

The Cabinet Office

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April 26, 2013

Mr. Thomas Adams
12 Sidford Court
Toronto, Ontario
M6S 2J4

Dear Mr. Adams:

**Subject: FOI Request 12/53
Appeal 13-84**

This is further to your request under the *Freedom of Information and Protection of Privacy Act* for records sent or received in the period January 1, 2012 through October 1, 2012 by the Premier, the Premier's Office, consultants to the Premier's Office, or advisors to the Premier's Office relating to the construction, contracting, relocation, or any other arrangements associated with the gas-fired power plants once contracted for development in Oakville by the firm TransCanada Energy or related entities and also Mississauga by the firm Eastern Power or related entities. This is also further to my decision letter of February 11, 2013 and discussions with the IPC in the mediation of appeal 13-84.

In a further search for records, we identified records that were prepared by the Government House Leader's Office relating to the conduct of matters within the Legislature. While these records are normally considered outside of the scope of the *Freedom of Information and Protection of Privacy Act*, in the interest of transparency, the government made a decision to voluntarily release these records.

The records are enclosed.

Sincerely,

Jamie Forrest
Coordinator
Freedom of Information and Issues

Encl.

cc. Leslie McIntyre, Mediator, IPC

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OVERVIEW OF CONTENTIOUS RESPONSIVE RECORDS IN POSSESSION OF ENERGY

VAPOUR-LOCK

JULY 7, 2012

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- September 26, 2011: email between Energy officials showing that MO (Andrew Mitchell) was asking questions during campaign and prior to announcement re who was party to original contract and what was estimated contract value.
 - October 6, 2011: email between Energy officials mocking the Premier's statement that cancellation had nothing to do with getting votes.
 - October 7, 2011: email between Energy counsel – "References to commercial contract payments, damages and other funds will usually be cost-recovered from the rate base. Hence, there will be rate-payer impacts".
 - October 21, 2011: email between Energy officials and OPA re T Star/John Spears media inquiry – shows PO changed and signed-off on msg'ing to conceal that OPA had advised Greenfield Plant was 'valuable' in light of SWGTA cancellation and that Greenfield cancellation would force acceleration of transmission upgrades.
 - Nov. 15, 2011: emails showing that OPA was set to issue press release cancelling Greenfield contract on basis that "Greenfield South has no intent to consider relocation".
 - November 16, 2011: email between Energy counsel attaching draft versions of Greenfield South Power Projects Act (which would have imposed a deal on Greenfield).
 - November 25, 2011: email between Energy officials re OPA payments to Greenfield re Keele Valley litigation; bureaucrat saying "I honestly don't know if we now know all the letters and side letters that are out there pertaining to this matter".
 - December 16, 2011: email to D Lindsay re extension of cessation agreement – indicates total of \$60M paid to Greenfield to stop work.
 - December 23, 2011: BN by MAG officials indicating that OPA has already paid Greenfield \$35m in sunk costs and will pay \$13.14m to Greenfield's supplier.

-NOTE: should be out of scope – not "correspondence"

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OPTIONS RE VAPOUR AND VAPOUR-LOCK

JULY 5, 2012

Assumption: In advance of the Estimates Committees hearings on July 11th, the government will be in a position to publicly announce the settlement of EIG Management's lawsuit in the State of New York regarding the financing of the Mississauga facility, but will not be in a position to publicly announce relocation of the Mississauga facility or any matters pertaining to the Oakville facility.

Option 1: *Rip the Band-Aid Off – V1*

1. Announce settlement of EIG lawsuit sometime in advance of Committee hearing (i.e. Monday a.m.).
2. Start negotiations with opposition parties at staff level. Offer to release all responsive records relating to Mississauga facility in advance of Wednesday hearing in return for opposition agreement to withdraw the motion currently on the floor.
3. Release Mississauga documents in advance of Wednesday hearing.
4. Minister Bentley completes final 5 hours of Estimates hearings on Wednesday.

THE PUBLIC VIEW: July 9th – announcement of EIG settlement.

July 11th – release of Mississauga documents and Bentley faces questions at Committee.

Late July (approx.) – announcement of relocation.

NOTES: Principal risk with this option is that we will be releasing Mississauga documents prior to resolution of relocation discussions. It eliminates our principled position that we won't release documents while sensitive commercial negotiations are going. Also, will release of the documents prejudice our discussions with Greenfield?

In addition, there will be nothing to stop the opposition from resuming their attempts to force the release of the Oakville documents at a later committee date.

Option 2: *Rip the Band-Aid Off – V2*

1. Announce settlement of EIG lawsuit sometime in advance of Committee hearing (i.e. Monday a.m.).
2. Start negotiations with opposition parties at staff level. Offer to pass the motion currently before the Committee if the opposition agrees to remove any language referring to contempt of the Legislature.
3. Minister Bentley completes final 5 hours of Estimates hearings on Wednesday.
4. Move swiftly toward resolution and public announcement of Mississauga relocation, shortly followed by release of all responsive records pertaining to Mississauga facility.

THE PUBLIC VIEW: July 9th – announcement of EIG settlement.

July 11th – Bentley faces questions at Committee

Late July (approx.) – release of Mississauga documents and announcement of relocation.

NOTES: This option addresses the risk from Option 1 regarding the release of the documents prior to resolution of Mississauga relocation, while ensuring the band-aid is ripped off in a reasonably condensed timeframe.

The downside to this option is that it will result in a motion passing that will trigger a request to the Speaker of the House to compel Minister Bentley and the OPA to release the records – a scenario the Minister is concerned about. My strong view is that the risks will be substantially mitigated if we remove any reference to “contempt” in the motion and also release the Mississauga documents prior to the House returning.

Option 3: *Keep the Band-Aid On*

1. Announce settlement of EIG lawsuit sometime in advance of Committee hearing.
2. Allow motion before the Committee to pass at outset of Committee hearing.
3. Minister Bentley completes final 5 hours of Estimates hearings on Wednesday.
4. No resolution of either Mississauga relocation or Oakville matter for an extended period of time.
5. Motion to request the Speaker to compel production of documents will be dealt with in a manner not dissimilar to the opposition’s attempts to compel production of documents relating to the handling of Afghan detainees during the Harper Minority.

THE PUBLIC VIEW: July 9th – announcement of EIG settlement.

July 11th – Bentley faces questions at Committee

Early September (approx.) – Bentley ordered to produce records and potentially followed by contempt proceedings (note that process could take weeks to months).

NOTES: The principal risk with this option is threefold. First, it will be of great concern to the Minister of Energy that he will be portrayed as actively blocking the release of this information and potentially being found in contempt of the Legislature. Second, we will be kicking the issue down the field with no certainty as to when/how the documents will be produced. Finally, it is my understanding that the litigation risk increases substantially if these matters go unresolved into the Fall.

OTHER RISKS: Whatever option is chosen, the opposition will continue to press – through a variety of potential forums – for the production of Oakville documents.

On the basis of the information contained in the records, it is possible that the opposition will attempt to start a committee investigation related to the circumstances surrounding the cancellation of the Mississauga facility.

Appendix A – Response to Original Motion from Minister Bentley

Dear Mr. Prue:

I am writing in response to the May 16, 2012 Estimates Committee motion brought forward by MPP Robert Leone under Standing Order 110B directing the Minister of Energy, the Ministry of Energy and the Ontario Power Authority (OPA) to produce all correspondence *in any form, electronic or otherwise, that occurred between September 1, 2010 and December 31, 2011 related to the cancellation of the Oakville power plant, as well as all correspondence in any form, electronic or otherwise, that occurred between August 1, 2011 and December 31, 2011 related to the cancellation of the Mississauga power plant.*

I respect the authority of the Committee and its interest in receiving this information. The Committee has an important role to play with respect to review of ministries' operations and is entitled to ask questions and seek answers.

As previously discussed with the Committee over the last number of sessions, there are confidential, privileged and commercially sensitive issues involved with both the Oakville and Mississauga power plants. There is also ongoing litigation with respect to the Mississauga power plant.

In response to the Committee's motion, the Ministry of Energy has undertaken a search for the requested correspondence. It is clear that these files are indeed confidential and in many cases the documentation is subject to solicitor-client privilege, litigation privilege and/or is highly commercially sensitive. Disclosure of these documents is anticipated to have a negative impact on resolution of these files in light of ongoing, confidential discussions, as well as litigation, in these files. The realities of the sensitive discussions that are occurring, as well as ongoing legal issues, cannot be forgotten as the Committee pursues its objectives.

As a threshold issue in response to the motion, you had to determine whether MPP Leone's motion was in order. In your May 16, 2012 ruling, you noted the Committee's right to ask for documents. You also noted that I have the right "to either decline giving that documentation or giving voice to that documentation during his answering of the questions." You further stated that I "may choose to answer the question in such a way as not to prejudice the province in any way." Moreover, you indicated that you expected me to approach my responses in this way.

In light of the confidential, privileged and highly commercially sensitive nature of these issues, it would not be appropriate for my office or the Ministry to disclose information that would prejudice these ongoing negotiations and litigation. I also note that these very commercially sensitive negotiations between the OPA, the Government and TransCanada Corporation ("TransCanada") and the OPA and Greenfield South Holdco Corporation and Greenfield South Power Corporation (collectively "Greenfield") have been carried out on a without prejudice basis.

Discussions with TransCanada have been ongoing since that time.

The latest 18-Month Outlook published in February 2012 indicated that the Independent Electricity System Operator (IESO) is able to manage the system to meet current needs in the southwest GTA. Study efforts are underway with the OPA, the IESO and Hydro One to develop a solution to address transmission and supply adequacy in the southwest GTA.

Again, this chronology of events with respect to the Oakville gas plant is intended to highlight for you the commercial context around the ongoing, confidential discussions. Disclosing anything more at this time would significantly prejudice the Province's interests.

I hope this information is helpful and is sufficient for the purposes of the Committee.

Sincerely,

Chris Bentley
Minister

Appendix B – Current Motion

Mr. Rob Leone: Thank you, Mr. Chair.

I move that the Chair write a letter to the Speaker as well as report to the Legislature and to draw its attention to a possible matter of contempt and a breach of the ancient parliamentary right of privilege that each elected member enjoys, and that the report include the following information:

That the Standing Committee on Estimates asked questions of the Minister of Energy on May 9, 2012, about the Oakville and Mississauga power plants. The minister refused to provide specific answers, citing that the answers would be “commercially sensitive.” This is after the minister attempted to invoke the sub judice principle, which the Chair ruled was out of order for compelling and correct reasons, on the advice of the clerk.

The committee then passed a motion on May 16, 2012, which stated:

“That the Standing Committee on Estimates, herein ‘the committee,’ understanding order 110(b), stating that ‘each committee shall have power to send for persons, papers and things,’ directs the Minister of Energy as well as the Ministry of Energy and Ontario Power Authority to produce, within a fortnight, all correspondence, in any form, electronic or otherwise, that occurred between September 1, 2010, and December 31, 2011, related to the cancellation of the Oakville power plant as well as all correspondence, in any form, electronic or otherwise, that occurred between August 1, 2011, and December 31, 2011, related to the cancellation of the Mississauga power plant.”

Despite that order as a directive of the committee, and despite giving ample time to comply, the Minister of Energy, the Honourable Christopher Bentley, MPP for London West, on behalf of the Ministry of Energy, responded in writing to the committee on May 30, 2012, which included the following excerpt:

“In light of the confidential, privileged and highly commercially sensitive nature of these issues, it would not be appropriate for my office or the ministry to disclose information that would prejudice these ongoing negotiations and litigation.”

Accordingly, the committee wishes to report to the Speaker and to the House as a whole that the Minister of Energy has refused to comply with an order of the Standing Committee on Estimates under the standing orders of the Legislative Assembly of Ontario. Furthermore, that the committee recommends to the House that the Minister of Energy be compelled to provide the Standing Committee on Estimates, without delay, the documents and information it ordered, pursuant to standing order 110(b), and, if the minister refuses, that he be held in contempt of Parliament for breach of privilege.

Thus, both the Government and the OPA have legal obligations to not disclose the content of those negotiations at this time.

However, I am able to provide a chronology on both plants and outline why the decisions were made to relocate them.

Mississauga Gas Plant Chronology

On April 12, 2005, the OPA and Greenfield executed a Clean Energy Supply Contract to develop and operate Greenfield South Generation Station, a 280 megawatt (MW) combined cycle natural gas plant in the City of Mississauga. This contract followed a competitive procurement that was run by the Ministry of Energy. This contract was amended and restated as of March 16, 2009.

Over the ensuing six years requisite environmental and generation approvals were obtained, but local public opposition to the gas plant grew. Mississauga Council and local residents groups expressed concerns about the proposed plant.

On December 10, 2008 the Ministry of the Environment issued a Certificate of Approval for Air and Noise (Environmental Compliance Approval) for Greenfield South Power Project.

On June 3, 2009 an Electricity Generation Licence for Greenfield was issued by the Ontario Energy Board, which authorized Greenfield to generate, purchase and sell electricity.

In May 2011 Greenfield entered into a financing agreement with EIG Management Company (EIG) to finance the gas plant. Greenfield subsequently obtained a building permit from the City of Mississauga that allowed for construction of the plant.

On May 30, 2011 the City of Mississauga issued a building permit allowing for the construction of the Mississauga gas plant.

On June 15, 2011 the Minister of the Environment requested Greenfield to provide an updated assessment of its anticipated emissions which conforms to the requirements of O. Reg. 419/05 made under the *Environmental Protection Act*

On June 22, 2011 the City of Mississauga passed a resolution requesting from the Minister of Environment that a full Environmental Assessment be conducted on the Greenfield South project and requesting that the Minister of Energy conduct a full review to determine the necessity of manufacturing 280 MW of electricity in a densely populated urban zone.

On June 24, 2011 Mississauga Mayor Hazel McCallion wrote a letter to then Minister of Energy Brad Duguid regarding the June 22 resolution requesting a full Environmental Assessment and outlined concerns over the location of the plant and health implications for residents of Mississauga.

On September 24, 2011 a Liberal Party news release was issued which committed that under a future Liberal government, the plant would not go forward at the current location. It also expressed a commitment to work with the developer to find a new location for the plant, should the Liberals form a government. Around this time, the Progressive Conservatives and the New Democratic Party also committed that they would not allow the plant to proceed in the community.

On October 12, 2011 the City of Mississauga passed a further resolution asking the government to take immediate action to stop construction and return the site to pre-construction condition.

On November 21, 2011 the OPA issued a media statement indicating there would be no gas plant located on the Mississauga Site and that Greenfield and OPA continue to discuss relocation options for the plant. Those discussions remain ongoing. They are confidential, commercially sensitive, and privileged as between the parties.

On November 21, 2011 the Ministry of Energy also issued a media statement.

On March 27, 2012 EIG for itself and as agent for the Note holders under the Note Purchase Agreement (NPA) simultaneously brought a claim against Greenfield in New York State for breach and default of the NPA.

Also on March 27, 2012 EIG served a Statement of Claim naming Ontario and the OPA as defendants. EIG's claim asserts that cessation of construction by Greenfield caused Greenfield to breach the NPA and that Ontario and the OPA induced the breach of that contract, interfered with their economic relations and engaged in a conspiracy to the plaintiff's detriment. Even as the parties pursue their legal rights through court proceedings, discussions between the parties are ongoing. This chronology is intended to highlight for the Committee the sensitivity of the commercial interests that are at stake and the important context surrounding the Committee's request.

Oakville Gas Plant Chronology

In 2008, then Minister of Energy George Smitherman directed the OPA to assume responsibility for the procurement of approximately 850 MW of combined cycle natural gas fired electricity generation for deployment in the southwest GTA, to be concluded by the end of June 2009.

On September 30, 2009 the OPA announced it would sign a contract with TransCanada to design, build and operate a 900 MW electricity generating station in Oakville.

Demand for electricity in southwest GTA did not increase as expected. Load in the southwest GTA remains below pre-recession levels.

On October 7, 2010 then Minister of Energy Brad Duguid announced that the Province would not proceed with the construction of the Oakville plant.