Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3717

Appeal PA14-379

Ministry of Energy

April 4, 2017

Summary: The appellant seeks access to all reports prepared by an Independent Oversight Advisor to the ministry in 2013 relating to the progress of the Darlington Nuclear Generation Station refurbishment project. The ministry located nine responsive records and denied the appellant access to them, in full. The ministry claimed that the records are exempt from disclosure under sections 17(1) (third party commercial information) and 18(1) (economic and other interests) of the *Act*. The adjudicator finds that the records are not exempt under sections 17(1) and 18(1) and orders the ministry to disclose them to the appellant in their entirety.

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

Cases Considered: PO-3459

OVERVIEW:

[1] In February 2010, Ontario Power Generation (OPG) announced plans for the mid-life refurbishment of the Darlington Nuclear Generation Station (Darlington). Darlington is owned and operated by OPG. The Darlington refurbishment project (the Project) is managed by OPG and consists of three phases: the initiation phase, the definition phase and the execution phase. According to OPG's website, the Project is currently in the execution phase and OPG has begun to refurbish the four reactors at Darlington.

[2] While OPG is primarily responsible for managing the Project, the Ministry of Energy (the ministry), which is the sole shareholder of OPG, states that it plays a

"critical decision-making and oversight role with respect to the Project." In November 2012, the ministry entered into a Memorandum of Understanding (MOU) with OPG in which the ministry and OPG jointly administered a competition for the procurement of an Independent Oversight Advisor (the IOA) to the Minister of Energy (the minister) for the Project. According to the ministry, the IOA's role is to perform independent assessments, evaluations, oversight and advisory services and to provide frequent reports to the minister and delegated ministry staff with respect to the Project. Pursuant to the MOU, OPG prepared the Request for Proposal for the procurement of the IOA. The ministry selected a company to be the IOA in February 2013.

[3] The appellant submitted a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> …all reports, including power point presentations, provided to the government in 2013 by the independent oversight adviser hired by the Ministry to monitor and report on the progress of the Darlington refurbishment. My understanding is [named consulting firm] has been contracted to do this work.

[4] The ministry located nine reports prepared by the consulting firm that cover the period from March to December 2013. In accordance with section 28 of the *Act*, the ministry notified the consulting firm (the affected party) that the responsive records contain information that may relate to it and referred it to section 17(1) (third party commercial information) of the *Act*. The ministry invited the affected party to make representations about whether the records should be disclosed. The affected party submitted representations to the ministry claiming that the records should not be disclosed to the appellant because they contain information that qualifies for exemption under section 17(1).

[5] Upon review of the affected party's submissions, the ministry issued a decision letter to the appellant, denying him access to the records, in full, under the mandatory exemption in section 17(1) and the discretionary exemption in section 18(1) (economic and other interests). The appellant appealed the ministry's decision.

[6] During mediation, the ministry specified that it relied upon sections 17(1)(a) and (b) and 18(1)(a), (c) and (d) to deny the appellant access to the records. The appellant claimed that there is a compelling public interest in the disclosure of the records, thereby adding the public interest override at section 23 of the *Act* as an issue in this appeal.

[7] Mediation did not resolve the issues under appeal and the file was subsequently moved to adjudication for an inquiry. The adjudicator with carriage of the appeal began his inquiry by seeking representations from the ministry and the affected party. Both submitted representations.

[8] Upon review of the ministry and affected party's representations, the adjudicator invited the appellant to submit representations in response to the ministry and affected

party's representations and the Notice of Inquiry. The affected party and ministry's representations were shared with the appellant in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations. The adjudicator then sought reply representations from the ministry and also invited OPG to submit representations in response to the Notice of Inquiry. The ministry submitted reply representations. OPG did not submit representations.

[9] The appeal was then transferred to me to complete the order. In the discussion that follows, I find that sections 17(1) and 18(1) do not apply to the records and order the ministry to disclose them to the appellant, in full.

RECORDS:

[10] The records at issue are set out in the following chart:

Record number	Description of record	No. of pages	Ministry's decision	Exemptions claimed
1	Report to the Minister of Energy on the Oversight of the Darlington Refurbishment Program for the period of March – April 2013	16	Withhold in full	17(1) 18(1)
2	Report to the Minister of Energy on the Oversight of the Darlington Refurbishment Program for the period of May 2013	13	Withhold in full	17(1) 18(1)
3	Report to the Minister of Energy on the Oversight of the Darlington Refurbishment Program for the period of June 2013	12	Withhold in full	17(1) 18(1)
4	Report to the Minister of Energy on the Oversight of the Darlington Refurbishment Program for the period of July 2013	17	Withhold in full	17(1) 18(1)
5	Report to the Minister of Energy on the Oversight of the Darlington Refurbishment Program for the period of August 2013	15	Withhold in full	17(1) 18(1)
6	Report to the Minister of Energy on the Oversight of the Darlington Refurbishment Program for the 6-month period ending September	56	Withheld in full	17(1) 18(1)

	2013			
7	Report to the Minister of Energy on the Oversight of the Darlington Refurbishment Program for the period of October 2013	17	Withheld in full	17(1) 18(1)
8	Report to the Minister of Energy on the Oversight of the Darlington Refurbishment Program for the period of November 2013	22	Withheld in full	17(1) 18(1)
9	Report to the Minister of Energy on the Oversight of the Darlington Refurbishment Program for the period of December 2013	21	Withheld in full	17(1) 18(1)

ISSUES:

A. Does the mandatory exemption at section 17(1) apply to the records at issue?

B. Does the discretionary exemption at section 18(1) apply to the records?

DISCUSSION:

Issue A: Does the mandatory exemption at section 17(1) apply to the records at issue?

[11] In its representations, the ministry submits that the records are exempt from disclosure under sections 17(1)(a) and (b) of the *Act*. The affected party does not refer to specific paragraphs of section 17(1), but appears to rely on paragraphs (a) and (b) as well. The relevant paragraphs of section 17(1) read as follows:

> 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 be so supplied

[12] 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]

[13] For section 17(1) to apply, the ministry and/or the parties whose information may be contained in the records at issue must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) and/or (b) of section 17(1) will occur.

Requirement 1: type of information

[14] The ministry submits that all nine records contain commercial, financial and technical information related to the Project. Specifically, the ministry submits that Record 6 contains commercially sensitive information about the Project, including information about the contracts OPG holds with vendors for the Project's major sub-projects. In addition, the ministry submits that Record 6 contains sensitive financial information in the form of the Project's cost estimate information, contingency estimates and an assessment of OPG's performance on cost control regarding the Project. As well, the ministry submits that Record 6 contains technical information, including the technical details about OPG's engineering process.

[15] The ministry submits that Records 1 to 5 and 7 to 9 contain similar commercial, financial and technical information, including confidential cost estimate data, evaluations of the engineering work performed by vendors and details of engineering techniques as well as equipment reliability, fuel handling and risk management.

[16] The affected party submits that the records contain technical information in the form of descriptions of projects, the basis for the scorecard rating, the basis for risks and challenges. Additionally, the affected party submits that the records contain commercial information including the descriptions of the scope of the Project, performance issues, project strategies and risks. Finally, the affected party submits that the records contain labour relations information including references to the strategies to prevent labour disruptions during the Project and to retain staff.

---

[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 and MO-1706.

[17] The appellant accepts that the records may contain commercial, technical and financial information in nature.

[18] Previous orders of this office have defined technical, commercial, financial and labour relations information as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[3]
>
> *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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
>
> *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.[6]
>
> *Labour relations* means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships. Labour relations information has been found to include:
>
> - discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute[7]
>
> - information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,[8]
>
> but not to include:
>
> - names, duties and qualifications of individual employees[9]

[3] Order PO-2010.
[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.
[7] Order P-1540.
[8] Order P-653.
[9] Order MO-2164.

- an analysis of the performance of two employees on a project[10]
- an account of an alleged incident at a child care centre[11]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation[12]

[19] On my review of the records at issue, I am satisfied that the records contain commercial, financial or technical information for the purposes of section 17(1) of the *Act*. The reports prepared by the affected party contain summary or overview information relating to the technical aspects of the Project, including summary information relating to various engineering projects, strategies and challenges. In addition, the records contain summary or overview financial information relating to the costs and cost management of the Project. Finally, I am satisfied that the records contain general information relating to the buying and selling of merchandise and services. While the affected party claims that the records also contain labour relations information, I find that general commentary relating to new staff members and strategies to avoid labour disruptions does not constitute *labour relations information* within the meaning of section 17(1) of the *Act*.

Requirement 2: supplied in confidence

[20] The requirement that it be shown that the information was *supplied* to the institution reflects the purpose of section 17(1) of protecting the informational assets of third parties.[13]

[21] 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.[14]

[22] 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. The expectation of confidentiality must have an objective basis.[15]

[23] 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:

---

[10] Order MO-1215.
[11] Order P-121.
[12] Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[13] Order MO-1706.
[14] Orders PO-2020 and PO-2043.
[15] Order PO-2020.

- 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.[16]

Supplied

[24] The ministry submits that the IPC has found that external consultants can be considered to be *suppliers* of confidential information to the institution under section 17(1). The ministry refers to Order MO-2684, in which the IPC found that a consultant retained by the City of Ottawa to provide it with a report on storm-water management constituted a *supplier* of the report to the City for the purposes of section 10(1), the municipal equivalent to section 17(1) of the *Act*.

[25] In addition, the ministry refers to *SNC-Lavalin v. Canada (Minister of Public Works)*[17], in which the Federal Court considered the scope of the *supplied* element under section 20(1)(b) of the *Federal Access to Information Act* (the federal equivalent to section 17(1) of the *Act*). The ministry states that in *SNC-Lavalin*, the third party submitted a proposed tunnel solution to Public Works Canada (PWC). PWC required an evaluation report as part of the proposal process and contracted with an external consultant to prepare it. The third party agreed to provide its private information to the consultant for the purposes of preparing this report and consented to giving the government access to this report and its information. Although the information was not directly *supplied* to the government by the third party, the Court held that the *supplied* requirement was met and that a *supplier* could be an intermediary consultant acting for the government to collect the third party information and present it to the government.[18]

[26] The ministry submits that the Court's decision in *SNC-Lavalin* is applicable to this appeal. As in *SNC-Lavalin*, the affected party acted as an independent consultant for the ministry and prepared the records exclusively for the minister and ministry staff based on the findings of its assessment of OPG and the project. The ministry submits that the affected party's assessment was based on, and contains, information supplied to it by OPG as well as its staff, vendors and other external oversight advisors for the purposes of completing the assessments and preparing the records exclusively for the minister and delegated staff. While the ministry acknowledges that OPG is an *institution* under the *Act*, it is a third party in this case, as are its vendors. Therefore, the ministry

[16] Order PO-2043.
[17] [1994] FCJ No. 1059 49, ACWS (3d) 211. (*SCN-Lavalin*)
[18] *Ibid.*, at para 35.

submits that the records contain third party information supplied by OPG and its vendors to the ministry through the affected party.

[27] The affected party submits that OPG supplied the information to the affected party and to the ministry.

[28] The appellant concedes that the information contained in the records may have been supplied by OPG to the ministry.

[29] Based on my review of the records, I accept that they contain information that was supplied by OPG to the affected party which was then supplied to the ministry. While the record was generated by the affected party, the information contained in the records reflects information that OPG provided to the affected party for review and consideration, and were supplied to the ministry as per the affected party's role as OPG's IOA to the ministry.

In confidence

[30] The ministry submits that the information contained in Records 1 to 9 was supplied *in confidence*. It submits that all the records were communicated to the ministry by the affected party on the understanding that they would be kept confidential at all times. The ministry notes that the affected party asserted that it supplied all of the records to the ministry in confidence in its response to the ministry's third party notice.

[31] The ministry also notes that section 2.10(b) of the agreement between the affected party and OPG states that the affected party would not disclose any confidential information it collected for the purposes of conducting its assessment. Furthermore, under the MOU, the ministry and OPG agreed that the ministry would keep all information disclosed by OPG in connection with the MOU confidential. The ministry also states that the MOU explicitly states that the ministry shall keep the information provided by OPG and the affected party in strict confidence. The ministry submits that these clauses demonstrate that the affected party and OPG intended the records to be kept in confidence by the ministry at all times and that the ministry also intended to keep these records confidential at all times.

[32] The ministry submits that the IPC has found that the existence of an explicit confidentiality agreement is evidence that the parties reasonably expected that the information would be treated in confidence.[19] Furthermore, the ministry notes that treating these records as confidential is consistent with a professional consultant's responsibility.

[33] The affected party submits that OPG provided the material contained in the records with the belief and expectation that it would be treated confidentiality and that the results would be treated in confidence. The affected party submits that it created

[19] The ministry refers to Orders PO-3154, PO-2569 and MO-1476.

these reports with the expectation that they would be treated confidentially by the ministry. Further, the affected party submits that it was instructed to present the reports directly to the ministry alone and not OPG's senior management, thereby highlighting the confidential nature of the records.

[34] The appellant submits that, as a Crown Corporation whose sole shareholder is the ministry, OPG is subject to a directive that requires it to cooperate with its competitors in the province to ensure the costs of nuclear energy are kept as low as reasonably possible. As such, the appellant submits that the expectations of confidentiality regarding OPG's operations and the importance of OPG's competitive advantage should not be considered to be absolute.

[35] Moreover, the appellant notes that the confidentiality of similar oversight reports relating to OPG's management of the Project was addressed by the Ontario Energy Board (OEB) in July 2014. In that instance, OPG included redacted versions of several oversight reports prepared by third parties and the OEB expressed concerns that OPG redacted more information than was necessary for its review. Ultimately, OPG revised their stance on the confidentiality of these reports and disclosed additional portions of the documents.

[36] The appellant states that it is likely that the oversight reports disclosed by OPG in the OEB proceedings are similar to the records at issue in this appeal. However, in this case, the ministry withheld the records from disclosure, in full. The appellant submits that the ministry's refusal to disclose any portions of the records may be inconsistent with OPG's disclosure of similar documents.

[37] In response, the ministry states that the records at issue in this appeal are similar to the oversight reports before the OEB to the extent that they are independent oversight reports prepared by third party external advisors that assess the Project's performance. However, the ministry submits that partial disclosure of the OEB records does not translate to partial disclosure of the records at issue in this appeal. The ministry submits that the purpose of the records is to provide an impartial and independent assessment of the Project and OPG's performance. The ministry claims that it is not able to disclose the records to OPG itself unless the minister provides the ministry with written permission. The ministry claims that this is done to ensure that it and the minister can make decisions related to the Project based on information that is not subject to criticism or input from OPG.

[38] Based on my review of the records and the ministry's representations, I am satisfied that the records were supplied to the ministry *in confidence*. The MOU creates an explicit expectation of confidentiality on the part of the ministry, the affected party and OPG regarding all information disclosed by OPG in connection with the MOU. Furthermore, given the relationship between OPG, its Independent Oversight Advisor (the affected party) and the ministry, I am satisfied that the information provided by OPG to its IOA and then the ministry was supplied in confidence. Therefore, I find that the second part of the three-part test in section 17(1) has been met.

Requirement 3: harms

[39] To meet this part of the test, the parties resisting disclosure must provide sufficient evidence to demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will, in fact, result in such harm. How much and what kind of evidence is needed will depend on the type of information at issue and the seriousness of the consequences.[20]

[40] The need for public accountability in the expenditure of public funds is an important reason behind the need for sufficient evidence to support the harms outlined in section 17(1).[21] However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of the harms in the *Act*.

Section 17(1)(a)

[41] The ministry submits that Records 1 to 9, and particularly Record 6, contain sensitive commercial information that, if disclosed to competitors of OPG and its vendors, would prejudice the competitive position of OPG and its vendors in the electricity market. The ministry provided an affidavit sworn by its Assistant Deputy Minister, Energy Supply Policy (the ADM) who states that the information related to OPG's performance on contract management, work to be performed under the contracts OPG holds with its vendors for the Project's sub-projects, contract values and the challenges the sub-projects face under these contracts, if released, would hinder the competitive position of OPG's vendors. The ADM states that there are a limited number of proponents capable of performing the specific work required for the Project and so, disclosure of the information prior to vendor negotiations for the same type of work would put OPG's vendors at a disadvantage in securing future contracts for this work.

[42] In addition, the ministry submits that any competitor or potential vendor with details about the contractual arrangements between OPG and its vendors would have a competitive advantage over OPG in securing future contracts with OPG's vendors.

[43] The ministry also submits that the records identify and assess the challenges and progress of the Project, including OPG's management of ongoing costs, managing financial and technical risks of the project, contractor and procurement management and engineering development from March to December 2013. The ministry submits that many of these challenges are currently relevant and OPG continues to manage them. The ministry submits that the disclosure of the records would provide OPG's competitors, who are currently in the negotiation stages of their own refurbishments, with insight into OPG's business strategies and the Project's weaknesses, allowing these competitors to improve their own plans and inform their own negotiations. The ministry

---

[20] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-54.
[21] Order PO-2435.

submits that this would allow OPG's competitors to unfairly compete more effectively than OPG within the electricity market, consequently affecting OPG's ability to earn money in the marketplace.

[44] The affected party submits that OPG is currently in negotiations with several vendors for the execution phase of the Project. The affected party submits that the disclosure of the records would provide information to these vendors about the performance of other companies in execution of the prerequisite projects and in the planning of the refurbishment projects. Further, the affected party submits that OPG is currently in discussions with labour unions for a long term agreement for the Project. The affected party also states that OPG is currently in discussions with Bruce Power to identify opportunities to collaborate in the planning and execution of the Project. The affected party submits that disclosure of the records may also negatively impact these discussions.

[45] OPG did not make submissions on the harms that could reasonably be expected to result from the disclosure of the records.

[46] The appellant submits that the ministry failed to provide "adequately persuasive evidence of harms that would result from disclosure" of the records.

[47] Based on my review of the records, the parties' representations and the affidavit of the ministry's ADM, I am not satisfied that the records qualify for exemption under section 17(1)(a) of the *Act*. Reviewing the records, I find that the ministry and the affected party did not provide me with sufficient evidence to demonstrate a reasonable expectation that OPG and/or its vendors would suffer significant prejudice to their competitive position or that there would be significant interference with their contractual or other negotiations if these records were disclosed.

[48] The records, with the exception of Record 6, are monthly reports prepared by the affected party on its oversight of the Project. Record 6 is a six-month overview of the Project and its progress, development and challenges. While the records contain information relating to OPG's performance, budget issues, contractor and procurement management and technical engineering details, the information in the records is general or overview in nature. The records contain the IOA's summary and assessment of OPG's progress on the Project. Upon my review, I find that they lack the specificity in detail required to establish the harm contemplated by section 17(1)(a) if they were disclosed.

[49] Based on my review of the parties' representations, I am not satisfied that the ministry or the affected party provided me with sufficient evidence demonstrating that the records are exempt from disclosure under section 17(1)(a). In his affidavit, the ADM submits that OPG's competitors would gain insight into OPG's business operations and strategies and the weaknesses of the project. The ADM submits that this would give OPG's competitors an unfair advantage in competing within the electricity market thereby affecting OPG's ability to earn money. While I do not dispute the contents of the records, the ADM and the ministry do not provide me with details regarding how the relatively general information contained in the records could be used by OPG's

competitors in their own negotiations nor how the disclosure of this information could reasonably be expected to impact OPG's ability to earn money.

[50] In his affidavit, the ADM also submits that there are a limited number of proponents capable of performing the type of work required for the Project and disclosure of the records would cause disadvantage to these parties' future negotiations as the value of their contracts and potential pitfalls associated with their work under the contracts would be public. The ADM does not provide further evidence to support this contention. The records at issue are assessments of the Project at particular points in time, between March and December 2013. Most of the records are monthly reports on the Project's progress and challenges and Record 6 is a six-month overview. Given the nature of these records, it is unclear how OPG and/or its vendors' competitors could use the information to undermine OPG and/or its vendors' current or future negotiations.

[51] The ADM also submits that disclosure of the records could reasonably result in the "manipulation of Ontario's electricity markets by OPG's competitors thereby prejudicing the competitive position of OPG and resulting in undue loss to OPG". The ADM does not refer to specific information contained in the records nor does he explain how this harm would result. Without further evidence, I am not satisfied that the disclosure of these general oversight reports could reasonably result in the manipulation of Ontario's electricity markets and, subsequently, harm to OPG's competitive position.

[52] I also note that OPG did not submit representations in response to a Notice of Inquiry. While OPG's lack of submissions is not determinative, the fact that it did not claim that section 17(1) applies to the records suggests that OPG does not share the ministry's concerns regarding disclosure.

[53] Finally, I note that the ADM states that the Project is "still in the planning phase" in his affidavit. The Project is presently in the execution stage. Given the age of these records and the current stage of the Project, I am not satisfied that the disclosure of these records that capture the Project's status in specific time periods would reasonably result in significant prejudice to OPG's competitive position or that there would be significant interference with OPG's contractual or other negotiations if these records were disclosed. Therefore, I find that section 17(1)(a) of the *Act* does not apply to the records.

Section 17(1)(b)

[54] The ministry states that, as part of the Project assessment, OPG allowed the affected party to review its confidential information, attend its internal meetings with staff, vendors and its own external oversight advisor. The affected party gathered this confidential information and used it to complete its assessment of the Project and prepared the records for the minister's review. The ministry submits that the information was provided to the affected party on the understanding that it and the records at issue would be kept confidential by the affected party and ministry. The ministry submits that the disclosure of the records would "significantly hinder the integrity of the assessment process and candor of OPG's vendors and staff in their

future dealings with [the affected party] with respect to conducting assessments of the project."

[55] The ministry submits that it is in the public interest that the information continues to be supplied to the affected party and the ministry. The ministry submits that any hindrance to the "frank and open information exchange between [the affected party] and OPG, its staff and vendors could lead to incorrect conclusions being drawn by [the affected party], or any other future Independent Oversight Advisor, with respect to the Project." The ministry submits that the ongoing assessments play a significant role in shaping the minister's decisions relating to the Project, including funding and budget decisions. Therefore, without accurate evaluations of the Project, the ministry submits that it would not be able to make "optimal economic and financial decisions related to the Project".

[56] The affected party submits that it has had "excellent cooperation with OPG refurbishment project management" in gathering information, attending sensitive OPG meetings and observing OPG's work on the Project. The affected party submits that disclosure of the records may prejudice its future ability to collect required information and provide the ministry with fulsome reports on the Project.

[57] The appellant submits that OPG is required to provide information to its IOA (i.e., the affected party) regardless of whether the information would reveal its success or challenges. The appellant submits that disclosure of the records should not adversely impact OPG's openness or truthfulness with IOA's or the ministry in the future. In any case, the appellant submits that the ministry did not provide sufficiently persuasive evidence that there is a reasonable expectation that the harm in section 17(1)(b) will result from disclosure of the records.

[58] In reply, the ministry acknowledges that the agreement between the affected party and OPG requires the ministry or OPG to disclose "certain information" to the affected party. However, the agreement itself stipulates that the confidential information provided by OPG would be kept in confidence. The ministry submits that, if these records are released, it could reasonably be expected that OPG may avoid similar contractual clauses obliging it to disclose its confidential information to the IOA in the future.

[59] The ministry reiterates that it intended to keep the records confidential at all times. The ministry provided me with a second affidavit sworn by its ADM. The ADM submits that if the records are disclosed, "any authority that the Minister or Ministry has to compel OPG to provide it with confidential information for the purposes of an independent oversight assessment, would likely be exercised more hesitantly." In fact, the ADM submits that the disclosure of the records could reasonably lead to the ministry and OPG having IOA's prepare their reports assessing the Project based only on publicly available or "disclosable" information, thereby defeating the purpose of having an independent and comprehensive overview of the Project's performance.

[60] Both the ministry and the affected party raise concerns that disclosure of the

records can reasonably be expected to result in similar information no longer being supplied to the affected party and then to the ministry where it is in the public interest that similar information continue to be so supplied, as contemplated by section 17(1)(b). I considered the ministry and the affected party's arguments, but conclude that this part of the test has not been met.

[61] I agree that it is in the public interest that similar information to that contained in the records continue to be supplied to the affected party and then the ministry, given the nature and cost of the Project. However, I do not accept the ministry and affected party's submission that disclosure of the records can reasonably be expected to result in similar information no longer being so supplied.

[62] The appellant noted and the ministry confirmed that OPG is required to disclose information relating to the Project to the affected party as part of the affected party's review and assessment of the Project. As the ministry stated in its representations, the affected party is required to perform independent assessments, evaluations, oversight and advisory services and provide frequent reports to the ministry and ministry staff with respect to the Project. In order for the affected party to conduct a proper assessment of the Project and prepare comprehensive reports to the ministry, it is likely that OPG is required to provide full and frank disclosure to the affected party. Therefore, regardless of whether these records are disclosed, OPG is required under its agreement to disclose information to the affected party as part of the affected party's review and assessment of the Project. As such, even if the records are disclosed, OPG will continue to provide this type of information to the affected party as part of its agreement.

[63] The ministry also claims that if these records are released, it is reasonable to expect that OPG may avoid similar contractual clauses obliging it to disclose its confidential information to an IOA in the future. However, the ministry does not offer sufficient evidence to support this claim and without this evidence, I find that the harm to be too remote or speculative.

[64] I note that OPG did not provide any evidence to support the ministry's contention that it would not cooperate with the affected party's assessments or any similar assessments in future if the records at issue are not disclosed. While OPG's lack of representations is not determinative, I find that the ministry and affected party's representations regarding the disclosure of records from 2013 which relate to a different phase of the Project, do not establish a reasonable expectation that OPG will not provide similar information to the affected party and/or the ministry in future assessments.

[65] Therefore, I find that the records do not qualify for exemption under section 17(1)(b) of the *Act*.

Issue B: Does the discretionary exemption at section 18(1) apply to the records?

[66] The ministry claims that the records are exempt from disclosure under sections 18(1)(a), (c) and (d) of the *Act*. These sections read as follows:

> 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;
> >
> > (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

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 section 17(1) of the *Act*.[22]

[67] I will begin by considering the application of section 18(1)(a) to the withheld information.

Section 18(1)(a)

[68] For section 18(1)(a) to apply, the ministry must show the following: (1) the information fits within one or more of the types of protected information, (2) it *belongs to* the Government of Ontario or the ministry, and (3) it has monetary value or potential monetary value. Based on my review of the records and the ministry's representations, I do not accept that section 18(1)(a) applies to the information at issue. I found in my discussion of section 17(1) above that the information at issue contains one or more of the types of protected information. However, even if I were to accept that the records belong to the Government of Ontario or the ministry, I find that they do not have monetary value or potential monetary value.

[69] In order to have *monetary value*, the information itself must have intrinsic value. The purpose of section 18(1)(a) is to permit an institution to refuse to disclose a record where disclosure of the information would deprive the information of the monetary

[22] See *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).

value of the information.[23]

[70] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of section 18(1)(a).[24] Nor does the fact, on its own, that the information has been kept confidential.[25]

[71] The ministry submits that the records and information contained in them have monetary value. The ministry states that the records and confidential information contained in them are not available to the public. Furthermore, the ministry asserts that disclosing the information contained in the records to OPG's competitors would allow them to use such information to improve their own refurbishment plans and inform their negotiations with potential bidders, thus giving OPG's competitors an unfair competitive advantage in competing within the electricity market. The ministry submits that this competitive advantage over OPG would allow its competitors to obtain a monetary gain in the electricity marketplace in relation to OPG.

[72] From my review of the ministry's representations on the application of section 18(1)(a), it appears that the ministry is most concerned about the *effect* that disclosure of the records will have on it and/or OPG's negotiating position. However, these arguments do not speak to whether the records themselves have *monetary value*. Instead, these arguments relate to the ministry's position that section 18(1)(c) of the *Act* applies.

[73] I have reviewed the ministry's representations and the records at issue, which are monthly reports and in the case of Record 6 a six-month review of the affected party's assessment of the Project's progress. Based upon this review, I am not satisfied that the ministry provided me with sufficient evidence to demonstrate that the records have intrinsic monetary value. The records are general in nature and each relate to a specific and defined period of the Project's progress in 2013. In addition, the ministry's main submission regarding the application of section 18(1)(a) to the records relates to the harms that it claims will result from its disclosure, not whether disclosure of the information would deprive it or OPG of its monetary value. In my view, the fact that disclosure of the information could adversely affected OPG's ability to secure contracts in the future does not mean that the information at issue also has intrinsic monetary value.

[74] Based on my review of the records and the ministry's representations, I am not satisfied that the ministry provided sufficient evidence to demonstrate that the information at issue has intrinsic monetary value. As stated above, the records are general and summary in nature, relating to the Project's progress at specific points in time. The records do not appear to have, nor has the ministry referred to any, intrinsic monetary value such as trade secrets, client lists or other similar types of information that the IPC previous found exempt under section 18(1)(a). In the circumstances, I find

[23] Orders M-654 and PO-2226.
[24] Orders P-1281 and PO-2166.
[25] Order PO-2724.

that the records do not qualify for exemption under section 18(1)(a) of the *Act*.

[75] I will now consider the application of sections 18(1)(c) and (d) to the records.

Sections 18(1)(c) and(d)

[76] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. Section 18(1)(c) recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[26]

[77] The section 18(1)(c) 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.[27]

[78] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[28]

[79] For sections 18(1)(c) and (d) to apply, the ministry must provide sufficient evidence to demonstrate a reasonable expectation of harm. The ministry must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of information at issue and the seriousness of the consequences.[29]

Representations

[80] In support of its position that sections 18(1)(c) and (d) apply to the records, the ministry submits that the disclosure of the records could reasonably be expected to prejudice the economic interests and competitive position of OPG for the reasons it articulated in relation to the application of section 17(1) above. The ministry notes that since it is the sole shareholder of OPG, the harms to OPG's interests are also harms to the ministry's own economic interests.

---

[26] Orders P-1190 and MO-2233.
[27] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[28] Order P-1398, upheld in judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (SCC), see also Order MO-2233.
[29] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-54.

[81] The ministry also refers to its arguments in relation to section 17(1)(b) in which it submitted that disclosure of the records would hinder the candour of OPG's staff and vendors in providing information to the affected party for the purposes of conducting its future assessments of the Project. The ministry reiterates that there is a risk that OPG will not provide the affected party and, therefore, the ministry with complete information regarding the Project in the future and this could lead to inaccurate assessments. Given that the minister's future decisions with respect to the Project, including funding and budgeting of the Project, are based on the IOA's assessments, any inaccuracies in the assessment findings could result in "uneconomical decisions being made about the Project by the Minister." The ministry submits that this would then negatively impact the successful planning and execution of the Project, thereby causing harm to the economic and financial interests of the ministry and OPG.

[82] In addition, the ministry submits that the records identify the various challenges the Project faces, including financial, commercial, engineering, scheduling and risk management challenges and pitfalls. The ministry submits that some of the challenges identified in the records are being dealt with on an ongoing basis. The ministry submits that since the Project is still in the planning phases, certain challenges or issues could be "managed to recovery" without affecting the Project's overall schedule or budget. The ministry submits that the disclosure of the records, which reveal the challenges or issues faced during the Project, would subject OPG, the ministry and the Government of Ontario to undue financial and economic scrutiny from the public and result in reputational harm to the Project. The ministry submits that this "undue scrutiny and reputational harm would likely hinder the Ministry and OPG's ability to successfully manage the Project thus causing harm to their financial and economic interests."

[83] The ministry further notes that the Project is already subject to public scrutiny and a public review process through other forums. For example, the ministry states that OPG is required to obtain the OEB's approval for payments to its regulated facilities, including Darlington. As well, the OEB sets electricity rates. The ministry states that the OEB provides its decisions on these matters following a public independent adjudicative hearing. The ministry states that the OEB may have access to the type of information that is contained in the Records in this adjudication process. Therefore, the type of information contained in the records "would already be subject to scrutiny by an independent public body without sacrificing the confidentiality of such information." The ministry submits when one considers this with "the risks associated with the misperception of information", it can "reasonably be expected that any increase in transparency resulting from the disclosure of the Records would not result in better management of the project by the Ministry or reduced risks for rate-payers."

[84] The ministry also submits that the disclosure of the Project's cost estimate, contingency estimate and interest and escalation estimate information and related evaluations could also prejudice the Government of Ontario's ability to manage Ontario's economy. The ministry submits that the disclosure of this financially sensitive information would allow market participants to "deduce OPG's forecast cost assumptions, which would in turn affect OPG's ability to earn money in the

marketplace."

Analysis and Findings

[85] Based on my review of the records and the ministry's representations, I find that the ministry did not provide sufficient evidence to persuade me that either sections 18(1)(c) or (d) apply to the records. The ministry relies heavily on its submissions regarding section 17(1) and submits that they apply equally to the harms that could reasonably be expected to result to its interests if the records are disclosed. However, as I found in relation to section 17(1), the ministry did not provide me with sufficient evidence to demonstrate that the disclosure of these oversight records from March to December 2013 that are summary in nature would result in harm to the ministry or OPG's economic interests and competitive position. Therefore, I find that the ministry did not establish a reasonable expectation of harms for the application of sections 18(1)(c) and (d) to it or OPG.

[86] Given my findings regarding the application section 17(1)(b), I am similarly not satisfied that the ministry provided sufficient evidence to demonstrate that it will suffer economic and competitive disadvantage or harms. While the ministry submits that it will suffer economic harm because OPG will be less likely to fully cooperate with the affected party's review and assessment of the Project, the ministry did not provide me with sufficient evidence to demonstrate that OPG would be less likely to cooperate with the ministry. Due to this finding, I am not satisfied that the ministry provided me with sufficient evidence to demonstrate that it would reasonably suffer harms as a result of OPG's potential lack of cooperation.

[87] With regard to the ministry's concerns about the harms that will result from increased public scrutiny, I find that the ministry did not provide me with sufficient evidence to demonstrate that the harms that may result from that scrutiny are more than speculative. While the disclosure of the records may result in greater public scrutiny, the ministry did not provide sufficient evidence to connect the greater public scrutiny to the harms identified in sections 18(1)(c) and/or (d). Similarly, while the ministry asserts that this increased public scrutiny will "likely" hinder it and OPG's ability to successfully manage the Project, it does not offer sufficient evidence to demonstrate how that will occur.

[88] I understand that the ministry is concerned about the potential harms that may result due to any "misperception" of the records if they are disclosed. Adjudicator Gillian Shaw considered a similar argument in Order PO-3459, in the context of section 17(1). In that decision, Adjudicator Shaw dismissed a party's concern that the public disclosure of an environmental assessment report at issue in her appeal had the potential to create an erroneous impression that the party deposited contaminated fill at the property, where, in fact, it contended that the contaminated fill came from others. In her decision, Adjudicator Shaw found that "if the [party] is of the view that the resulting report is misleading in some way, it should be a simple matter to convey updated

correct information to the requester."[30] I adopt Adjudicator Shaw's finding and apply it to the facts of the appeal before me. While I appreciate the ministry's concern that the records may be misinterpreted, I find that it should be able to correct any misunderstanding and provide updated information if required. Further, I note that given age of the records, there is likely more up-to-date information available relating to the Project that could assist in correcting any misunderstandings that may result from the disclosure of the records. In any case, I find that the ministry did not provide sufficient evidence to support its concern that misperception of the records could reasonably be expected to result in the harms identified in sections 18(1)(c) and/or (d) of the *Act*.

[89] Further, while I appreciate that similar information or types of information as that contained in the records may already have been subject to public scrutiny, this fact is not evidence to support that the harms contemplated in sections 18(1)(c) or (d) may reasonably be expected to result from the disclosure of the records.

[90] Finally, the ministry submits that the disclosure of the records will allow market participants to "deduce OPG's forecast cost assumptions, which would in turn affect OPG's ability to earn money in the marketplace." However, the ministry does not offer sufficient evidence to demonstrate how the information contained in the records would allow OPG's competitors to deduce the forecast cost assumptions and how that, in turn, could be used to affect OPG's ability to earn money in the marketplace. Therefore, I find that the ministry did not provide me with sufficient evidence to demonstrate that the harms contemplated by sections 18(1)(c) and/or (d) can reasonably be expected to occur if the records are disclosed.

[91] In conclusion, I find that the records do not qualify for exemption under section 18(1)(a), (c) or (d) of the *Act*. As I already found that section 17(1) does not apply to the records and no other exemptions were claimed, I will order the ministry to disclose the records to the appellant.

ORDER:

I order the ministry to disclose the records to the appellant, in full, by **May 11, 2017** but not before **May 5, 2017**.

Original signed by: April 4, 2017
Justine Wai
Adjudicator

[30] Order PO-3459 at para 43.