

Chris G. Paliare
Ian J. Roland
Ken Rosenberg
Linda R. Rothstein
Richard P. Stephenson
Nick Coleman
Donald K. Eady
Gordon D. Capern
Lily I. Harmer
Andrew Lokan
John Monger
Odette Soriano
Andrew C. Lewis
Megan E. Shortreed
Massimo Starnino
Karen Jones
Robert A. Centa
Nini Jones
Jeffrey Larry
Kristian Borg-Olivier
Emily Lawrence
Tina H. Lie
Jean-Claude Killey
Jodi Martin
Michael Fenrick
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Jessica Latimer
Lindsay Scott
Alysha Shore
Denise Cooney
Paul J. Davis
Danielle Glatt
Lauren Pearce
Elizabeth Rathbone
S. Jessica Roher
Daniel Rosenbluth
Glynnis Hawe
Hailey Bruckner
Charlotté Calon
Kartiga Thavaraj
Catherine Fan
Shawna LeClair
Douglas Montgomery
Chloe Hendrie
Jesse Wright

COUNSEL
Stephen Goudge, Q.C.

HONORARY COUNSEL
Ian G. Scott, Q.C., O.C.
(1934 -2006)

Richard P. Stephenson

T 416.646.4325 Asst 416.646.7419
F 416.646.4301
E richard.stephenson@paliareroland.com
www.paliareroland.com

File 98198

May 20, 2021

VIA EMAIL: Registrar@oeb.ca

Ms. Christine E. Long
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor,
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Long,

Re: EB-2020-0290

The following is the PWU's submission, filed pursuant to Procedural Order #3, objecting to aspects of OPG's confidentiality claims made in its correspondence to the Board on May 11, 2021.

In this submission, OPG makes broad claims of confidentiality over a large number of IR responses on the basis that it is disclosure of labour sensitive information in relation to collective bargaining. The PWU opposes these claims on the basis of (a) the claims are overbroad and do not reflect any genuine "sensitivity"; and (b) in any event the underlying premise of the claim is flawed and should be rejected.

Any analysis of confidentiality claims must begin from the understanding that the OEB is a part of the system of public justice in Canada. In discharging its public functions, the Board owes the public a high obligation to do so in an open and transparent manner. Confidentiality declarations are an exception to this strict rule, and can never be lightly made. A clear showing of a serious risk of material harm to other important public interests is required to overcome the presumption of public disclosure. The absence of specific objection by a hearing participant to confidentiality claims does not excuse the Board from ensuring that the public interest in transparency and public justice is maintained.

The Claims are Overbroad

The PWU acknowledges that documents which contain OPG's future collective bargaining strategy, or assumptions regarding future collective bargaining outcomes are appropriately confidential, subject only to information which is mathematically derivable from information which is otherwise on the public record.

However, the documents over which OPG is seeking confidentiality designations is much broader than this legitimate category. Specifically, upon review it is clear that a number of the IR responses, properly construed, fall into either or both of the following categories, that is: (a) the forecast future financial impact of past decisions and actions; and/or (b) forecast future operational actions or circumstances, and the financial impacts arising therefrom.

It is submitted that information of this nature is properly, and routinely put on the public record in these proceedings.¹ Information of this nature arises across many aspects of OPG's application, not just those which have compensation related implications. There is no basis for any different approach or treatment in relation where the financial impact is compensation related.

With respect to the first category, by definition, the focus of these questions is about the consequences of past actions. That does not engage issues of current or future labour relations sensitivity. With respect to the second category, the operational actions or circumstances exist independently of future collective bargaining. They may suggest the need for a collective bargaining response, but do not reveal future "strategy". Forecast future inflation rates and/or labour shortages or surpluses may have an impact on future collective bargaining, but are in no way confidential information.

Attached as Appendix A is a chart which places the IR responses over which OPG has asserted collective bargaining sensitivity as a basis for confidentiality into three categories. As can be seen, upon a closer inspection, many of the IR responses actually fall into categories (a) and (b), above. In the PWU's submission, there is no basis for these IR responses to be confidential. The PWU does not contest the confidentiality of IR responses in the column entitled "Forecast of Future Collective Bargaining Actions".

Most Claims of "Labour Relations Sensitivity" are Not Valid

Even if the Board is of the view that the IR responses which have been categorized as (a) or (b), above do have an element of labour relations sensitivity, the PWU submits that when OPG's position is properly understood within the applicable legal context, the claim for confidential treatment cannot be sustained.

The PWU acknowledges that the Board has historically recognized that "labour relations sensitivity" is a valid basis for an assertion of confidentiality. The PWU submits that the Board should recognize the proper limits of that approach.

¹ For example, information related to forecast future employee attrition, including retirement eligibility and uptake, has routinely been put on the public record, for OPG, and other employers. This information was filed publicly in OPG's last Prescribed Generation Rates case (EB-2016-0152, Exhibit L-6.6 AMPCO 126).

As noted above, the PWU acknowledges that documents which contain OPG's future collective bargaining strategy, or assumptions regarding future collective bargaining outcomes, are appropriately confidential, subject only to information which is mathematically derivable from information which is otherwise on the public record. However, the PWU submits that information that does not meet this narrow exception is not properly considered to be confidential.

The underlying premise of this type of confidentiality claim is that disclosure would cause prejudice to OPG because public disclosure would defeat OPG's ability to maintain the confidentiality over this information, and to use it to its advantage in future collective bargaining with its unions. The logic is that, if the unions were permitted to share the employers' understanding of the true state of affairs, they would be better positioned to extract a better deal.

Whether that premise is logical or not is not self-evident, however, it is ultimately not relevant to the Board's task. The Board's task is to determine whether there is a legitimate interest of sufficient importance to over-ride the presumption of public transparency. If the alleged prejudice is the potential use of the "confidential" information in collective bargaining, the question for the Board is whether the employer has a legitimate entitlement to refuse to disclose such information to its union in collective bargaining. If the answer to this question is "no", the employer has no interest worthy of protection, and no legally cognizable prejudice.

The difficulty with OPG's position is that it has no legal right (in the context of collective bargaining) to maintain the confidentiality of the information from its union counter-parties. To the contrary, any attempt to do so (in the face of a request from the union) would be bad faith bargaining, contrary to the provisions of the *Ontario Labour Relations Act*. This is not a controversial proposition, and has been recognized for decades:

43. Forced disclosure is not a self-evident principle in the context of bargaining. In contractual negotiations at common law, one quickly becomes familiar with the notion of caveat emptor. In fact, **good negotiators are analogized to good "card players" and, in the playing of cards, it is essential that players not be aware of the cards dealt to other participants. But collective bargaining is a matter of statutory policy and is aimed at achieving industrial peace. Therefore, it is not a game and involves ongoing economic relationships vital to the well-being of our economy. It is a process in which labour, management and the public have a vital interest. This is why the *Labour Relations Act* requires the parties to "bargain in good faith and make every reasonable effort to make a collective agreement". Disclosure arises out of this phrase in two quite different ways and based upon two quite different purposes of the bargaining duty. In *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar.**

49 the Board pointed out that the duty reinforced an employer's obligation to recognize a bargaining agent (the "good faith" component) but stated that beyond this important purpose it was also "intended to foster rational, informed discussion..." (the "reasonable effort" aspect). While *DeVilbiss* dealt with both aspects of the duty in considering the refusal of the employer to provide the union with existing wage rate and classification data about the bargaining unit in a first agree-ment bargaining context, the Board emphasized the rational and informed discussion perspective in ordering disclosure.

...

A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities. Disclosure encourages the parties to focus on the real positions of both the employees and the employer. And hopefully with greater sharing of information will come greater understanding and less industrial conflict.(emphasis added)²

The simple point is this – if OPG, as employer, has the legal obligation to provide this type of information to its unions, how can it claim to be prejudiced if it is required to put it on the public record in this proceeding?

From the Board's perspective, the solution to this issue does not lie in referring the PWU and the SUP on to the OLRB in the event the issue arises in future bargaining. Such an approach would abdicate the Board's responsibility to the public interest. The onus is on OPG to demonstrate the prejudice to its legitimate interests that disclosure would cause. The legal scheme which governs collective bargaining obligations is inconsistent with the existence of such prejudice.

The Board's task in this regard is essentially identical to when it is faced with refusal to provide otherwise relevant information based on a privilege claim. A valid assertion of privilege is a well-recognized socially protected interest, which overrides disclosure obligations. However, that treatment is dependent upon the privilege claim being a valid one. And it falls to the Board to determine that validity.

² *International Woodworkers of America Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, 1983 CanLII 970 (ON LRB). See also: *Care Partners v Service Employees' International Union*, 2015 CanLII 73888 (ON LRB)

For both of these reasons, the PWU submits that the Board should not grant confidential status to the IR responses in categories (a) and (b), above.

Yours very truly,

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

A handwritten signature in black ink, appearing to read 'R. Stephenson', is written over the printed name and initials.

Richard P. Stephenson
RPS:pb

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APPENDIX “A”

Financial Impacts of Past Actions		Forecast of Future Changes (attrition, closures, movements)		Forecast of Future Collective Bargaining Actions	
IR	Description	IR	Description	IR	Description
F4-03-PWU-018	Savings from existing changes to employee contribution, earnings basis for pension, and retirement eligibility	D3-01-Society-005	Severance for employees unwilling to move to Clarington Campus	F4-03-Energy Probe-063	Steps OPG is taking to reach WTW P50
F4-03-PWU-024	2022 Revenue requirement impact has contribution ration not changed since 2014	D3-01-Society-006	Niagara to Clarington (# employees, relocation costs, savings from reduced travel)	F4-03-Energy Probe-064	Projected contribution ratio in each year (2022-2026)
F4-03-PWU-026	Savings from changes to health benefits coverage (2018-2021 & 2022-2026 periods)	D3-01-Society-007	Kipling to Clarington (# employees, building sale plans, data to vacate Kipling)	F4-03-AMPCO-175	Headcount and sick days per employee (each year 2021-2026)
F4-03-SEC-145	Cost impact from changes in collective agreements since 2016	D3-01-Society-008	700 University to Clarington (# employees, relocation costs, date to vacate 700 University)	F4-03-SEC-149	Compensation at WTW P50 through 2022-2026
F4-03-SEC-152	Savings from pension changes (savings from Terms, changes to pensions, health benefits)	D3-01-Society-012	Clarington in the media (dates of termination of current leases, relocation estimates)	F4-03-Staff-300	Assumptions of changes to actuarial valuations from future collective bargaining
F4-03-Staff-282	Cost of Share Grant program and cost savings through 2022-2026 term	F4-03-AMPCO-174	Forecast retirements and attrition 2021-2026 (2016-2020 not redacted)	F4-03-Staff-304	Picking Shutdown impact on pension and OPEB costs
		F3-02-Energy Probe-059	Clarington cost and savings	F4-03-Staff-306	Salary escalation and headcount assumptions related to pensions & OPEBs
		F4-03-PWU-029	Employees eligible to retire, and would have been eligible under Rule 82	F4-03-Staff-307	Pension assumptions (difference between actuarial and accounting assumptions)
		F4-03-Staff-276	Expected retirements, retirements as share of FTE reduction, cost savings of Terms	F4-03-Staff-309	Salary escalation assumption for pensions
		F4-03-PWU-031	Number and % of employees eligible for Hydro One share grants	F4-03-Staff-311	Difference between FTE and headcounts (note on Pickering redacted)