



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2478**

**Appeal PA-040340-1**

**Ministry of Energy**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Ministry of Energy (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a named company's proposal to develop a wind power generating facility made in response to a Request for Proposal (RFP) issued by the Ministry.

The Ministry identified the responsive record and notified the named company (the affected party) pursuant to section 28 of the *Act*. After receiving a response, the Ministry issued a decision denying access to the responsive record on the basis of the exemptions found in sections 17(1) (third party information), 18(1) (economic and other interests) and 21(1) (invasion of privacy) of the *Act*.

The requester, now the appellant, appealed the decision.

During mediation, the affected party and the Ministry reconsidered their positions, and agreed to release portions of the record to the appellant. However, the Ministry continued to withhold some portions under sections 17(1)(a) and (c), 18(1)(c) and (d), and 21(1). Also during mediation, the appellant indicated that he was not interested in the employment history or personal information of the affected party's employees, and this information is, accordingly, no longer at issue in this appeal.

Mediation did not resolve the remaining issues, and the file was moved to the adjudication stage of the process. This office initially sent a Notice of Inquiry to the Ministry and the affected party, and received representations from both parties. This office then sent the Notice of Inquiry to the appellant, along with a copy of the non-confidential portions of the representations of the Ministry and affected party.

The appellant provided representations in which he identified that he was not pursuing access to certain financial information, including the financial questionnaire (Appendix D), certain cost information (page 52), the response to the financial questionnaire (pages 56-59) and Appendix 12. Those portions of the record are therefore no longer at issue. In addition, the appellant identified that he believed that the "public interest override" in section 23 of the *Act* applied in the circumstances. The appellant's representations were shared in full with the Ministry and the affected party, who were invited to respond to the appellant's submissions. The Ministry and the affected party provided reply representations.

Finally, the appellant was provided with an opportunity to respond to the reply representations of the Ministry and affected party. The appellant was given a complete copy of the Ministry's reply representations and the non-confidential portions of the affected party's reply representations, and provided representations by way of sur-reply.

## **RECORDS:**

The responsive record is the proposal prepared by the affected party. The following table identifies the pages of the record and the information remaining at issue, and the basis upon which the information is denied.

<b>Page #</b>	<b>Description of contents and information denied</b>	<b>Exemption</b>
5 – 7	Table of Contents – denied in full	17(1)(a),(c) 18(1)(c),(d)
8	Introduction – access to 2 <sup>nd</sup> paragraph and all of the bullet points denied	17(1)(a),(c) 18(1)(c),(d)
11 – 12	Development and Construction – middle of page 11 and all of page 12 denied	17(1)(a),(c) 18(1)(c),(d)
20 –25	Site Descriptions and maps – denied in full (page 22 is blank)	17(1)(a),(c) 18(1)(c),(d)
27	Land Lease Option Agreements – denied in full	17(1)(a),(c) 18(1)(c),(d)
30 – 35	Expected Energy Output and Wind Resource Studies – denied in full	17(1)(a),(c) 18(1)(c),(d)
36 – 38	Number of turbines (and supporting data) – denied in full	17(1)(a),(c) 18(1)(c),(d)
39 – 40 plus top of 41	Evidence of Progress Toward All Approvals and Permits – denied in part	17(1)(a),(c) 18(1)(c),(d)
42, 47 – 48	Access denied to the identity of an individual on page 42, and portions of the Environmental Assessment documentation on pages 47 - 48	17(1)(a),(c) 18(1)(c),(d) 21(1)
49 – 51	Access denied to the subcontractor information in the section Connection Assessment Overview	17(1)(a),(c) 18(1)(c),(d)
53	Schedule of Milestones – denied in full	17(1)(a),(c) 18(1)(c),(d)
61 – 70	Appendix C: Technical Questionnaire – denied in full	17(1)(a),(c) 18(1)(c),(d)
Supporting Appendix 1	Sample lease – denied in full	17(1)(a),(c) 18(1)(c),(d)
Supporting Appendix 2	Table of output – denied in full	17(1)(a),(c) 18(1)(c),(d)
Supporting Appendix 3	Subcontractor information – denied in full	17(1)(a),(c) 18(1)(c),(d)
Supporting Appendix 4	Meteorological Data – denied in full	17(1)(a),(c) 18(1)(c),(d)
Supporting Appendix 6	Scope of Project and Scope of Assessment – denied in full	17(1)(a),(c) 18(1)(c),(d)
Supporting Appendix 7	Environmental Assessment Report – denied in full	17(1)(a),(c) 18(1)(c),(d)
Supporting Appendix 8	Draft paper re Transport Canada – denied in full	17(1)(a),(c) 18(1)(c),(d)
Supporting Appendix 9	IMO Connection Assessment and Approval Process – denied in full	17(1)(a),(c) 18(1)(c),(d)
Supporting	Hydro One Networks Inc Customer Impact Assessment – denied	17(1)(a),(c)

Appendix 10	in full	18(1)(c),(d)
Supporting Appendix 11	Preliminary Connection Estimate – denied in full	17(1)(a),(c) 18(1)(c),(d)

## DISCUSSION:

### THIRD PARTY INFORMATION

The Ministry and the affected party take the position that the exemptions at sections 17(1)(a) and (c) apply to many of the pages of the record remaining at issue. Those sections state:

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

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

## **Part 1: type of information**

The affected party and the Ministry submit that the withheld portions of the record contain information that is scientific, technical, commercial and financial. These terms have been defined in prior orders as follows:

*Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [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 [P-1621].

*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].

I adopt these definitions for the purposes of this appeal.

### ***Representations***

The Ministry takes the position that much of the information remaining at issue consists of scientific, technical or commercial information. The Ministry refers to the fact that the record is a detailed proposal to develop, construct, operate and maintain a wind farm, and includes assessments of equipment, transmissions, connections to the grid and wind resources. The Ministry also notes that a number of the appendices to the record contain technical studies, as well as scientific and technical tests. The Ministry then summarizes its position by identifying the information it believes constitutes scientific and technical information.

The Ministry also identifies that the record was prepared by the affected party for the sole purpose of entering into a commercial venture, and that it contains details about the affected party's services, experience and costs. In particular, the Ministry refers to pages 21 through 27 which identify the commercial arrangements the affected party has entered into. The Ministry also takes the position that the identities of subcontractors, set out in the proposal, qualifies as commercial information.

The affected party also provides representations in support of its position that the portions of the record remaining at issue contain scientific, technical, commercial or financial information, and provides a table setting out the portions of the record remaining at issue and the type of information that would be disclosed. In its representations in support of its position that the records contain the defined information, the affected party states:

*Scientific and Technical Information*

The Record contains both scientific and technical information as required by the RFP. The Record is part of a detailed proposal to develop, construct, operate and maintain the ... project. Included in the Record are wind resource studies, environmental assessments, assessments of the preliminary and system impacts on the power transmission grid, and studies regarding site suitability of the equipment to be used.

Also included in the Record are a map and plan of survey of the proposed facility site .... The IPC has held that an area map should be treated as "technical" information in circumstances such as these (Order PO-1737).

All of the information included in the Record was prepared and reviewed by experts in their respective fields and based on observation and field study undertaken at considerable expense to [the affected party]. As well, [the affected party] has invested substantial resources in pioneering the application of computer modeled wind resource maps, tall tower meteorology, and [other identified] technology. The data obtained from the studies undertaken using these technologies form the very basis of the Proposal, as is particularly evident at pages 30 – 38 of the Record, and Appendices 2, 3 and 4.

*Commercial Information*

The Record was prepared by [the affected party] for the sole purpose of entering into a commercial venture: the provision of wind energy in exchange for payment. The entire Record thereby satisfies the definition of commercial information. More specifically, the Record contains information about land leasing transactions, sub-contractors and their services, and technical details regarding the development, construction and operation of the wind farm, all of which is commercial information.

The purchase of land is a commercial transaction and information such as the purchase price and the identity of the purchaser constitute “commercial” information (Order PO-1786-I). Pages 21 to 27 of the record identify properties whose owners have entered into lease agreements with [the affected party], as well as properties for which [the affected party] is currently negotiating lease or purchase agreements. This information is “commercial” information pursuant to the definition of the IPC.

The names and titles of individual employees and consultants identified by third parties in their bid proposals as those who would perform the work is “commercial” information (Order PO-1818). The Record identifies subcontractors and employees and describes the services that each will provide. This is also “commercial” information pursuant to the definition of the IPC.

The appellant submits that while he has not had an opportunity to view the record, he is unconvinced that the entirety of the record contains scientific, technical, commercial and/or financial information. The appellant argues that the Ministry and the affected party may be trying to use the section 17(1) exemption to protect information that does not necessarily fit within the definitions of scientific, technical, commercial and financial information.

### *Findings*

From my review of the record and the representations of the parties, I find that portions of the record contain commercial information as it relates to the buying, selling or exchange of merchandise or services.

I am also satisfied that much of the information remaining at issue contains scientific and technical information as those terms have been defined by this office in previous orders. Many portions of the record remaining at issue contain detailed information relating to the development, construction, operation and maintenance of the wind power generating facility project, including wind resource studies, environmental assessments, assessments of the impacts on the power transmission grid, site suitability studies, maps and surveys. The record also contains computer modeled wind resource maps and data obtained from studies using the identified technologies. I am satisfied that much of the information remaining at issue falls under the categories of applied sciences or mechanical arts, and were prepared by professionals in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

Specifically, although there is some overlap in the categories of information which the record at issue falls into, I find that the following portions of the record contain commercial or financial information:

- Pages 5 - 8 (information in the table of contents and the Executive Summary)
- Pages 11 – 12 (Development and Construction)

Page 27 (Land Lease Option Agreements)  
Pages 39 – 41 (Project permitting milestones)  
Pages 47 – 48 (Summary of environmental studies undertaken)  
Pages 49 – 50 (Connection Assessment Overview)  
Page 53 (Schedule of Milestones)  
Page 70 (Technical Questionnaire)  
Appendix 1 (sample lease)  
Appendix 3 (Statement of Services Rendered)  
Appendix 6 (Scope of Project and Scope of Assessment)  
Appendix 11 (Connection Estimates)

I also find that the following portions of the record contain technical information:

Page 20 (Site Description)  
Page 21, 23 and 25 (maps)  
Pages 30 – 35 (Expected Energy Output and Wind Resource Studies)  
Pages 36 – 38 (Number of wind turbines and supporting data)  
Pages 61 – 69 (Technical Questionnaire)  
Appendix 2 (Output)  
Appendix 4 (Meteorological Data)  
Appendix 7 (Environmental Assessment Report)  
Appendix 8 (Transport Canada Draft)  
Appendix 9 (Connection Assessment & Approval Process)  
Appendix 10 (Customer Impact Assessment),

Accordingly, I find that all of the information for which section 17(1) is claimed, as set out in the above pages of the record, meet the requirements for part 1 of the test for the application of section 17.

## **Part 2: supplied in confidence**

### ***General***

The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where



the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

### ***Representations***

The affected party and the Ministry submit that the information at issue was supplied to the Ministry. The appellant agrees.

Regarding the issue of confidentiality, the affected party submits the following:

[The affected party] supplied the Record on the basis that it was confidential and that it was to be kept confidential. The RFP states at page 30 that “[t]he Proponent will clearly indicate in a separate confidentiality statement ... any portion of the Proposal that contains proprietary or confidential information for which confidentiality is to be maintained by the Ministry and its technical advisors.” The RFP goes on to state that “[t]he confidentiality of such information identified by the Proponent will be maintained by the Ministry and its technical advisors, except where an order by the Information and Privacy Commission, a court or a tribunal requires the Ministry to do otherwise.”

[The affected party] clearly indicated which pages of the Record contained proprietary or confidential information. [The affected party’s] Confidentiality

Statement at page 4 of the Record provides a table listing the pages containing proprietary or confidential information. [The affected party] also stamped each confidential page of the Record "Proprietary and Confidential".

The Ministry also refers to the confidentiality statement on page 4 of the record, as well as the "Proprietary and Confidential" stamp on a number of pages, in support of its position that portions of the records were explicitly supplied in confidence. The Ministry also states that it treats documents of this nature as confidential.

The appellant takes issue with the position that all of the pages of the record were provided "in confidence" and, in support of his position that not all of the information is "confidential", also refers to the fact that portions of the record have been disclosed to him.

### ***Findings***

I have examined the pages of the record remaining at issue, as well as the "Confidentiality Statement" on page 4 of the proposal referred to by the affected party and the Ministry. Portions of the record are referred to in the confidentiality statement as containing "proprietary or confidential information", which the affected party identifies as that for which "confidentiality is to be maintained" by the Ministry. However, I note that some of the pages remaining at issue are not referred to in the "Confidentiality Statement".

Previous orders have established that the provisions of the *Act* apply to information contained in records, notwithstanding the existence of a confidentiality provision, but also that the existence of such an explicit arrangement may provide evidence of the confidentiality expectations of the parties. In Order MO-1476 former Assistant Commissioner Mitchinson stated:

I agree with the City that the provisions of the *Act* apply in the context of requests for access to records created under the terms of its contract with the appellant, notwithstanding the existence of a confidentiality clause. However, in my view, it does not necessarily follow that the appellant did not supply the information provided under the terms of the contract in confidence. Based on the representations provided by the parties, it is clear that the confidential nature of the arrangements between them was not only explicitly addressed in the terms of the contract, but also discussed in some detail at the time the contract was executed. The City's caution to the appellant regarding the extent to which the clause would apply in the context of an access request under the *Act* is an important one that is prudently addressed in contracts of this nature. However, the confidentiality clause is explicit, and evidences a clear intention on the part of the parties that the information would be provided in confidence and treated in that manner by the City. I am satisfied that the appellant's business protocols support its position that information from its surveys is treated confidentially within its organization, and that the survey results were prepared for a purpose that would not involve general disclosure to the public.

Therefore, I find that the appellant supplied the information contained in the records to the City explicitly in confidence, thereby satisfying part two of the section 10(1) test. It should be emphasized that confidentiality is only one component of the section 10(1) exemption claim, and that establishing the requirements of part two of the test does not mean that the document will be exempt from disclosure, unless both of the other parts of the test have also been established.

In this appeal I also find that the confidentiality statement in the record, which identifies clearly those portions of the record that the affected party considered proprietary or confidential, evidences a clear intention on the part of the parties that the listed information was being provided in confidence. It is also clear that this clause is not determinative of whether the information qualifies for exemption under the *Act*, as all three parts of the test must be met; however, the fact that information is referred to in the confidentiality statement is strong evidence of the parties' intentions with respect to whether the information was supplied "in confidence".

Conversely, in my view, the fact that some of the information remaining at issue is not included in the confidentiality statement is strong evidence that the information was not supplied "in confidence". Barring exceptional circumstances, the fact that information is not referred to in the confidentiality statement suggests that the affected party did not provide it to the Ministry with a reasonably held expectation that it was being communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

I have carefully examined the information remaining at issue in this appeal. Much of the information remaining at issue is included in the confidentiality statement signed by the affected party. I am satisfied that this information was communicated to the Ministry on the basis that it was to be kept confidential.

Of the information remaining at issue which was not included in the confidentiality statement, I note that Appendix 7, though not included in the statement, is stamped "proprietary and confidential" on each page. Based on the fact that it was stamped in such a manner, I am satisfied that it also was communicated to the Ministry on the basis that it was to be kept confidential.

On my review of the other portions of the records remaining at issue, which were not included in the confidentiality statement, I find that these portions of the records were not supplied to the Ministry "in confidence", either explicitly or implicitly. As they do not meet the second part of the three-part test, I find that they do not qualify for exemption under section 17(1) of the *Act*.

In summary, I find that the information in the following table was not supplied to the Ministry "in confidence", and I will order that it be disclosed to the appellant:

<b>Page #</b>	<b>Description of pages</b>
5 – 7	Table of Contents
8	Introduction – 2 <sup>nd</sup> paragraph and all of bullets
49 – 51	Subcontractor information in the section Connection Assessment Overview
Supporting Appendix 3	Subcontractor information
Supporting Appendix 8	Draft paper re Transport Canada
Supporting Appendix 9	IMO Connection Assessment and Approval Process
Supporting Appendix 10	Hydro One Networks Inc Customer Impact Assessment

However, I find that the following portions of the record meet the first and second parts of the three-part test under section 17(1):

<b>Page #</b>	<b>Description of pages</b>
11 – 12	Development and Construction – middle of page 11 and all of page 12
20 – 25	Site Descriptions and maps
27	Land Lease Option Agreements
30 – 35	Expected Energy Output; Wind Studies
36 – 38	Number of turbines and supporting data
39 – 40 plus top of 41	Evidence of Progress Toward All Approvals and Permits (the parts remaining at issue)
47 – 48	Portions of the Environmental Assessment documentation
53	Schedule of Milestones
61 – 70	Appendix C: Technical Questionnaire
Supporting Appendix 1	Sample lease
Supporting Appendix 2	Table of output
Supporting Appendix 4	Meteorological Data
Supporting Appendix 6	Scope of Project and Scope of Assessment
Supporting Appendix 7	Environmental Assessment Report
Supporting Appendix 11	Preliminary Connection Estimate

Accordingly, I will now review the remaining information to determine whether it meets the third part of the three-part test under section 17(1)

## **Part Three: Harms**

### ***Introduction***

To meet this part of the test, the institution and/or the third party 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.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus. [Order PO-2020]

### ***The Ministry’s Representations***

The Ministry provided the following representations with respect to the harms issue, in support of its position that the records qualify for exemption under section 17(1).

#### *Section 17(1)(a)*

The Ministry takes the position that the disclosure of the information would prejudice the competitive position of the affected party. It refers to the time, cost and research the affected party invested in preparing the proposal, and states that the affected party’s competitors would find access to the affected party’s proposal “extremely useful” in order to prepare their own proposals in the future. The Ministry also states that the affected party is a successful operator of wind farms throughout North America, and that “the knowledge they have gained would prove to be invaluable to a competitor and if disclosed, it would lead to a breakdown of the competitive process for other wind farms in Ontario and North America.”

The Ministry then refers to other wind farm projects the affected party is involved in, and that the development, construction, operation and maintenance services proposed by the affected party were in a large part based on the experience gained over 30 years. The Ministry argues that this experience is considered to be a proprietary asset, and that disclosure of this asset would undercut the affected party’s ability to compete elsewhere when an RFP for wind power is issued. The Ministry also refers to the affected party’s demonstrated track record to provide wind power, whereas some competitors only have theoretical knowledge, and also that the affected party’s experience allows for costs savings in the development and construction areas.

The Ministry also states:

Disclosure of the approach taken for the ... project would unquestionably compromise [the affected party's] ability to compete in future proposals. If the record is disclosed, the information that [the affected party] has developed as part of its bidding process will no longer be of benefit exclusively to [the affected party].

Competitors would be able to prepare future bids by replicating the affected party's unique approach, whereas the affected party would have no parallel insight into the other competitor's information. The Ministry also states that the affected party's costs would be increased because of the added research and development it would have to undertake to modify its approach so that the affected party's bid "stands out as one of the best proposals".

Competitors would also use the information in the bids to contact similar sub-contractors and improve their own services.

The Ministry summarizes its position by identifying that, "while snippets of the information may be known to the industry, the overall approach and method of structuring the proposal brings the entire proposal within the ambit of section 17(a)".

*Section 17(1)(c)*

The Ministry refers to the arguments put forward in support of the application of section 17(1)(a) to also support its position that section 17(1)(c) applies, and that disclosure would result in undue loss to the affected party, and undue gain to the affected party's competitors. The Ministry also states that, in addition, disclosure of the record would cost the affected party additional time, energy and resources to formulate a new response to RFP's issued by the Ministry or other entities in the future. The Ministry states that the affected party's capital expenditure on the wind farm in Ontario must be secure in the knowledge that the investment will not be for the benefit of competitors who have not had to expend the same investment in research and development costs. The undue harm would occur if a competitor were able to replicate the affected party's approach and therefore undercut costs because it did not have to expend resources and time to develop similar research, lease arrangements and bid responses for other future bids.

***The affected party's representations***

With respect to the possible application of section 17(1)(a), the affected party states that, although the RFP giving rise to the proposal is concluded, it is clear that there will be additional wind energy projects in the future. The affected party states that disclosure of the exact details of the successful bid would provide exact details of the form and structure of the bid, and potential competitors could adjust their future bids using the confidential and proprietary information

contained in the record to gain a significant competitive advantage (to the disadvantage of the affected party).

The affected party refers to the “intense” competition in the field of wind energy generation.

The affected party refers to Order PO-1791, which found that disclosure of information relating to pricing, material variations and bid breakdowns contained in a record was found to qualify for exemption under section 17(1), as disclosure of the information would permit a competitor to adjust its bid and underbid in future bidding processes. The affected party states that this is “the very type of prejudice” that the affected party would suffer, and the very advantage its competitors would gain if the information were to be disclosed.

The affected party also refers to the level of detail provided by it in the proposal, and states that this detail would allow competitors access to affected party’s confidential solutions to a number of technical issues involved in developing, constructing and operating a wind farm. The affected party also refers to specific information in the record which could be used to validate the economic decisions of competitors for future projects.

The affected party also refers to Order MO-1504, in which the disclosure of a bid was found to reveal the methodology employed in responding to requests for proposals, thus undermining the competitive position of the bidder. The affected party identifies that its successful bid could serve as a guide to competitors for future bids, thereby reducing the competitor’s costs of bidding, and increasing the affected party’s costs to modify its bids in order to “stand out”. The affected party also refers to the number of successful bids it has produced, as a result of significant expenditure of time and resources.

With respect to section 17(1)(a) in particular, the affected party states that disclosure of the record would interfere with ongoing contractual negotiations in that, if it became known that certain identified properties were being purchased, it could create upward pressure on pricing, and lead to substantial cost increases to the affected party. It also argues that competitors could attempt to purchase the land at issue to interfere with the project. As well, the affected party refers to concerns about intimidation by local citizens opposed to the project, which may cause property owners to decline to sell to the affected party.

Concerning section 17(1)(c), the affected party refers to its arguments as set out above, and also states that competitors would realize undue gains if release of the record would allow them to “free ride” on the affected party’s expertise and experience.

### ***The appellant’s representations***

The appellant states that the Ministry’s representations on harms are based on the position that the record contains information that reflects the special expertise of the affected party, but argues that the affected party does not have prior experience with wind power facilities (although some of its subcontractors might). Furthermore, the appellant states that very little of the information

contained in the record would reflect any special development approach taken by the affected party. The appellant also states that the Ministry's representations constitute bald assertions about the possible results of the disclosure of the record, and fall short of the requirement to provide "detailed and convincing" evidence in support of the position that the identified harm would result.

The appellant also argues that the proposal at issue concerns a particular wind power proposal, and that the design of a facility is unique to the particular proposal. Variations in the local geography ensure that each wind generation facility is unique, and the appellant asserts that the Ministry's representations fail to support the position that the record includes any unique design details.

With respect to the affected party's representations, the appellant asserts that the form and structure of the bids is dictated by the RFP itself – and that it is not appropriate to deny access on the basis of the form and structure of the bid.

The appellant also disputes the affected party's characterization of itself as a "market leader", arguing that the number of projects that the affected party is involved in is small, and that the proposal itself is subject to the successful permitting process, failure of which will mean the project will not proceed.

The appellant does acknowledge that there may be portions of the record which should not be disclosed to the public on the basis that:

... the information has been gathered by [the affected party] at expense to [the affected party] and should not be disclosed to the public at no cost. For example, detailed wind resource information resulting from [the affected party's] own testing is appropriately withheld ....

However, the appellant goes on to state that the affected party has not provided sufficient evidence to support its position that other information contained in the proposal, for example, the number of turbines and their proposed locations, would benefit a competitor. The appellant re-states that the design of a particular facility is dependent on a number of factors including local geography.

The appellant also asserts that, although the affected party refers to orders which confirm that information relating to pricing, materials variations, and bid breakdowns were found to be exempt, the affected party has failed to identify the parts of the proposal which contain this type of information, but that the affected party makes broad, sweeping references to the information at issue in this appeal.

The appellant also argues that disclosure of certain information such as the number and layout of the turbines does not disclose the methodology for the solution of technical design issues, but



rather that it discloses the results of the methodology. The appellant asserts that these results will be clear to all when the turbines are actually erected.

Concerning the argument that disclosure of the bids will give competitors an advantage in preparing future bids, the appellant states that the bids are dependent on the RFP, and using information other than that contained in an RFP would result in significant non-compliance with the requirements of future RFPs.

In response to the affected party's position that the disclosure of the records will harm ongoing negotiations, the appellant states that the renewables of the RFP clearly state that the affected party was required to demonstrate its entitlement to all project lands, whether by purchase, lease, license options or otherwise. If the affected party fulfilled those requirements, it is unclear to the appellant how the disclosure of the records could interfere with those transactions. On the other hand, the appellant argues that if disclosure of portions of the record could interfere with the negotiations, the affected party has not fulfilled its requirements, and any such deficiency ought to be disclosed to allow scrutiny of the proposal. The reply and surreply representations of the parties address this point in further detail.

### ***Findings***

The parties have provided significant representations both for and against the disclosure of the records at issue.

In general, I do not accept the position of the Ministry and affected party concerning the harms which could reasonably be expected to follow the disclosure of the record simply on the basis that the disclosure of the "form and structure" of bid would result in the identified harms under sections 17(1) (a) and (c), as it would allow competitors to use the information contained in the successful bid to tailor future bids. In a recent Order, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms. In Order PO-2435, Assistant Commissioner Beamish made the following statement:

The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

I accept the position taken by the Assistant Commissioner. In my view the arguments put forward by the Ministry and affected party regarding their concerns that disclosure of the "form and structure" of the bid, or its general format or layout, will allow competitors to modify their approach to preparing proposals in the future would not, in itself, result in the harms identified in either section 17(1)(a) or (c).

However, I do accept the position of the Ministry and the affected party with respect to the concerns expressed over the disclosure of information which it prepared and developed as a

result of the affected party's research. In fact, the appellant acknowledges that certain information such as wind rates and information resulting from the affected party's research could result in undue loss or gain.

In addition, I accept the position put forward by the Ministry and the affected party that disclosure of certain portions of the information at issue may interfere with the negotiations regarding the land transfers. The Ministry and the affected party have provided representations supporting the position that the negotiations with landowners are ongoing to some extent, and could be subject to interference. They identify the nature of the possible interference, and that this could significantly impact the negotiations between the affected party and certain landowners. Indeed, the appellant's representations (mainly made in the context of the public interest override) suggest that one of the reasons for requesting the information is to allow landowners who may have entered agreements with the affected party, or who are in the process of negotiating, to "re-think" their position regarding these agreements. In my view, disclosure of portions of the record could reasonably be expected to interfere significantly with the negotiations between the affected party and certain landowners.

Based on the above, I make the following findings with respect to the information remaining at issue:

*Section 17(1)(a)*

I am satisfied that the disclosure of portions of the record would prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. Specifically, I find that the disclosure of the site descriptions and maps on pages 20-25, the specific list of land lease option agreements, which identify the specific lots and locations, and the identification of those lands on page 27 could reasonably be expected to interfere with the negotiations involving the landowners.

In addition, information contained in supporting Appendix 11, which is the Preliminary Connection Estimate detailing the costs relating to the project, and the attachment thereto, could reasonably be expected to interfere with the contractual or other negotiations of the affected party, as it contains detailed information relating to costs.

*Section 17(1)(c)*

I find that the disclosure of portions of the record which contain proprietary information obtained as a result of research conducted by and paid for by the affected party, and supplied by the affected party to the Ministry, would qualify for exemption under section 17(1)(c), as disclosure could reasonably be expected to result in undue loss to the affected party, or undue gain to competitors of the affected party. Based on my review of the records and the representations of the parties, I find that the following portions of the record contain this type of information:

- Expected Energy Output; Wind Studies (pages 30-35);

- Information contained on pages 36-38 which contains detailed technical information about the wind farm including the information about the turbines and the supporting methods and calculations upon which that information is based;
- Pages 61-70, which consists of Appendix C: Technical Questionnaire;
- Supporting Appendix 2 (containing the table of output); and
- Supporting Appendix 4 (containing the meteorological data).

However, upon review of the information provided by the parties, and the record itself, I am not satisfied that the remaining information qualifies for exemption under sections 17(1)(a) and/or (c) of the *Act*. That information is described as follows, and I make the following findings:

Pages 11 – 12: the withheld portions of these pages consist of a list of the consultants and contractors involved, and identify the general terms of the agreement relating to the development, construction, and financing of the proposal. I have not been provided with sufficient evidence to persuade me that the disclosure of this information could reasonably be expected to result in the harms set out in section 17(1)(a) and/or (c).

Pages 39 – 41 and 53: the withheld portions of these pages consist of the project permitting milestones listed under the section entitled “Evidence of Progress Toward All Approvals and Permits”, and the “Schedules of Milestones” (page 53) identify the anticipated dates certain portions of the project are to be completed. I am not satisfied, nor have I been provided with sufficient evidence to demonstrate that the disclosure of this information could reasonably be expected to result in the harms set out in section 17(1)(a) and/or (c).

Pages 47 – 48 contain portions of the Environmental Assessment documentation; Supporting Appendix 6 is general information relating to the scope of the project and the scope of assessment; and Supporting Appendix 7 is the Environmental Assessment Report (which is more in the nature of a table of contents of what will be contained in the report). I am not satisfied that these portions of the record will result in the harms contemplated by section 17(1)(a) and/or (c), as I have not been provided with sufficient evidence to persuade me that the disclosure of this information could reasonably be expected to result in the harms set out in those sections.

Finally, Supporting Appendix 1 is a blank sample lease. I have not been provided with sufficient evidence to satisfy me that the disclosure of this blank sample lease could reasonably be expected to result in the harms set out in section 17(1)(a) and/or (c).

In summary, I find that the withheld portions of pages 20-25, 27, 30-38 and 61-70, as well as Appendices 2, 4 and 11 qualify for exemption under section 17(1)(a) or (c), and should not be disclosed, but that the other portions of the record at issue do not qualify for exemption under

those sections. I will now review whether the portions that do not qualify for exemption under section 17(1), qualify under section 18(1)(c) and/or (d).

## **ECONOMIC AND OTHER INTERESTS**

As noted above, the Ministry has claimed the application of sections 18(1)(c) and (d) to the records remaining at issue. These exemptions state:

A head may refuse to disclose a record that contains,

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests. (Order P-441)

To establish a valid exemption claim under section 18(1)(d), the institution must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario. (Orders P-219, P-641 and P-1114)

For sections 18(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.)].

### ***The Ministry's Representations***

The Ministry asserts that sections 18(1)(c) and (d) apply to the records because the Ministry is committed to provide the province with a source of renewable energy, and any delay in the development of the project will jeopardize the Ministry's ability to meet its commitments; and may also result in increased energy costs for energy users. The Ministry also identifies that it is particularly concerned that the identification of the specific properties could reasonably be

expected to negatively impact the competitive position of the Ministry or be injurious to the financial interests of the Ministry.

The Ministry also states that it exercised its discretion not to release the record because “the wind farm has not yet received final approval from the various authorities through an alternate public process”.

### **Finding**

The Ministry's submissions on the application of sections 18(1)(c) or (d) are for the most part very general in relation to the information contained in the record. The one exception to this is the Ministry representations on the identities of specific properties and landowners, and I have found that this information, contained on pages 20 – 27, qualifies for exemption under section 17(1) above. With respect to the remaining information contained in the record, I find that the Ministry's representations are not sufficiently specific or detailed, and I am not satisfied that the Ministry has provided sufficient evidence to demonstrate that disclosure of the record “could reasonably be expected to” lead to the harms identified in sections 18(1)(c) and/or (d). Accordingly, I find that these exemptions do not apply to the portions of the record which I have found do not qualify for exemption under section 17(1).

### **PERSONAL INFORMATION/INVASION OF PRIVACY**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates.

Section 2(1) of the *Act* defines “personal information”, in part, as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

To qualify as "personal information", it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The affected party takes the position that certain identified information on pages 20 through 27 and Appendix 1 contain the personal information of landowners. As I have found these portions of the record to be exempt under section 17(1)(a) of the *Act*, it is not necessary for me to review whether this information qualifies as the "personal information" of the landowners.

The Ministry takes the position that an individual is identified in the records as a local liaison within the community, and that this individual's name, along with the information that he is a local liaison, contains his personal information, as defined by section 2(1)(h) of the *Act*.

I have reviewed the record at issue, and note that the individual referred to by the Ministry is in fact referred to in the material which has been disclosed to the appellant, as well as in publicly available material. In my view the information in the record relating to the named individual consists of information associated with this individual in a professional. Accordingly, I find that it does not contain the personal information of this individual. As it does not contain the personal information, this information cannot qualify for exemption under section 21(1) of the *Act*.

## **PUBLIC INTEREST IN DISCLOSURE**

The appellant takes the position that there is a compelling public interest in the disclosure of the records, and that section 23 of the *Act* applies to override the applicable exemptions. Section 23 states:

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

I have found above that portions of the record do not qualify for exemption under the referenced sections of the *Act*, and ought to be disclosed. I will only review the issue of whether section 23 applies to the portions of the records which I have found qualify for exemption under section 17(1) of the *Act*.

The appellant states:

It is submitted that the circumstances surrounding the selection of the Proposed Project under the ... RFP has roused, and will continue to rouse, strong public interest and attention. Among other things:

- a) the Proposed Project presents significant public policy issues regarding large-scale wind power development in close proximity to the Niagara Escarpment;
- b) the Proposed Project has been the subject of extensive media coverage [and the appellant attaches a partial list of the media coverage of the project];
- c) the Proposed Project was instrumental in triggering the Niagara Escarpment Commission's restrictive wind power development policy...;
- d) the Proposed Project has triggered the establishment of wind power development committees/working groups in each of the municipalities;
- e) worldwide experience shows that when large-scale wind power development is proposed in sensitive locations, significant public concerns arise.

The appellant also identifies the importance of oversight regarding the basis upon which government contracts are awarded, to ensure public accountability. The appellant then states that the residents of the municipalities, and all Ontarians, have a compelling interest in receiving all relevant information relating to the project – particularly due to the location of the project and the controversy surrounding the awarding of the contract. The appellant argues that respect and confidence in the decision-makers within the Ministry can only be fostered with “complete transparency” with respect to the bid. Furthermore, the appellant states that, to the extent that the Ministry has not complied with its own tendering guidelines, this too would be a matter of compelling public interest.

The Ministry and the affected party take issue with the appellant's position that section 23 applies.

The Ministry argues that the appellant has not provided reasons why the public interest override should apply other than to aid in “policy discussions”. The Ministry also takes the position that a significant amount of information relating to the project has been disclosed, and identifies that the project itself will be subject to an environmental assessment where the public will be able to discuss their support and/or objections to the wind power project. Though the Ministry

acknowledges that the appropriate role of wind power in the supply mix of electricity in Ontario may be a matter of public interest, there is no compelling public interest in the disclosure of those portions of the records that I have found to be exempt under section 17(1).

The affected party sets out and identifies the numerous “established processes and procedures” mandated by the regulatory authorities responsible for dealing with large-scale wind power projects such as the ones contemplated by the proposal. The affected party summarizes its position by identifying that there will be “ample public consultation and disclosure processes which will enable the appellant to advance its concerns and obtain information before the relevant issues are decided and approved.”

In his sur-reply representations on the public interest override, the appellant focuses on his concern that the appropriate level of public scrutiny of the process, particularly whether the affected party has met certain stipulations set out in RFP, and identifies that this raises questions regarding issues of fairness and the transparency of government processes. The appellant goes on to argue that, in the event that the affected party has not met certain conditions of the contract (which the appellant refers to as a “possibility”, and provides observations which, in his view, support this “possibility”), the affected party may nonetheless use the perception that the conditions of the contract have been met to “unduly influence” landowners in negotiations.

Finally, with respect to the affected party’s position that sufficient public processes are in place, the appellant asserts that the affected party is “unduly focussed on the possibility of a litigious approval process”, and that these discussions should be resolved through public consultation. The appellant also asserts that the time provided under the environmental assessment process to respond to the environmental screening report is insufficient.

## **Findings**

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption (see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)). In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23:

An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a compelling public interest in disclosure, and (2) this compelling public interest must clearly outweigh the purpose of the exemption.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the



extent to which denying access to the information is consistent with the purpose of the exemption.

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

In this appeal I have found that the information relating to the identities of the specific properties and landowners, as well as proprietary information of the affected party is exempt under section 17(1).

I accept that there exists a public interest in the use of large-scale wind power development in close proximity to the Niagara Escarpment and beyond. However, I am not satisfied that the public interest in the disclosure of those portions of the records that are subject to the section 17 exemption is sufficiently compelling.

The appellant's representations focus predominantly on two aspects of the record: 1) the appellant's interest in obtaining access to the agreements entered into with local landowners, in order to scrutinize whether the Ministry and the affected party followed proper processes; and 2) the number and placement of the wind turbines. However, the appellant fails to provide sufficient evidence to establish that there exists a compelling public interest in this information at this time. Although the appellant provides extensive representations on why he is interested in reviewing these records, and argues that, in his view, the established processes by which the public can comment and provide input on issues surrounding projects such as these are inadequate, I am not persuaded that there exists a sufficient compelling public interest in the disclosure of the portions of the record which I have found qualify for exemption.

Having found that a compelling public interest in the disclosure of the portions of the record which qualify for exemption does not exist, it is not necessary for me to determine whether the public interest clearly outweighs the purpose of the section 17(1) exemption.

### **ORDER:**

1. I uphold the Ministry's decision to deny access to the withheld portions of pages 20-25, 27, 30-38 and 61-70, as well as Appendices 2, 4 and 11.
2. I order the Ministry to disclose the remaining portions of the record, as set out in the table below, to the appellant by providing him with copies by **July 26, 2006**, but not before **July 20, 2006**.

<b>Page #</b>	<b>Description of contents and information denied</b>
5 – 7	Table of Contents
8	Introduction
11 – 12	Development and Construction

39 – 40 plus top of 41	Evidence of Progress Toward All Approvals and Permits
42, 47-48	The identity of an individual on page 42, and portions of the Environmental Assessment documentation on pages 47 - 48
49 – 51	The subcontractor information in the section Connection Assessment Overview
53	Schedule of Milestones
Supporting Appendix 1	Sample lease
Supporting Appendix 3	Subcontractor information
Supporting Appendix 6	Scope of Project and Scope of Assessment
Supporting Appendix 7	Environmental Assessment Report
Supporting Appendix 8	Draft paper re Transport Canada
Supporting Appendix 9	IMO Connection Assessment and Approval Process
Supporting Appendix 10	Hydro One Networks Inc Customer Impact Assessment

3. In order to verify compliance with Order Provision 2, I reserve the right to require the Ministry to provide me with copies of the records that are disclosed to the appellant.

Original Signed By: \_\_\_\_\_

June 20, 2006 \_\_\_\_\_

Frank DeVries  
Adjudicator