Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3311

Appeal PA12-216

Ontario Power Generation

February 25, 2014

Summary: Ontario Power Generation (OPG) received a request under the *Freedom of Information and Protection of Privacy Act* for access to the agreements relating to the refurbishment of the reactors at the Darlington Nuclear Generating Station. OPG denied access to the responsive indemnity, engineering, procurement and construction agreements. Sections 17(1)(a) and (c) (third party information) were applied to the agreements in their entirety, while sections 18(1)(a), (c) and (e) (economic and other interests) were applied to various provisions and exhibits to these documents. In this order, the adjudicator partly upholds OPG's decision to deny access under sections 17(1)(a) and (c) and 18(1)(c), but orders that the non-exempt information be disclosed. The adjudicator also finds that the public interest override in section 23 does not apply.

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

Orders and Investigation Reports Considered: Orders MO-1706, MO-2233, PO-1688, PO-2034, PO-2195, PO-2453, PO-2632, PO-2676, PO-2758 and PO-3011.

Cases Considered: *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.); *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (CanLII); and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII).

OVERVIEW:

[1] The Darlington Refurbishment Project is a multi-year, multi-phase program for OPG's Darlington Nuclear Generating Station (Darlington) to replace critical components, rehabilitate other components and upgrade to meet regulatory requirements. Once completed, the refurbishment should allow Darlington's continued operation for an additional 30 years.

[2] According to OPG's website,[1] the Darlington refurbishment would be one of the largest infrastructure construction projects in Canada. The project has entailed significant "front-end planning," including detailed engineering, and development of the scope, cost and schedule. The "Definition Phase" of the refurbishment project is expected to be completed by 2015. OPG's website contains the following information about the costs involved:

> In 2010, the Ontario Minister of Energy estimated refurbishment costs in the range of $6-10 billion in 2009 dollars. This estimate includes:
>
> - Construction of facilities and infrastructure required to support the refurbishment outages and operation of the station following refurbishment. This includes training facilities, site water, sewage and electrical upgrades.
> - Procuring materials and executing the work during the refurbishment outages. This includes project oversight and monitoring.
> - Storage of waste generated from the refurbishment such as fuel channels and feeder pipes.

[3] This order addresses the appeal of OPG's access decision in response to a request submitted under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all agreements between OPG and two identified third parties for the replacement of "major components" of Darlington's four reactors.

[4] Upon receipt of the request, OPG identified the responsive records, which consist of the Indemnity Agreements signed with each of the two third parties, the Engineering, Procurement and Construction Agreements for the Darlington Mock-Ups Project and the Darlington Refurbishment Retube and Feeder Replacement (RFR) Project, with numerous schedules and exhibits. OPG notified the two third parties, which are operating as a joint venture for the project, under section 28(1)(a) of the *Act* to provide them with an opportunity to comment on the disclosure of the information.

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[1] http://www.opg.com/power/nuclear/refurbishment/dn_cost.asp

The affected party[2] responded to the notification, opposing disclosure of the records. OPG subsequently issued a decision letter to the appellant, denying access to the records, in their entirety, pursuant to sections 14(1)(i) (security of a building), 17(1)(a) and (c) (confidential third party information) and section 18(1)(a), (c) and (e) (economic or other interests) of the *Act*.

[5] The appellant appealed the access decision to this office. Appeal PA12-216 was opened, and a mediator was appointed to explore settlement of the issues.

[6] Shortly after the appeal was opened, OPG issued a revised decision confirming its reliance on the section 14, 17(1) and 18(1) exemptions previously claimed, and adding sections 16 (defence) and 22(a) (publicly available), as well as the labour relations and employment records exclusion in section 65(6), to certain identified records.

[7] During mediation, the appellant decided not to appeal OPG's exemption claims under sections 16 and 22(a). The appellant explained that the focus of his request is records related to the cost of the project to OPG, timelines, penalties for failing to complete the project on time, and the potential for cost overruns to be passed on to OPG. The mediator relayed this information about the narrowing of the scope of the request to OPG, which then reviewed the records and prepared a revised index of records to reflect the narrowed scope. After the appellant viewed the revised index, he asked that the two indemnity agreements that had been removed from it be returned to the list of responsive records, and OPG agreed.

[8] As no further mediation of this appeal was possible, it was transferred to the adjudication stage for an inquiry. I started my inquiry by sending a Notice of Inquiry to OPG and the affected party seeking their representations and the clarification of certain other issues. The affected party and OPG provided representations. OPG confirmed that section 14(1)(i) was no longer at issue and also withdrew its claim regarding the exclusion in section 65(6). After a brief interlude that was required to resolve issues with sharing the affected party's representations with the appellant, I sent a modified Notice of Inquiry to the appellant, along with non-confidential versions of both sets of representations. Once the appellant's representations were received, I sought, and received, reply representations from OPG and the affected party on the possible application of the public interest override in section 23.

[9] In this order, I conclude that sections 17(1)(a) and (c) and 18(1)(c) apply to exempt certain exhibits and portions of the main agreement from disclosure, and that sections 18(1)(a) and (e) do not apply to the remaining information, which must,

[2] The response from the two named companies participating in the joint venture for the Darlington refurbishment project was provided by one individual, the Project Director. For simplicity's sake, the two third parties are referred to in the singular in this order as the "affected party."

therefore, be disclosed. I also conclude that section 23 does not apply to override the exemptions in sections 17(1) or 18(1).

RECORDS:

[10] As detailed in the revised Index of Records prepared by OPG, the records remaining at issue consist of indemnity agreements and engineering procurement and construction agreements, with multiple schedules and exhibits (approximately 835 pages).

ISSUES:

A. Do the records fit within the third party information exemption in section 17(1)(a) or (c)?
B. Would disclosure harm the economic interests of OPG under sections 18(1)(a), (c) or (e)?
C. Should the OPG's exercise of discretion under section 18 be upheld?
D. Is there a compelling public interest in disclosure of the records sufficient to outweigh the purpose of sections 17(1) and/or 18(1)?

DISCUSSION:

A. Do the records fit within the third party information exemption in section 17(1)(a) or (c)?

[11] Both OPG and the affected party rely on exemptions that address the potential for economic or competitive harm. Section 17(1)(a) and (c) of the *Act* focuses on the harm to businesses or other organizations that provide information to institutions. Section 18(1)(c) refers to the harm to the economic or financial interests of the institution. Whether considering the application of sections 17(1)(a) and (c) or section 18(1)(c), similar approaches to analysis are usually followed because the exemptions function in a comparable manner, even though they are intended to protect the interests of different parties, *i.e.*, private sector business entities and public sector institutions, respectively.[3]

[12] OPG and the affected party oppose disclosure of the records under paragraphs (a) and (c) of the mandatory exemption in section 17(1). The exemptions state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

[3] Order MO-2249-I.

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; ...

[13] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] 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.[5]

[14] Under section 53 of the *Act,* the burden of proof rests on OPG and/or the affected party to establish each part of the following three-part test:

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

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

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

Part 1: type of information

[15] According to OPG, the records at issue contain sensitive information about the affected party's pricing models, reimbursable costs and cost incentives and general commercial and labour practices, which fits within the definitions of commercial, financial and/or labour relations information.

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[4] *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.).

[5] Orders PO-1805, PO-2018, PO-2184, and MO-1706.

[16] The affected party claims that the records also contain technical information, as well as commercial, financial and labour relations information. Specifically, the affected party submits that the contract contains:

- technical information about the engineering, procurement and construction of a full-scale reactor replica or mock-up;
- commercial information relating to the progress and completion of different phases of the project, including the provision of services to OPG by the affected party pursuant to various schedules;
- financial information with respect to pricing models, reimbursable costs and cost incentives, mark-ups, fixed fees, thresholds for various audits and burdens, and provisions relating to the terms and adjustment of payments; and
- labour relations information in the form of labour practices related to such things as apprenticeship (methodology, target percentages), WSIB numbers and rate tables.

[17] Along with these summary statements regarding the types of information, the affected party also listed specific portions of the records that are said fit within the definition of each of them. The identified examples are not set out here.

[18] The appellant's representations do not address the types of information contained in the records.

Findings

[19] Definitions for the types of information that OPG and the affected party submit are contained in the records have been established by past 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.[6]
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> *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.[7] The fact that a record

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[6] Order PO-2010.
[7] Orders P-493 and PO-2010.

> might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[8]
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> *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.[9]
>
> *Labour relations information* means information concerning relations and conditions of work, including collective bargaining, and is not restricted to employer/employee relationships.[10]

[20] I adopt these definitions for the purpose of this appeal.

[21] To begin, I note that the affected party provided a binder with its representations that contained "all copies of the Exhibits to the Contract referenced therein." However, some schedules or exhibits provided by the affected party are no longer at issue, as they were removed from the scope of the appeal during mediation.[11]

[22] Based on my review of the records remaining at issue after the narrowing of the appeal's scope, I find that they do not, for the most part, contain technical information associated with the the construction, operation or maintenance of a structure, process, equipment or thing; nor do they contain labour relations information, as that term is contemplated by section 17(1). Under the narrowed request agreed upon during mediation, most of the records that might have been found to contain such information were removed from the scope of the appeal. Exceptions to this finding are Exhibits 1.1(jjjjjjj) and 1.1(qqqqqqq), which relate to tooling price reduction and guarantees. Based on the content, which describes the affected party's time and performance guarantees for specific (tooling) processes, I find that the information fits within the definition of technical information. I am also satisfied that these two exhibits reflect the exchange of services, and that the information therefore qualifies as commercial information under part 1.

[23] In addition, I find that the records otherwise clearly contain commercial and financial information, as they are defined under part 1 of the test for exemption under section 17(1).

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[8] Order P-1621.
[9] Order PO-2010.
[10] Orders P-653 and PO-2010.
[11] For example, Tab D, RFR Contract: Exhibit 9.1(h) Parental Indemnity, Exhibit 10.1-1.3(f) (Insurance Requirements). From Exhibit 1.1(wwww) Mock Ups Contract: Schedules 1.1(jj) laser scans; 1.1(oo) Scope of Work for energy complex components and reactor interface control documents; Schedule 1.1(tt) Delegation of Authority; Schedule (kkk) Site and Designated Areas; Schedule 2.1(f) Reference Information; Schedule 2.2(a) affected party's Organizational Chart for mock up project; Labour Requirements; and various other templates.

[24] The agreements and schedules define and outline the arrangements between OPG and the affected party for the definition phase of the Darlington refurbishment project. I accept the affected party's evidence that the records address "the progress and completion of different phases of the project, including the provision of services to OPG by the affected party pursuant to various schedules." As the records represent agreements for the buying and selling of services, I find that the information meets the definition of "commercial information" for the purposes of part 1 of section 17(1).

[25] I also accept the evidence of the affected party that the records contain financial information because they contain "pricing models, reimbursable costs and cost incentives, mark-ups, fixed fees, thresholds for various audits and burdens, and provisions relating to the terms and adjustment of payments." Portion of these records clearly relate to money and refer to specific data about the cost of the agreements. Accordingly, I find that the records also contain "financial information" under part 1 of section 17(1).

[26] In view of my conclusions about the records at issue containing "technical," "commercial" and "financial" information, I find that part of the section 17(1) test has been satisfied.

Part 2: supplied in confidence

[27] In order to meet the requirements of part 2 of the test under section 17(1), OPG or the affected party must provide sufficient evidence to establish that the information at issue was "supplied" to OPG by the affected party "in confidence", either implicitly or explicitly.

[28] 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] 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] The contents of a contract involving an institution and a third party will not usually qualify as having been "supplied" for the purpose of section 17(1) because contracts are viewed as mutually generated, rather than "supplied" by the third party. This is the case even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. Another way of expressing this is that, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are

[12] Order MO-1706.
[13] Orders PO-2020 and PO-2043.

not, therefore, considered to be "supplied."[14] This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, and several other decisions.[15]

[30] Although the terms of a contract may reveal information about what each of the parties was willing to agree to in order to enter into the arrangement with the other party or parties, this information is not, in and of itself, considered to comprise the type of "informational asset" sought to be protected by section 17(1).[16]

[31] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by a third party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[17]

[32] In order to satisfy the "in confidence" component of part two, the party 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.[18]

Representations

[33] Citing Orders PO-2020 and PO-2043, the affected party submits that information may qualify as having been "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 the third party. As an example of information that was directly supplied to OPG, the affected party refers to the "sensitive technical information" related to design, engineering, construction and testing, found in the exhibits to the contact. However, since this information is no longer at issue for the most part, excepting the tooling exhibits which also contain commercial information, the submissions related to it are not outlined further in this order.

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[14] Orders MO-1706, PO-2371 and PO-2384.

[15] *Supra*, footnote 4. See also Orders PO-2018, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 (Div. Ct.) and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, [2008] O.J. No. 3475 (Div. Ct.) (*CMPA*). See also *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (CanLII) and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII).

[16] Orders PO-2018 and PO-2632.

[17] Orders MO-1706, PO-2384, PO-2435 and PO-2497, upheld in *CMPA v. Loukidelis*, (cited above). See also British Columbia Order 01-20.

[18] Order PO-2020.

[34] The affected party submits that the rate tables were also supplied directly by it to OPG and "were not part of contractual negotiations in respect of the contract."

[35] With respect to the "financial information relating to pricing, the commercial information relating to schedules and the labour relations information," the affected party submits that all of this information – the content of the contracts – fall under the "inferred disclosure" exception to the general rule that contracts between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1) of the *Act.* According to the affected party, their disclosure would permit accurate inferences to be made about its tender documents, which themselves contained non-negotiated confidential information. The affected party argues that:

> The Contract contains, in some fashion, the majority of the [affected party's] initial proposal submitted as part of the request for proposal phase, and if the contract is made available to third parties, it would reveal our commercial strategy.

[36] Further, the affected party submits that the contract was entered into by the parties with an expectation of confidence. Referring to the contract negotiations being conducted in confidence, the affected party states that access to the process was restricted to personnel, representative and agents on an as-needed basis. In addition, the affected party submits:

> ... OPG and the [affected party] entered into a Confidentiality Agreement on September 21, 2011 (the "Confidentiality Agreement") with respect to confidential financial information about the [affected party] and/or their affiliates which was to be provided to OPG in the course of discussions and negotiations concerning credit-related business terms for future agreements relating to services provided by the [affected party] to OPG in connection with the Darlington Retubing Feeder Replacement Project. The Confidentiality Agreement shows that OPG and the [affected party] contemplated that, at a minimum, sensitive financial information that was supplied by the [affected party] would be kept in strict confidence. ... Moreover, the Contract is not otherwise available to the public and is not required to be disclosed to the public under the [affected party's] continuous disclosure obligations as reporting issuers in Canada.

[37] OPG "supports and adopts the representations made by the affected party" and excerpts portions of those submissions relating to the argued application of the inferred disclosure exception to the "supply" rule. OPG also submits that the parties entered into the agreement with an expectation of confidentiality regarding the sensitive information in the agreement. According to OPG, the records were prepared for a purpose that would not entail disclosure and they are not otherwise available to the public.

[38] The appellant's representations do not address the "supplied" "in confidence" part of the test under section 17(1).

Analysis and findings

"Supplied"

[39] The records at issue in this appeal are the executed contracts that outline the terms of the agreement between OPG and the affected party regarding the provision of engineering, procurement and construction services for the Darlington Nuclear Generating Station Reactor Full-Scale Mock-Ups Project and the Darlington Refurbishment Retube and Feeder Replacement Project. The records are accompanied by associated indemnity agreements, schedules and exhibits.

[40] The affected party, with OPG's support, opposes the disclosure of the entire set of responsive records. Based on my review of these records, however, I conclude that they represent the negotiated intentions of the signatories and that they do not, with some limited exceptions, meet the requirements to qualify as "supplied" for the purpose of part 2 of the test for exemption under section 17(1) of the *Act.*

[41] To begin, I note that Ontario, like all Canadian jurisdictions, recognizes that the terms or content of a contract may be exempt where they reveal, or could be used to infer, proprietary information.[19]

[42] I accept that some components of these records may directly reflect information provided by the affected party in its bid documents. However, whether or not the specific contractual terms, schedules or exhibits to the agreements were individually subject to negotiation, or essentially reflect the affected party's tender documents, is not determinative of the "supplied" question. Rather, the fact that these agreements were executed suggests that their terms were not "supplied," according to this office's well-established approach to the determination under section 17(1) of the *Act.* As stated above, the agreed-upon essential terms of a contract are considered to be the product of a negotiation process and not "supplied," even when "negotiation" amounts to acceptance of the terms proposed by the third party.[20]

[43] In Order MO-1706, Adjudicator Bernard Morrow stated:

> ... [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1) [the municipal equivalent to section

[19] Order PO-3176.
[20] See Orders PO-2384, PO-2497 (upheld in *CMPA*, *supra*) and PO-3157.

> 17(1)]. The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

[44] As stated, this approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*.[21] Several more recent decisions of the Divisional Court have affirmed this office's approach to section 17(1).[22] In particular, these decisions confirm that one of the central purposes of freedom of information legislation is to make institutions more accountable to the public. In *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, the court upheld Adjudicator Donald Hale's decision ordering the disclosure of portions of bus services contracts between York Region and two companies on the basis that the third party information exemption did not apply. In doing so, the Court observed that:

> [44] The IPC adjudicator's decision was also consistent with the intent of the legislation which recognizes that public access to information contained in government contracts is essential to government accountability for expenditures of public funds: see *Vaughan (City) v. Ontario (Information and Privacy Commission)*, 2011 ONSC 7082 (CanLII), 2011 ONSC 7082, 109 O.R. (3d) 149 (Div. Ct.), at para. 49.

[45] In this context, I begin with the conclusion that the two Indemnity Agreements do not contain the "informational assets" of the affected party, at least in the sense that the information could be said to belong, or be proprietary, to it. The two records outline the agreed-upon obligations and arrangements for indemnification between OPG and each of the two partner companies making up the joint venture (affected party) for these projects. I am satisfied that the Indemnity Agreements were negotiated,[23] and I find that these two Indemnity Agreements were not "supplied" according to part 2 of section 17(1).

[46] I reach a similar conclusion with respect to nearly all of the content of the Engineering, Procurement and Construction Agreements for the Mock Ups Project and the RFR Project, and most of their constituent schedules or exhibits. The content of the records themselves support a finding that they are the product of negotiations. The main agreements describe in considerable detail the mutually agreeable processes and rules by which the parties intend to carry out the projects and address issues that will (or could) arise in the context of the projects, including obligations, scheduling, payments, reporting, submittals, delay, damages, warrantees, default, liability, termination, audit and dispute resolution. In addition, there is no evidence before me that pinpoints any specific contractual term contained in these agreements which would support a finding that such information was "supplied" to OPG by the affected party. In

[21] *Supra,* footnote 4.
[22] *Supra,* footnote 15.
[23] Orders M-680 and MO-2233.

my view, such terms are of the kind expected in a normal, contractual relationship, and I find that the main agreements, with a few minor exceptions, were not "supplied" to OPG as that term is contemplated by section 17(1) of the *Act.*

[47] For the most part, this finding extends to the exhibits and schedules to the agreements, including the schedules to the Mock Ups Project Agreement. These schedules to the Mock Ups Project Agreement consist of blank templates that establish the format for recording certain events or required submittals. In my view, these schedules represent agreed-upon formats for documenting certain aspects or processes of the agreements, and I find that they do not qualify as having been "supplied" by the affected party to OPG.[24]

[48] Additionally, some of the exhibits to the RFR Project Agreement resemble the schedules to the Mock Ups Project Agreement, in that they consist of blank templates establishing the form for documenting certain events or required submittals. However, the affected party stands alone in opposing the disclosure of the particular five exhibits addressed in this section. For the reasons given above, I find that the following records were also not "supplied" for the purpose of part 2 of section 17(1): Exhibit 9.1(a) (Letter of Credit), Exhibit 12.6 (Final Completion Notice), Exhibit 12.7(a)(3) (Release from Contractor), Exhibit 12.7(a)(4) (Statutory Declaration – Application for Final Payment), and Exhibit 14.9 (Notice of Breach by OPG).

[49] Another category of records that I find does not qualify as "supplied" are other remaining exhibits to the RFR Project Agreement. These other exhibits are not blank templates and actually contain essential terms of the agreements. However, in keeping with the reasoning outlined above, I conclude that these other exhibits are the product of the negotiation process between OPG and the affected party and are not, therefore, "supplied" in this context. Accordingly, I find that the following exhibits do not meet the requirements of the "supplied" component of part 2 of section 17(1): Exhibit 1.1(wwww) (Mock Ups Contract), Exhibit 2.9(a) (Submittal Review Periods), Exhibit 2.9(j) (Project Controls and Reporting), Exhibit 2.11 (Procurement Work), Exhibit 3.1(c)(A) (Target Schedule for Definition Phase Work),[25] Exhibit 3.1(d)(A) (Submittal

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[24] In the index of records provided by OPG, only the schedules to the RFR Project Agreement are itemized. The schedules to the Mock Ups Project Agreement are not individually listed, but consist of Schedules: 1.1(e) Amendment Agreement form, 1.1(g) Payment Related Documents, 1.1(zz) Project Change Directive Form, 2.10(a) Additional Submittal Provisions, 2.12(d)(3) Non-Conformance Notice, 6.2(b) Excusable Delay Notice, 7.4(g) Scientific Research and Experimental Development (*blank*), 7.9(a) Substantial Completion Form, 7.9(b) Substantial Completion Confirmation Form, 7.10 Final Completion Form, 7.11 Final Payment Related Documents, 7.12 Notice of Approval for Final Payment, and 10.6 Breach Form.

[25] OPG's index provided with its representations indicates that Exhibit 3.1(c)(B) (Target Schedule for Execution Phase Work) is at issue. Other than a note indicating that this schedule is subject to future development, this exhibit contains no content.

Schedule for the Definition Phase Work),[26] and Exhibit 3.5 (Development of the Execution Phase Target Schedule and Execution Phase Target Cost and Execution Phase Fixed Fee).

[50] The affected party also argues, supported by OPG, that pricing and payment matters in the agreements are sensitive information that ought not to be disclosed. However, consistent with many previous orders, I have concluded that the contractual terms, exhibits and schedules that contain this type of information were not "supplied" by the affected party.[27] Even if in the exact form initially proposed by the affected party, such as the professional overtime, construction and labour rates contained in Exhibit 1.1(fffffff), the incorporation of these terms or provisions into the agreements means that they cannot properly be characterized as "belonging" to the affected party in the sense protected by section 17(1). Upon execution of the agreement, which represents the negotiated intentions of the parties, the information is thought to "belong" as much to OPG as to the affected party.[28]

[51] The application of the "supplied" part of the section 17(1) test to the disclosure of pricing information contained within a contract or bid proposal has been addressed in a number of previous orders of this office. One of the most frequently cited decisions is Order PO-2435, where Assistant Commissioner Brian Beamish considered the Ministry of Health and Long-Term Care's argument that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish rejected that position and observed that the government's option of accepting or rejecting a consultant's bid is a "form of negotiation:"

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the

[26] Exhibit 3.1(d)(B) (Submittal Schedule for Execution Phase Work) is also noted as being at issue, but contains no content populating the "sample format."
[27] Orders MO-1706, PO-2371, PO-2384 and PO-3011/PO-3072-R, upheld in *HKSC Developments, supra*, footnote 15.
[28] Order PO-3157.

> Ministry, or [Smart Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

[52] Assistant Commissioner Beamish's reasoning in Order PO-2435 has been followed in many subsequent orders, emphasizing that the exemption in section 17(1) is intended to protect information belonging to an affected party that cannot change through negotiation, not that which could, but was not, changed.[29] I agree with the reasoning articulated and I find that nearly all of the pricing, target and payment information at issue represents the position taken by the affected party regarding the cost of providing and performing the various components of the engineering, procurement and construction agreements. If the pricing and related information submitted by the affected party had been deemed by OPG to be "too high, or otherwise unacceptable," OPG was in a position to accept or reject them. The same holds true for dates and other variables in the schedules that might be "unacceptable" to OPG.[30] In my view, the option to accept or reject such prices, rates or milestones is itself a "form of negotiation, as contemplated by Assistant Commissioner Beamish in Order PO-2435.

[53] Accordingly, I find that the following pricing or payment information was not "supplied" within the meaning ascribed to that term in section 17(1) of the *Act*: Schedules 7.1 (Milestone Payment Schedules),[31] and the following exhibits to the RFR Project Agreement (at Tab D of OPG's records binder): Exhibit 1.1(fffffff) (Rate Tables), Exhibits 3.1(a) and 3.1(b) (Milestone Schedules),[32] Exhibit 3.11 (Sample Calculation for Productivity Gains Formula), Exhibit 4.7 (Economic Cost Adjustments), Exhibit 6.1 (Pricing), *excluding* Attachments 1 and 2, Exhibit 6.3(a) (Cost Allocation Table), *excluding* Attachment 1, the affected party's Travel and Per Diem Policy dated 2006, Exhibit 7.1(b) (Tooling Milestone Payment Table), Exhibit 8.1(a) (Illustration: Definition Phase Target Cost – Incentives/Disincentives), and Exhibit 8.2(a) (Illustration and Examples: Execution Phase Target Cost – Incentives/Disincentives). For these records, part 2 of the test under section 17(1) has not been met.

[54] However, as indicated above, there are some exceptions to my finding that the records for the most part do not meet the requirements of the "supplied" part of the test.

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[29] See, for example, Orders PO-2371, PO-2453, and PO-2632; see also *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner),* [2002] B.C.J. No. 848 (S.C.).

[30] Milestone schedules have been found to be "supplied" in past orders (for example, Order PO-2478); however, the records at issue in that order were for the *proposal* to develop a wind power generating facility, not the final agreement. Regardless, the milestone schedule at issue in that order failed to meet the requirements of part 3 of section 17(1) and was ordered disclosed.

[31] There is a Schedule 7.1 to both the Mock-Ups Project Agreement and the other for Exhibit 1.1(wwww) (Mock Ups Contract) to the RFR Project Agreement.

[32] Percentage fees to be paid at certain points.

[55] The first exceptions consist of Exhibit 1.1(jjjjjjj), Tooling Fixed Price Reduction Methodology, *except* its first page, and Exhibit 1.1(qqqqqqq), Tooling Performance Guarantee, to the RFR Project Agreement. I concluded, under part 1 above, that these records contain technical and commercial information, including "contractor-populated" operation specifics to illustrate sample calculations required under the methodology, as well as for benchmarking performance. Based on the quality of the information contained in these two exhibits, I find they were "supplied" by the affected party to OPG, for the purpose of part 2 of the test under section 17(1).

[56] Next, I am satisfied that Attachments 1 and 2 to Exhibit 6.1 (Pricing) were "supplied" because the commercial and financial information contained in these tables relating to fixed fees for the Execution and Definition phases, respectively, includes cost overheads and other details derived from the affected party's bid materials.

[57] In addition, I find that the affected party's WSIB registration number in section 2.15(g) of the main RFR Project Agreement, its GST and/or HST registration numbers in section 7.7(a) of the RFR Project Agreement and section 7.4 of Exhibit 1.1(wwww) to the RFR Project Agreement, and its bank account information in section 18.15 of Exhibit 6.1 to the RFR Project Agreement, were directly "supplied" by it to OPG.

[58] Finally, I am satisfied that a portion of Exhibit 6.3(a) to the RFR Project Agreement qualifies as "supplied" under section 17(1). Specifically, I note that Attachment 1 to Exhibit 6.3(a), dealing with cost allocation, is a copy of the affected party's Travel and Per Diem Policy, dated 2006, and I find that it was "supplied" to OPG by the affected party.

[59] Next, I will address the argument of the affected party, with support from OPG, that the inferred disclosure exception applies to the financial and/or commercial information at issue in the agreements, such that it ought to be considered "supplied." As noted above, the "inferred disclosure" exception is one of two exceptions, along with "immutability," that may bring information otherwise found not to have been" supplied" back within the scope of part 2 of section 17(1). The "inferred disclosure" exception applies where contractual information gives rise to an inference, not that the very same information may be found in materials provided by a third party, but that other *non-negotiated* and confidential information belonging to the third party may be gleaned by reference to contractual information.[33]

[60] In this appeal, the affected party submits that "the commercial and financial information contained in the Contract would permit accurate inferences to be made" about its tender documents, which contained non-negotiated confidential information, and which was supplied … during the request for proposal and subsequent cotemporaneous discussion process." Disclosure, the affected party argues, would

[33] *Miller Transit, supra.*

reveal its "commercial strategy." However, aside from expressing this concern about inferences being made about its tender documents, the affected party has not offered sufficient evidence to link the information that actually remains at issue with its commercial strategy and, in my view, such a link cannot be discerned from the records themselves. What is required and is lacking is more specific evidence demonstrating how knowledge of the details in the agreement or identified schedules and exhibits will permit accurate inferences about the affected party's commercial strategy.[34]

[61] Therefore, having not been persuaded by the evidence provided that the disclosure of the information I found above not to be "supplied" would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to OPG, I find that it does not fit within the "inferred disclosure" exception.

[62] Neither the affected party nor OPG has strenuously argued that the "immutability" exception applies to the information at issue, and based on my review of the records, I conclude that it would not apply. The information that does not qualify as "supplied" is susceptible of change and does not fit within the scope of the "immutability" exception.

[63] Accordingly, I find that neither the "immutability" nor the "inferred disclosure" exception applies in the circumstances of this appeal.

In confidence

[64] As stated, to meet the "in confidence" requirement of part two, the party 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.

[65] Although not mentioned by OPG or the affected party, the RFR Project Agreement contains a clause that specifically contemplates the possibility of disclosure under the *Act.*[35] In particular, the language expressly states that the *Act* applies to "all Confidential Information" and may require disclosure. Therefore, although the affected party may have entered into the contracting process with the desire to protect the confidentiality of information viewed as financial or commercially sensitive, it was put on notice that OPG, as an institution under the *Act*, could be required to disclose it pursuant to the *Act*.

[66] That being said, past orders of this office have found that the inclusion of a notice provision in the record that identifies the *Act* applying to the information is important evidence in determining the "in confidence" component of part 2 of the

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[34] See *HKSC Developments, supra,* paragraph 34, and Order MO-2233.
[35] Article 11.6.

test.[36] In Order PO-1688, for example, the adjudicator found that the affected parties held a reasonable expectation of confidentiality despite the fact that the confidentiality clause contained a reference to proposals being subject to the provisions of the *Act*. When a notice provision is present, the onus has been found to rest on the individual bidders to identify the components of their submission that contain information they wish to remain in confidence.

[67] In this appeal, the affected party focuses on an expectation of confidentiality, as evidenced by the confidentiality agreement it signed with OPG which "contemplated that, at a minimum, sensitive financial information that was supplied by the [affected party] would be kept in strict confidence."

[68] Based on this evidence, I conclude that the affected party had an expectation of confidence in supplying the information to OPG that was reasonably held in the circumstances. Accordingly, I find that Exhibit 1.1(jjjjjjj) [except page 1], Exhibit 1.1(qqqqqqq), Attachments 1 and 2 to Exhibit 6.1, the affected party's WSIB, GST and HST numbers, bank account information and Travel and Per Diem Policy were all supplied in confidence, in accordance with part 2 of the test for exemption under section 17(1).

Part 3: harms

[69] Given my finding that much of the withheld information does not qualify as "supplied," that information is not exempt under section 17(1).[37] Therefore, I will now review whether the information that satisfied both parts 1 and 2, above, also meets the requirements of the third part of the test for exemption under section 17(1).

[70] To meet this part of the test, the parties resisting disclosure (the affected party or OPG) must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" with the release of the information.[38] Evidence amounting to speculation of possible harm is not sufficient. Further, 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*.[39]

[71] The affected party and OPG provide mirroring representations on the harms issue. Both submit that disclosure of the (entire) agreements could reasonably be expected to prejudice the affected party's competitive position within the construction and infrastructure development industries and interfere significantly with its future contractual negotiations. They argue that disclosing the affected party's pricing,

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[36] Orders PO-2371 and PO-2453.

[37] *Miller Transit, supra*, paragraphs 9 and 27.

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

[39] Order PO-2435.

technical know-how and "superior practices," would provide similar businesses with a competitive advantage. In its reply representations, OPG provided additional affidavit evidence[40] that refers to the potential advantage given to "counterparties" in the affected party's negotiations with prospective subcontractors and equipment suppliers for the RFR project with disclosure of the agreements.

[72] The affected party provided additional representations on the harms issue that are specific to certain components of these agreements. The affected party submits that:

> The Darlington Retubing and Feeder Replacement project consists of two phases – the definition phase (consisting of fixed price and cost reimbursable elements set out in the Contract) and the execution phase. [Certain] details ... in the Contract are also applicable to the execution phase of this project, which has not yet been finalized. The Contractors are part of a small pool of competitors that are capable of completing the execution phase and disclosure of sensitive information in the Contract could harm the Contractor's competitive position with respect to the execution phase.

[73] The affected party also argues that disclosure of the commercial model the agreements represent, as well as the confidential information the agreements contain, would affect its future work in this industry, "if exploited by [its] competitors."

[74] For the most part, the information remaining at issue under part 3 of section 17(1) does not include information that might truly be described as "technical know-how," nor are "superior practices" defined or identified by the parties. Nonetheless, with regard to the information that met the first two parts of the test for exemption under section 17(1), I am satisfied that disclosure of the tooling exhibits and portions of the pricing exhibit could reasonably be expected to prejudice the affected party's competitive position or interfere significantly with the contractual or other negotiations of the affected party for the purpose of section 17(1)(a). I accept that disclosure could provide the affected party's competitors with details that may jeopardize its competitive position. Therefore, I find that Exhibit 1.1(jjjjjjj) (Tooling Fixed Price Reduction Methodology) *except* page 1, Exhibit 1.1(qqqqqqq) (Tooling Performance Guarantee) and Attachments 1 and 2 to Exhibit 6.1 (Pricing) to the RFR Project Agreement satisfy part 3 of the test and are, therefore, exempt under section 17(1)(a).

[75] I am also satisfied that disclosure of the other financially sensitive information relating to the affected party contained in the remaining portions of the records could reasonably be expected to result in undue loss to it, according to section 17(1)(c) of the *Act.* In particular, I find that the portions of the RFR Project Agreement that contain the

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[40] The second affidavit provided by OPG was sworn by its Senior Vice President, Nuclear Refurbishment.

affected party's WSIB registration number (section 2.15(g)), GST and/or HST registration numbers (section 7.7(a) of the Agreement and section 7.4 of Exhibit 1.1(wwww)), and bank account information (section 18.15 of Exhibit 6.1) satisfy part 3 of section 17(1)(c) and are, accordingly, exempt.

[76] However, I am not persuaded by the parties' representations or the record itself that disclosure of the affected party's Travel and Per Diem Policy (Attachment 1 to Exhibit 6.3(a), RFR Project Agreement) could reasonably be expected to result in either of the harms contemplated by section 17(1)(a) or (c). The Policy represents the terms and conditions for the reimbursement of expenses for the affected party's employees assigned to work on the Darlington RFR project. In my view, these terms are of a general nature or are standard terms of the type expected in such a document. I am not satisfied that the disclosure of this Policy could reasonably be expected to result in either of the harms that paragraphs (a) and (c) of section 17(1) seek to insulate third parties from experiencing. Therefore, I find that sections 17(1)(a) and (c) of the *Act* do not apply to this record.

[77] Many of the records, or portions of records, that did not meet the three-part test for exemption under section 17(1) are also subject to OPG's section 18 exemption claim, and I will now review them.

B. Would disclosure harm the economic interests of OPG under sections 18(1)(a), (c) or (e)?

[78] OPG relies on sections 18(1)(a), (c) and (e) to withhold portions of the two indemnity agreements, the Mock-Ups Project and RFR Project Agreements, and many of their schedules and exhibits.[41]

[79] OPG's position on section 18 with respect to the indemnity and main (Mock-Ups and RFR) agreements was not revised to reflect the narrowing of the appeal's scope at mediation, resulting in there being information marked as withheld that might be considered to have been removed from the scope of the appeal.[42] Rather than parse out matters of narrowed scope in this section, I will simply review all of the information redacted under section 18 to determine whether it is, in fact, exempt.

[41] Certain exhibits to the RFR Project Agreement were subject only to the unsuccessful claim for exemption under section 17(1) and are not reviewed under section 18. These exhibits include Exhibits 3.1(c)(A), 3.1(d)(B), 9.1(a), 9.1(h), 10.1, 12.6, 12.7(a)(3), 12.7(a)(4) and 14.9.

[42] For example, the withheld contents of section 4.2 (Required Insurance) of the Mock-Ups Project Agreement refers to an exhibit that was removed from the scope of the appeal at mediation.

[80] Claimed uniformly for all information withheld under section 18, the relevant parts of section 18(1) state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (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;

[81] Broadly speaking, section 18 is designed to protect certain economic interests of institutions covered by the *Act*. Section 18(1)(c) takes into consideration the consequences that would result for an institution if a record was released. This can be contrasted with sections 18(1)(a) and (e), which are concerned with the type of the record, rather than the consequences of disclosure.

[82] For section 18(1)(c) to apply, OPG must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, OPG is required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[43]

[83] It should not be assumed that harms under section 18 are self-evident or can be substantiated by submissions that merely repeat the words of the *Act*. 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.[44]

Representations

[84] OPG submits that in its pursuit of a "low-cost and prudent strategy" to meet Ontario's electricity needs, the complex, multi-stage, multi-faceted project that is the Darlington Refurbishment Project plays a very important part. In this context, OPG

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

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

argues, the ability to finalize contracts on the best business terms will provide the greatest benefit for Ontario in securing its future generation requirements.

[85] OPG's representations on section 18 start by setting out the Ontario Government's directive (to the Ontario Power Authority) respecting the refurbishment of the Darlington Nuclear Generating Station. Next, OPG provides the following excerpt from the affidavit evidence of its Director of Strategic Oversight[45] for context in its opposition to disclosure:

> The refurbishment project includes bids from large sophisticated companies with expertise in nuclear refurbishments. ... I have reviewed the information which is contained in the records which are the subject of this appeal. This information was developed at the expense of OPG. OPG would not wish this information to become publicly available as it would provide an unfair advantage to some suppliers and contractors OPG is currently engaged with and has an interest in engaging in the future. The disclosure of the estimate of total costs and other commercial information contained in the records under appeal, would permit the bidding companies to determine project component costs and contracting strategies/terms and conditions with some precision. They would be able to do so because of their subject matter expertise, their understanding of the time frame in which these contracts will be negotiated and their knowledge of the standard major components of a refurbishment of this kind. With this background, they can extrapolate these costs from a point estimate of total costs. Because of a greater understanding of OPG's contracting strategy and a [sic] knowledge of specific [negotiated] terms and conditions, OPG would be at a disadvantage in negotiations because they would be entering negotiations without the bidders' corresponding information. Should the bidders obtain the terms and conditions and cost estimates in these records, they would gain an advantage in these upcoming negotiations with OPG by knowing, going in to the negotiation, OPG's contracting strategy as well as what OPG is expecting to pay. It would be logical for them to manipulate their bid to maximize their profit. OPG and ultimately, the ratepayers of Ontario, would consequently be deprived of an opportunity to gain the best price for its contracts.

[86] Regarding section 18(1)(a), OPG argues that the financial information at issue in this appeal, which was developed by OPG, in some cases in collaboration with the OPA, at its expense, has proprietary value to the company. OPG submits that disclosure would both adversely affect its ability to secure contracts and also deprive it of the opportunity to negotiate contracts with the most favourable pricing. OPG submits that

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[45] Employed by OPG since 2006, the Director of Strategic Oversight indicates that she "was instrumental in the development of the Technical Assessment of nine nuclear reactor technologies that were then being considered in Ontario. I am one of OPG's key participants in the procurement of nuclear projects."

the information has value in not being public because sophisticated bidders would be able to discern from the information what OPG is expecting to pay for what it needs and how much is budgeted for those needs.

[87] In support of its position under sections 18(1)(c) and (e),[46] OPG relies on Order PO-2676, where Adjudicator James upheld the exemption of fuel, operating and maintenance cost estimates for OPG's (coal-powered) generating stations under section 18(1)(c). As summarized in Order PO-2676, the adjudicator found that disclosure of "key price information" to fuel supplier and transportation contractors could affect the bidding on current and future contracts, thereby increasing OPG's costs and reducing competition and OPG's profitability accordingly. Further, the adjudicator accepted OPG's submission that when future bidders "have the means to determine OPG's costs and the price ceiling set by government and the O.E.B., they can strategically bid at a price somewhat higher than their most competitive price."

[88] According to OPG, disclosure of the commercially sensitive information at issue in this appeal to the "highly expert and very small qualified pool of potential bidders" would impair the strength of OPG in trying to negotiate the "best deal" in upcoming contracts for the project's execution phase. OPG goes on to argue that suppliers would be able to "confidently quote prices and conditions more favourable than they otherwise would have" been able to quote. OPG's affidavit evidence refers to contracts and sub-contracts to be negotiated over the next two to three years for "turbines and generators, fuel handling, re-tubing, balance of plant (which is a large scope), islanding, shutdown/layup and other infrastructure."[47]

[89] Referring specifically to records 40, 42, 43 and 44,[48] OPG submits that these exhibits contain the position and plans for costing and scheduling the execution phase of the project. OPG argues that the study of these exhibits along with the full form contracts would permit suppliers to glean, "with relative precision," OPG's bargaining position and strategy in current and future negotiations. OPG also cites Order PO-2195, stating that the adjudicator observed that "OPG has a mandate to negotiate further similar business arrangements in the future and ... disclosing information that would provide competitors with insight into OPG's business operations and strategies could reasonably be expected to result in competitive harm to OPG."[49]

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[46] OPG's representations on section 18(1)(c) and (e) are combined.
[47] Paragraph 2.
[48] Exhibit 3.11 (Sample Calculation for Productivity Gains Formula), Exhibit 4.7 (Economic Cost Adjustments), Exhibit 6.1 (Pricing), and Exhibit 6.3(a) (Cost Allocation Table).
[49] In Order PO-2195, the interests of OPG *as a third party* were found to be sufficiently engaged to uphold the application of section 17(1)(a) and (c).

[90] The appellant emphasizes his interest in obtaining information to assess the cost and risk sharing in the agreements. His representations briefly address OPG's section 18 claim,[50] as follows:

> It is also interesting to note that both OPG and [the affected party] assert that they will be financially harmed by the public release of the terms of the Darlington contract. OPG appears to be asserting that public release will require it to pay more for the re-build; and [the affected party] appears to be asserting that it will reduce their profits from proceeding with the re-build. It is hard to understand how both these propositions can be true.

[91] In reply representations addressing this point, OPG counters this submission, stating:

> The appellant lists cost and risk sharing but these are only two of the important and critical aspects that have to be finalized in all the contracts going forward for this project. The ... RFR [agreement] that is the subject of this appeal has been finalized after assessing and prioritizing the critical contract parameters ... [which] are different for each of the contracts that have to be negotiated and finalized.

[92] Respecting the complexity of the future contracts, OPG's Senior Vice President, Nuclear Refurbishment, submits that:

> There are many parameters contained in these contracts. Examples of these parameters include price, price structure, limits of liability, OPG obligations, contractor obligations, scope of work, schedule, intellectual property rights, termination rights and warranties. The priority of each of these parameters can vary from contract to contract depending on the nature of the work, marketplace competition and risks. A contracting strategy and negotiating strategy is developed for each contract.

[93] According to the affiant, disclosure of the records would reveal differences between OPG's starting position and its final position, as evidenced by the terms of the agreements. OPG submits, therefore, that a "potential counterparty" would "have an expectation that OPG should move [on certain parameters] and OPG's refusal to do so would impair successful negotiations." OPG argues that it is not in the best interest of OPG and, by extension, the public, to disclose the RFR project agreement, because:

> ... reasonably assumed conclusions would be inaccurate and [would] negatively impact the viability of the project. The ratepayers and

[50] These representations are set out under section 18 since very little information was found exempt under section 17(1).

> taxpayers of Ontario are best served when all bidders and contracting parties are on an equal footing.

Analysis and findings

Section 18(1)(a) – "belongs to"

[94] For section 18(1)(a) to apply, OPG must show that the information fits within one or more of the types of protected information, that it "belongs to" the Government of Ontario or OPG, and that it has monetary value or potential monetary value.

[95] The types of information listed in section 18(1)(a) are the same as those considered under section 17(1) of the *Act.* Accordingly, I adopt my findings from part 1 of section 17(1) in concluding that the records remaining at issue at this point contain commercial and financial information. Previously in this order, I concluded that the technical information in the records was either no longer in scope due to the narrowing of the appeal at mediation or that it is exempt under section 17(1)(a).[51] Accordingly, my analysis here relates only to the commercial and financial information contained in the remaining portions of the records at issue.

[96] The term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.[52]

[97] Examples of the latter type of information may include trade secrets, business-to-business mailing lists,[53] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.[54]

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[51] Exhibit 1.1(jjjjjjj) [except page 1] and Exhibit 1.1(qqqqqqq) to the RFR Project Agreement.

[52] Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner),* [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.

[53] Order P-636.

[54] Order PO-1763, *supra.*

[98] In considering part 2 of the section 18(1)(a) test, I referred to Order PO-2632, where OPG made similar arguments in relation to two information technology service agreements between OPG and a named company. In rejecting OPG's section 18(1)(a) exemption claim, I found that:

> ... none of the information withheld from the Index, the Agreement terms, and the exhibits (the price quote, the labour hours and job rate figures and the budget) "belongs to" OPG in the sense contemplated by this exemption. I have not been provided with sufficient evidence to establish that these particular items, which were produced through negotiations and included in the mutually-generated Agreements, constitute the intellectual property of OPG or are a trade secret of OPG. In view of my finding that this specific information does not meet part 2 of the test, and because all three parts must be met, it cannot be withheld under section 18(1)(a).

[99] I rely on this reasoning in the present appeal to find that OPG has not provided sufficient evidence to persuade me that the content of the agreements, schedules and exhibits at issue has proprietary value, or that it "belongs to" OPG, as far as section 18(1)(a) of the *Act* is concerned. In particular, I find that because the information at issue resulted from negotiations between OPG and the affected party, its incorporation into the Mock-Ups and RFR Project Agreements as the agreed-upon essential terms and methodologies for the projects means that it does not "belong to" OPG for the purpose of section 18(1)(a).

[100] Further support for this conclusion may be found in Order PO-3011,[55] where Assistant Commissioner Brian Beamish stated the following with respect to similar arguments on part 2 of section 18(1)(a) made by Infrastructure Ontario:

> [83] In keeping with my findings in my section 17(1) analysis, I find that the information contained in the agreement does not "belong" exclusively to Infrastructure Ontario, but was the product of negotiation(s) with the affected party. I do not accept that the schedules, once incorporated into the project agreement, became the property of Infrastructure Ontario. The project agreement and its schedules comprise the contract between the affected party and Infrastructure Ontario, setting out each party's rights and responsibilities. I also note that the RFP document, which Infrastructure Ontario submits is copyright protected, is not at issue in this appeal.

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[55] Order PO-3011 was followed by Reconsideration Order PO-3072-R, which addressed the Assistant Commissioner's reconsideration of his section 17(1) finding. These orders were upheld in *HKSC Developments, supra,* on section 17(1). The Assistant Commissioner's section 18 finding was not reviewed in Order PO-3072-R or challenged at the Divisional Court.

> [84] The project agreement was the result of negotiations between Infrastructure Ontario and the affected party. Therefore, the schedules that comprise the records at issue are not proprietary information of Infrastructure Ontario and do not satisfy the second part of the test under the discretionary exemption in section 18(1)(a).

[101] Given my finding that the evidence is not sufficiently convincing to establish the second part of the test under 18(1)(a), it is unnecessary for me to review whether, for the purpose of part 3, the information also has monetary value. Of note, however, is the established principle that information does not have intrinsic value, merely because an institution incurred expense to develop (or negotiate) it[56] or because there may be value maintaining its confidence and lack of availability to potential counterparties.[57] In my view, this latter argument is more aptly addressed under section 18(1)(c), to which I now turn.

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

[102] As noted previously, the purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace, recognizing that they may have economic interests and compete for business with other public or private sector entities. To establish that section 18(1)(c) applies, OPG must provide "detailed and convincing" evidence to demonstrate that disclosure of the particular information could reasonably be expected to prejudice these economic interests or competitive positions.

[103] As past orders have acknowledged, it is in the public interest that the Ontario government, its agencies and its institutions, negotiate favourable commercial and contractual arrangements.[58] However, accepting the existence of such a public interest does not alter the fact that an institution must submit sufficient evidence to establish that a claimed exemption applies to withhold government-held information that is otherwise subject to a right of access under the *Act*. In this appeal, I find that OPG's evidence is sufficiently detailed and convincing enough to persuade me that section 18(1)(c) applies to portions of Articles 3 and 4 and most of Article 8 of the RFR Project Agreement, as well as certain exhibits that expand upon, or set out the methodology for, various provisions of that agreement.

[104] The Execution Phase of the Darlington RFR Project is expected to last from 2016 to 2024.[59] I accept OPG's evidence that contracts and sub-contracts for "turbines and generators, fuel handling, re-tubing, balance of plant ..., islanding, shutdown/layup and other infrastructure" will be negotiated over the next few years. In that context, I accept that disclosure of information that provides specific details about the costing,

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[56] Orders P-1281 and PO-2166.
[57] Order PO-2724.
[58] For example, Orders PO-2632, PO-2990 and PO-2987.
[59] From OPG's website; see footnote 1.

calculation, incentives, disincentives, and allocations that will be applicable to the execution phase of the contract could reasonably be expected to prejudice OPG's position in the ongoing and future negotiations in which it must engage to bring the execution phase of the refurbishment project to fruition.

[105] In particular, I am satisfied that disclosure of the following provisions of the RFR Project Agreement or exhibits could reasonably be expected to result in the harm that section 18(1)(c) seeks to prevent:

- Article 3 (Schedules and Execution Phase Plan), section 3.11, in part (as severed by OPG)
- Article 4 (Changes in the Work), section 4.6
- Article 8 (Incentives and Disincentives – Cost and Schedule), sections 8.1 – 8.6, but *not* section 8.7
- Exhibit 3.11 (Sample Calculation for Productivity Gains Formula)
- Exhibit 4.7 (Economic Cost Adjustments)
- Exhibit 6.3(a) (Cost Allocation Table), *excluding* Attachment 1[60]
- Exhibit 8.2(a) Illustration: Execution Phase Target Cost – Incentives/ Disincentives

[106] Conversely, I am not persuaded by OPG's representations that disclosure of the remaining withheld information relating to the business and administrative arrangements between OPG and the affected party could reasonably lead to that same prejudicial effect on current or future negotiations.

[107] Insofar as this conclusion differs from the one reached in Order PO-2676, which was relied upon by OPG, I am satisfied that it can be distinguished by the fact that the alleged harm to OPG's competitive position from disclosure of pricing information in that order was in relation to *its own sale* of electricity. In that appeal, the adjudicator concluded that knowledge of OPG's pricing information could have real value to OPG's competitors. By contrast, in the present appeal, the records are engineering, procurement and construction agreements between OPG and a third party that establish the arrangements through which the third party is selling its services to OPG.

[108] OPG's reply representations, contained in an affidavit from its Senior Vice President, Nuclear Refurbishment, allege that disclosure of contractual terms and details such as price structures, limits of liability, OPG obligations, contractor obligations, scope of work, schedule, intellectual property rights, termination rights and warranties. As OPG itself acknowledges, "the priority of each of these parameters can vary from contract to contract depending on the nature of the work, marketplace competition and risks" and the same holds true for the strategy adopted in each instance. However, in my view, the withheld portions of the agreements remaining subject to OPG's section

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[60] Attachment 1 was also not exempt under section 17(1).

18 claim cut a much broader swath through the parties' contractual obligations than what is summarized in that affidavit evidence. The claim applies to definitions; obligations, including project organization, records and audits, submittals, procurements, site use, hazardous conditions; changes in the work; changes to schedules, including time extensions; acceptance and correction terms; default and termination, including liabilities; and dispute resolution. These sections do not discuss the actual processes and methodologies developed by the parties. Therefore, I conclude that disclosure of these provisions will not attract the harm set out in section 18(1)(c). In this context therefore, I reject the submission that knowledge of (most of) the terms of the agreement, many of which are routinely found in contracts of this nature, would put potential counterparties at an advantage or otherwise put OPG on an unequal footing with parties, as suggested.[61]

[109] I note that OPG relies on Order PO-2195, as it did in Order PO-2990, where Assistant Commissioner Brian Beamish determined that section 18(1)(c) did not apply to a lease agreement between OPG and Bruce Power. As I observed in a footnote, above, Order PO-2195 addressed the exemption of information where OPG was the third party. In Order PO-2990, the Assistant Commissioner distinguished Order PO-2195, as follows:

> In Order PO-2195, former Assistant Commissioner Mitchinson upheld the Ministry of Finance's decision to withhold portions of a lease agreement between the OPG and Bruce Power. However, this order can be distinguished on two grounds. Most importantly, the exemption at issue was not section 18, but rather section 17(1), which has significantly different considerations, including the question of whether the information was "supplied" to the institution receiving the request, which is not a factor under section 18(1)(c). In Order PO-2195, the request was made to the Ministry of Finance, who had been provided with a copy of the lease agreement between the OPG and Bruce Power. Former Assistant Commissioner Mitchinson found that the "supplied" portion of the section 17 test had been met, as the Ministry was not a party to the lease and was not part of the negotiation of the lease. Therefore section 17(1) did not apply. In the current appeal, the lease was directly negotiated between the OPG and the affected party and would not, therefore, be considered to be "supplied" by the affected party to the OPG. ...
>
> Having said that, it is nevertheless true that, like section 17(1), section 18(1)(c) takes into consideration the consequences that would result to an institution if the withheld information is released. ... However, as stated previously, the mere fact that an institution, or individuals or corporations doing business with it, may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements

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[61] Order MO-2233.

> does not necessarily prejudice the institution's economic interests or competitive position.

[110] I agree with this conclusion. Although OPG submits that it is currently engaged in, or will soon engage in, negotiations for the additional aspects of the execution phase of the RFR Project with prospective parties, I am not satisfied by the evidence that disclosure of the remaining portions of this executed agreement could reasonably be expected to prejudice its economic interests or competitive position in the manner described and for the purpose of section 18(1)(c).

[111] With reference to OPG's argument that "disclosing information which allows suppliers to confidently quote prices and conditions more favourable than they otherwise would have [being] detrimental to the economic viability of the Darlington refurbishment project and ultimately the ratepayers of Ontario," I find the analysis in Order PO-2758 helpful.

[112] In Order PO-2758, former Senior Adjudicator John Higgins reviewed the decision of McMaster University to deny access under section 18(1)(c) to the terms of vending contracts it had signed with various third parties. In that appeal, the institution and third parties presented similar arguments about the harms that could be expected with disclosure of the information as were submitted to me in the present appeal. Senior Adjudicator Higgins reviewed these arguments in the following manner:

> Referring to the records at issue in this appeal, McMaster submits:
>
>> By revealing certain detailed negotiated financial payments contained in the Records such as rent, royalty payments, payment arrangements and other commercial terms, McMaster's negotiating position is severely compromised when negotiating new agreements. The same can be said in instances where McMaster is attempting to negotiate renewal terms of existing agreements.
>
> McMaster argues that this is the case because:
>
>> ... the competitor would have knowledge of the actual pecuniary and commercial terms negotiated between McMaster and the original Service Provider. A precedent of a "floor" or ceiling would be established for any prospective supplier in advance of negotiations.

[113] In dismissing these arguments, the Senior Adjudicator stated:

> ... McMaster's arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.

[114] This line of reasoning has been followed in numerous other orders where similar arguments were put before the adjudicator.[62] I agree with the reasoning of the former senior adjudicator in Order PO-2758 and adopt it in my analysis of the information remaining at issue.

[115] As stated, I am not persuaded that disclosure of the information remaining at issue in these records could reasonably be expected to compromise or prejudice OPG's bargaining position in relation to its efforts to optimize contractual arrangements with potential counterparties. Even if I were to accept that disclosure of certain information (for example, the pricing summary on pages 1 and 2 of Exhibit 6.1) might provide certain insights for potential bidders into OPG's estimates or expectations about this project, I am not persuaded that the harm asserted by OPG could reasonably be expected to result. To paraphrase former Senior Adjudicator Higgins, if a counterparty, or a renewing party for that matter, truly wishes to secure a contract with OPG, it will do so by charging lower fees to OPG than its competitor. This is a sophisticated and competitive industry. In this context, I find that OPG has failed to provide me with sufficiently detailed evidence to establish a link between the disclosure of the remaining information and a reasonable expectation of the harms section 18(1)(c) is intended to protect against. Accordingly, I find that it does not apply.

[116] In addition, while my decision is not founded on this point, I note that there are good public policy grounds to justify why this type of information, set out in a contract entered into by a government organization, should be publicly disclosed.[63] As mentioned above, 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 assertions of harm resulting from disclosure.

[117] I will now consider whether section 18(1)(e) applies to the remaining records that are not exempt under section 18(1)(c).

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[62] Orders MO-2490, PO-2990 and PO-3011 (upheld in *HKSC Developments, supra*).
[63] Order MO-2233.

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

[118] In order for section 18(1)(e) to apply, OPG was required to 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 [Order PO-2064].

[119] The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.[64] The term "plans" is used in sections 18(1)(e), (f) and (g). Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme."[65] However, section 18(1)(e) will not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow.[66]

[120] OPG combined its representations relating to section 18(1)(c) and (e), focusing on impairment to future negotiations regarding the execution phase of the RFR Project Agreement. In doing so, OPG did not specifically address all four parts of the test for exemption under section 18(1)(e), above; nor did OPG identify particular records or agreement provisions that were of individual concern. Rather, the gist of OPG's representations is that the same justification providing a basis for exemption under section 18(1)(c) also provides the rationale for exemption under section 18(1)(e).

[121] In Order PO-2034, Adjudicator Laurel Cropley referred to Orders MO-1199-F and MO-1264 where she previously addressed section 11(e), the municipal equivalent of section 18(1)(e), as follows:

> 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"

[64] Orders PO-2034 and PO-2598.
[65] Orders P-348 and PO-2536.
[66] Order PO-2034.

> In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding.

[122] Adjudicator Cropley then concluded that there must be some evidence that a course of action or manner of proceeding is "pre-determined", that is, there is some organized structure or definition given to the course to be taken. Next, she provided an excerpt from page 321 of the *Williams Commission Report* 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 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.

[123] In view of the principles outlined above, including the evidence of legislative intent provided in the quote above, I find that none of the records for which OPG claims section 18(1)(e) satisfy the requirements of the exemption. Although, for example, Exhibits 2.11 (Procurement Work) and 3.5 (Development of the Execution Phase Target Schedule, Target Cost and Fixed Fee) outlines certain obligations, required submittal components or steps to be taken in procurement (of subcontractors) or the development items listed, respectively, they cannot be characterized as representing a pre-determined course of action or way of proceeding *with the future contract negotiations*. In my view, disclosure of the indemnity, Mock-Ups and RFR project agreements and exhibits that I have not yet found exempt under sections 17(1)(a) or (c) or 18(1)(c) will not disclose OPG's bargaining strategy or instructions given to individuals who might carry out the negotiations.

[124] Furthermore, even if I were to accept that any of the records at issue contains a pre-determined course of action or way of proceeding, I conclude that parts 3 and 4 of the section 18(1)(e) test are not met in the circumstances of this appeal. Even though OPG will most certainly enter into agreements with respect to the execution phase of the Darlington refurbishment and related matters, I do not accept that disclosure of the executed agreements, schedules and exhibits still at issue in this appeal would reveal positions, plans or procedures intended to be applied by OPG in the negotiation of those future agreements. Indeed, as the affidavit evidence of OPG's Senior Vice President of Nuclear Refurbishment acknowledges, "[a] contracting strategy and negotiating strategy is developed for each contract…" based on many variables, including the prioritization of the parameters mentioned in that same affidavit evidence.

[125] Based on that prioritization, any future agreements, and any preceding negotiations, will not only involve different parties, but also will entail different, perhaps unique, considerations from those existing at the time the records at issue in this appeal were negotiated. In my view, the records at issue do not contain any information relating to the conduct of either current or future negotiations. I conclude, therefore, that the assertions of harm to OPG's negotiating position as a result of their disclosure are purely speculative. Accordingly, I also find that OPG has also failed to satisfy parts 3 and 4 of the test under section 18(1)(e).

[126] In any event, I have concluded that OPG has failed to demonstrate that the agreements or exhibits remaining at issue at this point contain "positions, plans, procedures, criteria or instructions", and that therefore, parts 1 and 2 of the test under section 18(1)(e) have not been met. As all parts of the section 18(1)(e) test must be met for the exemption to apply, I find that section 18(1)(e) does not apply.

[127] As I am partly upholding OPG's exemption claim under section 18(1)(c), I must now review OPG's exercise of discretion.

C. Should the OPG's exercise of discretion under section 18 be upheld?

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

[129] On appeal, the Commissioner or her delegated decision-maker (the adjudicator) may determine whether OPG failed to exercise its discretion. In addition, the Commissioner or her delegate may find that OPG erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to OPG for an exercise of discretion based on proper considerations.[67] According to section 54(2) of the *Act,* however, I may not substitute my own discretion for that of OPG.

[130] I have upheld OPG's decision to apply section 18(1)(c) to deny access to certain records, or portions of records, and I must, therefore, review OPG's exercise of discretion under those exemptions.

[131] Regarding its exercise of discretion, OPG states that it withheld the information that was necessary to protect its economic interests and submits that because its

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[67] Order MO-1573.

reasons in doing so "follows the purposes of the section 18 exemption," I should uphold its exercise of discretion. In a letter from the Head,[68] OPG refers to the fact that these records represent "the first of many contracts and sub-contracts which will be awarded through the refurbishment project, all based on similar contracting strategies." She notes that OPG is entitled to protect its commercial and financial interests just as fully and effectively as a non-governmental organization and submits that she is obliged to treat the information at issue with "due consideration as part of [her] due diligence to OPG," but has considered the public interest, as recognized and discussed in past IPC orders. Citing Orders P-984 and PO-2556, the Head refers to the desirability of "open government, public debate and the proper functioning of government institutions, including the need for transparency and public accountability in the expenditure of public funds."

[132] The Head further submits that:

> After serious consideration and balancing the various competing interests, I have concluded that sufficient information on nuclear refurbishment has been made publicly available, through the public review process before the Ontario Energy Board in 2010 and more recently before the Canadian Nuclear Safety Commissioner in December 2012, to satisfy the public interest in open government... [R]elease of the information at issue in this appeal would deprive a public institution and Ontario [of] the opportunity to gain the best price for its contracts. Given the purposes of the exemption under consideration, as elaborated above in the *Williams Commission Report* and subsequent IPC decisions ... OPG is entitled to the protection of the exemption in section 18(1) of FIPPA for this valuable commercial information. ...

[133] The appellant's representations do not directly address OPG's exercise of discretion, but focus on there being a public interest in disclosure.

Analysis and findings

[134] I have considered OPG's representations on the exercise of its discretion in relying on section 18(1) to not disclose the records. In light of the submissions of OPG's Head, the evidence before me suggests that OPG properly exercised its discretion under section 18 with respect to disclosure of records responsive to the appellant's request.

[135] Overall, I am satisfied that OPG exercised its discretion under section 18 within generally accepted parameters, and that it did not consider irrelevant factors in doing so. In particular, I am satisfied that OPG properly considered the purpose of the section 18 exemption in deciding to withhold portions of the agreements and exhibits. I have

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[68] The letter was written by OPG's Head, the VP, Corporate Secretary.

also considered the disclosure the appellant will receive pursuant to this order. I find that OPG exercised its discretion properly in the circumstances, and I will not interfere with it on appeal.

D. Is there a compelling public interest in disclosure of the records sufficient to outweigh the purpose of sections 17(1) and/or 18(1)?

[136] The appellant takes the position that the public interest override in section 23 of the *Act* applies to all of the information withheld by OPG.

[137] Section 23 of the Act states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[138] Previously in this order, I found that sections 17(1)(a) and (c) and 18(1)(c) apply to portions of the RFR Project Agreement and a number of its exhibits. In the present appeal, section 23 could be applied to override the third party information exemption in section 17(1) or the economic interests exemption in section 18(1)(c) if two requirements are satisfied. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the particular exemption.

[139] 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.[69] 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 the citizenry about the activities of their government, 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.[70] Any public interest in *non*-disclosure that may exist also must be considered.[71]

[140] 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 of the appeal.

[141] 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 records before making submissions in support of his or her

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[69] Order P-984.
[70] Orders P-984, PO-2569 and PO-2789.
[71] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

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, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[72]

[142] The appellant's representations on the possible application of the public interest override in section 23 commence with the following statement:

> [M]any citizens believe that there are much lower cost and lower risk options to keep our lights on, namely, energy efficiency, combined heat and power and water power imports from Quebec.
>
> While the Government and OPG assert that they are pursuing a low-cost and prudent strategy to meet our electricity needs, their decision-making process with respect to the Darlington Re-Build Project is not transparent with respect to: a) cost and b) risk sharing between OPG and [the affected party] with respect to cost overruns. Therefore, we believe there is a compelling public interest to publicly reveal the terms of the ... contract with respect to the Darlington Re-Build project to help the public assess its prudence.

[143] The appellant observes that the estimate of the project's total cost provided by OPG ($6 to $10 billion) does not include interest and escalation costs, which he claims will result in those figures ranging from $8.5 to $14 billion.[73] According to the appellant, transparency in these matters is important since "every nuclear project in Ontario's history has gone massively over budget – on average by 2.5 times. And the cost overruns have been passed on to Ontario's consumers and taxpayers."[74] The appellant questions how, as OPG and the affected party assert, both parties could be harmed by disclosure of the agreements to the public, but acknowledges that if such disclosure persuades the government to pursue the other options mentioned, the "private interest" of OPG and the affected party will be harmed.

[144] According to OPG, the public interest lies in withholding, rather than disclosing, the records at issue. OPG refers to its arguments under section 18 in asserting that disclosure would "allow suppliers and competitors to obtain an unfair advantage" because other bidders or contracting parties would have leverage in negotiations "because they are privy to the anticipated costs or 'bottom line' of the party they are negotiating with." OPG points out that the cost and risk sharing components of these "complex, multi-staged and multi-faceted" agreements are only two of the critical

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[72] Order P-244.
[73] The appellant attached a copy of an undertaking (JT1.2) provided to the O.E.B. by OPG in relation to the EB-2010-0008 proceeding.
[74] The appellant refers to an Ontario Clean Air Alliance publication: *The Darlington Re-Build Consumer Protection Plan*, (September 2010), Appendix A.

aspects that have to be finalized in all of the contracts that must be negotiated for the refurbishment project. OPG submits that withholding the information protects its financial position in the marketplace – during future contract negotiations - as well as protecting the position of "its sole shareholder, the Government of Ontario."

[145] Further, OPG submits that the public interest in ensuring open government and accountability for the cost of electricity generation would not be advanced by disclosure of these agreements because:

> ... 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...
>
> While not binding on the [IPC], the O.E.B.'s confidential treatment of redacted information like that under review in the current appeal, during the 2010 rate hearings for OPG, merits favourable consideration on this appeal... Amongst the redacted portions ... are similar items in the current appeal, notably project-specific components that include both dollar and contingency amounts.

[146] OPG's representations provide considerable further detail about the O.E.B.'s "confidential filings" ruling that are not reproduced in this order. OPG maintains that the regulatory process followed by the Canadian Nuclear Safety Commission "provided the public with additional information on the Darlington refurbishment... [and] the Head has thereby concluded that sufficient information on nuclear refurbishment has been made available to serve the public interest." OPG submits that it is not in the best interest of the public to release the RFR agreement "whereby reasonably assumed conclusions would be inaccurate and negatively impact the viability of the project."

[147] The affected party was asked to provide reply representations on the possible application of the public interest override to any information that might be found exempt under section 17(1). In response to the appellant's submission that disclosure of the records is necessary so that the public can assess the prudence of the agreements, the affected party submits that:

> ... the target cost of the Execution Phase [of the refurbishment project] is to be determined during the Definition Phase, "once the regulatory and technical scope is determined, engineering is completed, construction contracts are signed, and a release quality cost and schedule is developed" as has been stated by OPG and posted on its website. As such, disclosing the terms of the Contract would not provide the public with information respecting the total cost. ...

> With respect to the prudence of proceeding with the Darlington Project instead of pursuing other alternative energy options which the appellant argues are lower cost and lower risk, it is our position that publicly revealing the terms of the Contract would not in any way provide clarity on such a policy matter, nor would the public interest be served. The decision to initiate and proceed with the Darlington Project is a policy decision resting with the Ontario Energy Board and OPG, and is a matter separate and apart from the contents of the Contract and the request for it to be disclosed pursuant to FIPPA.

Analysis and findings

[148] In order for me to find that section 23 of the *Act* applies to override the exemption of the records that I have found qualify under sections 17(1)(a) and (c) and 18(1)(c), I must be satisfied that there is a *compelling* public interest in the *disclosure of those particular records* that clearly *outweighs the purpose* of those exemptions.

[149] A compelling public interest has been found not to exist where, for example, another public process or forum has been established to address public interest considerations[75] or where a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[76] Indeed, OPG and the affected party's submissions referred me to the Ontario Energy Board and Canadian Nuclear Safety Commission proceedings to suggest that public interest considerations have been addressed by, and through, these fora. I have considered this possibility, including, for example, the information that is publicly available regarding OPG's cost and risk sharing obligations with respect to O.E.B. processes.[77]

[150] However, the appellant's representations and supporting documentation persuade me that there is a public interest in the transparency of OPG's contractual arrangements for the Darlington refurbishment project. I accept the appellant's submissions that there is a public interest specifically in learning more specific details about the sharing of cost overruns and risk burdens between OPG and the affected party, given the potential for those burdens effectively to be passed on to Ontario's

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[75] Orders P-123/124, P-391 and M-539.

[76] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

[77] For example, EB-2013-0321: Exhibit D2 Tab 2 Schedule 1, pages 18-19 (September 27, 2013) indicates, in part, that: At the conclusion of the definition phase, the "execution phase target price" will be determined to estimate the total cost to complete the execution phase work with upper and lower cost sharing bands. Within these cost sharing bands, OPG and the selected contractor will jointly share in cost over-runs and under-runs. Outside of these cost sharing bands, the RFR agreement reverts to a cost reimbursable agreement, excluding vendor profit and overhead. Financial incentives also exist for early completion of each unit outage, and financial penalties exist for failure to complete unit outages within the agreed upon schedule." Source: http://www.opg.com/about/regulatory-affairs/Documents/2014-2015/D2-02-01%20Darlington%20Refurbishment%2020140206.pdf

taxpayers. I accept that there is a public interest in this subject. I am also prepared to accept that the public interest is a compelling one.

[151] My intention in emphasizing certain words of the test for the application of section 23 in the introductory paragraph above is to underscore the fact that my determination of this issue does not end with a finding that a compelling public interest exists. That finding represents only the first threshold to be met. Although I may be persuaded that there is a compelling public interest in the cost and risk sharing arrangements between OPG and the affected party respecting cost overruns, the next question to be asked is whether that compelling public interest would be served by the disclosure of the specific records that are being withheld under sections 17(1) and 18(1) of the *Act.*

[152] In particular, then, I must ask if disclosure of the records for which I have upheld the third party information exemption in section 17(1) shed light on OPG's decision-making with respect to these stated areas of interest? Having carefully reviewed the exempt records once again for this purpose, I conclude that the answer is no. In my view, disclosure of the affected party's WSIB, GST or HST registration numbers, its banking information, the tooling information contained in Exhibits 1.1(jjjjjjj) [*except* page 1] and 1.1(qqqqqqq), or the worksheets that comprise Attachments 1 and 2 to Exhibit 6.1 to the RFR Project Agreement, does not carry with it the potential to address transparency issues with regard to cost overruns or other burdens shared by OPG and the affected party with respect to the Darlington refurbishment arrangements to date. Since both components of the first part of the test for the application of the public interest override are not met for this information, it is unnecessary for me to review the second part of the test; that is, whether the purpose of the section 17(1) exemption is clearly outweighed by a compelling interest in disclosure of the particular information.

[153] I reach a different conclusion with respect to the relationship between the records I have found exempt under section 18(1)(c) and informing the public or equipping them to participate more effectively in scrutinizing the costs and burdens reflected in the contractual arrangements between OPG and the affected party. In particular, I am satisfied that there is a connection between sections 3.11, 4.6 and 8.1-8.6 to the RFR Project Agreement and Exhibits 3.11 (in part), 4.7, 6.3(a) (not including Attachment 1) and 8.2(a) and evaluating the prudence of these contractual arrangements.

[154] However, the test for the application of section 23 of the *Act* also requires me to be satisfied that the compelling public interest in disclosure of the exempt records outweighs the purpose of the exemption - section 18(1)(c). In the circumstances of this appeal, I find that the desirability of assuring OPG's optimal bargaining position and strategy in current and future negotiations for the Execution Phase of the RFR Project outweighs the public interest in disclosure of this commercially sensitive information.

Accordingly, I find that any compelling public interest in the disclosure of the exempt portions of the RFR Project Agreement and certain of its exhibits, as identified above, does not clearly outweigh the purpose of section 18(1)(c), which is to protect OPG's economic and commercial interests.

[155] As the required elements of the test for the application of the public interest override are not met, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I uphold OPG's decision to deny access to the following portions of the RFR Project Agreement under section 17(1)(a) or (c) of the *Act*:

    - Section 2.15(g): affected party's WSIB registration number only;
    - Section 7.7(a): affected party's GST and/or HST registration number only;
    - Exhibit 1.1 (wwww): section 7.4, affected party's GST and/or HST registration number only);
    - Exhibit 1.1(jjjjjjj), *except* page 1;
    - Exhibit 1.1(qqqqqqq); and
    - Exhibit 6.1: section 18.15 (affected party's banking information), Attachments 1 and 2.

2. I also uphold OPG's decision to deny access to the following portions of the RFR Project Agreement under section 18(1)(c) of the *Act*:

    - Section 3.11, in part;
    - Section 4.6;
    - Sections 8.1 – 8.6, but not section 8.7:
    - Exhibit 3.11;
    - Exhibit 4.7;
    - Exhibit 6.3(a) (Cost Allocation Table), excluding Attachment 1; and
    - Exhibit 8.2(a)

3. I order OPG to disclose the responsive records or portions of records which I have found do not qualify for exemption to the appellant by **April 1, 2014** but not before **March 26, 2014**.

4. In order to verify compliance with this order, I reserve the right to require OPG to provide me with a copy of the records disclosed to the appellant pursuant to provision 3.

Original signed by: February 25, 2014
Daphne Loukidelis
Adjudicator