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

ORDER PO-2990

Appeal PA11-82

Ontario Power Generation

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NATURE OF THE APPEAL:

This order disposes of the issues raised as a result of a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Power Generation (the OPG) for the following information:

> ….a copy of the lease between Ontario Power Generation and [a named company] signed in 2002 for the property known as [description and address of the property]. I am also seeking any documents related to the lease including any discussion about possible demolition or modification of the building.

The requester subsequently narrowed the scope of the request to a copy of the lease agreement between the OPG and the named company (the affected party).

The OPG granted partial access to the requested record. Access to the remaining information in the record was denied pursuant to sections 17(1)(a) and(c) and 18(1)(a) and (c) of the *Act*.

The requester (now the appellant) appealed the decision of the OPG to this office. The appellant indicated that she believes there is a public interest in the disclosure of the information at issue. As a result, section 23 of the *Act* was added as an issue in this appeal.

During mediation, the appellant further narrowed the scope of the appeal, and the OPG subsequently issued a revised decision, granting the appellant further access.

At the conclusion of mediation, the appellant advised that she was still seeking access to the information severed in Article 7.1(A) of the lease agreement, which was denied under sections 17(1)(a) and (c) and 18(1)(a) and (c) of the *Act*, as well as Articles 32.1(b) and 32.1(c), which were denied pursuant to sections 18(1)(a) and (c) of the *Act*.

The appeal then moved to the adjudication stage of the process where an adjudicator conducts an inquiry. I sought, and received, representations from the OPG and the affected party.

For the reasons that follow, I order the OPG to disclose the sections of the record that are at issue in this appeal.

RECORDS:

Articles 7.1(A), 32.1(b) and 32.1(c) of the lease agreement remain at issue.

DISCUSSION:

THIRD PARTY INFORMATION

Initially, OPG relied on sections 17(1)(a) and (c) to deny access to Article 7.1(A) of the lease. Presumably they took this position in order to protect the interests of the affected party, which was a party to the lease.

However, the affected party advised in their representations that they did not wish to pursue the section 17 argument for Article 7.1(A). In its representations, the OPG simply restated section 17 of the *Act* and submitted that the sections at issue contain commercial information implicitly supplied in confidence by the affected party and, if released, there is a reasonable expectation that the affected party would experience the harms listed in sections 17(1)(a) and (c). However, the OPG went on to state that they were deferring to the affected party and had no further representations to make with respect to section 17.

While I am satisfied that the severed portions of Article 7.1(A), which set out the base annual rent payable during four consecutive five year terms, constitute "commercial information," as required by section 17, neither the OPG nor the affected party has provided any evidence that the "commercial information" was supplied in confidence or that its disclosure would cause the affected party harm. In fact, as noted, the OPG deferred to the affected party in terms of the application of the section, and the affected party withdrew their reliance on the section.

Therefore, I find that the OPG and the affected party have failed to meet the requirements of parts 2 and 3 of the section 17(1). As all three parts of the three-part test set out in section 17(1) must be met, I find that the remaining portions of Article 7.1(A) do not qualify for exemption under section 17(1).

ECONOMIC AND OTHER INTERESTS

The OPG is claiming that sections 18(1)(a) and (c) apply to all three sections of the lease at issue in this appeal. The affected party's representations in regard to section 18 state only that they fully support the OPG's section 18 claim. These sections state:

> 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.

Section 18(1)(a): information that belongs to government

For section 18(1)(a) to apply, the institution must show that the information:

1. is 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.

Part 1: type of information

The types of information listed in section 18(1) have been discussed in prior orders. It appears that the information at issue may contain financial and/or commercial information, described as:

> *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].
>
> *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].

The OPG submits that the information at issue is both "financial information" and "commercial information" for the purposes of section 18(1)(a). It is financial information, as the records deal with the use and distribution of money; in particular, payments made to lease the property in question. It is also commercial information as it relates to the buying, selling or exchange of merchandise or services; in particular, leasing and the ultimate sale of the property, including the terms and conditions of the right of first offer should the property be sold.

I have reviewed the records and I agree with the OPG's representations on this point, and find that the records contain both "financial information" and "commercial information" for the purposes of section 18(1)(a). Part 1 of the test is met. I will now determine if part 2 of the test is met.

Part 2: belongs to

The term "belongs to" refers to "ownership" by an institution. It is 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, the information 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.[1]

OPG submits that the information "belongs to" the OPG, as they have a proprietary interest in the information in the sense that the "law recognizes a substantial interest in protecting the information from misappropriation by another party."

In particular, the OPG submits that managerial staff at the OPG with specialized skill sets spent five months developing the terms and conditions of the lease, and that these terms and conditions are customized, and include a right of first offer to purchase acceptable to both parties. Disclosure of these terms would hinder the OPG in its ability to realize fair value in terms of rent or sale price in the foreseeable event of the lease terminating or the property being offered for sale, as it would reveal how the purchase price was derived. This would be advantageous to prospective purchasers who would normally not have this advantage in the commercial real estate market.

In addition, the OPG states that the terms and conditions at issue have been consistently treated as confidential.

The OPG relies on Orders PO-1763 and PO-2632 in support of the section 18(1)(a) argument. In Order PO-1763,[2] former Senior Adjudicator David Goodis reviewed the phrase "belongs to" as it

[1] 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.

[2] See footnote 1.

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).

In Order PO-2632, Adjudicator Daphne Loukidelis was satisfied that the institution's "business continuity planning" belonged to the institution within the meaning of that term in section 18(1)(a). Adjudicator Loukidelis accepted that the institution invested money and other resources in the development of its business continuity planning. However, she was not satisfied that agreement terms, and exhibits containing a price quote, labour hours, job rate figures and a budget, which were produced through negotiations and included in mutually generated agreements, "belonged to" the institution in the sense contemplated by this exemption, as they did not constitute the intellectual property or a trade secret of the institution.

I agree with and adopt the approach taken in Orders PO-1763 and PO-2632. The contractual terms at issue relate to rent and the right to make a first offer in the event that the property is sold. I find that the OPG has not established that it has any proprietary interest in this information in the traditional intellectual property sense. Further, I am satisfied that the information is not in the nature of a trade secret that the courts would protect from misappropriation.

The information at issue constitutes terms and conditions, produced through negotiations, and included in a mutually generated agreement and, as such, does not "belong to" the OPG as contemplated by section 18(1)(a). In view of my finding that this specific information does not meet part 2 of the test, and because all three parts of the test must be met, this information cannot be withheld under section 18(1)(a).

Section 18(1)(c): prejudice to economic interests

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. It provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions (Orders P-1190 and MO-2233).

This exemption 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 (Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758).

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.[3]

The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests (see Orders MO-2363 and PO-2758).

The OPG submits that releasing the information at issue would place the OPG and its shareholder, the Province, at a competitive disadvantage. In particular, the property that is the subject matter of the lease is sufficiently unique that there is no standard rent that would be generally known and/or publicly available. The property is a former coal and gas-fired generating station and has not been used to generate electricity since 1983.

The OPG has disclosed to the appellant that the current lessee pays the OPG base rent in excess of one million dollars per year, which escalates every five years, along with its share of property taxes and directly pays all of it operating costs. The OPG submits that disclosing the specific base rent would undermine the OPG's ability to obtain fair market rent for any future lease. The OPG states:

> In any lease arrangement, the lessor must always protect against the risk that the lease will be terminated. This risk is increased in the situation at hand where the property is to be repositioned for another use. In such circumstances the lessor will be forced to find a new lessee or purchaser of the property to achieve a fair return on the property. OPG, as the lessor in this case, is wholly owned by the Province of Ontario. It should expect, just like any other commercial entity in

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

> Ontario, that upon termination, it may negotiate a new lease with another tenant at a fair market rent. This will not be an attainable goal when perspective lessees are aware of the specific rent payable under the existing lease.

The OPG goes on to argue that potential lessees of unique commercial properties do not know, when bidding, the specific rent paid by the previous lessee and, as a result, they typically bid at or close to a fair market rent based on their intended use. The OPG should not be placed at a competitive disadvantage with bidders for their real estate, but should have the benefit of the same market conditions applicable to other commercial lessors.

The OPG is relying on Orders P-1190 and PO-2195 to support the section 18(1)(c) argument. In Order P-1190, the records at issue were peer evaluation reports, in which former Assistant Commissioner Tom Mitchinson accepted the institution's argument that these reports did not provide a balanced picture of safety at nuclear power plants in the Province and that releasing these reports could be used by others in the industry to gain a competitive advantage over Ontario Hydro in their negotiations. However, the records in Order P-1190 are in stark contrast to the information at issue in this appeal, which consists of mutually generated and agreed upon contractual terms and conditions; that is, the base rent to be paid by the affected parties and the terms of the right of first offer.

In Order PO-2195, former Assistant Commissioner Mitchinson upheld the Ministry of Finance's decision to withhold portions of a lease agreement between the OPG and Bruce Power. However, this order can be distinguished on two grounds. Most importantly, the exemption at issue was not section 18, but rather section 17(1), which has significantly different considerations, including the question of whether the information was "supplied" to the institution receiving the request, which is not a factor under section 18(1)(c). In Order PO-2195, the request was made to the Ministry of Finance, who had been provided with a copy of the lease agreement between the OPG and Bruce Power. Former Assistant Commissioner Mitchinson found that the "supplied" portion of the section 17 test had been met, as the Ministry was not a party to the lease and was not part of the negotiation of the lease. Therefore section 17(1) did not apply. In the current appeal, the lease was directly negotiated between the OPG and the affected party and would not, therefore, be considered to be "supplied" by the affected party to the OPG. More significantly, section 17 is not at issue in this appeal, and because the provisions are so different, Order PO-2195 provides no persuasive basis for concluding that section 18(1)(c) applies.

Having said that, it is nevertheless true that, like section 17(1), section 18(1)(c) takes into consideration the consequences that would result to an institution if the withheld information is released.[4] However, as stated previously, the mere fact that an institution, or individuals or corporations doing business with it, may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not necessarily prejudice the institution's economic interests or competitive position.

I accept that it is in the public interest that the OPG be able to maximize any return it gets from renting the building. I also agree that disclosure of this information will reveal to the appellant

[4] See Order MO-1474.

and prospective tenants how much the OPG is willing to accept for such terms as rent and the conditions for right of first offer. However, I am not satisfied that disclosure of the information at issue could reasonably be expected to lead to the harms identified by the OPG in section 18(1)(c). I am unable to find that disclosure of this information could reasonably be expected to reveal to potential tenants the minimum value the OPG will accept for the building. The lease was the result of negotiations and I have not been provided with evidence that suggests that the affected party offered the OPG less than market value for each of the terms at issue. Rather, it is more likely that the OPG and the affected party negotiated the terms in good faith, that fair market value was achieved by the OPG and that the OPG has the power to similarly agree or disagree to any new terms in any future lease agreements. I find that the OPG has not provided me with sufficiently detailed and convincing evidence to substantiate its position that future tenants, by having access to the details of the current lease, will be able to negotiate terms and conditions that are below market value when renting or buying the building.

For these reasons, I am not persuaded that disclosure will result in prejudice to the OPG's economic interests or competitive position. Consequently, I find that the exemption at section 18(1)(c) does not apply to the information at issue.

Having found that neither section 18(1)(a) or (c) apply to the records, it is not necessary for me to conduct an analysis with respect to the OPG's exercise of discretion. Similarly, as neither sections 17 nor 18 apply, I do not need to address the public interest override at section 23, which was raised by the appellant. Consequently, I will order the OPG to disclose the sections of the record at issue in this appeal to the appellant.

ORDER:

I order the OPG to disclose Articles 7.1(A), 32.1(b) and 32.1(c) of the lease agreement in their entirety by **September 28, 2011** but not before **September 22, 2011** to the appellant.

Original Signed By: August 24, 2011
Brian Beamish
Assistant Commissioner