

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3534

Appeal PA14-247

Independent Electricity System Operator

September 21, 2015

**Summary:** The Ontario Power Authority, now the Independent Electricity System Operator (the IESO),<sup>1</sup> 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's Feed-in Tariff Contract. The IESO denied access to some of the information in the records, consisting of emails and attachments to the emails, pursuant to the mandatory third party information exemption in section 17(1), and the discretionary solicitor-client privilege exemption in section 19 of the *Act*.

In this order, the adjudicator upholds the IESO's decision under section 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), and 19.

**Orders and Investigation Reports Considered:** Order MO-3224.

### OVERVIEW:

[1] The Ontario Power Authority, now the Independent Electricity System Operator

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

(the IESO),<sup>2</sup> 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:

All records related to [the affected party's wind project], [a particular] [Feed-in Tariff (FIT)] Contract, and any lands and rights of access, and any amendments thereto, and any predecessor corporation, project location, IESO contracts, agreements, e.g. RESOP [Renewable Energy Standard Offer Program], pertaining to any parts of the lands subject to [the affected party's] FIT contract dated between August 1, 2013 to February 18, 2014.

[2] The IESO clarified with the requester that the time period for this request is October 18, 2013 (the date of the requester's previous request) to February 18, 2014, the date of the request.

[3] The IESO located 73 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.

[4] 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 some information in 33 records and denied access to 40 records in their entirety pursuant to the mandatory third party information exemption in section 17(1) the discretionary economic and other interest exemptions in section 18(1)(a) and (c), and the discretionary solicitor-client privilege exemption in section 19 of the *Act*. The IESO also advised that some information in the records was being denied as it was not responsive to the request.

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

[6] When the affected party did not file an appeal, the IESO disclosed to the requester the records denied in part, confirming that some information in the responsive records continued to be denied pursuant to sections 17(1), 18(1)(a) and (c) and 19 of the *Act* or because it was not responsive to the request.

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

[8] During mediation, the appellant advised the mediator that he was not interested in information denied as non-responsive to the request. As a result, the responsiveness of records is not an issue in this appeal.

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<sup>2</sup> In this order, I will refer to all references in the records and representations to the Ontario Power Authority as references to the IESO.

[9] The appellant also advised the mediator that he was interested in pursuing access to only some of the remaining records denied in part and some of the records denied in full pursuant to sections 17(1), 18(1)(a) and (c) and 19 of the *Act*. Accordingly, all other records/pages are no longer at issue in this 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 IESO withdrew its reliance on sections 18(1)(a) and (c), therefore, these discretionary exemptions are no longer at issue in this appeal.

[12] In addition, both the IESO and the affected party consented to disclosure of pages 545 to 547<sup>3</sup> and 738 to 740,<sup>4</sup> which contain a copy of a court order. Therefore, I will order these pages disclosed.

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

## **RECORDS:**

[14] The sixteen records remaining at issue consist of emails and email attachments.

## **ISSUES:**

- A. Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 38, 46, 51, 55, 57, and 66?
- B. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?
- C. Does the third party information mandatory exemption at section 17(1) apply to Records 4 to 6, 18, 31, 37, 50, 54, 56, and 59?

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<sup>3</sup> These pages are contained in Record 51.

<sup>4</sup> These pages are contained in Record 66.

## **DISCUSSION:**

### **A. Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 38, 46, 51, 55, 57, and 66?**

[15] 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.

[16] 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.

[17] The IESO provided both confidential and non-confidential representations on this issue. In its non-confidential representations, the IESO states that the records are exempt under branch 1 communication privilege as they are confidential written communications between a legal advisor and its staff that are directly related to the seeking, formulating or giving of legal advice. It also states that the records are exempt under branch 2 communication privilege as they were prepared for the IESO's Crown counsel for use in giving legal advice. The IESO describes the records as follows:

- Record 38 is an email sent from its Contract Analyst to IESO legal counsel.
- Record 46 is an email from its Business Analyst to IESO legal counsel.
- Record 51 is an email chain between IESO analysts and legal counsel and represents the provision of information to IESO legal counsel for the purpose of obtaining legal advice.
- Record 55 is an email chain between IESO analysts and legal counsel. The top email in the chain is a discussion about gathering information for a meeting with IESO legal counsel. The remainder of the chain involves discussions directly with IESO legal counsel for the purpose of seeking his views.
- Record 57 consists of correspondence between IESO analysts and IESO legal counsel about the proper way to deal with the affected party's claims, including a related letter. IESO legal counsel expressly contemplates the consequences that could result from the conduct of the Ministry of the Environment (MOE).

- Record 66 is an email chain between IESO analysts and IESO legal counsel about the affected party's claims. It is a continuation of the email chain in Record 51. The top three emails above those included in Record 51 may not be privileged in content, however the top email includes attachments on which IESO legal counsel's advice is being sought.

[18] The appellant did not provide representations on this issue.

### ***Analysis/Findings***

[19] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.<sup>5</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>6</sup> 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.<sup>7</sup>

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

[21] 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.<sup>9</sup> The privilege does not cover communications between a solicitor and a party on the other side of a transaction.<sup>10</sup>

[22] Based on my review of the records at issue and the confidential and non-confidential representations of the IESO, I agree with it that Records 38, 46, 51, 55, 57, and 66 are subject to solicitor-client communication privilege under branch 1 of section 19. This information represents 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. I have no evidence that this privilege has been waived or lost.

[23] I have considered the IESO's representations on Records 51 and 66. Record 66 appears to contain the same information as Record 51, though Record 51 contains additional documents. Both records are email chains where legal advice is being sought from IESO counsel. All of the information in both of these records is subject to solicitor-client communication privilege.

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<sup>5</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>6</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>7</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

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

<sup>9</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>10</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

[24] I note IESO's representations on the first three emails of Record 66, which may not be privileged in content. However, the top email includes a listing of the attachments on which IESO legal counsel's advice is being sought. I agree with the IESO that the attachments as listed in the top email would reveal information about the legal advice being sought. The second and third emails, although not privileged, are worthless or meaningless information. As stated in Order MO-3224:

Where a record contains exempt information, section 10(2) [of *FIPPA*] requires a head to disclose as much of the record as can be reasonably severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.<sup>11</sup>

[25] The records at issue are subject to both branch 1 and branch 2 solicitor-client communication privilege. I have no evidence that this privilege has been waived or lost. Therefore, subject to my review of the IESO's exercise of discretion, Records 38, 46, 51, 55, 57, and 66 are exempt by reason of section 19.

**B. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?**

[26] The sections 19 exemption is discretionary and permits 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.

[27] 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.

[28] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>12</sup> This office may not, however,

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<sup>11</sup> Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

<sup>12</sup> Order MO-1573.

substitute its own discretion for that of the institution.<sup>13</sup>

[29] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>14</sup>

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

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

- a. whether disclosure will increase public confidence in the operation of the institution;

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<sup>13</sup> Section 54(2).

<sup>14</sup> Orders P-344 and MO-1573.

- 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.

[31] The IESO states that proper legal review is a valid component of its business practices and should be afforded a sphere of protection. It also submits that privilege has not been waived and it should not be compelled to release the information. The IESO submits that disclosure would compromise its ability to obtain legal advice on positions taken by contractual counterparties. It further submits that the appellant does not have a compelling need to receive these records and is not seeking his own personal information.

[32] The appellant did not provide representations on this issue.

### ***Analysis/Findings***

[33] 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 in deciding not to disclose the information I have found exempt under section 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 under section 19 and find that Records 38, 46, 51, 55, 57, and 66 are exempt. As these records are exempt under section 19, there is no need for me to also consider whether they are exempt under section 17(1).

### **C. Does the third party information mandatory exemption at section 17(1) apply to Records 4 to 6, 18, 31, 37, 50, 54, 56, and 59?**

[34] Section 17(1) states in part:

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;



(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency.

[35] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>15</sup> 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.<sup>16</sup>

[36] 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***

[37] The IESO and the affected party both state that the records contain commercial information and provided primarily confidential representations on part 1 of the test under section 17(1).

[38] The affected party also submits that commercial information should be broadly construed to include any and all information dealing with commerce.

[39] The appellant did not provide representations on this issue.

### ***Analysis/Findings***

[40] This type of information relied upon by the IESO and the affected party which is referred to in section 17(1) has been discussed in prior orders, as follows:

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<sup>15</sup> *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.*).

<sup>16</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

*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.<sup>17</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>18</sup>

[41] 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.<sup>19</sup>

[42] I agree with the IESO and the affected party that the records contain commercial information related to the buying and selling of goods and services related to the FIT program. Therefore, part 1 of the test under section 17(1) has been met.

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

#### *Supplied*

[43] Both the IESO and the affected party provided both confidential and non-confidential representations on part 2 of the test.

[44] In its non-confidential representations, the IESO states that the information at issue was supplied to it by the affected party and that it is not akin to a completed contract such as a supply agreement. It states that the third party information as it was received by the IESO, was not subject to change, was immutable and judged by the IESO as it was provided.

[45] The affected party did not provide representations on whether the information in the records was supplied by it, other than saying that the records were supplied by it to the IESO.

[46] The appellant did not provide representations on this issue.

#### Analysis/Findings re: supplied

[47] I will first consider whether the information at issue in the records was supplied by the affected party to the IESO. If so, I will then consider whether it was supplied in

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<sup>17</sup> Order PO-2010.

<sup>18</sup> Order P-1621.

<sup>19</sup> Representations of the IESO.

confidence.

[48] 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.<sup>20</sup>

[49] 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.<sup>21</sup>

[50] The records are all email chains, some of which have attachments listing certain information referred to in the covering emails. Based on my review of the information at issue in the records, I find that it was all either supplied directly by the affected party to the IESO or that disclosure would reveal information supplied by the affected party to the IESO.

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

*In confidence*

[52] 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.<sup>22</sup>

[53] 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
- prepared for a purpose that would not entail disclosure.<sup>23</sup>

[54] The IESO states that although the third party information was not marked as

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<sup>20</sup> Order MO-1706.

<sup>21</sup> Orders PO-2020 and PO-2043.

<sup>22</sup> Order PO-2020.

<sup>23</sup> 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.

confidential when it was provided, it believes that the affected party had an expectation of confidentiality since:

- a. it was provided to the IESO in connection with the FIT Contract;
- b. the third party information has not otherwise been disclosed; and
- c. the third party information was prepared for a purpose that would not entail disclosure.

[55] The IESO states that the affected party's expectation of confidentiality is especially objectively reasonable in light of the history of this matter, which includes litigation initiated and then discontinued by an associate of the requestor.

[56] The affected party states that the records were supplied to the IESO with an expectation of confidentiality, which expectation encompassed any request under freedom of information legislation. It 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.

[57] The affected party further states that the records were submitted to facilitate the development of the wind project and, in light of anti-wind coalitions attempting to halt proposed wind energy projects in Ontario, the IESO has consistently acted with due caution to protect the information in the records from disclosure. It submits that the redacted portions of the records would surely not otherwise be available from sources to which the public has access.

[58] The appellant did not provide representations on this issue.

Analysis/Findings re: in confidence

[59] 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.

[60] 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.

[61] 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**

[62] 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.<sup>24</sup>

[63] 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*.<sup>25</sup>

[64] 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).<sup>26</sup>

[65] The IESO states that 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 it carries out this mandate is the Feed-In Tariff (“FIT”) Program, where the IESO procures energy from renewable energy projects. It states that the affected party is a supplier of energy to the IESO through the FIT Program.

[66] The IESO states 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. It 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.

[67] The IESO relies on sections 17(1)(a) to (c) and states that the release of the third party information is likely to interfere with the affected party’s relationship with it, as well as interfere with other parties’ valid operations under their respective FIT contracts.

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<sup>24</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>25</sup> Order PO-2435.

<sup>26</sup> Order PO-2435.

[68] The IESO also states that it could suffer undue loss if counterparties to FIT contracts believe certain information in the records will be unduly disclosed.

[69] The affected party states that it has experienced firsthand the attempts made by anti-wind activists to delay its projects. As a result, it is concerned that disclosure of the records could impact not only future negotiations with the IESO regarding ongoing and future wind projects and will certainly impact credit agreement assumptions with lenders providing financing for such projects.

[70] The affected party also submits that disclosure of the information from the records will also prejudice it in similar approvals and development processes in other jurisdictions.

[71] The appellant did not provide representations on this issue.

*Analysis/Findings re: part 3*

[72] Record 4 - One item has been severed from this record. The remainder of the responsive information in this email chain has been disclosed. Based on my review of this record, I find that this information does not reveal sufficient detail to reasonably be expected to cause the harms set out in the IESO's and the affected party's representations. Therefore, part 3 of the test has not been met for this record. As no other mandatory exemptions apply, I will order this record disclosed.

[73] Records 5 and 6 - There is one severance in each record. I agree with the affected party's confidential representations that disclosure of this information 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.

[74] Records 18 and 31 - Although there are only two severances in each record, I agree with the confidential representations of the IESO and the affected party that the disclosure of the information in these severances combined could reasonably be expected to cause the harms set out in sections 17(1)(a) and (c). Therefore, part 3 of the test has been met for these records.

[75] Records 37, 50, 54, 56, and 59 - These records have been denied in full. I agree with the confidential representations of the IESO and the affected party that the disclosure of the information in these records could reasonably be expected to cause the harms set out in sections 17(1)(a) and (c). Therefore, part 3 of the test has been met for these records.

[76] In conclusion, I find that Records 5, 6, 18, 31, 37, 50, 54, 56 and 59 are exempt under section 17(1). Record 4 is not exempt and I will order it disclosed.

***Public interest override applicability to section 17(1) records***

[77] The appellant provided extensive representations, none of which appear to directly respond to the Notice of Inquiry,<sup>27</sup> the records at issue, or the IESO's and the affected party's representations.

[78] In his representations, the appellant raised the issue of a compelling public interest in the disclosure of the records.<sup>28</sup> The appellant claims that there is a public interest in the disclosure of the information at issue as the records may pertain to the selection and publication by the affected party of a Noise Receptor Location that would negatively affect a retirement residence under construction. He states that the affected party ignored this retirement residence in its Renewable Energy Approval (REA) Application.

[79] The appellant further states that there is public interest in full disclosure of the status of the Assumption Agreement and of FIT contract supplier's identity and any IESO records that confirm:

- the date on which the affected party became the supplier of the FIT contract,
- when the Assumption Agreement became final and binding, including "Updated" contract financial security in the name of new supplier,
- the status of a Force Majeure Claim by the original supplier, and
- the related extension of the Milestone Commercial Operation Date in the FIT Contract Cover Pages for the wind project.

[80] The appellant states that:

There is Compelling Public Interest in the identity and qualifications of Supplier/Applicant of the Project is seeking all approvals necessary to feed electricity into the publicly - owned power grid that supplies electricity to homes, farms and businesses in community of [name] Township, in accordance with the FIT Contract and Rules, Agreements with Hydro One

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<sup>27</sup> The Notice of Inquiry sought representations from the appellant on the issues in this appeal, namely the application of sections 17(1) and 19 to the information at issue in the records.

<sup>28</sup> Section 23 of *FIPPA* states that:

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.

Section 23 can only apply to the records found exempt under section 17 and not the records found exempt under section 19, *see Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

Networks Inc., and a Renewable Energy Approval, by the MOECC [Ministry of Environment and Climate Change], among others...

The qualifications and resources of the Supplier, and determination of compliance with applicable laws and regulations, is the responsibility of numerous Decision Makers. Accurate and complete information is essential to informed Decision Making and informed public comments to the Decision Makers respecting matters about which the public is well informed and has identified that significant negative environmental effects will result from engaging in the FIT Contract Project, to the community, which the Supplier/REA Applicant has not identified in the REA Application...

### *Analysis/Findings*

[81] I have found that section 19 applies to Records 38, 46, 51, 55, 57, and 66. The public interest override in section 23 cannot apply to records exempt by reason of section 19.

[82] I have found that section 17(1) applies to remaining information at issue in the records,<sup>29</sup> except for the information at issue in Record 4.

[83] The records at issue are all email chains with attachments. The appellant's request seeks records about the wind project dated between October 18, 2013 and February 18, 2014. Most of the responsive information has been disclosed to the appellant. The appellant also received an index of records. I find that the information that I have found exempt under section 17(1) does not address the appellant's concerns raised in his representations, as set out above.

[84] Therefore, even if I were to accept the appellant's public interest argument as compelling, the information at issue in the records does not address the public interest raised by the appellant. A compelling public interest does not exist where the records do not respond to the applicable public interest raised by an appellant.<sup>30</sup> In this case, the records that I have found exempt by reason of section 17(1) do not respond to the applicable public interest raised by appellant.

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<sup>29</sup> I have found that section 17(1) applies to the information at issue in Records 5, 6, 18, 31, 37, 50, 54, 56, and 59.

<sup>30</sup> Orders MO-1994 and PO-2607.



**ORDER:**

1. I order the IESO to disclose to the appellant Record 4 and pages 545 to 547 and 738 to 740 of the records by **October 27, 2015** but not before **October 22, 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

\_\_\_\_\_ September 21, 2015