



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2676**

## **Appeal PA07-2**

### **Ontario Power Generation**



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## **BACKGROUND:**

Ontario Power Generation (OPG) is an Ontario-based electricity generation company whose principal business is the generation and sale of electricity in Ontario. The OPG was created under the *Business Corporations Act* and is wholly owned by the Province of Ontario, who is the OPG's sole shareholder.

As part of the Province's policy to replace the generation capacity associated with coal with capacity associated with cleaner energy sources, the Ministry of Energy in 2005, on behalf of the Province of Ontario, directed the OPG to convert the Thunder Bay Generating Station to a natural gas fuelled generating system by year-end 2007.

Upon receipt of the directive, the OPG commenced discussions with potential service providers for the conversion project.

The OPG, however, received a subsequent directive from the Ministry of Energy in 2006 to cancel the gas conversion of OPG's coal-fired generating station in Thunder Bay.

The majority of the records at issue in this appeal relate to documentation regarding the cancelled conversion project.

## **NATURE OF THE APPEAL:**

The OPG received a three-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

1. Please provide your best estimate of the fuel, operating and maintenance costs, per kWh, of each of the following generating stations: Nanticoke, Lambton, Thunder Bay and Atikokan. Please provide this information for 2005 and 2006.
2. Please provide copies of all the reports provided to OPG's board of directors, since 2003, with respect to the conversion of the Thunder Bay Generating Station to natural gas.
3. Please provide a copy of the directive to OPG from the Government of Ontario which directed OPG to cancel the conversion of the Thunder Bay Generation Station to natural gas.

The OPG located responsive records and notified four affected parties (the parties whose interests may be affected by disclosure) under section 28 of the *Act*. Three of the affected parties replied that they did not consent to disclosure. One affected party consented to disclosure. Upon receipt of these responses, the OPG issued an access decision in which it decided to grant the requester full access to some records. The OPG also denied access to portions of other records and in one instance withheld an entire record. The OPG claimed that the exemptions at sections 17(1)(a) and (c) [third party information], 18(1)(a) and (c) [valuable government information] and 19 [solicitor-client privilege] of the *Act* applied to the withheld information.

The OPG also advised the requester that the record responsive to part three of the request was publicly available and could be located on its website.

The requester (now the appellant) appealed the OPG's decision to this office and the appeal was assigned to a mediator. During mediation, the appellant confirmed that she was not appealing the OPG's decision regarding part three of her request. Mediation did not resolve the remaining issues and the file was transferred to the adjudication stage of the appeal process.

This office commenced its inquiry by sending a Notice of Inquiry to the OPG and the three affected parties objecting to the disclosure of the withheld information. The OPG and all three of the affected parties submitted representations in response to the Notice of Inquiry. The OPG, in its representations, indicated that it no longer relies on section 18(1)(a) of the *Act* to deny access to Records 2, 4, 5, 6, 7 and 8, listed in the chart below. The affected parties, however, continue to object to the disclosure of the withheld information in these records.

The non-confidential portions of the OPG's and the first affected party's representations, along with the complete representations of the second affected party were sent to the appellant. The representations of the third affected party was not shared with the appellant due to confidentiality concerns.

The appellant was also provided with an opportunity to make representations, which she declined. The appellant, however, confirmed that she continues to seek access to the information at issue.

## RECORDS:

Record at issue relating to part one of request:

	<b>Record No./Description</b>	<b>No. of Pages</b>	<b>Access Granted</b>	<b>Exemptions Claimed</b>
1	Generation, Fuel Energy Costs, OM&A Energy Costs, Fossil Stations	1	No	18(1)(a) and (c)

Records at issue relating to part two of the request:

	<b>Record No./Description</b>	<b>No. of Pages</b>	<b>Access Granted</b>	<b>Exemptions Claimed</b>
2	Report for Submission to the Major Projects Committee (Gas Conversion Project) June 28, 2006	2	Partial	17(1)
3	Report for Submission to the Major Projects Committee (Shareholder Resolution) June 28, 2006	4	Partial	17(1) 18(1)(a) 19

	<b>Record No./Description</b>	<b>No. of Pages</b>	<b>Access Granted</b>	<b>Exemptions Claimed</b>
4	Recommendation for Submission to the Board of Directors March 29, 2006	13	Partial	17(1)
5	Report for Submission to the Major Projects Committee (Shareholder Resolution) February 06, 2006	3	Partial	17(1)
6	Recommendation for Submission to the Board of Directors November 10, 2005	6	Partial	17(1)
7	Business Case Summary November 10, 2005	19	Partial	17(1)
8	Report for Submission to the Major Projects Committee (Gas Conversion Project) June 28, 2005	10	Partial	17(1)

## **DISCUSSION:**

I have decided to first consider the OPG's claim that the discretionary exemptions at sections 18 and 19 of the *Act* apply to Records 1 and 3. I will then consider the OPG's and affected parties' claim that the mandatory exemption at section 17(1) of the *Act* applies to the Records 2 to 8.

## **SOLICITOR-CLIENT PRIVILEGE**

The OPG submits that Record 3, which it describes as the draft sole shareholder resolution/declaration and summary cover page, is exempt under section 19 of the *Act*.

The relevant portions of section 19 of the *Act* states:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
  - (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;
- or

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-2538-R; *Blank v. Canada*

(*Minister of Justice*) (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

### ***Solicitor-client communication privilege***

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The OPG submits that Record 3 is subject to solicitor-client privilege and states that:

While the bulk of these records did not originate in the Ministry of Energy, record number 3 (the draft shareholder's declaration) did, in fact, originate in the Ministry. The Ministry asserts s.19 in respect of the draft Sole Shareholders Resolution which was prepared by Crown Counsel in order to advise the Ministry of Energy as regards certain options for addressing the [first affected party] request for compensation.

...

The covering summary was created by OPG as a summary of the DRAFT Shareholder resolution, if released this information would provide the exact information that the Ministry of Energy wishes to withhold.

In support of its position, the OPG forwarded a copy of a letter the Ministry of Energy provided it during the request stage, as well as representations from the Ministry of Energy. Some portions of the Ministry of Energy's letter and representations were withheld from the appellant due to confidentiality concerns.

### ***Analysis and Findings***

I have reviewed the representations of the OPG and Ministry of Energy along with the record itself and I am satisfied that the draft shareholder resolution and summary cover page amount to “direct communications of a confidential nature” between counsel and OPG’s Board of Directors. I am also satisfied that the shareholder resolution and summary page was provided to the Board of Directors in draft form for the purposes of providing legal advice which was to be accepted or rejected. There is no evidence before me that the common law solicitor-client communication attached to Record 3 has been terminated or waived. Accordingly, I find that Record 3 is exempt under Branch 1 of the section 19 exemption. As a result of my finding, it is not necessary that I consider whether Record 3 is also exempt under Branch 2 of section 19 or sections 18(1)(a) or (c) of the *Act*.

### **ECONOMIC AND OTHER INTERESTS**

The representations of OPG submit that the exemptions at sections 18(1)(a) and 18(1)(c) of the *Act* apply to Record 1. Sections 18(1)(a) and (c) of the *Act* states:

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;

The purpose of section 18 is 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.

For section 18(1)(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 [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The exemption at section 18(1)(c) is arguably broader than section 18(1)(a) in that it 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]. Accordingly, I will first consider the OPG’s representations regarding the possible application of section 18(1)(c) of the *Act* to Record 1.

Record 1 is responsive to the appellant’s request for information regarding the 2005 and 2006 estimates for the fuel, operating and maintenance costs for four generating stations. Record 1 consists of the year-end totals for 2005 and the period January to September 2006, for the fuel unit costs and operations, maintenance and administration unit energy costs (OM&A) for the four specified generating stations. Record 1 also contains information regarding the total amount of generating units used at the specified generating stations for the above-referenced time periods.

In support of its position that section 18(1)(c) of the *Act* applies to Record 1, the OPG attached an Affidavit from one of its Senior Advisors. The Senior Advisor explains that the fuel and OM&A unit energy costs refer to OPG’s fossil fuelled “operating costs”. The Senior Advisor explains that the OPG, unlike some other wholesale generators, cannot bid “what the market will bear” and has the following restrictions placed on its bidding:

- i) it must offer almost all its fossil fuelled generation at its “margin cost” which typically equals its fuel price, plus incremental operating and maintenance costs,
- ii) its bid price and the price paid to it are capped by government and Ontario Energy Board ...

The OPG’s representations state that disclosure of the fuel and OM&A unit energy costs could reasonably be expected to harm the OPG’s marketability and profitability in two ways:

- 1) Fuel supplier and transportation contractors can ascertain key price information from what is being paid by OPG for its various fuels at various sites. This doesn’t drive the best price to OPG. This can affect the bidding of current and future fuel contracts, as well as transportation contracts. This is likely to increase costs, reduce competition, and because of its cap on its process any fuel price increase can only reduce OPG’s profitability.
- 2) Electricity Wholesale competitors can better ascertain OPG costs at various sites and in some circumstances undercut/underbid OPG pricing reducing both the

volume of OPG sales and the price paid for all OPG sales. In a “blind bid” competitors would have an incentive to bid as low as they could to capture the market. When however, they have the means to determine OPG’s costs and the price ceiling set by government and the O.E.B., they can strategically bid at a price somewhat higher than their most competitive price. Pricing of imports ... and fossil exports out of Ontario could also be impacted.

The OPG also submits that disclosure of the fuel and OM&A unit energy costs could reasonably be expected to impact the competitiveness of the fuel procurement process which could result in higher electricity rates for Ontario consumers.

### *Analysis and Findings*

The purpose of section 18(1)(c) of the *Act* 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].

As noted above, for section 18(1)(c) of the *Act* to apply, the OPG must demonstrate that disclosure of the record at issue could reasonably be expected to prejudice its economic interests or competitive position. Further, this section does not require the OPG to establish that the record at issue falls within any particular category or type of information, or that it has intrinsic monetary value. Rather, the OPG must demonstrate that disclosure of the record “could reasonably be expected to” lead to the specified result. To meet this test, “detailed and convincing” evidence to establish a “reasonable expectation of harm” must be provided. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

I have carefully considered the representations of OPG along with Record 1 and find that the unit prices reported representing the fuel and OM&A unit energy costs contained in this document qualify for exemption under section 18(1)(c) of the *Act*. In my view, the OPG operates in a competitive market and as a result, pricing information regarding its generation and sale of electricity in Ontario has value to its competitors. Accordingly, disclosure of the OPG’s pricing practices could reasonably be expected to prejudice its economic interests and competitive position as it would allow competitors to predict, with greater accuracy, OPG’s fuel costs and, in turn, its bids in the wholesale electricity market.

The remaining information in Record 1 is the amount of generation units produced by the specified generating stations during the above-reference time period. This information, however, was not requested by the appellant and thus is non-responsive.



Accordingly, I am satisfied that the fuel and OM&A unit energy costs information contained in Record 1 qualifies for exemption under section 18(1)(c) of the *Act*. As a result of my finding, it is not necessary for me to also consider the possible application of section 18(1)(a) of the *Act* to this record.

### **EXERCISE OF DISCRETION**

The exemptions in sections 18(1)(c) and 19 are discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The OPG provided representations stating that it properly exercised its discretion. Based on the representations of the OPG, I am satisfied that the OPG exercised its discretion in good faith and has taken into account relevant factors and not irrelevant factors. As a result, I will uphold the OPG's decision not to disclose Records 1 and 3 under sections 18(1)(c) and 19 of the *Act*.

I will now consider the affected parties' claim that the third party information exemption at section 17(1) of the *Act* applies to the remaining information.

### **THIRD PARTY INFORMATION**

The OPG did not provide its own submissions in support of its original position that sections 17(1)(a) and (c) apply to Records 2, 3, 4, 5, 6, 7 and 8. Rather, the OPG's representations state that it adopts the submissions of the affected parties and that the "...information in these records was communicated to OPG on the basis that it was confidential and it was to be kept confidential." As I have already found that Record 3 is exempt under section 18(1)(c), I need only consider whether the third party information exemption at section 17(1) applies to Records 2 and 4 to 8.

The affected parties provided representations in support of their position that sections 17(1)(a), (b) and (c) apply to the withheld portions of Records 2 and 4 to 8. The relevant portions 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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

### **Part 1: type of information**

The affected parties submit that the withheld information contains technical, commercial or financial information for the purpose of the first part of the three-part test. These terms have

been defined in prior orders as follows:

*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 [Order 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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The first affected party submits that the information at issue contains "...cost estimates, proposed schedules of events and regulatory proceedings, and event descriptions..." regarding the conversion project. The second and third affected parties submitted similar representations in support of this position.

Records 2 and 4 to 8 consist of reports to the OPG's Board of Directors regarding the status of the Thunder Bay conversion project and as a result contain commercial, technical and financial information relating to the project. Having regard to records and representations of the parties, I am satisfied that the withheld information in Records 2 and 4 to 8 meet the requirements for part 1 of the test for the application of section 17(1).

## **Part 2: supplied in confidence**

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

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

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

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The position of the affected parties is that the reports which comprise Records 2 and 4 to 8, contain information they supplied in confidence to the OPG. In particular, the first affected party submits that though the information at issue is not marked “confidential” it “... was intended to be treated confidentiality because this is [their] expectation of every other customer or potential customer of natural gas.” The first affected party distinguishes the circumstances it supplied the information at issue to the OPG from that relating to bids of government projects where bidders are told that their bids are subject to public process. The representations of the second party states that it:

... entered into an agreement with OPG for the supply of a Distributed Control System for the Thunder Bay Generating Station Gas Conversion Project following a Request for Proposals (RFP) from OPG. The invitation to submit proposal dated August 2, 2005 expressly stated that it was not a call for tenders.

...

The RFP expressly stated that “*Except with the approval of a Proponent, under no circumstances, will OPG disclose any information contained in the proposal of that Proponent to any other Proponent, including a Preferred Proponent*”

The third affected party also provided representations in support of its position that it also supplied information in Records 2 and 4 to 8 to the OPG in confidence.

### ***Analysis and Findings***

I have carefully reviewed the withheld information and note that the only document that was created by one of the affected parties is a schedule and cash flow forecast contained in the last page of Record 8. This record includes information regarding the estimated dollar amounts the first affected party anticipates it will spend as the project progresses from its design and delivery stage. The schedule forecast also specifies the period of time the first affected party predicts it will take to complete each stage of the project.

The remaining information at issue in Records 2 and 4 to 8 consist of reports prepared by OPG staff for its Board of Directors describing their analysis and recommendations regarding certain aspects of the conversion project. The affected parties take the position that the information they supplied to the OPG in confidence is included in these reports. The affected parties also submit that the circumstances of this appeal differ from the line of decisions of this office which have found that mutually generated information, such as the negotiated terms of a contract involving an institution and an affected party, will not normally qualify as having been “supplied” for the purpose of section 17(1).

I am satisfied that the references to the dollar amount the first affected party spent and is willing to commit to the conversion project, as well as its estimate of the total costs of the natural gas pipeline, along with the schedule and cash flow forecast it prepared meets part 2 of the test under section 17(1). I am also satisfied that the references in the records which identify specific technical information relating to the third affected party was “supplied in confidence” to the OPG.

I also agree with the affected parties that the context of this appeal differs from the line of decisions addressing the application of the *Act* to negotiated terms set out in written agreements between government institutions and affected parties. However, I am of the view that some of the remaining information at issue was “mutually generated” by the OPG and the affected parties, though not set out in a finalized written agreement. However, given my decision under the third part of the three-part test under section 17(1) below, it is not necessary for me to determine whether or not the remaining withheld information meets part 2 of the test.

### ***Part 3: harms***

To meet this part of the test, the institution and/or the third party must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm.” Evidence amounting to

speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

**Section 17(1)(b): similar information no longer supplied**

The first affected party submits that disclosure of the withheld information would force it to reconsider providing the OPG with similar information in the future. The first affected party goes on to state that the “chilling effect” of disclosure would impact the OPG’s ability to discuss natural gas conversion for any OPG facility with it in the future.

The OPG did not provide representations in support of the first affected party’s position regarding the application of section 17(1)(b).

I am not persuaded that disclosure of the information relating to the first affected party could reasonably be expected to result in similar information no longer being supplied to the OPG in the future, as contemplated in section 17(1)(b). In my view, companies doing business with public institutions such as the OPG must understand that certain information regarding how the institution plans to carry out its obligations will be made public [Order MO-2274].

As I have found that section 17(1)(b) does not apply, I will now consider whether the information at issue in Records 2 and 4 to 8 qualify for exemption under sections 17(1)(a) and 17(1)(c) of the *Act*.

**Section 17(1)(a) and Section 17(1)(c) : prejudice to competitive position, undue loss or gain**

The affected parties submit that disclosure of the information at issue in Records 2 and 4 to 8 could reasonably be expected to significantly prejudice its competitive position, interfere significantly with the contractual or other negotiations (section 17(1)(a)) and/or result in an undue loss or gain (section 17(1)(c)).

In particular, the first affected party submits that it is in competition with not just other forms of energy, but also with others who seek to build natural gas transmission systems. The first affected party’s representations state that disclosure of the information at issue to its competitor would result in:

... an advantage which is unfair. The Records disclose cost and planning information which was developed by [it] from its own resources and shared with OPG on a confidential basis. With disclosure, competitors can now obtain this

information without having to invest in the development of cost or planning expertise.

The second party's representations state that:

[d]isclosure of [its] price and potentially, other information contained in the contract would therefore significantly prejudice [its] competitive position. With that commercial and financial information in hand, [its] competitors would be able to revisit their pricing and strategy for upcoming RFP's.

The third affected party provided confidential representations and took the position that disclosure of any information regarding its proposed involvement, including opinion statements made by OPG staff to its Board of Directors regarding the third affected party and the proposed form of contract and pricing information requested by the OPG, constitutes its technical, commercial and/or financial information which, if disclosed, could result in one of the harms specified in sections 17(1)(a) and (c).

### *Analysis and Findings*

The position of the affected parties is that disclosure of the withheld information could reasonably be expected to significantly prejudice their competitive position and result in an undue loss or gain, taking into consideration the fact that the conversion project was cancelled. As a result, the affected parties share concerns that disclosure of the withheld information could impact their future negotiations with the OPG regarding a resurrected Thunder Bay conversion project or other conversion projects in the future.

Having regard to the submissions of the affected parties, I am satisfied that the following portions of the withheld information in Records 2 and 4 to 8 contains technical, commercial and financial information which if disclosed, could reasonably be expected to result in the harms contemplated in sections 17(1)(a) and (c) of the *Act*:

- Records 4, 6, 7 and 8 – the negotiated prices for the Control supply contract and boiler conversion along with the actual budgeted amount for the boiler conversion (which would reveal information about the negotiated price, as it is not described in percentage form)
- Records 6 and 7 – information relating to specified technical information relating to the third affected party
- Record 5 – amounts of monies spent and committed by the first affected party
- Records 7 and 8 – estimate amount provided by the first affected party for the construction of a natural gas pipeline and schedule and cash flow forecast prepared by the first affected party

I am satisfied that disclosure of the above-noted information could reasonably be expected to significantly prejudice the affected parties' competitive position or result in an undue loss or gain. I find that disclosure of the negotiated price would enable competitors to undercut the affected parties' future bids should the OPG hold a competitive bid process for the Thunder Bay conversion or similar project in the future. I am also satisfied that disclosure of the amounts of monies spent by the first affected party and its estimated cash flow forecast reveals information about the first affected party's financial situation, which if disclosed, could reasonably be expected to result in the harms contemplated by sections 17(1)(a) and (c). Finally, I am of the view that the information contained in the schedule and cash flow forecast and the first affected party's estimated cost for the natural gas pipeline qualifies for exemption under sections 17(1)(a) and (c) as it represents the result of significant resources expended by the first affected party.

As the appellant has not raised the possible application of the public interest override at section 23 of the *Act*, I find that the above-referenced portions of Records 4, 5, 6, 7 and 8 qualify for exemption under the *Act*.

In my view, the remaining information at issue does not qualify for exemption under sections 17(1)(a) and (c) of the *Act*, as it contains OPG staff opinion, analysis and recommendations or is already in the public domain or has been provided to the appellant. Accordingly, I find that the remaining information at issue in Records in 2 and 4 to 8 should be disclosed to the appellant.

*Information contained in Records 2 and 4 to 8 which contain OPG staff opinion regarding the third affected party*

Though I accept the third affected party's position that it operates in a competitive environment, I am not satisfied that disclosure of information relating to the proposed form of contract and pricing information requested by the OPG or general opinion statements made by OPG staff to its Board of Directors about the negotiation process or the ability of the third affected party to complete the project qualifies for exemption under sections 17(1)(a) and (c). In order for the third affected party to establish that disclosure of this information could reasonably be expected to significantly prejudice its competitive position or result in an undue loss or gain, it would have to establish that disclosure of this information could reasonably result in the harms contemplated in sections 17(1)(a) and (c). Instead, I was provided with evidence speculating harm on the basis that the information might be useful to competitors in future negotiations with the OPG. Accordingly, even if I was persuaded that this information was supplied by the third affected party to the OPG in confidence, I am not satisfied that disclosure could reasonably result in the harms specified in sections 17(1)(a) and (c) of the *Act*. In any event, as set out in my discussion below some of the information the third affected party seeks to withhold was disclosed to the appellant following the OPG's third party notification during the request stage.



*Information contained in Records 2 and 4 to 8 which contain OPG staff analysis and recommendations regarding the conversion project*

Some of the information the parties seek to withhold from the appellant contains OPG staff analysis and recommendations regarding the conversion project, such as the need for a capacity contract, the evaluation of gas supply alternatives and the setting of target dates relating to the completion of key events. The parties also seek to withhold information relating to the maximum dollar amount the OPG is prepared to pay the first affected party for its actual costs incurred if the project is not completed and the dollar amounts or percentages the OPG has set aside for contingencies and construction contributions. The information in this category was previously claimed to be exempt by the OPG under the discretionary exemptions found at sections 18(1)(a) and (c) of the *Act*. The OPG, however, no longer relies on these exemptions to deny access to this information. In determining whether disclosure of this information could reasonably be expected to significantly prejudice the competitive interests of the affected parties or result in an undue loss or gain under sections 17(1)(a) and (c), I find that the representations of the affected parties in this regard are not sufficiently detailed and convincing. Again, even if I was persuaded that this information met the “supplied in confidence” test in part two of the three-part test, I find that, disclosure of this information could not reasonably be expected to result in the harms contemplated in sections 17(1)(a) and (c) of the *Act*.

*Information contained in Records 2 and 4 to 8 which is in the public domain or has been provided to the appellant under the Act.*

Finally, a significant portion of the remaining information at issue is in the public domain or has been provided to the appellant under the *Act*. For example, the Report for Submission to the Major Projects Committees dated May 12, 2006 and the disclosed portions of the reports (including their attachments) dated November 10, 2005, February 6, 2006, March 29, 2006, and June 28, 2006, disclosed to the appellant identify that:

- the first affected party was to design and plan the 30 kilometer pipeline to the plant under a Memorandum of Understanding with OPG and was to execute a Transportation Service Agreement for the supply of natural gas;
- OPG’s contracting strategy for the project anticipates “that sole-sourcing of some key contracts may be required due to specific vendor knowledge, and to maintain a consistent control architecture for the plant” and that the third affected party’s role was to be sole-sourced and that it is the successor of the original manufacturer of the Thunder Bay boilers;
- The OPG requested fixed price proposals for the design and supply of control systems;
- Letters of intent were to be issued for the boiler conversion and controls replacement contracts by a specified date; and

- the OPG is to pay the first affected party for its actual costs it incurred if the conversion project is not completed.

Accordingly, other than the information I found exempt under sections 17(1)(a) and 17(1)(c), the remaining withheld information should be disclosed to the appellant.

**ORDER:**

1. I uphold the OPG's decision to withhold access to portions of the records I found exempt under sections 17(1)(a), 17(1)(c), 18(c) and 19 of the *Act*.
2. I order the OPG to disclose the remaining withheld portions of the records to the appellant by **June 27, 2007** but not before **June 23, 2008**. For the sake of clarity, I have highlighted the portions of these records that should not be disclosed in the copy of the records enclosed with this Order to the OPG.
3. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by OPG pursuant to order provision 2.

Original signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ May 21, 2008