

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3005

Appeals PA10-265 and PA10-266

Ontario Lottery and Gaming Corporation

October 26, 2011

Summary: The appellant sought access to records relating to the construction and operation of the Windsor Energy Centre (the WEC). The scope of the appeals was substantially narrowed during mediation to include only: 1) agendas and minutes of meetings of the OLG's Executive and Board of Directors, along with any audits, evaluations, reports or communications pertaining to decisions relating to the WEC; and 2) documentation relating to one identified consultant during the requisite time period. The OLG denied access to the remaining responsive records on the basis that they were exempt under sections 13(1), 18(1)(a), (c) and (d) and 19. Some of the records at issue in both appeals were found to qualify for exemption under sections 13(1), 18(1) and 19. Others were not exempt and were ordered disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 13(1), 18(1)(a) (c) (d), 19.

Orders and Investigation Reports Considered: MO-1714, PO-1763, PO-2028.

Cases Considered: *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564;

OVERVIEW:

[1] The Ontario Lottery and Gaming Corporation (the OLGC) received a total of six requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the Windsor Energy Centre (the WEC) and the Casino Windsor Expansion Project.

Request A-2010-00075/Appeal Number PA10-265

[2] Two of the requests (A-2010-00075 and A-2010-00077) were merged to become one (designated as Request A-2010-00075), which sought access to the following information:

- 1) Emails of [two identified individuals] regarding the Windsor Energy Center from January 1, 2008 to the [date of the request].
- 2) Agendas and minutes of OLG's Executive Council and the Board of Directors regarding the Windsor Energy Center from January 1, 2008 to the [date of the request].
- 3) Audits, evaluations or reports and communications with Minister's Office concerning decisions with respect to Windsor Energy Center from January 1, 2008 until the [date of the request].

[3] The OLGC issued an interim decision regarding access and a fee estimate. In response, the requester narrowed his request to exclude the emails of the identified individuals regarding the Windsor Energy Center. As a result, the request was revised to include only:

- 1) Agendas and minutes of OLGC's Executive Council and the Board of Directors regarding Windsor Energy Center from January 1, 2008 to the [date of the request].
- 2) Audits, evaluations or reports and communications with Minister's Office concerning decision with respect to Windsor Energy Center January 1, 2008 until the [date of the request].

[4] The OLGC issued a final decision regarding access in which it advised the requester that it had not located any audits or communications with the Minister's office; but that it had located technical and financial reports, as well as Board of Directors' meeting materials. The OLGC indicated that it was denying access to these records in full, based on the exemptions contained in sections 13(1) (advice or recommendations), 18(1) (economic or other interests of an institution), 17(1) (third party information) and 19 (solicitor-client privilege) of the *Act*.

[5] The requester, now the appellant, appealed the OLGC's decision to this office, which opened Appeal PA10-265. During the mediation of this appeal, the OLGC

provided the appellant with additional disclosure of records, in whole or in part. In addition, the appellant withdrew his appeal respecting pages 000136 to 000138 and the OLGC withdrew its reliance on section 17(1). Finally, the OLGC indicated that it was relying on the discretionary exemptions in sections 13(1), 18(1)(a), (c), (d) and (g) and 19(a) and (b).

[6] I began my inquiry by providing a Notice of Inquiry setting out the facts and issues in the appeal to the OLGC. Prior to submitting its representations, the OLGC withdrew its reliance on section 18(1)(g) and certain other exemption claims for some of the records at issue and provided both this office and the appellant with an updated Index of Records. The OLGC then submitted representations in response to the Notice, portions of which were not shared with the appellant in accordance with section 7 of the *IPC Code of Procedure* and Practice Direction 7. The appellant also submitted representations in response to the notice which I provided to him.

Request A-2010-00076/Appeal Number PA10-266

[7] Another of the six requests received by the OLGC from the appellant, Request A-2010-00076, was narrowed by the parties to include access to "any contracts from January 1, 2007 until the present with Direct Energy Consulting Services, as well as any deliverable(s) pertaining to the contract."

[8] The OLGC initially issued a decision to the appellant indicating it was denying access in full to the consulting agreements, reports, project status reports and associated documents that are responsive to the request. The OLGC advised the appellant that it was relying on the discretionary exemptions in sections 13(1) (advice or recommendations), 18(1) (economic or other interests of the institution) and 19 (solicitor-client privilege) of the *Act* to deny access to the records.

[9] The appellant appealed this decision to the Commissioner's office, which opened Appeal PA10-266.

[10] During the mediation of Appeal PA10-266 and following consultations with third parties, the OLGC issued a second decision letter in which it granted partial access to two consulting agreements. The appellant indicated that he was no longer seeking access to the undisclosed portions of these records, but continued to seek access to the remaining records that were identified as responsive to Request 00076, totaling 631 pages.

[11] I then provided a Notice of Inquiry to the OLGC seeking its representations on the facts and issues extant in the appeal. After the issuance of a Notice of Inquiry, the OLGC disclosed additional records, leaving 80 pages of records remaining at issue, and followed with representations in response to the notice. I also provided the appellant with a Notice of Inquiry and shared most of the OLGC's representations with him,

except certain portions that would be exempt under sections 13(1) and 17(1), in accordance with section 7 of the *IPC Code of Procedure* and Practice Direction 7. The appellant also submitted representations in response to the notice.

[12] This order disposes of two appeals (PA10-265 and PA10-266) filed in relation to three decisions arising from the six-part request originally made by the appellant. In this decision, I partially uphold the OLG's decision.

RECORDS:

[13] The records remaining at issue in the appeals were described in detail in the Indexes of Records that were forwarded to the appellant with the Notices of Inquiry for both appeals.

ISSUES:

- A. Does the discretionary exemption in section 13(1) apply to the records?
- B. Does the discretionary exemption in section 19 apply to the records?
- C. Do the discretionary exemptions in sections 18(1)(a), (c) and (d) apply to the records?
- D. Did the OLG properly exercise its discretion to deny access to the records under section 13(1), 18(1) and 19?

DISCUSSION:

A. Does the discretionary exemption in section 13(1) apply to the records?

[14] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[15] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

[16] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

[17] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

[18] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; and
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.

[19] [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

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Page 2 – Board of Director's Meeting Minutes of February 14, 2008

[20] The OLGC submits that the minutes contain two courses of action from the Board of Directors and directed to OLGC Management, along with its recommended approach, with respect to the WEC. In order MO-1714, a record containing a similar directive from the CEO of the Township of Tiny to its staff, his subordinates, was found not to qualify as "advice or recommendations" for the purposes of section 7(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, which is the equivalent provision to section 13(1). Adjudicator Frank DeVries determined, following an earlier decision in order P-363, that:

In Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), Assistant Commissioner Mitchinson had to determine whether a direction given from a supervisor to an investigator constituted "advice or recommendations" for the

purpose of section 13 of the provincial *Freedom of Information and Protection of Privacy Act* (similar to section 7 at issue in this appeal). He stated:

Record 5 consists of a July 18, 1980 memo from the investigating human rights officer to her supervisor, together with the supervisor's reply, dated August 14, 1980. The July 18, 1980 memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the August 14, 1980 response, it just outlines the supervisor's direction on how the investigation should proceed. It does not contain any information that can properly be characterized as "advice or recommendations" as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission's governing legislation. In my view, the August 14, 1980 response also does not qualify for exemption under section 13(1).

I accept the approach taken by Assistant Commissioner Mitchinson, and adopt it for the purpose of this appeal.

I find that Record 1 does not qualify for exemption under section 7 of the *Act*. As identified by the Township, this record is a direction given to staff regarding a particular action. Similar to the situation in Order P-363, the record in this appeal does not set out a suggested course of action which may be either accepted or rejected in the deliberative process, rather, it directs staff to take a particular action. This does not constitute "advice or recommendations" for the purpose of section 7 of the *Act*.

[21] In my view, the course of action described in record 2 represents a directive given by the Board of Directors to OLGC management. In this case, the directive does not represent a suggested course of action that may be accepted or rejected by its recipient. Rather, the course of action is clearly a directive and cannot be said to constitute advice or recommendations from the Board of Directors to its managers for the purposes of section 13(1). Accordingly, as no other exemptions have been claimed for this record and no mandatory exemptions apply to it, I will order that it be disclosed to the appellant.

Page 6 – Board of Directors Meeting Minutes of September 25, 2008

[22] The OLGC submits that the first paragraph of this page of the minutes pertaining to the September 25, 2008 Board meeting is exempt under section 13(1) as it provides a recommendation from a consultant to the OLGC Board. Based on my review of this record, I find that paragraph 1 of page 6 qualifies for exemption under section 13(1) as it contains advice or a recommended course of action to be taken by the OLGC about a specific issue.

Pages 24-29 – Comments from consultants on a proposed agreement

[23] The OLGC solicited comments from a consulting firm with respect to a proposed energy services agreement between it and a proponent. This record represents a clause by clause critique and analysis of the entire agreement and contains recommendations for amendment, as well as advice on potential pitfalls that may occur should the agreement as written be entered into.

[24] I have carefully reviewed the contents of the entire document that comprises pages 24 to 29 and agree that they contain advice or recommendations within the meaning of section 13(1). The document provides the OLGC with suggested language to be inserted in each clause in the proposed agreement and its rationale for suggesting these changes. As a result, the entire document qualifies for exemption under section 13(1).

Pages 81-88 – EnerQuest Services report dated February 24, 2009

[25] The OLGC submits that this document, which sets out a number of options regarding linking, in whole or in part, the generating load of the WEC to the generating assets, is exempt under section 13(1). It goes on to argue that pages 87 and 88 include a specific recommendation as to which option is most advantageous.

[26] In order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564, former Assistant Commissioner Tom Mitchinson summarized a line of cases which addressed whether records containing options that did not include a recommended course of action could qualify for exemption under section 13(1). He stated:

What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains "advice" for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker.

In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain "mere information" and what, if any, contain information that actually "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing "mere information", then section 13(1) applies.

[27] Having concluded that the disclosure of the records under consideration in that appeal would not reveal actual advice, he went on to determine whether the disclosure of the options would "allow one to accurately infer any advice given" and concluded that:

. . . disclosure of the "pros and cons" for the various options would not permit accurate inferences to be drawn as to the nature of any advice implicitly contained in these portions of the record. In my view, in comparing the various "pros and cons" it would not be reasonable to infer a suggested course of action by Ministry staff, which will ultimately be accepted or rejected by the Board during the deliberative process. Accordingly, I find that the "pros and cons" portions of pages 9 and 10 do not consist of or allow one to accurately infer any advice or recommendations. Therefore, section 13(1) of the *Act* does not apply.

[28] I adopt this approach for the purposes of the current appeal. Based on my review of the contents of the information contained in pages 81 to 86 of the record, I find that it would not be reasonable to infer a suggested course of action to be taken by the OLGC. However, I find that the information in pages 87 and 88 does include a recommended course of action for the OLGC and is, accordingly, exempt from disclosure under section 13(1).

Page 94 – Progress Report dated January 16, 2009

[29] The OLGC claims the application of section 13(1) to a portion of page 94, which was highlighted on the copy of the records provided to me. The highlighted portion of page 94 consists of a recommended course of action for the OLGC from a consultant it had retained to examine a particular situation. I agree that this portion of page 94 is properly exempt from disclosure under section 13(1).

Page 98 – Substantial Completion Criteria Review – January 16, 2009

[30] Again, the OLGC claims the application of section 13(1) to a portion of page 98 which was highlighted on the copy provided to me. Based on my review of the contents of the highlighted portion of page 98, I find that it is exempt under section

13(1) as it contains a recommended course of action to solve a particular identified problem.

Pages 141-142 – Executive Summary of OPG Study – June 11, 2009, duplicated at pages 568-569 dated May 29, 2009

[31] This two-page executive summary of a larger report includes a section entitled “Recommended Action Plan” which includes a set of specific recommendations from Ontario Power Generation (the OPG) on a course of action to be followed by the OLGC. I find that this portion of the executive summary falls within the ambit of section 13(1), while the remaining portions do not.

Pages 146-149, 155, 157-160 and 162 – OPG Study – June 11, 2009, duplicated at pages 573-576, 582, 584-587 and 589 – May 29, 2009

[32] These portions of the actual complete OPG Study contain more detailed information relating to the OPG’s recommended course of action. I find that pages 146, 147, 148, 149 and 155 contain a recommended action plan that qualifies for exemption under section 13(1). The remaining information contained in these records is not exempt.

[33] Pages 157-161 set forth a number of options which describe possible course of action to be taken by the OPGT with respect to the operation of the WEC. Page 162 contains the actual recommended course of action to be taken by OLGC. In accordance with the analysis set out in my discussion regarding pages 81-88, I find that the disclosure of the options in pages 157-161 would not reveal a recommended course of action, nor would its disclosure allow one to accurately infer the advice given. The pages of the study document prepared by the OPG are not, accordingly, exempt under section 13(1).

[34] Page 162 contains the actual recommended course of action and qualifies, therefore, under section 13(1).

Pages 169, 173, 292 and 384 – H.H. Angus Reports to OLGC November 6, 2009

[35] A number of reports were prepared by a firm of consulting engineers who were retained by the OLGC to examine a number of issues around the connection of the WEC to the power grid. The consulting engineers prepared lengthy reports setting out various problems and offering their expertise to assist in resolving them.

[36] The OLGC takes the position paragraph 4.2.2 on page 169 is exempt from disclosure under section 13(1) as it contains a recommended course of action from the original contractor to be taken by OLGC in 2007 respecting the connection process.

[37] Based on my review of the record, I agree that this information, consisting of just the fourth sentence of paragraph 4.2.2 qualifies for exemption under section 13(1).

[38] Paragraph 5.2.6 on page 173 of the same document also contains a recommended course of action regarding a technical issue identified by the consulting engineers. I find that paragraph 5.2.6 qualifies for exemption under section 13(1).

[39] Similarly, all of the information claimed to be exempt under section 13(1) in page 292, which is entitled "Conclusions and Recommendations" is properly exempt under that section as it provides a recommended course of action from the consulting engineers to the OLGc regarding some technical questions that arose as part of its investigations.

[40] Finally, the Executive Summary at page 384 also contains a recommended course of action from the consulting engineers to the OLGc with respect to the purchase and installation of additional equipment and the completion of further work on the project. These recommended actions are outlined under the headings "Architectural/Structural", "Mechanical" and "Electrical". As a result, page 384 qualifies for exemption under section 13(1), in its entirety.

Page 417 - Recommendation to OLGc Board of Directors

[41] The recommended course of action for the Board of Directors from OLGc Management included at the bottom of page 417 is exempt from disclosure under section 13(1) as it clearly indicates a recommendation which may or may not be acted upon by its recipient as part of the decision making process.

Pages 468 – 489 – Financial Analysis presented to OLGc Board August 27, 2009

[42] The OLGc has provided only the most cursory of representations respecting the application of section 13(1) to this document. I have carefully reviewed this record and make the following findings respecting it:

- the bullet points listed on page 468 contain advice or recommendations within the meaning of section 13(1) and are, accordingly, exempt;
- on page 469, only the first paragraph under the heading "Financial Assessment of Keep *versus* Sell Options" qualifies for exemption under section 13(1);
- the disclosure of the two options listed on page 470 would not reveal which represents the recommended option and would not allow for an inference to be drawn as to which was suggested by the author of the report to the Board of Directors. The information on page 470 is not, accordingly, exempt under section 13(1);
- pages 472–476, 478–481 and 482–489 represent various drafts of a detailed analysis setting out several options available to the OLGc regarding the future

ownership of the WEC. Again, there is no single option recommended by the author of the report and its content does not infer a particular course of action. As a result, I find that section 13(1) does not apply to pages 472-476, 478-481, or to pages 482-489.

Pages 490-521 – OLG Power Study (EnerQuest Services)

[43] The OLGC's submissions respecting the application of the section 13(1) exemption to this record consist of the following statement:

Provides advice and recommendations to OLG on linking the generating assets. Outlines advantages and disadvantages of each possible alternative.

[44] I have reviewed the contents of this record and conclude that it does not contain advice or recommendations within the meaning of section 13(1). While advantages and disadvantages of various optional actions are outlined, no particular course of action is recommended and no preferred course of conduct can be inferred from the information therein.

Page 526 – PWC Analysis dated February 6, 2008

[45] Page 526 is the second of a two-page letter written to the OLGC's CEO by a consulting firm which it retained to provide certain advice about a particular course of conduct to be taken in relation to the ongoing operation of the WEC. I find that the second paragraph of page 526 consists of a recommended course of action from the consultant to the management of the OLGC and qualifies for exemption under section 13(1) on that basis. The remainder of page 526 does not contain such information and is not, accordingly, exempt under section 13(1).

Page 536 – PWC Financial Analysis

[46] The OLGC appears to take the position that only the final bullet point on page 536 is subject to the section 13(1) exemption. Based on my review of this document, I agree as it contains a very specific recommendation respecting a course of conduct to be followed by the OLGC.

Pages 538 and 540-542 – PWC Financial Analysis

[47] The information contained on these pages of the analysis report consists of a comparison of various figures regarding the proposals set forth by two proponents, as well as the OLGC's own projections regarding costs and revenue. Again, I find that section 13(1) has no application to this information as it does not include a

recommended course of action to be taken by the OLG; rather it simply describes certain financial proposals from each of the proponents.

Pages 543-544 – Request for Board Approval – September 25, 2008

[48] Again, the OLG appears to be taking the position that the final paragraph on page 544 qualifies for exemption under section 13(1) as it represents a recommended course of action from OLG Management to the Board. Based on my review of the contents of this portion of page 544, I agree and find that section 13(1) operates to exempt from disclosure the final paragraph on page 544.

Pages 547-548 – Update to the Board – February 14, 2008

[49] Page 547 includes a number of alternative courses of action put to the Board by OLG's Management. However, as was the case with other records discussed above, the document does not suggest, nor does it infer a particular course of action as the recommended one. As a result, this information cannot qualify for exemption under section 13(1). I find that the portion of page 548 which follows the heading "Recommendation" contains a suggested course of action to be taken by the Board and therefore qualifies for exemption under section 13(1).

Pages 559-561 – Corporate Accounting and Reporting Discussion Paper – March 2009

[50] Similarly, pages 559 and 560 contain a detailed discussion of the merits of three alternative course of action relating to in-service dates for the WEC. On page 561, a recommended course of action is described. I find that because the alternatives set out on pages 559 and 560 do not include a recommended course of action and do not provide sufficient information to allow one to infer a suggested course of action, this information does not fall within the ambit of the section 13(1) exemption. However, I agree with the OLG that the portion of page 561 which follows the title "Recommendation" meets the requirements of the exemption.

Pages 593-606 – Cole Valuation Partners Memorandum – April 16, 2010

[51] This document was prepared by a consulting firm for outside legal counsel retained by the OLG with a view to evaluating the proposal submitted in December 2009 by one of the participants in the WEC, using certain cash flow projections prepared by another consulting firm retained by the OLG.

[52] Page 593 sets out an introduction and provides a summary of its preliminary analysis, which includes very specific advice to the OLG regarding the efficacy of the choices available to it. In my view, the information contained in the box at the bottom of page 593 qualifies for exemption under section 13(1) as it advises the OLG as to a course of action with respect to a particular issue before it.

[53] Pages 594-596 sets out a number of scenarios for the future of the WEC and evaluates each from the perspective of the OLGC. I find that the information contained in these pages does not qualify as advice or recommendations for the purposes of section 13(1) as they do not suggest a particular course of conduct or lead one to an inference about a particular action to be taken.

[54] Pages 597-606, however, provide specific advice to the OLGC about the financial ramifications of the proposal and other scenarios set forth therein. I find that this portion of the report qualifies for exemption under section 13(1).

Appeal PA10-266

Pages 17-19 and 22-23 – Project Status Reports – October 29, 2007 and November 8, 2007

[55] Pages 17-19 form part of the initial Project Status Report prepared by Direct Energy Consulting, whose role is described in the report as follows: to support the project, design and construction teams in the most effective manner to execute their respective responsibilities. Pages 22 and 23 are excerpts from another Project Status Report addressing similar issues to those described in the initial report. The OLGC argues that the items listed under the headings "Considerations", "Recommendation" and "Action" in the Priority Issues section of the report are exempt from disclosure under section 13(1).

[56] The OLGC argues that these portions of the records contain an actual recommended course of action from the consultants to OLGC's WEC managers. It further argues that other portions of the text of pages 17-19, particularly those listed under the heading "Considerations", were written "in a manner from which advice can be reasonably inferred." It also argues that the items listed under the heading "Action" on pages 22 and 23 contain a recommended course of action.

[57] I have reviewed the contents of those portions of pages 17-19 which the OLGC claims to be exempt under section 13(1) and agree that the disclosure of the information under the headings "Considerations", "Recommendation" and "Action" are exempt under that section as they contain actual or inferred advice or recommendations. Similarly, I find that the information under the heading "Action" falls within the ambit of the exemption for the same reason.

Pages 25-29 – Direct Energy Controls Assessment – November 16, 2007

[58] I have reviewed the contents of pages 25-26 and find that they contain only factual information respecting the existing proposal regarding the WEC's Control Systems, as outlined by the original builder. As such, this information does not qualify

for exemption under the section 13(1) exemption as it does not contain advice or recommendations, explicit or inferred.

[59] Pages 27-29 outline an alternative approach to the control plan design for the WEC. However, I cannot agree that the description of an alternative design for one aspect of the WEC alone constitutes "advice or recommendations" within the meaning of section 13(1). The design plan described in these pages is not recommended or given as a suggested course of action to be undertaken. Rather, the alternative is presented in a neutral and factual way without either an actual recommendation or one that can be inferred from the manner in which it is written. Accordingly, I find that pages 27-29 are not exempt from disclosure under section 13(1).

Pages 32 and 33 – Project Status Report – November 15, 2007

[60] The OLGC argues that much of the information listed under heading 2.2 entitled "Priority Issues" is exempt under section 13(1). Specifically, it indicates that bullet points 3, 4, 5, 8 and 9, as well as the information included under the headings "Action" qualifies for exemption. Based on my review of the record, I agree with the OLGC's position and find that the items listed above in pages 32 and 33 are exempt under section 13(1).

Page 36 – Project Status Report – November 21, 2007

[61] The OLGC argues that all of the information contained in page 36 under the heading "Priority Issues" qualifies for exemption under section 13(1) as it "describes actions to be taken in the construction process". I find that information of this nature does not qualify for exemption under this section as it does not explicitly or by inference describe any advice or recommendations for a specific course of action to be accepted or rejected by its recipient.

Pages 38-44 – Direct Energy Controls Assessment (final version) – November 27, 2007

[62] This document contains information that is essentially the same as that discussed above on pages 25 to 29. For the reasons described in that discussion, I find that this document is also not exempt from disclosure under section 13(1).

Pages 47 and 48, 51 and 52, 55 and 56, 59 and 60, 63, 86 and 87 and 96 – Project Status Reports – November 29, 2007, December 6, 2007, December 12, 2007, January 9, 2008, January 17, 2008, February 7, 2008 and February 15, 2008

[63] The OLGC submits that the items listed in section 2.2 of each of these reports are similar to those included in page 36 above, with additional items identified beyond those in the list on page 36. Again, for the reasons outlined in my discussion of page 36, I find that this information does not qualify for exemption under section 13(1).

Page 77 – E-mail dated January 29, 2008 – Windsor CESOP

[64] The OLGC claims the application of section 13(1) to two paragraphs of an email dated January 29, 2008. Based on my review of the contents of these portions of page 77, I agree that they either contain advice or recommendations or that their disclosure would allow accurate inferences to be made as to the nature of the advice provided. Therefore, I conclude that these paragraphs qualify for exemption under section 13(1).

Page 97 – OLGC Executive Steering Committee minutes – February 15, 2008

[65] The OLGC submits that each of the three numbered points listed under "Action Items" are subject to the section 13(1) exemption. Based on my review of this record, I conclude that the first numbered item that begins "DEC recommended that . . ." represents a recommended course of action for the recipients of the minutes, the OLGC Steering Committee. The remaining items listed as items 2 and 3 do not, however, contain such information and cannot, therefore, qualify for exemption under section 13(1).

Page 99 – Project Status Report – February 22, 2008

[66] I find that the sentence which the OLGC claims to contain advice or recommendations is simply a suggestion and cannot be properly characterized as a recommended course of action for the purposes of section 13(1).

Pages 116 and 117 – Project Status Update – March 13, 2008 (duplicated at pages 121 and 122)

[67] I agree with the position taken by the OLGC with respect to the recommended course of action contained in the third paragraph under the headings Boiler Plant and Comments. This information is properly exempt under section 13(1). The information on page 117 that is claimed to be exempt under this exemption represents an opinion offered by a consultant on a particular issue but does not recommend a specific course of action. This information is not, therefore, exempt under section 13(1).

Pages 136-138 – Ownership and Operational Plan Framework – April 28, 2008

[68] The OLGC claims the application of section 13(1) to the information contained in the "Strategies" and "Operational Guidelines" sections of this document, which was prepared for the OLGC by a consulting firm. Based on my review of these portions of the record, I agree that they contain a recommended course of action and fall within the ambit of the section 13(1) exemption.

Pages 139 and 141 – Expected Cooling Demand – November 11, 2008

[69] I have reviewed the contents of these pages and agree with the position taken by the OLGc with respect to the first and second paragraph of the email on page 139, as well as the Summary portion of page 141. I find that they contain a specific recommended course of action for the OLGc to take with respect to the issue identified in the report. Accordingly, these two portions of the covering email and the report are exempt under section 13(1).

B. Does the discretionary exemption in section 19 apply to the records?

[70] Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[71] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

Branch 1: common law privilege

[72] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

[73] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

[74] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[75] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

[76] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

[77] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

[78] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated [Order MO-1337-1; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above)].

[79] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth’s: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable

prospect, should be privileged and excluded from inspection.

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document’s production, but it does not have to be both.

.

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

[80] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[81] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, “for use in giving legal advice.”

Statutory litigation privilege

[82] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, “in contemplation of or for use in litigation.”

[83] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel’s skill and knowledge, are exempt under branch 2 statutory litigation privilege [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733].

[84] Termination of litigation does not affect the application of statutory litigation privilege under branch 2 [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (cited above)].

[85] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation. [*Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.]

Appeal PA10-265

[86] The OLGC claims that many of the responsive records identified in Appeal PA10-265 are exempt from disclosure under section 19. It has also claimed that pages 139 to 144 in Appeal PA10-266 are exempt under this section. The OLGC's representations relating to the application of section 19 to the records in Appeal PA10-265 were not shared with the appellant because, as written, they contained information which would also qualify for exemption under section 19. For this reason, I am unable to refer directly or in any detail to the submissions made in support of the application of this exemption to the records.

[87] Generally, the OLGC takes the position that many of the records for which it has applied the section 19 exemption contain information relating to the seeking and giving of legal advice pertaining to problems arising from the WEC's construction and operation. It also submits that other records qualify for exemption under section 19 on the basis that they are subject to litigation privilege as they were prepared for the dominant purpose for their creation was existing or reasonably contemplated litigation.

Page 6 – September 25, 2008 Board of Directors Minutes

[88] The OLGC argues that paragraph 3 of page 6 is exempt because it refers to certain legal advice given by its Corporate Secretary to the Board. I have reviewed the sentence containing this information and find that it does not offer any actual legal advice beyond simply referring to the fact that it was given. As a result, I find that section 19 has no application to the sentence for which it is claimed.

Pages 11-12 – November 18 and 30, 2009 Board of Directors Minutes

[89] The third paragraph under the title "Issue Scan" on page 11 and the second paragraph under the title "Windsor Energy Centre" on page 12 represent part of the continuum of communications passing between the Board of Directors, the client, and its counsel. As a result, these portions of pages 11 and 12 are exempt under the solicitor-client communication privilege aspect of Branch 1 of section 19. The remaining portions of pages 11 and 12 are not exempt under this section, however. As no other exemptions have been claimed for this information, I will order that it be disclosed to the appellant.

Pages 13 and 15 – December 15, 2009 and January 26, 2010 Board of Directors Minutes

[90] I find that the first paragraph under the heading "Litigation Report" falls within the ambit of the solicitor-client communication privilege aspect of Branch 1 of section 12. This information represents a confidential communication passing between a

solicitor and his client, the Board of Directors. The remaining portions of pages 13 and 15 do not contain responsive information and need not be disclosed.

Pages 17, 18, 19 and 20 – March 24, 2010, March 29, 2010 and April 20, 2010 Board of Directors Minutes

[91] Based on my review of the contents of these minutes, I find one portion is exempt on the basis that it is a confidential communication passing between a solicitor and his client. Specifically, paragraph 4 of page 17, which begins “[I]n that context”, contains information relating to the communication of legal advice to the Board by counsel. This information qualifies for exemption under section 19.

[92] The remainder of the minutes in pages 17, 18, 19 and 20 does not contain information relating to privileged communications passing between a solicitor and his client. As no other exemptions were claimed for the information in pages 18, 19 and 20, I will order that it be disclosed to the appellant.

Pages 30-55 and 56-77, drafts of which constitute pages 418-434 and pages 438-463 – Financial Evaluation and Analysis

[93] The OLGC argues that these reports were prepared by consultants retained by outside legal counsel acting on the instructions of the OLGC’s Chief Financial Officer. Each of these lengthy reports was prepared by consulting financial analysts with expertise in the energy field. In the introduction portion of both reports, the authors indicate that they were prepared by the consultants for the OLGC, but do not refer to the participation of the outside law firm as stated in the OLGC’s representations.

[94] Based on the representations of the OLGC, including the affidavit submitted and sworn by its former Manager of Development, I conclude that these records contain information that is exempt from disclosure on the basis that they were prepared for the dominant purpose of anticipated or existing litigation on behalf of the OLGC’s solicitors in accordance with the litigation privilege aspect of branch 2 of section 19.

Pages 163-346 – Generation Connection Report; Pages 347-382 – North Block Interconnect Study; Pages 383-416 - Facility Assessment – November 6, 2009; and Pages 549-565 - Summary of Findings – February 4, 2010

[95] The detailed and technical reports which comprise this group of records were prepared by consultants retained by the OLGC’s outside legal counsel in order to assist counsel in providing legal advice on matters relating to the WEC at that time. I agree with the position taken by the OLGC and find that these records were prepared for the dominant purpose of anticipated and existing litigation. Accordingly, I conclude that these documents qualify for exemption under the litigation privilege component of branch 1 of section 19.

Page 545-548 – Update to the Board of Directors – February 14, 2008

[96] I have reviewed the content of this document and find that the portion following the title "Litigation Risk" on pages 547-548 is exempt from disclosure under section 19 as its release would reveal confidential legal advice passing between a solicitor and his client.

Pages 590-607 and 608-631 – Financial Analysis of a Proposal, with attachments – April 16, 2010

[97] The OLGC argues that this report, with its attachments, were prepared by a consulting firm with particular expertise at the request of its outside legal counsel in order to assist the law firm in providing the OLGC with legal advice and support in potential litigation. On its face, the records contain detailed information relating to the proposal being evaluated and its strengths and weaknesses, from the perspective of the OLGC. In addition, some analysis is provided of possible legal consequences which may flow from various actions available to the OLGC.

[98] Based on my review of the records and the obvious purpose for which they were prepared, as indicated on their face, I find that they qualify for exemption under both the solicitor client communication and the litigation privilege aspect of branch 2 of section 19. I find that the dominant purpose for the creation of the report and its accompanying attachments was possible future litigation, and that it also served to provide legal counsel with information that would assist in providing legal advice to the OLGC about certain courses of action. Accordingly, I find that section 19 applies to exempt all of pages 590- 631 from disclosure.

Appeal PA10-266

Pages 139-144 – Direct Energy report - November 11, 2008

[99] The OLGC argues that the report contained in pages 139-144 was prepared by staff with Direct Energy and provided to the consultants who then prepared the report addressed as pages 55-67 in Appeal PA10-265. The OLGC argues that the consultants report described above as pages 55-67 was created to assist its outside legal counsel in conducting litigation.

[100] On its face, pages 139-144 were prepared by Direct Energy staff and much of the technical information contained in it found its way into the report described above as pages 55-67 in Appeal PA10-265. Consistent with my approach to pages 55-67, I conclude that the information contained in pages 139-144 was prepared for the OLGC's legal counsel or was gathered to assist in some existing or contemplated litigation. Accordingly, for the reasons set out above in my discussion of pages 55-67, I find that section 19 applies to the information contained in pages 139-144.

C: Do the discretionary exemptions in sections 18(1)(a), (c) and (d) apply to the records?

[101] The OLGC claims the application of sections 18(1)(a), (c) and (d) to many of the records at issue in this appeal. Sections 18(1)(a), (c) and (d) 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; and
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

[102] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[103] For sections 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

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

[105] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

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

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

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

1. is a trade secret, or financial, commercial, scientific or technical information,
2. belongs to the Government of Ontario or an institution, and
3. has monetary value or potential monetary value.

Part 1: type of information

[108] Financial and commercial information have been discussed in prior orders:

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].

Part 2: belongs to

[109] 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.

[110] Examples of the latter type of information may include trade secrets, business-to-business mailing lists [Order P-636], customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others [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.]

Part 3: monetary value

[111] To have “monetary value”, the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information [Orders M-654 and PO-2226].

[112] The fact that there has been a cost to the institution to create the record does not mean that it has monetary value for the purposes of this section [Orders P-1281 and PO-2166]. In addition, the fact that the information has been kept confidential does not, on its own, establish this exemption [Order PO-2724].

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

[113] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Orders P-1190 and MO-2233].

[114] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution’s economic interests or competitive position [Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758].

Section 18(1)(d): injury to financial interests

[115] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the “ability of the Government of Ontario to manage the economy of Ontario”, section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233].

Appeal PA10-265

Page 17 – Board of Directors Minutes – March 24, 2010

[116] I note that I have found above that paragraph 4 of page 17 is exempt from disclosure under section 19. Accordingly, I need not address that part of page 17 in my consideration of section 18 to it. While the OLGc takes the position that the disclosure of the remaining information on page 17 could reasonably be expected to give rise to the harms contemplated by sections 18(1)(c) and (d), it has not provided the required detailed and convincing evidence to substantiate such a claim. As a result, I find that the remaining portions of page 17 which are not subject to the section 19 exemption are not exempt from disclosure under sections 18(1)(c) or (d).

Pages 22-29 – Energy Advantage report dated March 17, 2008

[117] I have found above that pages 24-29 of this record are exempt from disclosure under section 13(1). Pages 22 and 23 are the cover page and index of the report and do not contain any information that might qualify for exemption under section 18(1). Accordingly, I will order that pages 22 and 23 be disclosed to the appellant.

Pages 78-91 – EnerQuest Services report dated February 24, 2009

[118] In my discussion of section 13(1) above, I found that the information at pages 87 and 88 was exempt under that section. Accordingly, I will only address the application of the section 18(1) exemptions claimed for the remaining portions of this record.

[119] In my view, the information in pages 78-91 has no intrinsic monetary value and cannot, therefore, be exempt from disclosure under section 18(1)(a).

[120] In its confidential representations, the OLGc argues in favour of a finding that the information in pages 78-91 is exempt under sections 18(1)(c) and/or (d). It argues that harm to its economic interests would result if potential purchasers of the facility were to obtain access to the information in the records.

[121] In my view, while the records contain highly technical evaluations of many aspects of the WEC's energy generating capabilities, I have not been provided with sufficiently detailed evidence to demonstrate that the disclosure of this information could reasonably likely give rise to the harms described in sections 18(1)(c) or (d). In my view, as part of its due diligence, any potential purchaser would insist on obtaining this information prior to any purchase and, accordingly, any harm that may result from the report's disclosure at this time, over 2.5 years following its preparation, is speculative.

Pages 92-114 – Report on Job Progress and Operational Issues dated January 16, 2009

[122] I have found above that portions of pages 94 and 98 contain information that is exempt from disclosure under section 13(1). The OLGC has also claimed the application of section 18(1)(a), (c) and (d) to this document, a detailed technical evaluation of the work performed on the WEC project. It argues that the disclosure of this record "would reveal information about the true value of the WEC." I find that this statement alone is not sufficient to enable me to make a finding in favour of upholding the application of the exemptions claimed. I have carefully reviewed the record itself and find that on its face, there is nothing to lead to a conclusion that disclosure could reasonably be expected to result in any of the harms contemplated by sections 18(1)(a), (c) or (d).

Pages 115-135 – WEC Issues Update – January 28, 2009

[123] Similarly, I conclude that the confidential representations provided in support of the application of sections 18(1)(a), (c) and (d) to this document are insufficient in their scope and fail to draw the necessary connection between the disclosure of the information therein to the exemptions claimed. Specifically, the OLGC has not provided me with a sufficiently detailed explanation as to how the harms contemplated by the exemptions could reasonably be expected to flow from the disclosure of this record. As a result, I find that it is not exempt under sections 18(1)(a), (c) or (d).

Pages 139-162 – Ontario Power Generation paper – June 11, 2009; near duplicate of pages 566-589 – May 29, 2009

[124] I found above that certain portions of pages 142 and 146-149, along with all of pages 155 and 162 are exempt from disclosure under section 13(1). Accordingly, it is not necessary for me to consider whether they also qualify for exemption under section 18(1).

[125] Again, the OLGC's representations with respect to the application of section 18(1) to the remaining information in this document are rather sparse, stating only that it "contains a detailed analysis of the value of the WEC and the true operating costs of the WEC". It does not, however, provide a link between the disclosure of the actual

information in the document and the harm set forth in section 18(1), as is required in order for me to make a finding that it is exempt. Based on my review of the contents of the report, it is not clear to me that its disclosure could reasonably be expected to result in the harm alleged. As a result, I find that those portions of pages 139-162 that are not subject to the section 13(1) exemption are not exempt under section 18(1)(a), (c) or (d) and ought to be disclosed to the appellant.

[126] With respect to pages 566-589, I found above that the recommended actions in pages 569, 573-576, 582, 584-587 and 162 are exempt under section 13(1). For the reasons outlined above, I find that the remaining portions of pages 566-589 are not exempt under sections 18(1)(a), (c) or (d).

Pages 468-469 – Information for Board of Directors – August 27, 2009

[127] The OLGc submits that the information on pages 468-469 of this three-page document is exempt under section 18(1)(c) and (d) as it “contains information regarding a current valuation of the WEC.” In my discussion above, I found the bullet points on page 468 and the 1st paragraph under the heading “Financial Assessment of Keep versus Sell Options” exempt under section 13(1). It is not, therefore, necessary for me to consider whether this information is also exempt under section 18(1).

[128] Based on my review of the information remaining at issue, I conclude that I have not been provided with sufficiently detailed evidence to substantiate a finding that this information qualifies for exemption under section 18(1). The OLGc has not provided me with any submissions linking the disclosure of this information to the harms alleged under section 18(1). Accordingly, I will order that the remaining portions of pages 468-469 that are not subject to the section 13(1) exemption be disclosed to the appellant.

Pages 470-481 and 482-489 – Information for Board of Directors February 14, 2008 Meeting

[129] The OLGc’s submissions on the application of section 18 to this information were not disclosed to the appellant. I have carefully reviewed the record and the representations of the OLGc and find that the exemptions in sections 18(1)(a), (c) and (d) have no application. I note that the information is now nearly four years old and it addresses various options available to the OLGc with respect to the WEC facility. I find that I have not been provided with sufficiently detailed information to enable me to make a finding that these records contain information that is exempt under section 18(1). As no other exemptions have been claimed for them and no mandatory exemptions apply, I will order them to be disclosed to the appellant.

Pages 490 to 524 – Power Point presentation accompanying Pages 56-77

[130] The OLGC submits that this document “was meant to accompany” the report designated as pages 56-67. It argues that this record, if disclosed, would reveal certain information that could be useful to a potential purchaser of the WEC. Again, I note that this record dates from at least December 2008, making it nearly four years old. I find that I have not been provided with sufficiently cogent evidence to establish that the disclosure of the information which it contains could reasonably be expected to result in the harms contemplated by sections 18(1)(a), (c) or (d). As a result, I find that the exemptions do not apply to pages 490-524 and I will order that they be disclosed to the appellant.

Pages 525 to 542 – Consultant's report dated February 6, 2008

[131] I have found above that paragraph 2 of page 526 and the highlighted portion of page 536 are exempt under section 13(1). This report was prepared by a consulting firm at the request of the OLGC to evaluate three options available to it with respect to the operation of the WEC from that point in time. The report outlines the nature of the problem facing the OLGC and examines each option available to it in some detail. In my view, I find that I have not been provided with the required detailed evidence with respect to the harms which are contemplated by sections 18(1)(a), (c) and (d) in the representations of the OLGC.

Pages 543-544 – Request for Approval – September 25, 2008

[132] I have found above that the final paragraph of page 544 is exempt under section 13(1). However, I find that the evidence tendered by the OLGC in support of its arguments in favour of the application of section 18(1)(a), (c) and (d) is not sufficiently persuasive to enable me to uphold its decision. Accordingly, I will order that the remaining portions of pages 543 and 544 be disclosed to the appellant.

Pages 545-548 – Update to the Board of Directors – February 14, 2008

[133] Again, in my discussion of section 13(1) above, I found that portion of page 548 entitled “Recommendation” to be exempt. I also found that the portion entitled “Litigation Risk” at pages 547 and 548 is exempt under section 19. Based on my review of the remaining information in this document, I conclude that it does not qualify for exemption under section 18(1), based on the submissions made by the OLGC in support of such a finding.

Appeal PA10-266

[134] The information in Appeal PA10-266 that the OLGC claims is subject to the section 18(1) exemption consists mainly of a number of tables and charts that contain

technical data regarding several issues around the generation of electricity at the WEC facility and its use of natural gas. The OLGC has provided me with extensive representations on this issue and has submitted an affidavit sworn by its former Manager of Development and Resort Casinos, who was intimately involved in the administration, communication and coordination of this project.

[135] In his affidavit, the former manager explains that the reports under consideration in this appeal were prepared by Direct Energy as part of a consulting retainer agreement between the OLGC and Direct Energy which was in place between October 2007 and November 2008. Copies of this retainer agreement have been made available to the appellant. Part of the responsibilities assumed by Direct Energy early in 2008, as evidenced by an amending agreement it entered into with OLGC in May 2008, was to provide support to the OLGC in creating a valuation of the WEC. In performing this work, Direct Energy provided the OLGC with a number of records, described as follows:

- Pages 65-73 – Source of Supply – January 23, 2008;
- Pages 74-76 – Export Fuel Cost – January 24, 2008;
- Pages 77-84 – Windsor CESOP – January 29, 2008;
- Pages 88-90 – Estimate of Unassigned Thermal – February 7, 2008;
- Pages 106-115 – OLG Energy Centre Operations Pro Forma – March 7, 2008; and
- Pages 136-138 – OLG Ownership and Operational Plan Framework – April 24, 2008, which I have already determined to be exempt from disclosure under sections 13(1) and/or 19.

[136] Based on my review of each of these records, it is clear that they contain information which was designed to better inform the OLGC about the actual value of the WEC, particularly as it relates to its forecasted costs and revenues. The OLGC goes on to argue that this information remains current and continues to have value should the WEC be put up for sale. It submits that the disclosure of this information would prejudice its ability to maximize its return upon such a sale.

[137] I find that all of the documents listed above qualify for exemption under section 18(1)(c) on the basis that their disclosure could reasonably be expected to significantly prejudice the ability of the OLGC to maximize the return on its investment in the WEC project should the facility be put up for sale. In my view, the disclosure of the information in these records would impair the OLGC's ability to obtain the best deal possible upon a sale of the WEC, and could reasonably be expected to harm its economic interests. Further, I conclude that the disclosure of this information could reasonably be expected to undermine the OLGC's ability to negotiate on an even footing with a potential purchaser.

[138] Accordingly, I find that all of the records to which the OLGC has applied section 18(1)(c) qualify for exemption, subject to my discussion below regarding the exercise of discretion.

D. Did the OLGc properly exercise its discretion to deny access to the records under section 13(1), 18(1) and 19?

[139] The section 13(1), 18(1) and 19 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[140] In addition, this office may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations;
- it fails to take into account relevant considerations.

[141] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[142] In its representations, the OLGc explains its reasoning behind the decisions to claim each of the exemptions in both appeals. It argues that there exists a significant public interest in not making these records publicly available in order to ensure that:

- it is desirable that there be a zone of privacy around the advice or recommendations provided to it by its consultants, as contemplated by section 13(1);
- in order to obtain the best possible return in any future sale or operational decision around the WEC, it was necessary to deny access to the information claimed to be exempt under section 18(1); and
- in order to ensure that legal counsel are able to obtain the information they need to pursue litigation and the provision of legal advice, it was necessary to claim the application of section 19 to many of the records.

[143] It argues that these interests outweigh the appellant's right of access to this information.

[144] Based on the representations of the OLGc and my own review of the contents of the records, I find that the OLGc has properly exercised its discretion. I conclude that it has, as it argues, acted in good faith, considered all relevant factors and made a decision based on appropriate considerations. I uphold the OLGc's exercise of discretion, accordingly.

ORDER:

1. I order the OLGc to disclose the following records, or parts of records, with respect to Appeal PA10-265 by providing him with copies by **December 5, 2011**, but not before **November 28, 2011**:

Pages 2, 6 (except the first paragraph), 11 (except the third paragraph), 12 (except the second paragraph), 17 (except the fourth paragraph), 18, 19, 20, 22-23, 78-80, 81-88 (except the recommendations section on pages 87-88), 89-91, 92-93, 94 (except the highlighted portion), 95-97, 98 (except the highlighted portion), 99-114, 115-135, 136-138, 139-140, 141-142 (except the recommended action plan on page 142), 143-145, 146-149 (except the recommended actions), 150-154, 156, 157-160, 161, 468 (except the bullet points), 469 (except the first paragraph of Item 2), 470-524, 525, 526 (except the second paragraph), 527-530, 531-536 (except the highlighted portion of page 536), 537, 538, 539, 540-542, 543, 544 (highlighted portion only), 545-546, 547-548 (except the Litigation Risk section on page 547 and the Recommendation section on page 548), 566-567, 568-569 (except the recommended action plan on page 569), 570-572, 573-576 (except the recommended actions), 577-581, 583, 584-587 and 588.

2. I order the OLGc to disclose the following records, or parts of records, with respect to Appeal PA10-266 by providing him with copies by **December 5, 2011**, but not before **November 28, 2011**:

Pages 17-19 and 22-23 (except the Considerations, Recommendations and Actions sections), 25-29, 36, 38-44, 47-48, 51-52, 55-56, 59-60, 63, 96, 97 (except Item 1), 99, 117 and 122.

3. I uphold the OLGc's decision to deny access to the following records, or parts of records, with respect to Appeal PA10-265:

Paragraph 1 of page 6, paragraph 3 of page 11, paragraph 2 of page 12, 13, 15, paragraph 4 of page 17, 24-29, 30-55, 56-77, the recommendations on pages 87-88, the highlighted portions of pages 94 and 98, the recommended actions on pages 142 and 146-149, 155, 162, 163-346, 347-434, 438-463, the bullet points in page 468, the first paragraph of Item 2 on page 469, paragraph 2 of page 526,

the highlighted portion of page 536 and 544, 545-546, the Litigation Risk portion of page 547, the Recommendations section of page 548, 549-565, the Recommended Action Plan on page 569, the recommended actions on pages 573-576, 582, 589 and 590-631.

4. I uphold the OLG's decision to deny access to the following records, or parts of records, with respect to Appeal PA10-266:

the Considerations, Recommendations and Action portions of Pages 17-19 and 22-23, 32-33, 65-73, 74-76, 77-84, 88-90, Item 1 of page 97, 106-115, 116, 121 and 136-144.

5. In order to verify compliance with this order, I reserve the right to require the OLG to provide me with copies of the records that are disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

_____ October 26, 2011