Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3676

Appeal PA13-125

Independent Electricity System Operator

December 9, 2016

Summary: The Independent Electricity System Operator (IESO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a named electronic document relating to the refurbishing of the Darlington Nuclear Generating Station. The IESO issued a decision denying access to the record on the basis of the exemptions in section 17(1) (third party information) and sections 18(1)(a) and (e) (economic and other interests) of the *Act*. During the processing of this appeal, portions of the record were disclosed to the appellant. In this order, the adjudicator finds that the exemptions in sections 17(1)(a) and 18(1)(e) apply to the information for which they are claimed. The public interest override, argued by the appellant, does not apply to the withheld portions of the record, and the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17, 18(1)(a), 18(1)(e), 23.

Orders and Investigation Reports Considered: Orders PO-2195, PO-2034.

OVERVIEW:

[1] The former Ontario Power Authority (OPA), now the Independent Electricity System Operator (IESO) [hereafter referenced in this order as the IESO], received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a named electronic document relating to the refurbishing of the Darlington Nuclear Generating Station.

[2] The IESO issued a decision denying access to the record on the basis of the exemptions in section 17(1) (third party information) and sections 18(1)(a) and (e) (economic and other interests) of the *Act*. The appellant appealed the IESO's decision to deny access to the record.

[3] During mediation, the IESO explained that it is relying on sections 18(1)(a) and (e) of the *Act* to deny access to portions of the record as disclosure would reveal financial and commercially sensitive information that has a monetary value and would jeopardize future negotiations with a specified sector. The IESO also stated that section 17(1) of the *Act* applies to the record as a third party, Ontario Power Generation (the OPG), provided some of the data found in the record.

[4] Also during mediation, the IESO provided the following summary of the record, which was shared with the appellant:

> The file entitled "Darl Refurb Alt (vs) 2010-08-05" is a spreadsheet that contains [IESO] analysis comparing the cost of refurbishing the Darlington Nuclear Generating Station ("NGS") to other generator options. The costs of Darlington NGS refurbishment and other generator options were compared across a range of conditions, including in relation to nuclear performance, nuclear refurbishment cost, fuel price and carbon price. Key assumptions related to Darlington refurbishment cost and performance were provided to the [IESO] by [the OPG] and are contained within the file.

[5] Also during mediation, the appellant (a representative for an environmental group) indicated his position that the withheld document contained information that was publically available, and provided documents which he believed contained information from the record. These documents were provided to the IESO, which resulted in the IESO issuing a revised decision, granting partial access to the record. The IESO continued to withhold the remaining parts of the record under sections 17 and 18(1)(a) and (e) of the *Act*.

[6] The appellant advised that he still believed more of the record could be disclosed, and provided additional documentation in support of his view that much of the record is already in the public domain.

[7] In addition, the appellant indicated that, given the scale of the project discussed in the record and the historical issues with other nuclear projects in Ontario, he believed the public had a right to be fully informed about the possibility of refurbishing the Darlington NGS, including the costs of refurbishment in comparison to considered alternatives. As a result, he took the position that the public interest override in section 23 of the *Act* applies. Accordingly, the possible application of this section was added as an issue in this appeal.

[8] Mediation did not resolve this file, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the IESO and the third party (the OPG), initially, and received representations from both of them. I also sought clarification from the IESO on certain issues raised in their representations, and received supplementary representations on those issues. I then sent a Notice of Inquiry to the appellant, and received representations from him. I sought and received reply representations from the IESO and the OPG on the issues raised in the appellant's representations.

[9] While this file was being processed, the IESO confirmed that certain additional records at issue could be disclosed to the appellant, and granted access to two of the tabs for the spreadsheet, which is the record at issue in this appeal. The IESO also granted access to certain "comments" which formed part of the spreadsheet. The IESO maintained its position that the remaining portions of the record are exempt. The appellant confirmed that he continued to seek access to the remaining records at issue.

[10] In this order, I find that the exemptions in section 17(1)(a) and 18(1)(e) apply to the information for which is claimed. The public interest override does not apply to the withheld portions of the record, and the appeal is dismissed.

RECORD:

[11] The record remaining at issue consists of the withheld portions of a spreadsheet entitled "Darl Refurb Alt (vs) 2010-08-05."

[12] The record includes detailed cost information relating to the refurbishing of the Darlington Nuclear Generating Station ("NGS"). Also withheld are particular "comments" which form part of the spreadsheet (the redacted comments).

ISSUES:

A. Does the mandatory exemption at section 17 apply to the records?

B. Do the discretionary exemptions at sections 18(1)(a) and/or (e) apply to the records?

C. Did the institution exercise its discretion under section 18? If so, should this office uphold the exercise of discretion?

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17 and/or 18 exemptions?

DISCUSSION:

THIRD PARTY INFORMATION

Issue A: Does the mandatory exemption at section 17 apply to the records?

Section 17(1): the exemption

[13] Section 17(1) states:

> 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; or
> >
> > (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[14] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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.[2]

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

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[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).
[2] Orders PO-1805, PO-2018, PO-2184, MO-1706.

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.

Preliminary matter

[16] In this appeal the third party is the OPG, which itself is also an institution listed in the regulations.[3] In this appeal, the appellant takes the position that, because the OPG is a public company owned by the provincial government on behalf of Ontarians, its "commercial" interests are determined by policy decisions in addition to market forces and competition. The appellant takes the position that considerations of traditional business practices fail to take into account the unique position the OPG (and the IESO) hold.

[17] Some previous orders of this office have determined that, in certain circumstances, an institution's economic and other interests are to be protected by the exemptions in section 18(1), and not by the third party exemption in section 17(1).[4] Other previous orders have considered the OPG's interests under section 17(1).[5] Throughout this appeal, the section 17(1) claim has been argued by both the IESO and the OPG for OPG's information that they claim was supplied to the IESO. These parties take the position that the OPG will suffer the harms set out in section 17(1)(a) if its information in the record is disclosed – in particular – that disclosure will prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the OPG.

[18] Clearly an institution that receives a request cannot claim the exemption in section 17(1) for its own information, as it would not have "supplied" the information to itself. An institution receiving a request has the option of claiming the discretionary exemptions set out in section 18 for the information that, if disclosed, would cause it economic or other harms. I note that the wording of some of the harms in section 17(1) and section 18(1) are very similar,[6] and the courts have established that the type of

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[3] R.R.O. 1990, Reg. 460: GENERAL under *Freedom of Information and Protection of Privacy Act*, RSO 1990, cF31, Schedule item 114.0.1.

[4] For example, see Order MO-2468-F.

[5] See, for example, PO-2500. See also PO-2068 and PO-2195, but see O. Reg 424/03.

[6] For example, sections 18 (1)(c) and (d) read:

evidence required to meet the harms is also similar.

[19] In this appeal, the request was made to the IESO, and that institution identified that the OPG's interests were engaged as the records contained information which was supplied to it by the OPG.[7] In the circumstances of this appeal, the OPG's claims to the protections for its economic or other interests established in the *Act* must be considered. In the circumstances, I will review the OPG's economic and other interests under the section 17(1) discussion below.

[20] I also note that, although the wording of the subsections in sections 17(1)(a) and 18(1)(c) and (d) are similar, the test in section 17(1) is, in some ways, more onerous, as it requires the third party to establish that the information at issue was also supplied by it in confidence to the IESO.

[21] I will now consider the three-part test set out in section 17(1) as it applies to the records for which it is claimed.

Part 1: type of information

Representations

[22] The third party (the OPG) submits that the withheld information is commercial, financial or technical information, and generally relies on this office's characterization of those types of information in Order PO-2010. The OPG states,

> The information in the records at issue and that [the OPG] submits is exempt from disclosure constitutes financial information in that it includes costs pertaining to the Darlington Refurbishment Project. In addition, the records at issue include technical information in that it discloses specific data such as Station Capacity Factors, Planned Outage Days and Station Energy.

[23] The IESO adopts the OPG's representations on the application of section 17(1),

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18. (1) A head may refuse to disclose a record that contains,

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario; […]

[7] The IESO may have had the option of transferring that part of the request to the OPG under section 25 of the *Act*;[7] however, it chose to notify the OPG as an affected party under section 17(1). Section 17(1) protects the interests of "organizations", among others, who supply information to institutions.

and states that it understands the information at issue to be commercial and financial information.

[24] The appellant acknowledges that the information at issue may be financial and technical in nature.

Analysis

[25] The types of information listed in section 17(1) have been discussed in prior orders:

> *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.[8]
>
> *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.[9] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[10]
>
> *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.[11]

[26] I have reviewed the records, and considered the representations of the IESO, the OPG and the appellant. I find that the information at issue constitutes technical, commercial and financial information.

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[8] Order PO-2010.

[9] Order PO-2010.

[10] Order P-1621.

[11] Order PO-2010.

Part 2: supplied in confidence

[27] 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.[12]

[28] 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.[13]

[29] 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.[14]

[30] 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.[15]

Representations

[31] The OPG's initial representations identify its position that the information contained in the spreadsheets was supplied in confidence by it to the IESO. It states:

> … the records at issue consist of various costs and other raw data provided to the [IESO]. OPG supplied the raw data in confidence without negotiation. Other information in the records at issue can be considered

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[12] Order MO-1706.

[13] Orders PO-2020 and PO-2043.

[14] Order PO-2020.

[15] Orders PO-2043, PO-2371, PO-2497.

> as "supplied" by OPG in the sense that its disclosure would permit the requester to back calculate the raw data OPG directly supplied to the OPA.

[32] It also states:

> Information qualifies as being "supplied" if it was directly supplied to an institution by a third party, or where disclosure of the information in the record would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.
>
> The specific information in the records at issue that OPG seeks to exempt from disclosure includes: 1) information supplied in confidence directly to the [IESO]; and 2) additional information [which], if disclosed, would allow the requester to calculate the information supplied directly by OPG to the [IESO].

[33] The OPG also notes that the IESO received and subsequently manipulated the data supplied by it, and takes the position that the appearance of its logo in various spreadsheet tabs is "inaccurate and misleading."

[34] Regarding whether the information was supplied by the OPG to the IESO "in confidence", the OPG states:

> OPG had a reasonable expectation that the information in the records at issue and that it seeks to exempt from disclosure would be maintained in confidence. All of the raw data supplied to the [IESO] in the original spreadsheets was explicitly designated and clearly marked "OPG Confidential - Commercially Sensitive; contains information of a commercially sensitive nature which could harm the competitive position of OPG, if disclosed." OPG has consistently treated the records at issue as confidential. The [IESO] and OPG also signed a Confidentiality Agreement prior to supplying the raw data to the [IESO]. …
>
> The records at issue have not been disclosed by OPG, nor are [they] within any other information available to the public. Similar information to the records at issue was supplied to the Ontario Energy Board (OEB) for its 2010 rate hearing. OPG sought and was granted confidential status for the information by the OEB. [The OPG attaches supporting material to its representations].

[35] In response, the appellant states that the OPG has failed to provide sufficient evidence to support the assertion that the information was supplied in confidence, or would permit the drawing of accurate inferences with respect to information that was supplied by the OPG. The appellant notes that the OPG acknowledges providing raw data to the IESO, which the IESO "subsequently manipulated, added their own detailed calculations as well as added comparisons to other generation options." The appellant

submits that the OPG's disapproval of the inclusion of its logo in the record "may cast doubt on the extent to which the information in the requested document was in fact 'supplied', or whether it was, in fact, mutually generated."

[36] In its reply representations, the OPG confirms that it provided raw data to the IESO and that, from that raw data, other information was created or developed independently by the IESO. The OPG notes that some of the information at issue was created by the IESO without the third party's input or verification. To clarify its position, in its reply representations, the OPG provides a table outlining which information was supplied by it, and distinguishes which information was created or developed independently by the IESO.

Analysis and findings

[37] I have reviewed the information at issue for which the section 17(1) claim is made. Based on the representations of the OPG, I am satisfied that the information at issue was supplied by the OPG to the IESO in confidence. The OPG has identified that the information was supplied by it directly to the IESO. The OPG has also identified that this information was supplied in confidence, and has referred to the fact that the information was explicitly identified as confidential when it was supplied. I also find support for this finding in the materials provided by the OPG, including the confidentiality agreement and the decision of the OEB.

[38] I have also considered whether *all* of the information was supplied in confidence, or whether the portions which the OPG states were "manipulated" by the IESO would result in that information no longer being supplied in confidence, as argued by the appellant.

[39] The fact that data may have been manipulated or added to does not necessarily mean that disclosure would not reveal the underlying data supplied by a third party.

[40] The OPG confirms its position that disclosure of the additional information would allow the requester to calculate the information supplied directly by the OPG to the IESO. As noted above, previous orders have confirmed that 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.[16]

[41] I have reviewed the information which the OPG has indicated is its specific information which was supplied. I have also reviewed the other portions of the records which the OPG identifies as having been manipulated, but which it still claims would reveal information it supplied, as disclosure would allow parties to calculate the

[16] Orders PO-2020 and PO-2043.

information supplied directly by OPG to the IESO. On my review of that information in the records, I accept the OPG's position that disclosure of the additional information would reveal information supplied by the OPG to the IESO in confidence. I make this finding based on both the representations of the OPG and my review of the specific information at issue, including the "raw data" which was supplied by the OPG, as well as the other information which the OPG states was "manipulated."

[42] Accordingly, I find that the second part of three-part test in section 17(1)(a) has been met.

Part 3: harms

General principles

[43] 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.[17]

[44] 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.[18]

[45] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[19]

[46] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[20]

Representations

[47] In support of its position that disclosure will result in the harms under section 17(1)(a), the OPG states:

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

[18] Order PO-2020.

[19] Order PO-2435.

[20] Order PO-2435.

> [Previous decisions] have held that disclosure of information that reveals costs can reasonably be expected to cause competitive harm. Competitors in the same industry can be expected to use such information to gain an unfair advantage. In addition, potential suppliers and contractors could be expected to use the information to gain an unfair advantage in future negotiations with OPG.

[48] The OPG refers to Order PO-2478 in support of this, and then states:

> [The IPC] furthermore has held that disclosure of information supplied in the context of ongoing negotiations can reasonably be expected to cause harm to the Institution.
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> Order PO-2195 involved a request for records relating to the Bruce Nuclear Facility. The adjudicator accepted the following:
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> > … release of financial and commercial information [could reasonably be expected to] compromise OPG's competitive edge to negotiate future business relationships in furtherance of its mandated decontrol, [by] providing third parties with the ability to predict OPG's negotiation and valuation schemes and therefore prejudice OPG's ability to maximize value. (para. 40)

[49] The OPG then states:

> [The OPG] is currently in negotiations with other parties on target pricing as required by [specified sections of an identified agreement]. The information in the records at issue is the basis from which OPG will negotiate. Disclosure of the records at issue would significantly harm OPG's competitive position during these current negotiations.
>
> In Order-2195, the adjudicator accepted the following:
>
> > [The Ministry] maintains that valuations, tax information, cash inflows and outflows, business plan forecasts, assumed price curves, operating information etc. are the type of commercial information that clause 17(1)(a) is intended to exempt from disclosure since that type of confidential information could be used by competitors with insight into OPG's business and permit accurate inference regarding OPG's bidding strategies in the spot market for electricity and negotiations for long term, fixed price contracts, competitive prices, costs, etc. that could harm OPG's competitive position in electricity markets in Ontario... (Para 41)
>
> Similar to Order PO-2195, currently OPG competes with other generators for electricity supply in Ontario. Release of the records at issue would

> provide competitors with insight into OPG's business costs, operations and strategies which would reasonably be expected to result in competitive harm to OPG.
>
> In the event that the records at issue are disclosed and OPG is therefore prejudiced, such prejudice will result in undue loss to OPG or an unwarranted gain to its competitors.

[50] The appellant takes the position that the harms in section 17(1)(a) are not established by the OPG. It reviews the OPG's argument and then states:

> [The appellant] submits that disclosure should not create a "chilling effect." Rather, it should strengthen OPG operations by ensuring they are efficient and effective enough to withstand public scrutiny.
>
> Further, because OPG is a public company, owned by the provincial government on behalf of Ontarians, its commercial position is determined by policy decisions, in addition to market forces and competition. More specifically, the province has ordered OPG to cooperate with its competitors to ensure nuclear costs in the province are kept manageable. The redacted information provided by the OPG informs [the IESO's] energy sourcing recommendations to the Ontario Ministry of Energy. The [IESO's] advice, in turn, is generally adopted as provincial energy policy.
>
> Thus, considerations of traditional business practices fail to take into account the unique positions OPG and [IESO] hold, and should not be relied on to support [the application of the exemption] on section 17(1).

[51] In support of its positon the appellant refers to a letter dated 2013 and sent from the Minister of Energy to OPG instructing it to "… work with Bruce Power to find ways of leveraging economies of scale in the area of refurbishment and operations. This could include suppliers, procurement of material, shared training, lessons learned, labour arrangements and asset management strategies."

[52] In reply, the OPG takes issue with the appellant's position. It identifies its concern that disclosure will affect its ability to protect its competitive position in the electricity sector. It also notes that while the 2013 letter refers to cooperation, it did not specify release of cost estimate information to OPG's competitors. The OPG reaffirms its position that the interests of ratepayers are best served if it is able to negotiate the most cost effective contracts with its major suppliers, and states that release of the records at issue could compromise its negotiating position on contracts yet to be signed.

Analysis and findings

[53] On my review of the information for which section 17(1)(a) is claimed, and the

parties' representations, I am satisfied that the disclosure of the information at issue could reasonably be expected to result in the harms identified in section 17(1)(a). I find that the OPG has provided sufficient evidence to demonstrate that disclosure of the information at issue could reasonably be expected to prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations. In particular, I accept the position that disclosure of information that reveals costs can reasonably be expected to cause competitive harm, and that others can use such information to gain an unfair advantage in current and future negotiations. I also accept that potential suppliers and contractors could be expected to use the information to gain an unfair advantage in future negotiations with OPG.

[54] Furthermore, based on the OPG's statement that the information at issue is the basis upon which the OPG will negotiate the specific agreements it states it is currently negotiating, I am satisfied that disclosure of the information at issue could reasonably be expected to significantly harm OPG's competitive position during these negotiations. The OPG refers to the quotation for Order PO-2195 set out above, which sets out the non-exhaustive types of information which, if disclosed, may result in harms to a party's negotiating position. It confirms that it competes with other generators for electricity supply in Ontario, and that release of the information at issue would provide competitors with insight into OPG's business costs, operations and strategies which would reasonably be expected to result in competitive harm to OPG.

[55] As all three parts of the three-part test in section 17(1)(a) have been established for the information for which it is claimed, I find that the information qualifies for exemption under section 17(1)(a).

ECONOMIC AND OTHER INTERESTS

Issue B: Do the discretionary exemptions at sections 18(1)(a) and/or (e) apply to the records?

[56] The IESO has withheld certain comments that are embedded in the record on the basis that these comments contain confidential financial and commercial information that was developed by the IESO itself or by paid consultants.

[57] I note that, during the course of this appeal, the IESO disclosed a number of comments contained in the record to the appellant. The analysis that follows relates to the remaining redacted comments.

General principles

[58] Sections 18(1)(a) and (e) 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;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

[59] 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.

[60] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18.[21]

[61] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[22]

[62] 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.[23]

[63] I will begin by reviewing the possible application of section 18(1)(e) to the redacted comments.

Section 18(1)(e): positions, plans, procedures, criteria or instructions

[64] Section 18(1)(e) provides as follows:

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[21] Orders MO-1947 and MO-2363.

[22] Order MO-2363.

[23] See Orders MO-2363 and PO-2758.

A head may refuse to disclose a record that contains,

> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario.

[65] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[24]

[66] In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.[25]

[67] Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation.[26]

[68] The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.[27]

[69] Previous orders have defined "plan" as "… a formulated and especially detailed method by which a thing is to be done; a design or scheme".[28] The section does not apply if the information at issue does not relate to a strategy or approach to the

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[24] *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).

[25] Order PO-2064.

[26] Orders PO-2064 and PO-2536.

[27] Orders PO-2034 and PO-2598.

[28] Orders P-348 and PO-2536.

negotiations themselves but rather simply reflects mandatory steps to follow.[29]

IESO representations

[70] The IESO takes the position that the redacted comments qualify for exemption under section 18(1)(e). It states that the comments contain confidential financial and commercial information that was developed by the IESO itself or by paid consultants, and that disclosure of the redacted comments would reveal financial and commercially sensitive information that would jeopardize future negotiations within the broader electricity sector. It states:

> Disclosing the Redacted [IESO] Comments could impact the business and financial dealings between the [IESO] and the electricity suppliers with which it contracts. The Redacted [IESO] Comments … contain information that would jeopardize future negotiations between the [IESO] and other parties in the electricity sector. Part of [the IESO's] mandate is to secure a reliable and cost-effective supply of electricity for Ontario. This requires the [IESO] to negotiate with energy suppliers in order to arrive at agreements that are advantageous to the people and the economy of the province.
>
> The release of such information would prejudice the [IESO] its current and future negotiations with parties in the electricity sector.
>
> It is in the public interest for the [IESO] to be in a position to negotiate the best possible agreements for Ontario. Disclosing the Redacted [IESO] Comments would create an information asymmetry that would give other parties the upper hand in future negotiations with the [IESO]. This would artificially inflate the costs of refurbishment and other such electricity generation agreements. These price increases would ultimately be passed on to consumers or the Government of Ontario, which provides funding for large energy projects. The public therefore has an interest in [the redacted comments being withheld] ….
>
> The [IESO] is an "information organization" and relies on information from a variety of sources in order to fulfill its mandate of securing a reliable and cost-effective supply of electricity for Ontarians. Forcing the [IESO] to release the information could affect the willingness of these and other groups to continue providing the [IESO] with the information it needs to carry out its important work.

[71] The IESO also provides an affidavit in support of its position, sworn by the

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[29] Order PO-2034.

Director of Resource Integration within the IESO's Power System Planning Division. In its affidavit, the affiant affirms the following:

> The Government of Ontario publishes the Long-Term Energy Plan, which broadly describes the electricity services in Ontario and identifies the government's electricity-related priorities. The Long-Term Energy Plan is publicly available on the [IESO's] website. ….
>
> Nuclear generation accounts for approximately half of Ontario's total annual electricity production. Ontario currently has eighteen units: six units at Pickering Nuclear Generating Station ("NGS"), four units at Darlington NGS, four units at Bruce A NGS, and four units at Bruce B NGS.
>
> The 2013 LTEP sets out a timeline to refurbish the four units at Darlington NGS and six of the eight units at Bruce NGS, all of which are approaching their end of life. The refurbishments are planned to start in 2016.
>
> The Pickering NGS is expected to remain in service until 2020.
>
> At the moment, the [IESO] holds a contract with Bruce Power providing for the refurbishment of four units at the Bruce A site, of which two have been refurbished to date. The [IESO] is currently in commercial discussions with Bruce Power on refurbishing the remaining units at the Bruce A and Bruce B sites.
>
> The Darlington NGS refurbishment is currently being considered in a rate application by Ontario Power Generation ("OPG") to the Ontario Energy Board.
>
> During the refurbishment, additional electricity generation from other sources may be needed to replace the nuclear generators that will be offline. Alternatives to nuclear generation include gas-fired generation in Ontario and the purchase of electricity from other jurisdictions. The timing of negotiations related to these nuclear generation alternatives will depend on the option selected, but generally take place several years before the additional power is required.

[72] The affiant then refers specifically to the information at issue in this appeal, and states:

> I have reviewed the … record subject to this appeal. The record is a spreadsheet that contains analysis by the [IESO] comparing the cost of refurbishing Darlington NGS to other power generation options.
>
> Some of the information in the record was provided to [the IESO] in confidence by [the OPG].

> Other portions of the record contain confidential financial and commercial information that was developed by [the IESO] or by paid consultants. …

[73] The affiant then confirms that the redacted comments contain confidential financial and commercial information and, in the confidential portions of the affidavit, provides specifics of the types of information set out in the comments. He then states:

> The [IESO] does not usually release these types of confidential information to the public.
>
> I believe that the [IESO] could be harmed if the Confidential Comments are released.
>
> The [IESO] will be engaging in negotiations with various electricity generators in Ontario, such as with Bruce Power for the refurbishment of Bruce NGS units and with other electricity generators who may need to provide replacement generation. Disclosing the [IESO's] confidential, internal information … could handicap the [IESO's] position in advance of future bargaining.
>
> For example, Bruce Power is engaged in ongoing negotiations with the IESO concerning the Bruce NGS refurbishment and the price of electricity that it supplies …. The IESO's information could also be used by other electricity generators, who may be engaging with the [IESO] in negotiations about replacement generation or other types of generation projects. This could result in higher prices on the projects and for the electricity they generate than might otherwise be the case, which would in turn inflate costs for the [IESO] and Ontario rate payers.
>
> The [IESO] is an "information organization" - it relies on its own information and information provided from a variety of other parties in order to fulfil its mandate of securing a reliable and cost-effective supply of electricity for Ontarians. …

[74] The affiant then refers to other specific information in the redacted comments, and states:

> If the [IESO] is forced to release this information, … other groups could become less willing to continue providing the [IESO] with the information that the [IESO] needs to do its work. The release of such confidential information could therefore harm the [IESO] and, as a result, should be protected.

The appellant's representations

[75] The appellant argues that the IESO has failed to provide sufficiently detailed or

convincing evidence to establish that the exemption in section 18(1)(e) applies to the information. It reviews the four requirements for section 18(1)(e) to apply, as set out above, and then states that, in the IESO's representations, the IESO:

> … did not properly distinguish between sections 18(1)(a) and 18(1)(e) in its arguments. … little information is provided by the [IESO] concerning how the withheld information would specifically impair its future negotiations and contracts under section 18(l)(e). As such, [the appellant] submits that the [IESO] has failed to provide sufficiently detailed or convincing evidence to meet the distinct legal tests or its evidentiary burden under section 53 of the *Act*.

[76] In addition, the appellant states that any possible harms that may result from disclosure would only apply if the information is being used in ongoing negotiations and has not already been shared with the public. The appellant takes the position that this would likely apply to "very little, if any, of the information included in the requested document as much of this information already exists in the public domain."

IESO's reply representations

[77] In its reply representations, the IESO refers to the affidavit material it had provided in its earlier representations and how that information provided evidence on the impact of the release of the redacted comments. The IESO also identifies that it is claiming section 18(1)(e) to only a limited number of the comments, that these comments relate to cost calculations that inform the IESO's assumptions made elsewhere in the record. The IESO also states that, "contrary to the appellant's assertions, the information is not already in the public domain."

Analysis and Findings

[78] As set out above, in order for section 18(1)(e) to apply, the IESO must demonstrate that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.[30]

[79] Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations and not in the context of the government developing policy with a view to introducing new legislation.[31]

[80] The terms *positions, plans, procedures, criteria or instructions* are referable to predetermined courses of actions or ways of proceeding.[32] Previous orders have defined *plan* as "a formulated and especially detailed method by which a thing is to be done; a design or scheme."[33] The section does not apply if the information does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow.[34]

[81] In Order PO-2034, the adjudicator considered this section of the *Act*, and stated:

> Previous orders of the Commissioner's office have defined "plan" as "… a formulated and especially detailed method by which a thing is to be done; a design or scheme."
>
> In my view, the other terms in [section 18(1)(e)], that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to predetermined courses of action or ways of proceeding.

[82] The adjudicator then stated that there must be some evidence that a course of action or manner of proceeding is *predetermined*, that is, there is some organized structure or definition given to the course to be taken. She also referred to an excerpt from the *Williams Commission Report* [35] for context in understanding the Legislature's intent in including this section of the *Act*:

> [T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the

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[30] Order PO-2064.

[31] Orders PO-2064 and PO-2536.

[32] Orders PO-2034 and PO-2598.

[33] Orders P-348 and PO-2536.

[34] Order PO-2034.

[35] 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) at page 321.

> government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other government. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.

[83] On my review of the redacted comments for which the section 18(1)(e) exemption is claimed, I am satisfied that disclosure of the redacted comments would disclose positions, plans, procedures, criteria or instructions to be applied to negotiations carried on or to be carried on by or on behalf of the IESO.

[84] In the course of this appeal the IESO has disclosed some of the comments in the record to the appellant. With respect to the remaining comments, which have not been disclosed, I note that they include:

- assumptions made relating to specific cost information in the record; and
- specific cost or pricing information referenced from other documents, and/or methods of calculating that information (including, in some cases, comparison information).

[85] Applying the four-part test set out above to the redacted comments, I find that the redacted comments qualify for exemption under section 18(1)(e).

[86] To begin, with respect to the first two parts of the test, I am satisfied that the remaining redacted comments contain positions and/or criteria that are intended to be applied to negotiations. The redacted comments include internal assumptions made by the IESO and internal cost or pricing information and/or methods of calculating that information. I am satisfied that this information consists of criteria established by the IESO or the positions it takes on certain information in the record, and that disclosure would reveal the manner in which the IESO determined how to proceed. The affidavit provided by the IESO confirms that the redacted comments include "confidential, internal [IESO] information." I am satisfied that the redacted comments do contain such information, and that disclosure would reveal the internal IESO criteria or positions it takes as it relates to the commercial negotiations referenced by the IESO in its representations.

[87] With respect to the third and fourth parts of the test, based on the representations of the IESO, I am satisfied that negotiations are being carried on currently, or will be carried on in the future, and that they are being conducted by or on behalf of the IESO. The IESO has identified that it is involved in current and future negotiations between itself and other parties in the electricity sector. The affidavit confirms that the IESO is currently in commercial discussions with Bruce Power on refurbishing the remaining units at certain Bruce sites, that the Darlington NGS refurbishment is currently being considered in a rate application, and that during the

refurbishment, additional electricity generation from other sources may be needed to replace the offline nuclear generators. It also establishes that, although the timing of these negotiations will depend on the option selected, they generally take place several years before the additional power is required.

[88] As a result, I am satisfied that the redacted comments qualify for exemption under section 18(1)(e) of the *Act*.

Issue C: Did the institution exercise its discretion under section 18? If so, should this office uphold the exercise of discretion?

General principles

[89] The section 18 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[90] In addition, this office 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.

[91] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[36] This office may not, however, substitute its own discretion for that of the institution.[37]

Relevant considerations

[92] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[38]

- the purposes of the *Act*, including the principles that
    - information should be available to the public

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[36] Order MO-1573.

[37] Section 54(2).

[38] Orders P-344 and MO-1573.

  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[93] The IESO submits that, in the circumstances, it properly exercised its discretion to apply section 18(1)(e) and that the IPC should uphold this exercise of discretion. It states that, in exercising its discretion to withhold the redacted comments, it did not act in bad faith or for an improper purpose, take into account irrelevant considerations, or fail to take into account relevant considerations. It also considered:

> *Whether disclosure will increase public confidence in the operation of the institution*
>
> The IESO states that the redacted comments contain confidential financial and commercial information that is related to other projects, the calculations in the released information, or both, and that there is nothing in the redacted comments that would relate to "public confidence" in the IESO.
>
> *The nature of the information and the extent to which it is significant and/or sensitive to the institution or the requester*
>
> The IESO states that the redacted comments are made up of financial and commercially sensitive information and that disclosure would jeopardize

> future negotiations within the broader electricity sector. It states that, in contrast, the redacted comments are not sensitive to the appellant, who will not be affected by the disclosure or non-disclosure of the redacted comments.
>
> *The historic practice of the institution with respect to similar information*
>
> The IESO states that it does not generally disclose confidential commercial information, and that disclosing such information would compromise its mandate to develop a reliable, cost-effective and sustainable electricity system. It also states that disclosure could cause the harms identified in section 18(1)(e).
>
> *The principle that exemptions from the right of access should be limited and specific*
>
> The IESO states that, in withholding the redacted comments, it has exercised its discretion under section 18 in a limited and specific manner. The IESO notes that it has already released the portions of the record that will not cause harm to it. It also states that it has continued to reassess which portions of the record can be disclosed. It states that this demonstrates that the IESO has not fettered its discretion or applied its discretion in an arbitrary or capricious manner.

[94] The IESO also provides additional confidential representations relating to the manner in which it exercised its discretion.

[95] The appellant reviews the IESO's representations on its exercise of discretion, and particularly notes that the IESO asserts that nothing in the redacted comments would relate to "public confidence" in the IESO. The appellant then states:

> ... disclosure of the withheld information directly relates to public confidence as it would justify a decision to approve a $12.9 billion dollar project funded by Ontarians when there are potentially cheaper, more reliable, and more environmentally sustainable alternatives. Further, disclosure would assist, not compromise, the [IESO's] mandate. This is because it would allow the public and external experts to provide insights to better inform the [IESO's] recommendations concerning the development of reliable, cost-effective, and sustainable energy for the province. [The appellant organization's] need to see the redacted comments is compelling because it has the experience and expertise to help ensure that wise energy policy is made in the public interest. However, [the appellant] needs the requested information to ensure that its analysis is accurate and its recommendations are as helpful as possible. Finally, [the IESO's] incremental and partial disclosure of information over

> the course of this appeal, when most information is already in the public domain, suggests that [the IESO's] decisions are arbitrary.

[96] The appellant also states that the document is redacted to the point that "it provides no information at all concerning alternative energies that were compared with nuclear generating options." It states that both OPG and the IESO have published statements about the costs of alternative energy sources at different times in the past, and that withholding the information at issue is contrary to the severance requirements in section 10(2) of the *Act*. In addition, the appellant takes the position that the IESO failed to consider the purposes of the *Act* when making its decision, and did not afford sufficient weight to the importance of making institutional information public, and that exemptions are limited and specific.

[97] In its reply representations, the IESO states that it was mindful of the purposes of the *Act* in exercising its discretion to deny access to the redacted comments, including the principle that exemptions from the right of access should be limited and specific.

Analysis and findings

[98] Based on the IESO's representations and my review of the information withheld under section 18 of the *Act*, I am satisfied that the IESO considered relevant factors in exercising its discretion, as listed in the factors it considered. In particular, I note that the IESO considered that the redacted comments are made up of financial and commercially sensitive information and that disclosure would jeopardize future negotiations and compromise its mandate to develop a reliable, cost-effective and sustainable electricity system. I also note that the IESO has disclosed a number of the comments contained in the record, and has claimed the section 18(1)(e) exemption only for the redacted comments. In that regard, the IESO has clearly considered each of the comments, and its severance obligations under section 10(2).

[99] With respect to the appellant's position that the IESO has not properly considered the "public confidence" concerns, particularly in light of the significant costs of the project, I review the cost of the project as an issue in the public interest discussion below. Regarding the impact of the cost on the IESO's exercise of discretion, I note that the IESO has indicated that it specifically considered that disclosing the commercial information in the record would compromise its mandate to develop a reliable, cost-effective and sustainable electricity system.

[100] In the circumstances, I am satisfied that the IESO exercised its discretion properly and in good faith and I will not interfere with it on appeal. The IESO took into account relevant considerations and there is no evidence that it acted in bad faith or for an improper purpose. The IESO also disclosed additional information during the processing of this appeal, and disclosed portions of the record, withholding only those portions which it claimed qualify for exemption. I see no error in the IESO's exercise of

discretion to apply section 18(1)(e) to the redacted comments, and I uphold its exercise of discretion.

Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17 and/or 18 exemptions?

General Principles

[101] Section 23 reads:

> 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.

[102] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption.[39]

[103] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, this office will review the record with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[40]

Compelling public interest

[104] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[41] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[42]

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[39] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 488 (C.A.).

[40] Order P-244.

[41] Orders P-984 and PO-2607.

[42] Orders P-984 and PO-2556.

[105] A public interest does not exist where the interests being advanced are essentially private in nature.[43] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[44]

[106] A public interest is not automatically established where the requester is a member of the media.[45]

[107] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[46]

[108] Any public interest in *non*-disclosure that may exist also must be considered.[47] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[48]

Purpose of the exemption

[109] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[110] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[49]

Representations

[111] In its initial representations, the IESO states that there is no compelling public interest in disclosing the redacted comments withheld under section 18(1)(e). It notes that previous orders have defined "compelling" as "rousing strong interest or attention," and that in making this determination it is necessary to look at the broader public interest rather than the narrow interests of the appellant. It then states:

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[43] Orders P-12, P-347 and P-1439.

[44] Order MO-1564.

[45] Orders M-773 and M-1074.

[46] Order P-984.

[47] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

[48] Orders PO-2072-F, PO-2098-R and PO-3197.

[49] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

> While [the appellant organization] appears to have a strong interest in nuclear projects in Ontario and may have an individual interest in the information contained in the [redacted comments], the proper group to consider is the general public.
>
> The IESO has already released the portion of the record that compares the costs of various electricity generator options. The [redacted comments], which is the only information over which the [IESO] is claiming a section 18 exemption, do not relate to a compelling public interest.

[112] The IESO also states that if there is found to be any public interest in the disclosure of the redacted comments, this public interest would not outweigh the purpose of the section 18 exemption in the circumstances.

[113] Furthermore, the IESO argues that there is a public interest in non-disclosure of the records. It states:

> … Any interest in disclosure of the [redacted comments] must … also be weighed against the public's broader interest in protecting the confidentiality of the information.
>
> Disclosing the [redacted comments] would be harmful to the [IESO] and jeopardize future negotiations in the electricity sector. Such a result is contrary to the purpose of the section 18 exemption and detrimental to the public's interest in a reliable, cost-effective, and sustainable electricity system. These harms far outweigh any alleged interest in releasing the information.

[114] The OPG's initial representations on the public interest in records covered by the section 17(1)(a) exemption begin by referring to the following excerpt from Order PO-2072-F:

> The issue of compelling public interest is more accurately characterized as whether, on balance, disclosure should be required. The determination must be made on the facts and circumstances of the specific appeal and the evidence and arguments made by the various parties regarding its application to particular records.

[115] The OPG then states:

> The Head has carefully considered the public interest and concluded that the public interest lies in withholding, rather than disclosing the records at issue on this appeal. Disclosure to the appellants would be disclosure to the world. Disclosure would allow suppliers and competitors to obtain an unfair advantage when negotiating with OPG during ongoing negotiations

> establishing target pricing. Also, disclosure would allow competitors of OPG (ie: other generators) to obtain an unfair advantage when negotiating with the [IESO] in securing power purchase agreements. The ratepayers and taxpayers of Ontario are best served when all prospective generators and contracting parties are on an equal footing and none have leverage in negotiations because they are privy to the anticipated costs or "bottom-line" of other generators and contracting parties. Simply put, if contracting parties and competitors of OPG are not obliged to disclose to OPG their anticipated costs, OPG should not be obliged to disclose its anticipated costs. OPG's financial position in such a marketplace is protected, as is that of its sole shareholder, the Government of Ontario. At the same time, disclosure of the records in question does not significantly advance the public's interest in ensuring open government and accountability for the cost of electricity generation, since sufficient information on nuclear refurbishment has been made publicly available already through a public review process before the Ontario Energy Board [O.E.B.] and the O.E.B. continues to maintain its jurisdiction over economic efficiency and cost effectiveness in electricity generation in accordance with section 1(1) of the *Ontario Energy Board Act, 1998*.[50]
>
> While not binding on [the IPC], the O.E.B.'s confidential treatment of the information like that under review in the current appeal, during the 2010 rate hearings for OPG, merits favourable consideration on this appeal. The O.E.B. is, by law, the principal authority responsible for protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service in addition to ensuring the economic efficiency and cost effectiveness of electricity generation. Further, the O.E.B's *Practice Direction on Confidential Filings* states very clearly in its introduction and purpose (at par.1) that:
>
> > The Board's general policy is that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the Board's view that its proceedings should be open, transparent, and accessible. The Board therefore generally places materials it receives in the course of the exercise of its authority under the *Ontario Energy Board Act, 1998* and other legislation on the public record so that all interested parties can have equal access to those materials.

[116] The OPG then states that the O.E.B. was asked by the OPG to give confidential

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[50] This section sets out the objectives which the O.E.B., in carrying out its responsibilities under the OEBA or any other Act in relation to electricity, shall be guided by.

treatment to certain redacted portions of its filed Business Case Summaries and that, amongst the redacted portions OPG sought to remain confidential, is the information in the records at issue.

[117] The OPG states:

> The basis for OPG's request is set out in a letter from its outside counsel … to the O.E.B. Secretary …. The position taken in the letter was that there was sufficient information in the redacted portions, when combined with other available information, to allow sophisticated bidders to determine the project costs and that the records at issue, if it became public, would place OPG at a substantial disadvantage relative to project suppliers, harm OPG's position in future negotiations and harm ratepayers. The letter relied on the *November 16, 2006 O.E.B. Practice Direction on Confidential Filings* … at subsections a) i, ii and iv and b). These subsections, (now Appendix A to the revised October 13, 2011 *Practice Direction*), read as follows:
>
> > Considerations in Determining Requests for Confidentiality: The final determination of whether or not information will be kept confidential rests with the Board. The Board will strive to find a balance between the general public interest in transparency and openness and the need to protect confidential information. Some factors that the Board may consider in addressing confidentiality of filings made with the Board are:
> >
> > (a) the potential harm that could result from the disclosure of the information, including:
> >
> > i. prejudice to any person's competitive position;
> >
> > ii. whether the information could impede or diminish the capacity of a party to fulfill existing contractual obligations;
> >
> > iii. whether the disclosure would be likely to produce a significant loss or gain to any person
> >
> > (b) whether the information consists of a trade secret or financial, commercial, scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the Board;

[118] The OPG states that the O.E.B. rendered its decision on the request for confidentiality in July of 2010, and that the relevant portion of its ruling is as follows:

> There are 34 redacted BCS, and the Board finds that it is appropriate to retain the confidential status of all these documents. … Parties also provided submissions opposing confidential treatment for the Darlington Refurbishment. The Board finds that it is appropriate to retain the confidential status at this time, however, the Board may reconsider this protection as the review of CWIP for Darlington Refurbishment progresses.

[119] The OPG confirms that the O.E.B. has not reconsidered this protection and then states:

> In addition to the O.E.B. public hearings discussed above, there have been public hearings conducted by the Canadian Nuclear Safety Commission (C.N.S.C.).
>
> These hearings provided the public with additional information on the Darlington Refurbishment and the evidence provided underwent regulatory scrutiny thereby increasing the confidence in the quality of information. One of the outcomes of O.E.B. and C.N.S.C. regulatory hearings is that the public have been provided a significant body of information on the Darlington Refurbishment Project.

[120] The appellant takes the position that there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government. He states:

> Here, the requested document must be an important means of informing the citizenry about the activities of government and add to the information on which the public can better inform its political choices and express public opinion.[51]

[121] In support of its position the appellant refers to the following:

> First, … the information in the requested document contains crucial data, figures, analysis, and assumptions that have dictated significant developments in provincial energy policy. While the non-disclosure of data may allow the [IESO] and OPG to enter into beneficial contracts, this benefit should not outweigh the public's right to know the costs involved with the Darlington Refurbishment, and how these costs were compared to potentially less costly and more beneficial alternative energy sources.

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[51] The appellant refers to PO-3311 at para 139 referencing established point of law in P-984, PO-2569, and PO-2789.

> Nuclear energy raises significant public safety concerns,[52] which have been found to merit the public interest override in the past.[53] Further, it has been shown to adversely impact the green energy sector.[54] As such, public scrutiny of the facts that led to this decision are essential.
>
> Second, there is no alternative forum to obtain information or address the public interest considerations that are at the crux of this appeal. The Integrate Power System Plan (IPSP) was established in 2004 as a means to ensure greater public input into the development of Ontario's energy policies. It involved extensive public consultations and was meant to include a series of public hearings to determine which sources of energy the province should pursue, ensuring these decisions were made in the public interest. However, complete hearings have yet to take place, and if they occur in the future, they will be too late to reconsider the Darlington Refurbishment.[55] Without the IPSP process, public diligence is all the more important in ensuring transparency and accountability of provincial energy decisions.
>
> Further, neither the Ontario Energy Board nor the Canadian Nuclear Safety Commission have jurisdiction to consider or review the policy decisions to pursue nuclear energy over other sources, thus they should not be considered as alternative forum[s] for the purpose of this appeal.
>
> Third, there has not been wide public coverage or debate concerning the rationale for the province's decision to pursue the Darlington Refurbishment over other energy alternatives. Providing [the appellant] with full disclosure of the information contained in the requested document would allow for informed public debate and the development of public opinion and political choices on these issues that are based on evidence and fact.

[122] The appellant also provides representations in support of its position that the public interest outweighs the sections 17 and 18 exemptions. It states:

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[52] The appellant references an attached affidavit.

[53] The appellant references P-1190, upheld on judicial review in *Ontario Hydro v Ontario (information and Privacy Commissioner)*, [1996] OJ No 4636 (Div Ct), leave to appeal refused [1997] OJ No (CA), and PO-1805].

[54] The appellant references an attached affidavit.

[55] The appellant references an attached affidavit submitted in support of the appellant's representations.

> Both the [IESO] and OPG use very narrow definitions of the public interest that fail to adhere to the purposes of the *Act*. They equate the public interest as their ability to enter into advantageous contractual relationships with energy suppliers. As such, they use this narrow public interest definition to justify a decision that affirms the secrecy of the information on which they rely to determine public policy.
>
> [The appellant] submits that the public interest should be defined in a broader way to include the public's interest in having the province pursue the safest and most economically and environmentally beneficial sources of electricity in a transparent and accountable way. This definition is more consistent with the *Act*. …

[123] In support of its representations, the appellant provides two affidavits. One is sworn by a senior nuclear analyst for the appellant organization, the other sworn by a lawyer representing environmental organizations including the appellant organization.

[124] Both the IESO and the OPG provide reply representations.

[125] The IESO states that the appellant has not identified a "compelling public interest" in the records. It states that the appellant's representations focus on the appellant's interest in reviewing the records. It states that the appellant organization has its own interest in the records, which does not equate to a public interest in the records.

[126] The IESO then states that, even if there is a public interest in the records, the test is whether there is a compelling public interest in the disclosure of the records, and the IESO states that this does not exist. It states:

> … Simply because the information in the record relates to nuclear power does not mean that there is a compelling public interest in it release.

[127] The IESO refers to Order PO-2072-F which dealt with records relating to nuclear safety and other information relating to nuclear operations. In that order, the adjudicator found that there was a compelling public interest in releasing information related to nuclear safety, but found that the records at issue[56] did not relate to safety issues, and did not fall within the scope of a "compelling" interest for the purpose of section 23. The IESO states that the records at issue relate to the cost of the Darlington refurbishment, not to any issues of nuclear safety, and that there is therefore no "compelling public interest" in their disclosure.

[128] In addition, the IESO states that the fact that a record relates to the expenditure

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[56] Specifically, records identified as Category II records in that order.

of public funds is not sufficient, on its own, to find that there is a compelling public interest in its release. It states:

> The appellant refers to the cost of the Darlington refurbishment on numerous occasions in his representations and suggests that it provides a basis for disclosing the withheld information.
>
> … the fact that a record relates to the expenditure of public funds does not, in and of itself, mean that there is a compelling public interest in its release.

[129] The IESO refers to previous orders of this office which have found that a compelling public interest in disclosure of particular records did not exist simply because the records related to matters which involved significant expenditure of public funds.[57]

[130] The IESO also states that any public interest in non-disclosure must also be considered in assessing whether there is a compelling public interest in the release of records. It states that it is in the public interest for the IESO to be in a position to negotiate the best possible agreements for Ontarians and that, as referenced in its representations, disclosure of the information at issue would artificially inflate the costs to the IESO and, ultimately, to consumers or the Government of Ontario.

[131] The OPG also provides brief reply representations in support of its position that the public interest override does not apply, which position is largely reflected in the IESO's representations.

Analysis and finding

[132] As noted above, two requirements must be met to establish that the public interest override in section 23 of the *Act* applies to the record:

- There must be a compelling public interest in the disclosure of the information; and
- This interest must clearly outweigh the purpose of the exemption.

[133] In determining whether a compelling public interest in the disclosure of the exempted information exists, I must first consider whether the interest being advanced is a public or private interest. As mentioned above, a public interest does not exist where the interests being advanced are essentially private in nature.

[134] To begin, it is clear that there exists a public interest generally in information relating to nuclear energy, including the significant costs associated with its production,

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[57] The IESO refers to Order PO-3111 and PO-2864.

the possible use and comparisons of costs of other sources of energy, and the ultimate costs of energy to consumers. I accept that a number of previous orders have specifically focused on the public interest in information related to nuclear safety; however, the public interest is not restricted to nuclear safety issues, and can include other information relating to nuclear energy as an energy source. In addition, I accept that the very significant costs of energy to Ontarians, including the significant costs of nuclear energy as identified by the appellant, establish a public interest in information relating to the use of nuclear energy.

[135] I have also considered whether the interest in the records is a public or private interest. Although the appellant accepts that there has not been "wide public coverage or debate" about the province's decision to pursue the Darlington Refurbishment over other energy alternatives, he identifies his interest (and therefore, his organization's interest) in reviewing the records to "allow for informed public debate" on these issues. Having regard to the nature of the appellant's organization and the expressed interest in disclosure of the records to allow for "informed public debate", in the circumstances, I find that there exists a public interest in the records. In that regard, in the circumstances of this appeal, I do not accept the IESO's position that the appellant organization's interest does not equate to a public interest in the records.

[136] However, section 23 requires me to determine whether there is a *compelling* public interest in the disclosure of the information in the records at issue and, in doing so, to also consider whether there exists a public interest in *non*-disclosure of the records. In the circumstances, I am not satisfied that a compelling public interest in the record has been established. I make this finding for a number of reasons.

[137] First, I find that there exists a public interest in non-disclosure of the record. As stated in previous orders:

> Any public interest in *non*-disclosure that may exist also must be considered.[58] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[59]

[138] Based on the representations of the parties, I found above that disclosure of the withheld portions of the record would result in the harms set out in sections 17(1)(a) and 18(1)(e), essentially, harm to the government institutions' future negotiations. In these circumstances, disclosure of the withheld portions of the record would adversely affect the ability of the institutions to negotiate as effectively as possible in the future. On its own, this could potentially impact the costs of nuclear energy versus other

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[58] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

[59] Orders PO-2072-F, PO-2098-R and PO-3197.

sources of energy, and further adversely impact energy costs to Ontarians. Although I stated above that the very significant costs of energy (including nuclear energy) to Ontarians establishes a public interest in information relating to the use of nuclear energy, I find that, in the circumstances, there exists a public interest in non-disclosure of information that would result in further additional energy costs to Ontarians.

[139] I am also aware of the appellant's interest in obtaining the information to review how nuclear energy costs are compared to "potentially less costly and more beneficial alternative energy sources." I find that there exists a public interest in non-disclosure of information which may adversely impact nuclear energy costs and thereby affect broader decisions on alternative energy sources in the future.

[140] In addition, I find persuasive the OPG's references to the role and responsibilities of the O.E.B., particularly its jurisdiction over economic efficiency and cost effectiveness in electricity generation as set out in section 1(1) of the *Ontario Energy Board Act 1998,*[60] as well as the O.E.B.'s decisions as referenced in the OPG's representations set out above. Although not binding on me, the O.E.B. clearly considered issues regarding disclosure of the information and found it appropriate that the information retain its confidential status at the time of its decision.

[141] I also note the OPG's reference to the public hearings that have been conducted

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[60] Section (1)(1) reads:

> The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
>
> > 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
> >
> > 1.1 To promote the education of consumers.
> >
> > 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
> >
> > 3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
> >
> > 4. To facilitate the implementation of a smart grid in Ontario.
> >
> > 5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

by the Canadian Nuclear Safety Commission (C.N.S.C.), and its view that one of the results of the O.E.B. and C.N.S.C. regulatory hearings is that "the public have been provided a significant body of information on the Darlington Refurbishment Project." The appellant takes the position that neither of these bodies have the jurisdiction to consider or review the policy decisions to pursue nuclear energy over other sources, and that they should not be considered as alternative forum for the purpose of this appeal. Although this may be the case, I accept the OPG's position that these hearings have, to some extent, provided additional information about the Darlington refurbishment project.

[142] In these circumstances, I find that a compelling public interest in the disclosure of the withheld information in the record has not been established. Therefore, I find that the public interest override provision in section 23 does not apply to the information remaining at issue.

ORDER:

I uphold the IESO's decision, and dismiss this appeal.

Original Signed by: December 9, 2016

Frank DeVries
Senior Adjudicator