, as regards disclosure of pricing and other commercial and financial information. I find that the evidence presented is not sufficiently detailed to persuade me that a reasonable expectation of such prejudice exists.

In addition, it should be noted that the Agreements are based on a number of variables, which are subject to change and which may, in fact, have changed, since the time of their negotiation and formation in 2002. In my view, this further reduces the persuasiveness of the argument that knowledge of the terms of these Agreements could adversely affect OPG's interests in negotiating other agreements or renegotiating the same one. In my view, it cannot reasonably be concluded that OPG would be forced to accept unfavourable contractual terms based on another party's knowledge of certain limited portions of the terms of these Agreements.

Ultimately, the generalized statements made by OPG in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)*, cited above. Accordingly, I find that none of the information for which OPG has claimed exemption under section 18(1)(c) qualifies and I will order it disclosed.

PUBLIC INTEREST OVERRIDE

The appellant has raised the possible application of the "public interest override" in section 23 of the *Act* as a basis for requiring the disclosure of the records at issue in this appeal.

A considerable number of the records originally at issue in this appeal have either been excluded from my purview based on the operation of the jurisdictional exclusion in section 65(6)3, or as a consequence of the appellant's concession that certain types of information may be removed from the scope of the appeal.

However, I have previously found that the business continuity planning documents known as Exhibits G, G.1 and H.2 to Schedule 2.2(1) of EMITSA are exempt under section 18(1)(a), and it is exclusively in relation to these records that I will consider the possible application of section 23 of the *Act*.

General principles

Section 23 states:

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

Section 23 is commonly referred to as the "public interest override" since it permits information which is otherwise exempt from disclosure under certain exemptions to be disclosed in the public interest. For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23:

An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

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

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. However, where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564]. A compelling public interest has been found *not* to exist where a significant amount of information

has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, MO-2249-I].

Representations

The appellant takes the position that the public has a right to know about the circumstances of OPG's outsourcing agreements "in a non-competitive market." The appellant states that:

The matter to which the records relate is the terms of the outsourcing of the provision of maintenance and engineering services by a public utility. It is in the public interest to disclose the fullest terms of these transactions.

The appellant makes special reference to there being a strong public interest in disclosing information about the standards of service performance for which OPG has contracted with the Company.

OPG submits that a significant amount of information relating to the Agreements has already been disclosed and that information is adequate to address any public interest considerations. OPG also submits that the appellant has failed to provide evidence to establish the existence of a compelling public interest in the release of this information, particularly since its interests are essentially private in nature. Although OPG provided specific examples to support its position on the "essentially private" nature of the appellant's interest, these cannot be reproduced as they would reveal confidential portions of the Company's representations.

The Company contends that the focus of the submissions provided by the appellant affirm that its interest in obtaining access to the records is a vested private interest. The Company characterizes the appellant's interest in the disclosure of "confidential employee, pension and services performance-related matters" as evidence of the private nature of the appellant's interest, which the Company suggests is the antithesis of the compelling public interest required. Furthermore, the Company contends that the appellant has been unable to support any argument that the public would be served by the disclosure of the information which, it submits, is "far too narrow in scope and applicability to serve anything but a private and highly particularized interest in disclosure." The information does not, it is suggested, raise an issue of more general applicability which may be in the public interest [Order MO-1564]. The Company argues that even if a public interest in disclosure is found, it cannot be properly characterized as "compelling".

Analysis and Findings

As outlined above, for me to order the disclosure of information I have found to be exempt under section 18(1)(a), I must be satisfied that there is a compelling public interest in the disclosure of the records, and that such an interest clearly outweighs the purpose of the valuable government information exemption.

Having contrasted the appellant's representations on the public interest override with the information contained in Exhibits G, G.1 and H.2 to Schedule 2.2(1) [EMITSA], I find that no compelling public interest in the disclosure of this information has been demonstrated. As

previously noted, these records are OPG business continuity planning documents and, in my view, the evidence provided by the appellant does not support a finding that there is a compelling public interest in their disclosure that would override the exemption applied to them. Their disclosure would not, in my view, serve the purpose of informing the citizenry about the activities of their government, nor would it qualitatively assist the public in expressing opinions about the transactions and Agreements or in making effective political choices [Order P-984].

I note that as a result of this process, the appellant will gain access to much of the information sought. In my view, any compelling interest that may exist is already satisfied by the degree of disclosure required by this order.

Accordingly, having concluded that there is no compelling public interest in the information I have found to be exempt under section 18(1)(a) of the *Act*, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. My determination on whether a record, or portion of a record, is excluded from consideration by the application of section 65(6)3, or removed from the scope of the appeal, or exempt from disclosure is set out in the attached Appendix that will be sent to OPG, the Company and the appellant. A copy of the Appendix will be provided to any of the affected parties, aside from the Company, upon request.
2. I order OPG to disclose records that are not excluded, removed or exempt under the *Act* to the appellant by sending him a copy by **February 8, 2008** but not before **February 1, 2008**.
3. In order to verify compliance with the terms of this order, I reserve the right to require OPG to provide me with a copy of the records disclosed to the appellant, upon my request.

Original signed by: _____
Daphne Loukidelis
Adjudicator

January 4, 2008