

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3525

Appeal PA14-4

Independent Electricity System Operator

August 21, 2015

Summary: The Independent Electricity System Operator (the IESO) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for access to information relating to a specific wind project. The records concern amendments made to the contract between the affected party, as a supplier of energy from renewable energy projects, and the IESO. The IESO denied access to some of the information in the records pursuant to the mandatory exemption in section 17(1) (third party information), and the discretionary exemptions in sections 18(1) (economic and other interests) and 19 (solicitor-client privilege) of the *Act*. This order upholds the IESO's decision under sections 18(1) and 19 and partially upholds its decision under section 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 18(1)(e), 19.

OVERVIEW:

[1] The Ontario Power Authority, now the Independent Electricity System Operator (the IESO),¹ received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to information relating to a specific wind project (the wind project). Specifically, the request was for the following information:

¹ In this order, I will refer to all references in the records and representations to the Ontario Power Authority as references to the IESO.

All correspondence, communications, emails, records, documents, contracts, codicils, deleted emails, memorandums, notes and material relating to or between any of the following: the [IESO] and [a specified company, the affected party)] relating to amendments in [its] Feed in Tariff contract.

[2] The IESO located 266 records responsive to the request and wrote to the affected party to seek its position on the disclosure of the records. In response, the affected party provided submissions on the disclosure of the records.

[3] The IESO subsequently issued a decision letter to the requester advising that partial access would be provided to some records and access to other records would be denied in full. In particular, the IESO denied access to portions of 162 records and further denied access to 104 records in their entirety pursuant to the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemptions in sections 18(1) (economic and other interests) and 19 (solicitor-client privilege) of the *Act*.

[4] The IESO also wrote to the affected party to advise of its decision and to confirm that the third party had 30 days to appeal the decision.

[5] When the affected party did not file an appeal, the IESO disclosed to the requester those records which it denied, in part. The IESO also provided the requester with an index of the responsive records in which it confirmed that some information in the records was being denied as being not responsive to the request.

[6] The requester (now the appellant) filed an appeal of the IESO's decision.

[7] During mediation, the appellant advised the mediator that it had decided not to pursue access to any of the information withheld from those records that were denied in part, the information denied pursuant to section 21(1), and the information denied as non-responsive to the request. As a result, this information was no longer issue in this appeal.

[8] However, the appellant advised that it was interested in pursuing access to some of the remaining records that were denied in full pursuant to sections 17(1), 18(1) and 19 of the *Act*. Specifically the appellant sought access to Records 1, 2, 4, 29, 34, 42, 43, 45, 48-52, 68-72, 75, 78 and 102. Accordingly, all other records that were denied in full were no longer at issue in this appeal.

[9] In response, the IESO advised that it was no longer relying on section 19 of the *Act* to deny access to Record 1 and 2. However, as these records were still denied pursuant to section 17(1) of the *Act*, they remain at issue in the appeal.

[10] As no further mediation was possible, this file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[11] In its representations, the affected party consented to the disclosure of pages 2129 to 2144, 2157-2166 and 2168, which are all part of Record 68. Page 2168 is a blank page. As only the mandatory third party information exemption in section 17(1) was claimed for these pages, and the third party (the affected party) is consenting to its disclosure, I will order them disclosed.

[12] In this order, I uphold the IESO's decision under sections 18(1) and 19 and partially uphold its decision under section 17(1).

RECORDS:

[13] The 21 records remaining at issue consist of correspondence, emails and their attachments, agreements and a spreadsheet, as set out in the IESO's index as follows:

Record #	Description	Date	Exemptions applied	Pages at issue
1	Email to and from IESO staff with letter of credit for external counsel to review attached	May 5, 2010	17(1)	1-4
2	Email to IESO External Counsel from IESO staff with letter of credit attached	May 6, 2010	17(1)	5-7
4	Email to affected party Canada and IESO staff from IESO with letter of credit attached	May 10, 2010	17(1)	12-15
29	Email to and from IESO staff	July 7, 2011	17(1) 18(1)(e)	1052-1055
34	Email to IESO staff from MEI	Feb. 7, 2012	17(1) 18(1)(e)	1129
42	Email to and from IESO staff with spreadsheet attached	Dec. 11, 2012	17(1) 18(1)(e)	1915-1920
43	Note from affected party	Undated	17(1)	1921-1925
45	Second Amending Agreement	Oct. 12, 2010	17(1)	1931-1934
48	License and Option to Lease Agreement	Oct 22	17(1)	1962-1974
49	Schedule C the Lease	Undated	17(1)	1975-1990
50	License and Option to Lease	June 25,	17(1)	1991-2019

	Agreement	2010		
51	Letter to [name at IESO]	Undated	17(1)	2020-2022
52	Spreadsheet containing affected party project information	Undated	17(1)	2023
68	Letter to and from IESO Counsel with FIT [Feed In Tariff] contract attachments	July 23, 2013	17(1) 19(a)	2127 2145-2156 2167
69	Email to IESO staff from IESO Counsel with Assumption and Acknowledgement attached	Aug. 1, 2013	17(1) 19(a)	2169-2193
70	Letter to IESO from affected party	June 14, 2013	17(1)	2194-2197
71	Email to and from IESO staff with response letters attached	March 16, 2011	17(1)	2198-2207
72	Email to and from IESO staff with contract material attached	April 14, 2011	17(1)	2208-2215
75	Email to and from IESO staff	Aug. 4, 2011	17(1)	2248-2249
78	Email to and from IESO External Counsel with summary documents attached	July 17, 2013	17(1) 19(a)	2260-2307
102	Email to and from IESO staff	Jan. 4, 2012	17(1)	3295-3296

ISSUES:

- A. Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 68, 69, and 78?
- B. Does the discretionary economic and other interests exemption at section 18(1)(e) apply to Records 29, 34, and 42?
- C. Did the institution exercise its discretion under sections 18(1)(e) and 19? If so, should this office uphold the exercise of discretion?
- D. Does the mandatory third party information exemption at section 17(1) apply to Records 1, 2, 4, 29, 34, 42, 43, 45, 48-52, 68-72, 75, 78, and 102?

DISCUSSION:

- A. Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 68, 69, and 78?**

[14] Section 19 of the *Act* states, in part, as follows:

A head may refuse to disclose a record,

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

[15] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply. The statutory exemption and common law privileges, although not identical, exist for similar reasons

[16] The IESO provided both confidential and non-confidential representations on this issue.

[17] The IESO states that Record 68 is an email exchange to and from IESO counsel, with FIT contract attachments.²

[18] Record 69 is an email to IESO staff from IESO Counsel with an Assumption and Acknowledgement Agreement attached. The IESO states that the attachments are draft contracts and are not the versions that were executed.

[19] Record 78 is an email exchange between two IESO's in-house counsel, attaching two spreadsheets. Most of the information in the spreadsheets is not responsive to the request. The IESO states that this information was gathered and provided to counsel for use in providing legal advice.

[20] Addressing branch 1, the IESO states that these records are confidential written communications between a legal advisor and IESO staff that are directly related to the seeking, formulating or giving of legal advice.

[21] In relation to branch 2, the IESO states that each of Records 68, 69 and 78 and attachments are records prepared for the IESO's crown counsel for use in giving legal advice.

[22] The IESO further submits that there has been no waiver of privilege over Records 68, 69 and 78.

² Page 2155 is a blank page, with one number written on it and no exemptions claimed. I will order page 2155 disclosed.

[23] The appellant states that it is unable to respond based on the information that was provided to it.

Analysis/Findings

[24] Solicitor-client communication privilege applies where legal advice was sought and received from IESO counsel. This privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.³ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁴ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.⁵

[25] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁷

[26] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁸

[27] Based on my review of the records, I agree with the IESO that both branch 1 and branch 2 solicitor-client communication privilege apply to the information at issue in the records. Records 68,⁹ 69 and 78 consist of emails with attachments. Sections 17(1) and 19 have been claimed for all of the information remaining at issue in all three records, except for the two pages of shareholder registers in Record 68. The IESO has only claimed section 17 for these two pages.¹⁰

[28] All of the emails in the three records for which section 19 has been claimed address the seeking or receiving of legal advice from the IESO's lawyers about the information in the emails or in the attachments to these emails, where section 19 has also been claimed.

[29] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege:

³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁴ Orders PO-2441, MO-2166 and MO-1925.

⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

⁸ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁹ Section 19 has been claimed for pages 2127.

¹⁰ Pages 2156 and 2167.

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.¹¹

[30] I have no evidence that the privilege in these three records has been waived or lost. Accordingly, subject to my review of the IESO's exercise of discretion, I find that the information at issue in Records 68, 69, and 78 is exempt under section 19.

B. Does the discretionary economic and other interests exemption at section 18(1)(e) apply to Records 29, 34, and 42?

[31] Section 18(1)(e) states:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

[32] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.¹²

[33] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹³

[34] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.¹⁴

[35] The IESO provided both confidential and non-confidential representations on this issue. In its non-confidential representations, it states that Records 29, 34 and 42 refer to pre-determined courses of action about how the IESO would consider certain positions, procedures, criteria or instructions that may be applied in the future to IESO contracts.

¹¹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹² Toronto: Queen's Printer, 1980.

¹³ Order MO-2363.

¹⁴ See Orders MO-2363 and PO-2758.

[36] The appellant states that without any knowledge of the information in question, it is virtually impossible for it to respond to this issue.

Analysis/Findings

[37] In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.¹⁵

[38] Section 18(1)(e) applies to financial, commercial, labour, international or similar negotiations, and not to the development of policy with a view to introducing new legislation.¹⁶

[39] The terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.¹⁷

[40] This office has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme".¹⁸

[41] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations but rather simply reflects mandatory steps to follow.¹⁹

[42] The IESO applied section 18(1)(e) to all of Record 29, except for one email which it has applied section 17(1). It also has applied section 18(1)(e) to all of Records 34 and 42.

¹⁵ Order PO-2064.

¹⁶ Orders PO-2064 and PO-2536.

¹⁷ Orders PO-2034 and PO-2598.

¹⁸ Orders P-348 and PO-2536.

¹⁹ Order PO-2034.

[43] The IESO provided detailed confidential representations about the information at issue in Records 29, 34, and 42. Based on my review of the information at issue in these records, along with these representations, I agree with the IESO that the information at issue in these records is subject to section 18(1)(e). It consists of positions, plans, procedures, criteria or instructions to be carried on by or on behalf of the IESO. As well, I find that none of the exceptions to the exemption in section 18(2) apply to this information.

[44] Accordingly, subject to my review of the IESO's exercise of discretion, the information at issue in Records 29, 34, and 42 is exempt under section 18(1)(e).

C. Did the institution exercise its discretion under sections 18(1)(e) and 19? If so, should this office uphold the exercise of discretion?

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

[46] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[47] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁰ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[48] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²¹

- the purposes of the *Act*, including the principles that
 - information should be available to the public

²⁰ Order MO-1573.

²¹ Orders P-344 and MO-1573.

- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[49] The IESO provided both confidential and non-confidential representations on this issue. In exercising its discretion, it states that it considered:

- (a) whether disclosure will increase public confidence in the operation of the institution;
- (b) the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- (c) the historic practice of the institution with respect to similar information;

- (d) whether the requester has a compelling need to receive the information; and
- (e) whether the requester is seeking his or her own personal information.

[50] The IESO states that with respect to the section 18(1)(e) records, disclosure will not increase public confidence in the operation of the institution. As a commercial party to the Feed In Tariff (FIT) contracts, it states that the IESO must be able to negotiate without disclosing certain specific information identified in its confidential representations.

[51] Addressing the application of section 19, the IESO states that a proper legal review is a valid component of its business practices and should be afforded a sphere of protection.

[52] The appellant states that Regulation 359 under the *Green Energy Act* sets out a complex process which a prospective developer must follow in order to apply for and obtain a Renewable Energy Approval. This process is intended to protect the environment in the area where the project is to be located and the surrounding community. The process includes the preparation and submission by the proponent of reports dealing with certain specific aspects of the environment. The appellant is concerned that the requirements relating to these supporting materials had not been properly complied with in a timely manner.

[53] The appellant submits that the IESO has not considered the appellant's "sympathetic and compelling need" to receive the information at issue in order that the appellant may satisfy itself that the applicable regulating requirements have been complied with.

[54] The appellant further submits that the proposed wind power project will affect thousands of people who live in the communities surrounding the project location because of the enormous impact of the eight turbines which the affected party proposes to erect.

Analysis/Findings

[55] The records concern amendments made to the FIT contract between the affected party and the IESO. This contract is between the affected party, as a supplier of energy from renewable energy projects, and the IESO.

[56] I have found that Records 29, 34, and 42 contain certain specific positions, procedures, criteria or instructions that may be applied in the future to IESO contracts and that section 18(1)(e) applies to them.

[57] Page 2127 of Record 68 and Records 69 and 78 contain privileged written communications between IESO legal advisors and IESO staff that are directly related to the seeking, formulating or giving of legal advice.

[58] I find that the information at issue in the records which I have found exempt under sections 18(1)(e) or 19 is not information that is concerned directly with regulatory approval as submitted by the appellant.

[59] Based on my review of the IESO's representations and the information at issue, I find that the IESO exercised its discretion in a proper manner concerning the information I have found exempt under sections 18(1)(e) and 19. In doing so, I find that the IESO took into account relevant considerations and did not take into account irrelevant considerations. Accordingly, I uphold the IESO's exercise of discretion.

D. Does the mandatory third party information exemption at section 17(1) apply to Records 1, 2, 4, 29, 34, 42, 43, 45, 48-52, 68-72, 75, 78, and 102?

[60] I have found that page 2127 of Record 68, and Records 69 and 78 are exempt under section 19 and that Records 29, 34, and 42 are exempt under section 18(1)(e). Therefore, there is no need for me to also consider whether this information is exempt under section 17(1).

[61] Concerning the remaining records, the IESO and the affected party claim the application of sections 17(1)(a) to (c). These sections read:

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

[62] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.²² Although one of the central purposes of the *Act* is to shed light on the operations of

²² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²³

[63] 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

[64] The IESO and the affected party provided confidential and non-confidential representations on this issue. They both state that the records contain technical, commercial, and financial information.

[65] The affected party submits that the records include information relating to: contractual agreements, license agreements, option to lease agreements, leases, shareholder and corporate information, assumption and acknowledgement agreements, financial and banking information, including letters of credit.

[66] The appellant states that the affected party's submission that "commercial information" should be broadly construed to include all information dealing with commerce is too broad a definition of that term. It also submits that the records do not contain commercial information.

Analysis/Findings re: part 1

[67] According to the IESO, one of its mandates is to engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources. One of the ways in which the IESO carries out this mandate is the Feed-In Tariff ("FIT") Program, where the IESO procures energy from renewable energy projects. The affected party is a supplier of energy to the IESO through the FIT Program.²⁴

²³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

²⁴ Representations of the IESO.

[68] I agree with the IESO and the affected party that the records contain commercial and financial information. They contain commercial information related to the buying and selling of goods and services as described in the various agreements set out above in the index and the affected party's representations. These agreements are also referred to in the emails that comprise the records. I also find that the records contain financial information relating to banking and shareholder information, including letters of credit.

[69] These types of information as listed in section 17(1) have been discussed in prior orders:

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.²⁵ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.²⁶

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.²⁷

[70] I agree with the appellant that the affected party's submission that "commercial information" should be broadly construed to include any and all information dealing with commerce, is too broad a definition for that type of information and that the definition set out above for that type of information is more appropriate.

[71] The IESO also submits that Record 120 contains technical information. Based on my review of this record and the confidential representations of the IESO on this record, I agree that it contains technical information. This type of information has been discussed in prior orders, as follows:

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.²⁸

²⁵ Order PO-2010.

²⁶ Order P-1621.

²⁷ Order PO-2010.

²⁸ Order PO-2010.

[72] As the records contain technical, commercial and financial information, part 1 of the test under section 17(1) has been met.

Part 2: supplied in confidence

Supplied

[73] I will first consider whether the records were supplied by the affected party to the IESO. If so, I will then consider whether they were supplied in confidence.

[74] The requirement that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.²⁹

[75] 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.³⁰

[76] 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.³¹

[77] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.³² The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.³³

[78] In its confidential representations, the IESO lists the types of information in the records that were supplied to it by the affected party. It also submits that even where the third party information was generated by the IESO, such as in a summary, it was based on immutable information supplied by the affected party. It further submits that

²⁹ Order MO-1706.

³⁰ Orders PO-2020 and PO-2043.

³¹ This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

³² Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

³³ *Miller Transit*, above at para. 34.

this information, as it was received by the IESO, was not subject to change and was judged by the IESO as it was provided.³⁴

[79] The affected party submits that the records were supplied by it to the IESO.

[80] The appellant representations focus on whether the affected party supplied the information in confidence to the IESO.

Analysis/Findings re: supplied

[81] Based on my review of the records, I find that all of the information in them was either supplied directly by the affected party to the IESO or that disclosure would reveal information supplied by the affected party to the IESO.

[82] Although there are agreements in the records, these are either agreements entered into between the affected party and non-government parties, or draft agreements. Therefore, these records have not been mutually generated between the IESO and the affected party such as to be considered not supplied.

[83] I will now consider whether the information at issue in the records has been supplied to the IESO in confidence.

In confidence

[84] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.³⁵

[85] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access

³⁴ The IESO relies on *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

³⁵ Order PO-2020.

- prepared for a purpose that would not entail disclosure.³⁶

[86] The IESO and the affected party provided both confidential and non-confidential representations on this issue.

[87] In its non-confidential representations on this issue, the IESO states that although the third party information was not marked as confidential when it was provided, the affected party had an expectation of confidentiality. The IESO further states that this information has not otherwise been disclosed and was prepared for a purpose that would not entail disclosure. It states that:

The affected party's expectation of confidentiality is particularly objectively reasonable in light of the history of this matter, which includes litigation initiated and then discontinued by an associate of the requester.

[88] The affected party states that although the General Terms and Conditions of a FIT contract includes an acknowledgement that all information supplied to the IESO may be subject to freedom of information requests under the *Act*, such an acknowledgement does not undermine the fact that it provided the records to the IESO with the understanding that they would only be publicly disclosed if required by law or court order.

[89] The appellant states that the FIT contract includes an acknowledgement by the affected party that all information supplied to the IESO is subject to freedom of information requests and that *FIPPA* requires disclosure of information except in very limited circumstances.

[90] In reply, the IESO states that the General Terms and Conditions clause of the FIT contract simply acknowledges that the IESO is subject to *FIPPA* and may be required under *FIPPA* to disclose information that is provided to the IESO. It states:

Furthermore, the General Terms and Conditions also contain explicit language recognizing that a party's confidential information shall not be disclosed except for in certain limited circumstances. These confidentiality provisions are set out immediately before and in the same section as the above-referenced *FIPPA* acknowledgement. The General Terms and Conditions therefore do not preclude a supplier of information from having an expectation of confidentiality.

[91] In reply, the affected party representations are similar to the IESO's. It also states that the confidentiality clause simply recognizes that, in the event there is a

³⁶ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

request for information under *FIPPA*, the IESO is required to adhere to its obligations under *FIPPA*, including any obligations it has to affected third parties (e.g. providing notice and allowing an affected party to make representations on the records at issue). As such, it states that any request for information must be processed in accordance with *FIPPA* requirements, which grants the affected party the right to protect its confidential information through the available exemptions contained in *FIPPA*.

Analysis/Findings re: in confidence

[92] The records were either generated internally by the IESO, or were supplied by the affected party to the IESO, in relation to the affected party's Feed-in-Tariff application and subsequent contract in connection with the wind project.

[93] The FIT contract clause referred to by the parties reads:

The Parties acknowledge and agree that the [IESO] is subject to FIPPA and that FIPPA applies to and governs all Confidential Information in the custody or control of the [IESO] ("FIPPA Records") and may, subject to FIPPA, require the disclosure of such FIPPA Records to third parties. ...The provisions of this Section 7.5 shall survive any termination or expiry of this Agreement and shall prevail over any inconsistent provisions in this Agreement.

[94] I agree with the IESO and the affected party that this clause only speaks to compliance with *FIPPA* and does not automatically result in disclosure of information supplied by the affected party to the IESO. Disclosure of the records is still subject to the application of any exemptions set out in *FIPPA*.

[95] Based on my review of the records and the parties' representations, I find that the records were supplied in confidence to the IESO by the affected party. The information in the records was communicated to the institution on the basis that it was confidential and that it was to be kept confidential. This information was also treated consistently by the affected party in a manner that indicates a concern for confidentiality. The information was not otherwise disclosed or available from sources to which the public has access and was prepared for a purpose that would not entail disclosure.

[96] Accordingly, part 2 of the test under section 17(1) has been met as the information at issue in the records was supplied in confidence.

Part 3: harms

[97] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.³⁷

[98] 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 the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.³⁸

[99] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 17(1).³⁹

[100] The IESO provided confidential and non-confidential representations on part 3 of the test. In its non-confidential representations, it states that it is essential to the successful use of the FIT contract that the IESO obtain detailed information relating to the FIT contract. It submits that within a major project, which can be expected to place a strain on the financial resources of a FIT counterparty, it is usually necessary to provide detailed information.

[101] The IESO further submits that if governments cannot provide the confidentiality assurances that suppliers expect - and routinely obtain from the private sector - then government institutions become inherently more problematic for the private sector to deal with.

[102] Addressing 17(1)(a), the IESO states that release of the information at issue would likely interfere with its relationship with the affected party.

[103] With respect to section 17(1)(b), the IESO states that disclosure of the information at issue may interfere with other parties’ valid operations under their respective FIT contracts.

[104] With regards to 17(1)(c), the IESO states that it could suffer undue loss if counterparties to FIT contracts believe that certain confidential information will be unduly disclosed.

³⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

³⁸ Order PO-2435.

³⁹ Order PO-2435.

[105] The affected party relies on sections 17(1)(a) and (c) and provided confidential and non-confidential representations on part 3 of the test.

[106] The affected party could not provide specific representations on whether the mandatory exemption at section 17(1) applies to Records 29, 34, 42, 69, 71 and 78 as the IESO did not provide it with a copy of such records for review.

[107] In its non-confidential representations, the affected party states that Records 45, 48, 49, 51, and 52 are contractual agreements and amendments thereto entered into with private landowners to host wind turbines and related infrastructure. It states that the lawsuits filed against landowners who have partnered with the affected party have resulted in those landowners being extremely sensitive about publicly releasing the terms of their arrangements with the affected party. Therefore, it submits that disclosure of these records would result in the affected party being prejudiced in its current contractual relations, as well as in its ability to enter into and negotiate contracts with private parties in the future.

[108] The affected party states that the information remaining at issue in Record 68 is non-public information and correspondence relating to the shareholders of the affected party, a private company, and its affiliate, including shareholder registers listing the current shareholders and the number and class of shares held by each. It states that this shareholder information was provided by the affected party to clarify whether the affected party had preferred shares and not to negotiate terms and conditions of the FIT contract or the associated assumption agreement between the affected party and the IESO. It submits that disclosure would prejudice the affected party in its current contractual relations, as well as in its ability to enter into and negotiate contracts with private parties in the future.

[109] The affected party states that Records 1, 2, and 4 contain financial and banking information, including a letter of credit between the affected party, the IESO and a named bank, and relates to contractual arrangements between private parties, including terms and conditions of financing, the release of which could detrimentally affect the competitive position of the affected party. It states that disclosure of these private commercial agreements would deter lenders from providing financing to the affected party for similar projects in the future.

[110] The affected party is concerned that disclosure could impact not only future negotiations with the IESO regarding ongoing and future wind projects, but also credit agreement assumptions with lenders providing financing for such projects. It is also concerned that disclosure will also prejudice it in similar approvals and development processes in other jurisdictions.

[111] The appellant states that the records are disclosable if they relate to amendments to the FIT contract. It states that it is irrelevant whether it opposes the affected party's project.

[112] The appellant submits that the harm argued by the affected party that will flow from disclosure will simply allow residents to take steps to ensure that it complies with all applicable regulatory requirements and that this is not a harm listed in section 17(1). It states that nowhere in *FIPPA* is there any support for the proposition that a party need not disclose information because it might be helpful to other parties opposing a development proposal.

[113] The appellant states that the IESO already has all the information in question, therefore, disclosure cannot affect the affected party's future negotiations with the IESO, nor could disclosure impact credit agreement assumption with lenders. As well, the appellant submits that the affected party's obligation to disclose under *FIPPA* with respect to a project located entirely in Ontario cannot be qualified with respect to its activities in other jurisdictions.

[114] In reply, the affected party states that it has experienced firsthand the attempts made by anti-wind coalitions, such as the appellant, to delay or halt its projects.

[115] The affected party states that the regulatory requirements the appellant is referring to are under the *Environmental Protection Act* administered by the Ministry of Environment and that these regulations facilitate renewable energy projects and not contractual requirements under the FIT contract. Therefore, it states that disclosure of the IESO's records would not allow the public to assume a regulatory role.

[116] The affected party further states that it has expended significant resources to develop the wind project and it would incur undue loss if the sensitive information contained in the records was disclosed. As well, it states that *FIPPA* does not limit the consideration of potential harm to that which occurs or is contained within Ontario.

Analysis/Findings re: part 3

[117] I will now review each record individually.

[118] Record 1 - is an email chain dated 2010 between the IESO and the affected party seeking approval of the form of the attached draft letter of credit. The draft letter of credit does not contain any dollar amounts. It appears to be a standard form letter of credit with notations of what type of information is needed to be filled in on it. I find that this record does not contain, as alleged by the affected party, information whose disclosure would deter lenders from providing financing to the affected party for similar projects in the future. Based on the age and contents of this record, I find that I do not have sufficient evidence that part 3 of the test under section 17(1) has been met for

this record. Therefore, as no other mandatory exemptions apply to this record, I will order the responsive information in this record disclosed.

[119] Record 2 - has the same attachment as Record 1, the draft letter of credit from 2010. The covering email is an internal mail distributing the attachment to other IESO staff. For the same reasons as set out above for Record 1, I find that part 3 of the test has not been met and I will order this record disclosed.

[120] Record 4 - has the same 2010 draft letter of credit attachment as Records 1 and 2, except this copy of the letter of credit has six words handwritten on it. This notation does not contain any specific financial or other information belonging to the affected party. The covering email does contain the proposed required dollar amount of the letter of credit.

[121] I find that I have not been provided with sufficient detailed and convincing evidence that disclosure of the proposed dollar amount from Record 4, a 2010 letter of credit, even with the additional handwritten notation, could reasonably be expected to cause the harms set out in section 17(1)(a) to (c). In particular, I do not see how disclosure of this record would deter lenders from providing financing to the affected party for similar projects in the future as claimed by the affected party. This dollar amount in 2010 for a particular project proposed to be provided by way of a letter of credit is specific to this particular wind project. Therefore, as no other mandatory exemptions apply to this record, I will order the responsive information in this record disclosed.

[122] Record 43 - is described as a note from the affected party. It is five pages and is very detailed. Record 72 - is an email with a copy of Record 43. The affected party provided detailed confidential representations on these records.

[123] Based on my review of representations and the information in these records, I agree with the affected party that disclosure of Records 43 and 72 could reasonably be expected to impact future negotiations with the IESO regarding ongoing and future wind projects, as well as impact credit agreement assumptions with lenders providing financing for such projects.

[124] Therefore, disclosure of Records 43 and 72 could interfere significantly with the contractual or other negotiations of the affected party under section 17(1)(a) and could result in undue loss to the affected party under section 17(1)(c). Therefore, part 3 of the test has been met for these records.

[125] Records 45, and 48 to 52 - are either copies of agreements between the affected party and private landowners⁴⁰ or records containing details of these agreements.⁴¹ I

⁴⁰ Records 45, 48 to 50.

⁴¹ Records 51 and 52.

agree with the affected party that disclosure of these private contractual arrangements between it and private landowners could reasonably be expected to result in deterring landowners from partnering with it. As set out above, there have been lawsuits filed against landowners who have partnered with the affected party and disclosure could reasonably be expected to prejudice it in its current contractual relations, as well as in its ability to enter into and negotiate contracts with private parties in the future.

[126] Therefore, disclosure of Records 45, and 48 to 52 could interfere significantly with the contractual or other negotiations of the affected party under section 17(1)(a) and could result in undue loss to the affected party under section 17(1)(c). Therefore, part 3 of the test has been met for these records.

[127] Record 68 – consists of a one page email chain⁴² referred to in IESO's index of records as a letter⁴³ to and from IESO counsel with FIT contract attachments. Also remaining at issue in this record are two pages of shareholder registers.⁴⁴ The affected party describes the email as non-public correspondence from the IESO relating to an assumption and acknowledgement agreement. It describes the shareholder registers as its and its affiliates' non-public constating documents.

[128] Record 68 originally consisted of pages 2127-2168. The affected party has consented to disclosure of pages 2129 to 2144 and 2157-2166. As well, I have found that page 2128,⁴⁵ which only contains the name of the IESO's website and page 2168, which is a blank page, should be disclosed.

[129] I found above that pages 2127 and 2145 to 2154, which consist of an email chain to and from IESO's legal counsel and an attachment to this email chain, was exempt by reason of section 19.

[130] The IESO applied section 17 only, and not section 19, to two pages of Record 68, pages 2156 and 2167, which are both shareholder registers. The affected party states that if sensitive shareholder information was released, it would be prejudiced in its current contractual relations, as well as in its ability to enter into and negotiate contracts with private parties in the future.

[131] The shareholder registers at issue merely list a shareholder as of 2009 and the amount and class of shares held. The information at page 2156 is also found in the Corporate Profile documents at pages 2129 to 2144, which the affected party has consented to disclosure of. This information is similar to the information at page 2167. I find that I do not have sufficient evidence to find that part 3 of the test for section

⁴² Page 2127.

⁴³ Page 2127 of Record 68 is actually an email chain exchanged between IESO staff, including legal staff.

⁴⁴ Pages 2156 and 2167.

⁴⁵ No exemptions were claimed on these pages of this record.

17(1) has been met for pages 2156 and 2167. Therefore, I will order this information disclosed.

[132] Therefore, part 3 of the test has not been met for this information at issue at pages 2156 and 2167 of Record 68. As no other exemptions apply to pages 2156 and 2167, I will order these two pages disclosed.

[133] Record 70 – is a letter to the IESO from affected party. The affected party provided confidential representations on this record. Based on my review of this record and these confidential representations, I agree with the affected party that disclosure of this record could reasonably be expected to cause undue loss to the affected party.

[134] Record 71 – is a letter to the affected party from the IESO, along with an internal IESO covering email. The IESO provided confidential representations on this record. Based on my review of this record and these confidential representations, I agree with the IESO that disclosure of this record could reasonably be expected to cause undue loss to the affected party and that part 3 of the test under section 17(1)(c) has been met.

[135] Record 72 – is an internal IESO email attaching contract material. Record 75 – is an email to and from IESO staff. The IESO and the affected party provided confidential representations on these records. Based on my review of these records and the confidential representations of the IESO and the affected party, I agree that disclosure of these records could reasonably be expected to cause undue loss to the affected party and that part 3 of the test under section 17(1)(c) has been met.

[136] Record 102 – is an email chain between the affected party and the IESO. The IESO and the affected party provided confidential representations on this record. Based on my review of this record and the confidential representations of the IESO and the affected party, I agree that disclosure of this record could reasonably be expected to cause undue loss to the affected party and that part 3 of the test under section 17(1)(c) has been met.

Conclusion re: section 17(1)

[137] I have found that Records 1, 2, 4,⁴⁶ and pages 2156 and 2167 of Record 68 are not subject to section 17(1) and as no other exemptions apply, I will order this information disclosed.⁴⁷

[138] I have found that one email in Record 29 that section 17(1) was claimed for is subject to this exemption.

⁴⁶ Records 1, 2, and 4 are pages 1-4, 5-7, and 12-15 of the records.

⁴⁷ Also ordered disclosed in Record 68 is the information at pages 2128, 2129 to 2144, 2155, and 2157-2166, as set out above.

[139] I have also found that section 17(1) applies to Records 43, 45, 48 to 52, 69, 70 to 72, 75, 78, and 102.

ORDER:

1. I order the IESO to disclose to the appellant pages 1 to 4, 5 to 7, 12 to 15, 2128 to 2144, and 2155 to 2168 of the records by **September 28, 2015** but not before **September 21, 2015**.
2. I uphold the IESO's decision not to disclose the remaining information at issue in the records.
3. In order to verify compliance with order provision 1, I reserve the right to require a copy of the information disclosed by the IESO to the appellant to be provided to me.

Original Signed By: _____
Diane Smith
Adjudicator

_____ August 21, 2015