



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2806

Appeal PA08-90

Ontario Power Generation



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BACKGROUND:

Ontario Power Generation Inc. (OPG) is a provincially-owned commercial entity that was established in December 1998 to operate the electricity generating assets of the former Ontario Hydro.

According to its website, OPG currently operates 65 hydroelectric generating stations, three nuclear generating stations, and five fossil generating stations, four of which are coal-fired. Ash (fly, bottom and berm) is a by-product of the burning of coal in a coal-fired generating station, and can itself be used in the production of a variety of other materials, such as cement.

NATURE OF THE APPEAL:

OPG received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to OPG's coal-fired generating stations at Nanticoke, Lambton, Lakeview, Thunder Bay and Atikokan. The requester sought access to the following information:

For each year from 1995 to 2006 inclusive please state the payments made by Ontario Hydro/Ontario Power Generation to transportation service providers to ship ash and other materials from [each named location's] boilers and pollution control equipment to off-site locations.

Please provide a break-out of the amounts of ash and other materials and annual payments by transportation service providers by year. Please provide the name of the transportation service providers. If OPG has contracts with the transportation service providers, please provide the end date of each contract.

For each year from 1995 to 2006 inclusive please state the payments made by Ontario Hydro/Ontario Power Generation to third parties to dispose, recycle, treat, or otherwise manage, the ash and other materials from [each named location's] boilers and pollution control equipment.

Please provide a break-out of the amounts of ash and other materials and annual payments by the final destinations of the ash and other materials by year. With respect to each final destination, please state its location and the name of its owner. If OPG has contracts with the third parties, please provide the end date of each contract.

OPG identified a set of records related to the Lakeview, Lambton and Nanticoke generating stations as responsive to the request. OPG stated that no records exist for the Atikokan and Thunder Bay generating stations.

OPG notified the companies identified in the records (the affected parties) of the request, pursuant to section 28 of the *Act*. Section 28 requires notification of affected parties prior to disclosure of information that might be subject to the third party information exemption at section 17(1) of the *Act*. Section 28 also provides an opportunity for the affected party to make submissions on the proposed disclosure before a final decision respecting access is made.

Two of the three affected parties notified by OPG responded with an objection to the disclosure of the information related to them. Upon review of the affected parties' positions on the records, OPG issued a decision letter to the requester, denying access to the Lakeview and Nanticoke records (spreadsheets) relating to the first affected party in their entirety, pursuant to sections 17(1)(a) and (c) and 18(1)(a) and (c) of the *Act*. Partial access was granted to one record (an invoice from the second affected party) relating to the Lambton station. The remainder of this record was severed in accordance with sections 17(1)(a) and (c) and 18(1)(a) and (c) of the *Act*.

The requester (now the appellant) appealed OPG's decision to this office, which appointed a mediator to try to resolve the issues. During mediation, the scope of the appeal was narrowed to records covering the period from April 1, 1999 to December 31, 2006. OPG explained that there are no responsive records for Atikokan and Thunder Bay because no third parties were hired to transport the waste from those generating stations. OPG also clarified that certain information on the Lambton invoice was deemed non-responsive to the request and was severed on this basis. Finally, OPG indicated that the Lakeview spreadsheet does not identify the destination of the waste material because the available records do not provide this information. The appellant accepted OPG's explanations on these issues and this order does not, therefore, address them. The appellant raised the possible application of section 23 (public interest override) of the *Act* to the records.

As the appeal could not be resolved through mediation, it was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry outlining the facts and issues to OPG and the affected parties, initially. The two affected parties provided representations regarding the possible application of section 17(1) to the records related to each of their companies, and OPG submitted representations addressing all of the issues canvassed in the Notice of Inquiry.

After the resolution of issues related to the sharing of the three sets of representations with the appellant, I sent a modified Notice of Inquiry to the appellant, along with copies of the non-confidential representations of OPG and the affected parties. Although invited to respond to these representations and to the issues outlined in the Notice of Inquiry, the appellant did not submit representations for my consideration.

RECORDS:

The records at issue in this appeal consist of two one-page spreadsheets relating to the Lakeview and Nanticoke facilities to which access was denied in full, and a one-page invoice relating to the Lambton facility, which was disclosed in part.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

It is sometimes necessary to review the scope of the request in an order and, in my view, clarification of the scope of the request in this appeal is required prior to the review of the exemptions claimed by OPG.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. To better serve the purpose and spirit of the *Act*, institutions should adopt a liberal interpretation of a request. Previous orders have established that to be considered responsive to the request, records must “reasonably relate” to the request [Order P-880].

In view of these principles, and on a plain reading of the request, I find that the appellant’s request includes all records reasonably related to the transport of ash and other materials from each of OPG’s named coal-fired generating station’s boilers and pollution control equipment to off-site locations, including information relating to payments, quantity, destination(s), identity of the service providers, and end-date of the relevant contracts. In addition, I find that the date range contemplated by this request was agreed to during the mediation of the appeal, and is April 1, 1999 to December 31, 2006.

Given my findings above, I find that the final column of the Nanticoke spreadsheet, which relates to the year 2007, is outside the scope of this request. Respecting the Lambton invoice, I note that the appellant confirmed during mediation that she was not seeking access to banking information, address and account numbers from the lower part of the invoice, or to the information already withheld as non-responsive. Given this expression of interest, in my view, this record also contains other information that is not responsive to the request, as outlined above. Specifically, I find that the following information in the second affected party’s invoice is non-responsive: “Duns Number,” “Account Number,” [for OPG], “Service Number,” “Location Number,” “Service Doc Number,” “PO Number,” “Manifest Number.” Accordingly, this information is removed from the scope of this appeal and it should not be disclosed to the appellant.

VALUABLE GOVERNMENT INFORMATION

OPG claims that the exemptions in sections 18(1)(a) and/or (c) apply to the information withheld from the records. The severed information consists of the number of metric tonnes [of ash] removed from the facility, the annual payment for removal, the final destination [where available], the owner of destination [first affected party], and the contract end-date in the Lakeview and Nanticoke spreadsheets; and the name and address of the company, facility location and phone number, service date, cost per tonne for removal, sales tax and total payment in the invoice.

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.

Section 18 is designed to protect certain economic interests of institutions. 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].

Representations

OPG explains the context of its decision to deny access to the information in the spreadsheets in the following manner:

... [Ash is] suitable for beneficial reuse in construction applications, supporting sustainable practices to improve the environment. Ash which is not reused... is sent to landfill. Diversion of ash is an important environment objective for OPG....

Unlike some other products, ash pricing is not disclosed in the marketplace and is the subject of private negotiation between parties under a commercial agreement. Prices are dependent not only on the quality of the ash, but also on the landfill capacity at the coal plant, and distances to be transported.

Respecting section 18(1)(a) of the *Act*, OPG submits that the information at issue qualifies as both financial and commercial information, as contemplated by past orders of this office, including Order PO-2010. With regard to the requirements that the information must “belong to” OPG and that it must have monetary value or potential monetary value, OPG submits:

OPG has a proprietary interest in protecting the information from misappropriation... [as] disclosure of the information requested in this case would enable competitors ... to develop a pricing strategy which would, at the very least cause OPG to pay more to avoid landfilling its ash on site, ... thereby depriving OPG of its ability to meet its environmental objectives. ...

There is actual or potential value when the information is not otherwise known, or disclosure of the information would result in some form of monetary gain to others or monetary loss to the person to whom the request for information is made [Orders PO-2024-I and PO-1740].

OPG also refers to Order PO-2676 in which Adjudicator Jennifer James accepted OPG's evidence that disclosure of "unit prices ... representing the fuel and [operating, maintenance and administration] unit energy costs" for its Nanticoke, Lambton, Thunder Bay and Atikokan generating stations qualified for exemption under section 18(1)(c).

OPG's representations respecting section 18 of the *Act* were accompanied by an affidavit prepared by OPG's "By-Products Section Manager," an individual responsible for negotiating and managing agreements for diversion of coal combustion by-products, including fly ash. There are confidential portions of this individual's affidavit that cannot be reproduced in this order. However, the gist of the non-confidential submissions respecting section 18(1)(c) is that the disclosure of the shipping and disposal information in the spreadsheets would permit fly ash producers to calculate key price information; which means that OPG would not get the best price due to the effect on bidding in current and future shipping and disposal contracts. According to OPG, this would increase costs, reduce competition and reduce OPG's profitability. OPG also asserts that the knowledge gleaned from disclosure of the shipment and disposal information could result in competitors outbidding OPG or could damage existing and ongoing contractual arrangements, thereby impeding OPG's ability to remove fly ash from its generating stations.

The affidavit evidence also indicates that coal plants in several U.S. states are capable of producing more ash than OPG's plants at a time when "a shrinking market results in reduced demand for ash, creating greater competition for the available market share." The confidential affidavit evidence supports the existence of ongoing or future negotiations between OPG and the first affected party. OPG submits that disclosure of the information – namely, the unit price that can be calculated by using the dollar figure in the spreadsheets in conjunction with the publicly available transportation rates - would adversely influence the negotiating price OPG would offer.

With respect to the application of sections 18(1)(a) and (c) to the second affected party's invoice, OPG states that it relies on the arguments presented for the spreadsheets and submits, in addition, that:

The speciality waste handling/disposal business is an industry comprised of a few large players, all of whom know each other. Given the tight regulations around the industry as to number of staff required for each job, staff training and expertise, and equipment required, the players differentiate themselves on price alone.

As previously indicated, the appellant did not submit representations.

Analysis and Findings

I have considered OPG's submissions and I have carefully reviewed the information that is at issue in this appeal.

As previously stated, in order to establish that section 18(1)(c) applies to the withheld information, OPG was required to provide sufficiently detailed and convincing evidence of a reasonable expectation of prejudice to its economic interests or competitive position with

disclosure [*Ontario (Workers' Compensation Board)*, cited above]. In view of the submissions provided, I am satisfied that there is a reasonable expectation of this type of harm resulting from disclosure of the 2005 and 2006 payments for removal and shipping contained in the Nanticoke spreadsheet. I am satisfied that it may be possible, using publicly available sources of information, as well as non-exempt information, to calculate OPG's "key pricing information" in the *current* contract and that, further, this may damage or prejudice ongoing or future contractual arrangements to remove ash from its generating stations. Accordingly, I find that this information qualifies for exemption under section 18(1)(c).

However, my finding with respect to the exemption of the payment information applies only to the current contract term for the Nanticoke generating station. Based on the evidence and the nature of the rest of the information at issue, including payment information for long-expired contracts, I am not satisfied that disclosure could reasonably be expected to prejudice OPG's economic interests or its competitive position for the purposes of section 18(1)(c) of the *Act*.

Simply put, the evidence before me does not establish the harm contemplated by section 18(1)(c) resulting from the disclosure of the amounts of ash removed, its final destination, the owner of the destination, the contract end-dates in the spreadsheets for Lakeview and Nanticoke or any of the information remaining at issue in the second affected party's invoice. I am not persuaded by the evidence that disclosure of this information could reasonably be expected to damage OPG's economic interests or cause harm to its competitive position. In my view, the age of the information is relevant to my finding that its disclosure would not reasonably be expected to cause harm to ongoing or future contractual arrangements, as is the fact that Lakeview generating station closed operations in 2005.

I will now consider OPG's claim for exemption under section 18(1)(a). Given my findings above, I need only consider whether it applies to the information not exempt under section 18(1)(c). For section 18(1)(a) to apply, OPG must show that the information: 1) constitutes a trade secret, or financial, commercial, scientific or technical information; 2) belongs to the Government of Ontario or an institution, and 3) has monetary value or potential monetary value.

To begin, I find that the information in the records qualifies as commercial information. Specifically, I am satisfied that it relates to the buying, selling or exchange of services, namely the transportation and disposal services for ash and other by-products of OPG's coal-fired electricity generation processes [Order PO-2010].

The next question to be asked in reviewing the possible application of section 18(1)(a) is whether the information at issue "belongs to" OPG. For information to "belong to" an institution, the institution must have some proprietary interest in it, either in a traditional intellectual property sense, 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 supplier lists, price lists, or other types of confidential business information. For each example, 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 [Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming*

Corporation v. Ontario (Information and Privacy Commissioner), [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.]

Based on these principles and on my review of the records, I am not satisfied that the information remaining at issue “belongs to” OPG or that it qualifies as OPG’s intellectual property to the extent that the “law would recognize a substantial interest in protecting it” from disclosure to, and use by, other parties [*Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.)]. Further, in my view, I do not think it is reasonable to conclude that there has been any “application of skill and effort to develop the information” related to, for example, the number of metric tonnes of ash removed from the Nanticoke or Lakeview generating stations, at least in the sense section 18(1)(a) contemplates the term. For these reasons, I find that none of the information remaining at issue meets the second requirement for exemption under section 18(1)(a), and OPG’s exemption claim therefore fails.

I will now consider whether the remaining information qualifies for exemption under section 17(1) of the *Act*.

THIRD PARTY INFORMATION

According to OPG and the affected parties, sections 17(1)(a) and/or (c) of the *Act* apply to the withheld information. The second affected party also argues that section 17(1)(b) applies to its invoice.

Section 17(1) of the *Act* is a mandatory exemption that applies to the “confidential business information” of a third party and protects it from disclosure 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, if 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) 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.

Representations

OPG's position on the possible application of section 17(1) is summarized briefly by expressing support for, and adoption of, the affected parties' representations. OPG maintains that all three records were "communicated to OPG on the basis that [they were] confidential and that [they were] to be kept confidential."

The first affected party provided submissions regarding the information contained in the spreadsheets relating to the Nanticoke and Lakeview Generating Stations. The commercial context of the first affected party's opposition to disclosure is described as follows:

The cement business is extremely competitive as pricing is dictated solely by the costs associated with the acquisition of inputs (in this case ash) as well as the cost associated with transporting those inputs to the cement manufacturing plant and the transportation of the final product to the customer's site. Apart from specialized cement mixtures for specific applications, there is not much room for value added benefits to be incorporated into the price of cement.

The first affected party submits that the "price paid" to it, the volume of ash removed, the destination of that ash and the term of the contract under which the ash was removed from the Lakeview and Nanticoke facilities qualifies as "commercial information" for the purpose of part 1 of the test for exemption under section 17(1).

The first affected party submits information relating to the amount of ash it removes from the Nanticoke and Lakeview locations is “supplied” by it to OPG. The basis of this argument is that there is no pre-existing ordering process, and the ash is picked up regularly based on the first affected party’s need for ash. According to the first affected party, it is only because it reports the amount of ash removed and its final destination to OPG that OPG is aware of the information.

The first affected party maintains that it has always treated “where, on what terms and the quantity of ash obtained from OPG as confidential commercial information.” Further, this information was communicated in “strict confidence,” is not “publicly available” and not prepared or collected for any reason that would entail disclosure, but rather only reported to OPG pursuant to their established arrangement. For these reasons, the first affected party submits, it has a reasonable expectation that the commercial and confidential information it supplied to OPG would not be disclosed by OPG.

The first affected party expresses concern about harm to its negotiations with other suppliers of ash. The first affected party submits that disclosure of the information would prejudice its competitive position in the following way:

While the rate per ton paid by OPG to [us] to remove the ash is the result of negotiation between OPG and [us], the total price paid by [us] is derived from the amount of ash actually removed and the distance from [our] plants. Information relating to the total price paid and the amount actually removed is information that allows for the drawing of accurate inferences about confidential information. ... In particular, it would allow competitors to calculate [using publicly available transportation cost figures] the real cost [of acquiring] ash for [our plants] and to resell some ash...

... By knowing the volume of the ash shipped or the cost of acquisition of that ash at OPG’s site, competitors or other suppliers of ash will be able to calculate ... [our] acquisition costs.

According to the first affected party, since it is in a continual process of negotiating and renegotiating agreements with suppliers, the disclosure would significantly prejudice those negotiations. Disclosure could also reasonably be expected to prejudice it in bidding on contracts with OPG since other parties could use the information to tailor their bids “in what is effectively an ongoing competitive bidding process to acquire a commodity.”

According to the second affected party, the information contained in the invoice it issued to OPG,

... falls squarely within the three-part test for exemption under s. 17 of the Act. The information contained in the Record is financial/commercial information supplied ... to [OPG] in an explicit expectation of confidence. Disclosure of this information could not only be reasonably expected to result in harm but, in fact, would result in harm to [the second affected party’s] commercial operations and

its negotiating position with potential customers and suppliers and would have a very negative impact on [its] ability to provide such favourable pricing to [OPG].

The second affected party submits that when any “commercially sensitive information,” including this invoice, is shared with a customer, this is done “on the basis of a very clear and precise non-disclosure agreement” which requires that all financial information be maintained in confidence for the term of the agreement. Aside from the confidentiality agreement, the second affected party submits that the pricing information contained in the invoice, in particular, was “submitted” with an expectation that it would be received and maintained in confidence.

The second affected party submits that disclosure could reasonably be expected to result in the harms specified by paragraphs (a), (b) and (c) of section 17(1) since the price at which the by-product was removed from the Lambton station was “a highly favourable price.” According to the second affected party, release of the pricing information would “permit competitors ... to undercut pricing for future services and would undermine any competitive advantage that [it] has arising from the confidentiality of its pricing information.” In the second affected party’s submission, this “direct commercial harm” would cause it “irreparable harm.” According to the second affected party, therefore, “the information has real, and real time, value to a competitor.”

Analysis and Findings

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders, and are closely related to the types of information already discussed under section 18(1)(c). Of specific relevance in this appeal are the definitions of “commercial information” and “financial information.”

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 [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].

Based on the representations of the parties and upon review of the records, I find that the information at issue is connected to the “buying, selling or exchange of goods or services,” in that it flows from the arrangements between OPG and the affected parties for transportation and disposal services for ash and other by-products of OPG’s coal-fired electricity generation processes. I find that this information qualifies as the “commercial information” of the affected parties for the purposes of part 1 of the test in section 17(1). I am also satisfied the records

contain information related to money matters, including payment amounts due and taxes, and I find, therefore, that the records contain financial information as that term has been defined in previous orders.

Having determined that the records contain commercial and financial information, I find that part 1 of the test under section 17(1) of the *Act* has been met. I will now go on to consider whether the affected parties' commercial and/or financial information was "supplied in confidence" to OPG under part 2 of the test.

Part 2: supplied in confidence

In order to satisfy part 2 of the test under section 17(1), OPG or the affected parties must establish that the information at issue was "supplied" to OPG by the affected party "in confidence", either implicitly or explicitly.

Supplied

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 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 and PO-2453]. 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) [Orders PO-2018 and PO-2632].

There are two exceptions to the general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products [Orders MO-1706, PO-2384, PO-2435, and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.). See also British Columbia Order 01-20].

The Lakeview and Nanticoke spreadsheets were clearly prepared by OPG and were not, therefore, supplied directly to OPG by the first affected party. However, I must still decide whether the information is considered to have been supplied for the reason that its disclosure would permit the drawing of accurate inferences with respect to (confidential business) information actually supplied to OPG [Orders PO-2043 and MO-1199-F].

In addition, although the Lambton invoice was prepared by the second affected party, this does not finally determine the issue of whether the invoice was “supplied” to OPG by the second affected party.

Based on my review of the records and having carefully considered the representations of the parties opposing disclosure, I find that all of the information remaining at issue arises from, or is the product of, negotiations between the affected parties and OPG, and that it was not, therefore, “supplied” for the purposes of section 17(1). In my view, disclosing the information remaining at issue would not reveal information originally supplied by the affected parties nor would it permit the drawing of accurate inferences about such information. Furthermore, in my view, none of the third party information at issue is “immutable,” by reason of it not being susceptible to change. My reasons for reaching these conclusions on the various constituent elements of the records follow.

I note that OPG itself did not use the word “supplied” in its brief representations regarding section 17(1). In my view, it is more accurate to state, as OPG did, that much of the information at issue was “communicated” to it by the affected parties for the purpose of seeking payment for, or in carrying out, the terms of their contractual service agreements.

To begin, the annual payment amounts in the spreadsheets – not including the 2005 and 2006 figures for Nanticoke, which I found above qualify for exemption under section 18(1)(c)) – merely represent the cumulative sum of the amounts calculated as owing to the first affected party for the removal service over the course of the year. This amount can readily be traced back to the first affected party’s negotiated arrangement with OPG and is not, therefore, “supplied” by the second affected party to OPG.

As regards the withheld price per metric tonne contained in the second affected party’s invoice, I also find that it represents a mutually-agreed upon unit price for the removal of each tonne of that particular by-product from OPG’s Lambton facility, which is not “supplied.”

In my view, the dollar figures mentioned above simply represent calculations arising from negotiated commercial arrangements between OPG and the affected parties. Past orders have established that where an institution has the option to accept or reject a third party’s bid or pricing, it cannot argue that the pricing information was “supplied” to it by the third party. In this appeal, there is no evidence to suggest circumstances where OPG was unable to accept or reject the affected parties’ unit prices or the terms of its pricing, more generally, for the provision of the removal services. As previously recognized by this office, the option to do so is itself a “form of negotiation” [Orders PO-2435 and PO-2632]. Accordingly, I find that the remaining payment amounts in the spreadsheets and the unit price given on the invoice are not “supplied” for the purposes of part 2 of section 17(1).

From this finding, it follows that the withheld amount of sales tax and the total for the removal of the specific by-product contained in the second affected party’s invoice also does not qualify as “supplied.” Similarly, I have insufficient evidence before me from either OPG or the second affected party, to establish that the name and address of the second affected party, the destination location, phone number, and service date appearing on the invoice was “supplied.” As a result, I

conclude that this information was also not “supplied” for the purposes of part 2 of section 17(1). Accordingly, none of the information remaining at issue from the second affected party’s invoice meets the second part of the test for exemption under section 17(1). As all three parts of the test under section 17(1) must be satisfied, I will order the information disclosed to the appellants.

I now turn to the other information at issue in the spreadsheets relating to the first affected party. First, I reject the first affected party’s argument that the amount of ash (tonnage) removed for disposal is a figure that is “supplied” by it to OPG. The first affected party argues that “absent [our] reporting this information, OPG would not have a detailed account of the amount of ash removed.” In Order MO-2423, I considered a similar argument from a third party concert promoter that the total number of seats available for an Elton John concert at an arena operated by the City of Sudbury was information that had been “supplied” by it to the City. In rejecting the argument, I stated

In my view, **this number is determined to a large extent by the capacity of the Arena. Further, the number would necessarily be based on information provided by the City – as the operator of that facility – to the affected party and not the other way around.** In my view, while the information representing the total number of seats at the Arena for the Elton John concert may possibly have been agreed-upon, I do not accept that it was “supplied,” as that term is defined in the context of the third party information exemption. Accordingly, I find that this particular information does not meet part 2 of the test and cannot, therefore, qualify for exemption under section 10(1) [emphasis added].

In the present appeal, and for similar reasons to those expressed in Order MO-2423, I reject the argument that the quantity of ash removed from OPG’s Lakeview and Nanticoke generating stations constitutes information “supplied” by the first affected party to OPG. I note that the quantity of ash by-product would be dependent on the capacity of the particular generating station and other factors related to coal-fired generation processes that would be known, or even determined, by OPG itself. Moreover, by the terms of the contractual arrangement between the first affected party and OPG, it would be necessary for OPG to know the precise quantity in order to pay the correct price for the service. In other words, the provision of the tonnage information by the first affected party to OPG is a negotiated component of their agreement, which can be considered to represent each of their interests. In these circumstances, I find that the metric tonnage of the ash is not “supplied” by the first affected party for the purposes of part 2 of section 17(1).

The first affected party has also argued that the final destination of the ash removed from OPG’s two generating station and the owner of the destination was “supplied” to OPG. Although I have considered the evidence provided by the first affected party on this point, I am not persuaded that the destination of the ash or the owner of the location is “supplied” information. On my own review of OPG corporate documentation found on OPG’s website, dating back to the earlier years of the scope of this request, at least one of the destinations and the owner is readily available to the public through annual (on-line) reporting and other documents. Indeed, it appears that the first affected party’s commercial service arrangements with OPG are long-standing. In

such circumstances, I cannot accept that this information qualifies as a confidential informational asset “supplied” by a third party for the purposes of section 17(1) of the *Act*.

Finally, and for similar reasons to those articulated above, I am not persuaded that the end-date of OPG’s contracts with the first affected party for ash removal and disposal qualifies as “supplied” and I find that they were not.

I find, therefore, that the information in these records was not “supplied” by either of the affected parties to OPG. Since all three parts of the test under section 17(1) must be met, the exemption claim fails and the information will be disclosed to the appellant. Given my findings, it is not necessary for me to consider the harms part of the test.

EXERCISE OF DISCRETION

After deciding that a record or part of it falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 18 exemption is discretionary, which means that OPG could choose to disclose information, despite the fact that it could withhold it. OPG was required to exercise its discretion under these exemptions.

On appeal, the Commissioner or her delegated decision-maker (the adjudicator) may determine whether OPG failed to do so. In addition, the Commissioner or her delegate may find that OPG erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to OPG for an exercise of discretion based on proper considerations [Order MO-1573]. I may not, however, substitute my own discretion for that of OPG [section 54(2)].

As I have upheld OPG’s decision to apply section 18 to deny access to certain information in the records, I must review OPG’s exercise of discretion under section 18.

OPG submits that it was necessary to exercise its discretion to not disclose the records under section 18 of the *Act* in order to protect its economic interests. OPG states that its reasoning in choosing to deny access under the discretionary exemption was in keeping with the purpose of section 18. Referring to Order MO-1573, OPG submits that although this office may review its exercise of discretion to determine whether or not OPG has erred in exercising it, this office may not substitute its own discretion for that of OPG.

Analysis and Findings

I have considered OPG’s representations on the exercise of its discretion in choosing not to disclose the information withheld under section 18, and I have considered the overall circumstances of this appeal. As noted, I did not receive representations from the appellant.

Although its representations were brief, I am satisfied that the OPG exercised its discretion in this appeal appropriately and within generally accepted parameters. I am also satisfied that OPG

did not consider irrelevant factors in doing so. Accordingly, I find that the OPG properly exercised its discretion, and I will not interfere with it on appeal.

PUBLIC INTEREST OVERRIDE

Although the appellant suggested during mediation that the public interest override in section 23 of the *Act* applies to the information withheld by OPG, no submissions were provided to me in support of this position. Section 23 of the *Act* 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 could be applied to override the valuable government information exemption in section 18(1)(c) that I have found to apply to certain information in the Nanticoke spreadsheet if the following requirements are satisfied: first, there must be a compelling public interest in disclosure of the records; and second, this interest must clearly outweigh the purpose of the exemptions. Since the burden of proof in this instance rests with the appellant to establish these two requirements for the application of the public interest override, and in the absence of any representations, I find that section 23 of the *Act* does not apply.

ORDER:

1. I uphold OPG's decision to deny access to 2005 and 2006 payment amounts on the Nanticoke spreadsheet that I found exempt under section 18(1)(c) of the *Act*.
2. I order OPG to disclose the Lakeview spreadsheet in its entirety, the remaining non-exempt responsive portions of the Nanticoke spreadsheet and the non-exempt responsive portions of the Lambton invoice by sending the records to the appellant no later than **August 31, 2009** but not before **August 25, 2009**.
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: _____
Daphne Loukidelis
Adjudicator

July 27, 2009