

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3530

Appeal PA14-5

Independent Electricity System Operator

September 3, 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 about force majeure, delays, waivers and extensions in a specified company's Feed-in Tariff contract with the IESO relating to a specific wind project. 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 exemption in section 19(a) (solicitor-client privilege) of *FIPPA*. This order partially upholds the IESO's decisions under section 17(1) and 19(a).

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

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 project). Specifically, the request was for the following:

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

1. [a specified company]

Relating to Force Majeure, delays, waivers and extensions in [the specified company's] Feed-in Tariff contract

[2] The IESO located 326 records responsive to the request and wrote to an affected party seeking 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. Access to other records would be denied in full. In particular, the IESO denied access to some information in 240 records and, however, full access to 86 records pursuant to sections 17(1) (third party information), 18(1) (economic and other interests), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the Act. The IESO also advised that some information in the records was being denied as it was not responsive to the request.

[4] 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.

[5] 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), 19 and 21(1) of the *Act* and because it is not responsive to the request.

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

[7] During mediation, the appellant advised that it was not interested in information denied pursuant to section 21(1) of the *Act* and that which was denied because it was non-responsive to the request. As a result, these portions of records, the section 21(1) exemption, and the responsiveness of records are not issues in this appeal.

[8] The appellant advised that it was interested in pursuing access to some of the remaining records that were denied in part and some of the records denied in full pursuant to sections 17(1), 18(1) and 19 of the *Act*. Accordingly, those other records/pages which were not identified by the appellant are no longer at issue in this appeal.

[9] The mediator relayed this information to the IESO. In response, the IESO revisited its decision and advised the mediator that it had changed its position with respect to only one record and attachment. The IESO advised that its position on all

other records remained the same.

[10] The IESO advised that it was no longer relying on section 18(1) of the *Act* to deny access to Record 24 (denied in full) and attachment 1 to that record. However, as this record and attachment was still being denied pursuant to section 17(1) of the *Act*, this record remained at issue in the appeal. (Attachment 2 to this record was removed from the appeal by the requester; attachment 3 continued to be denied pursuant to sections 17(1) and 18(1)(a) and (e) of the *Act*).²

[11] 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*.

[12] In its representations, the IESO withdrew its reliance on sections 18(1)(a) and (e) to those portions of pages 328-386 that were denied in part, and pages 853, 854, 871 to 872, 873 to 874, 878 to 882, 905 to 907, 918, 966 to 970, 991 and 1096 to 1097 that were denied in full. However, these pages are still subject to a section 17(1) claim by the IESO. It also clarified that it was relying on the solicitor-client privilege exemption at section 19(a).

[13] With its representations, the IESO provided me with a copy of the records, identifying the applicable exemptions to each page or to each portion of the records, as well as identifying the non-responsive portions of each record. In particular, certain records or portions of records are not responsive to the request, including all of the following pages that were denied in full:

- 1, 44, 105, 376 to 377, 648 to 649, 804, 1035, 1090 to 1091, 1124 to 1128, 1175 to 1176, 1790, 1791, 2163 to 2171, 2369 to 2391, 2393 to 2398, 2400 to 2463, 2465, 2509 to 2513, 2557 to 2559, 2679 to 2680, 2884 to 2886, 2974, 3011.

[14] As well, pages 1121 and 1164 are blank. Therefore, these pages are not at issue in this appeal.

[15] In its representations, the affected party consented to disclosure of pages 351 to 353, 2242 to 2244, 2152 to 2177 and 2179 of the records for which section 17(1) had been claimed. As no other exemptions apply, I will order these pages disclosed.

[16] In this order, I partially uphold the IESO's decision under sections 17 and 19(a).

² The covering email to Record 24 is page 988, attachment 1 is page 989, and attachment 3 is page 991.

RECORDS:

[17] The records remaining at issue consist of correspondence, emails and email attachments.

ISSUES:

- A. Does the mandatory third party information exemption at section 17(1) apply to:
- portions of pages 19-23, 29-31, 38-45, 146-161, 164-166, 218-220, 233-239, 247, 252, 253, 269-271, 279, 289-292, 298-302, 317-322, 328-350, 354 to 366, 427-429, 430-434, 439-472, 482-490, 545, 547-548, 565-583, 590-601, 638-640, 669, 680-698, 703-705, 708, 709, 714, 715, 731-733, 794-796, 812, 816-829, 833-847, 852-868, 899-905, 916, 927-961, 974-977, 1011-1014, 1020, 1033-1036, 1049-1059, 1061, 1063, 1064, 1096-1098, 1107-1110, 1137, 1149-1152, 1177, 1207, 1237-1244, 1316, 1357, 1381, 1393-1396, 1407-1409, 1415-1418, 1422, 1425-1428, 1479-1481, 1485, 1486, 1494-1499, 1500, 1505-1509, 1513, 1514, 1531, 1532, 1608-1611, 1866, 1919-1922, 2178, and 2219-2257, and
 - all of pages 31, 136, 204, 814, 850, 851, 853, 854, 871-874, 878-882, 897, 898, 905-907, 913, 914, 918, 935-938, 954, 955, 966-970, 984-989, 991, 1036, 1080, 1081, 1086-1089, 1092-1121, 1124-1159, 1162-1163, 1165-1169, 1172-1174, 177, 1652-1654, 1926, 1927, 1972-2003, 2038-2040, 2053-2056, 2061-2080, 2101-2103, 2111-2113, 2118, 2119, 2131, 2141-2143, 2147, 2367, 2392, 2399, 2967-2970, 3049-3082, 3085, and 3086?
- B. Does the discretionary solicitor-client privilege exemption at section 19(a) apply to pages 1652 (first 3 severances), 2367, 2368, 2392, 2967-2968, 3049, 3052, 3053, 3054 (first severance), and 3085 (first two severances) of the records?
- C. Did the institution exercise its discretion under section 19(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the mandatory third party information exemption at section 17(1) apply to:

• portions of pages 19-23, 29-31, 38-45, 146-161, 164-166, 218-220, 233-239, 247, 252, 253, 269-271, 279, 289-292, 298-302, 317-322, 328-350, 354 to 366, 427-429, 430-434, 439-472, 482-490, 545, 547-548, 565-583, 590-601, 638-640, 669, 680-698, 703-705, 708, 709, 714, 715, 731-733, 794-796, 812, 816-829, 833-847, 852-868, 899-905, 916, 927-961, 974-977,

1011-1014, 1020, 1033-1036, 1049-1059, 1061, 1063, 1064, 1096-1098, 1107-1110, 1137, 1149-1152, 1177, 1207, 1237-1244, 1316, 1357, 1381, 1393-1396, 1407-1409, 1415-1418, 1422, 1425-1428, 1479-1481, 1485, 1486, 1494-1499, 1500, 1505-1509, 1513, 1514, 1531, 1532, 1608-1611, 1866, 1919-1922, 2178, and 2219-2257, and

• all of pages 31, 136, 204, 814, 850, 851, 853, 854, 871-874, 878-882, 897, 898, 905-907, 913, 914, 918, 935-938, 954, 955, 966-970, 984-989, 991, 1036, 1080, 1081, 1086-1089, 1092-1121, 1124-1159, 1162-1163, 1165-1169, 1172-1174, 177, 1652-1654, 1926, 1927, 1972-2003, 2038-2040, 2053-2056, 2061-2080, 2101-2103, 2111-2113, 2118, 2119, 2131, 2141-2143, 2147, 2367, 2392, 2399, 2967-2970, 3049-3082, 3085, and 3086?

[18] 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; or

[19] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.³ 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.⁴

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

³ *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.*).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

[21] Both the IESO and the affected party provided confidential and non-confidential representations on the application of section 17(1).

[22] The IESO states that the records contain commercial information relating to the buying, selling or exchange of merchandise or services. As well, it submits that information in the records about the corporate structure of the affected party and about the affected party obtaining a letter of credit constitutes financial information.

[23] The affected party submits that the records contain commercial information, which should be broadly construed to include any and all information dealing with commerce.

[24] The affected party states that the records include contractual agreements and amendments thereto entered into with private landowners to host wind turbines and related infrastructure, in particular:

- license agreements, options to lease agreements, leases as well as amendments to such agreements;
- letter correspondence from the affected party discussing the terms and conditions of a licence and option to lease agreement;
- standard IESO forms related to a FIT contract including quarterly progress bullets and project status report forms; and
- a chart summarizing material terms in certain license agreements and option to lease agreements, including information related to property identifiers and the effect of the requested amendments.

[25] The affected party states that the records also include non-public shareholder registers relating to its shareholders and certain of its affiliates.

[26] 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

[27] 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 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.⁵

[28] 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.

[29] 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.⁶ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁷

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.⁸

[30] 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.

⁵ Representations of the IESO.

⁶ Order PO-2010.

⁷ Order P-1621.

⁸ Order PO-2010.

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

Part 2: supplied in confidence

Supplied

[32] 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.

[33] 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.⁹

[34] 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.¹⁰

[35] 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.¹¹

[36] 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.¹² 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.¹³

[37] 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 this information, as it was received by the IESO, was not subject to change and was

⁹ Order MO-1706.

¹⁰ Orders PO-2020 and PO-2043.

¹¹ 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*).

¹² Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹³ *Miller Transit*, above at para. 34.

evaluated by the IESO as it was provided.¹⁴

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

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

Analysis/Findings re: supplied

[40] Based on my review of the records, I find that most 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.

[41] Certain agreements in the records have also been supplied as these were entered into between the affected party and non-government parties, or are draft agreements. These agreements between the affected party and third parties have not been mutually generated between the IESO and the affected party and cannot be considered to have been supplied.

[42] However, I find that certain information in the records was not supplied by the affected party but instead these records are executed agreements mutually generated between the IESO and the affected party.¹⁵ In particular, these records are found at:

- pages 146 to 161, 273 to 275, 299 to 302, 482 to 490, 590 to 601, 1051 to 1059, 1149 to 1152, 1393 to 1396, 1407 to 1409, 1415 to 1418, and 1422 of the records denied in part, and
- pages 2038 to 2040, 2053 to 2056, and 2101 to 2103 of the records denied in full.

[43] I have no evidence that the inferred disclosure and immutability exceptions apply to these executed agreements.

[44] I also find that I do not have sufficient evidence that the information at issue at the last severance on page 1652 and pages 1653 to 1654, 2367 to 2368, 2392,¹⁶ the last severance on page 3085 and on page 3086 of the records denied in full was supplied by the affected party to the IESO. This information originates from the IESO and does not reveal information about the affected party.

¹⁴ The IESO relies on *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

¹⁵ There are duplicates of the same records throughout the records. For example, pages 146 to 148, 273 to 275, and 2038 to 2040 are the same and pages 158 to 161, 299 to 302, 1149 to 1152, 1393 to 1396, and 2053 to 2056 are the same.

¹⁶ Section 19(a) has been claimed for pages 2367, 2368, and 2392. I will consider the application of this exemption below to these pages.

[45] I find that part 2 of the test has not been met for this information. As no other mandatory exemptions apply and no discretionary exemptions have been claimed, I will order these executed agreements and the last severance on page 1652 and pages 1653 to 1654 be disclosed. I will consider below the application of section 19(a) to pages 2367 to 2368 and 2392.

[46] I find that, other than the information at issue on pages 1652 to 1654, 2367, 2368 and 2392, 3085, 3086, and the executed agreements between the IESO and the affected party listed above, the remaining information at issue in the records has been supplied by the affected party to the IESO and meets part 2 of the test under section 17(1).

[47] I will now consider whether the information that I have found to have been supplied was supplied to the IESO in confidence.

In confidence

[48] 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.¹⁷

[49] 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.¹⁸

[50] 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:

¹⁷ Order PO-2020.

¹⁸ 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.

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.

[51] 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.

[52] 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. Consequently, the appellant submits that no information could have been provided by the affected party in relation to the FIT Contract with a reasonable expectation of non-disclosure.

[53] In reply, the IESO states that The General Terms and Conditions clause of the FIT contract simply acknowledge 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.

[54] In reply, the affected party representations are similar to those submitted by the IESO. It also states that the confidentiality clause simply recognizes that, in the event there is a 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

[55] I find that 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.

[56] 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.

[57] 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*.

[58] Based on my review of the records that I have found to be supplied and the parties' representations, I find that these 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.

[59] Accordingly, part 2 of the test under section 17(1) has been met. The information at issue in the records that I have found to have been supplied was supplied in confidence.

Part 3: harms

[60] 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.¹⁹

[61] 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

¹⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

description of harms in the *Act*.²⁰

[62] 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).²¹

[63] Both the IESO and the affected party provided confidential and non-confidential representations on part 3 of the test. Neither the IESO nor the affected party provided representations on the specific section 17(1) severances on the records that were denied in part; nor did they provide specific representations on part 3 for each document in the records denied in full under section 17(1).

[64] The IESO states that it is essential to the successful operation of the FIT contract that the IESO obtain detailed information relating to the counterparty 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.

[65] 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.

[66] Addressing 17(1)(a), the IESO states that release of the information at issue would likely interfere with its relationship with the affected party. It states that the appellant and his associates have spent considerable resources attempting to stymie the affected party’s project and providing disclosure of the records will add to these efforts.

[67] 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.

[68] 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.

[69] The affected party relies on sections 17(1)(a) and (c). It states that the records include contractual agreements and amendments thereto entered into with private landowners to host wind turbines and related infrastructure. It states that since there have been lawsuits filed against landowners who have partnered with the affected party, those landowners are also extremely sensitive about publicly releasing the terms

²⁰ Order PO-2435.

²¹ Order PO-2435.

of their arrangements with the affected party.

[70] The affected party submits that the disclosure of the information at issue would deter other parties from partnering with it in the future and, therefore, 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.

[71] The affected party is also concerned that disclosure could impact future negotiations with the IESO regarding ongoing and future wind projects, as well as credit agreement assumptions with lenders providing financing for such projects.

[72] The appellant submits that opposition to a project is irrelevant in the context of an access request under *FIPPA*. 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.

[73] Further, the appellant does not understand how disclosure can affect the affected party's future negotiations with the IESO if the IESO already has all the information in question; nor does the appellant understand how it can impact credit agreement assumption with lenders.

[74] 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. It 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.

[75] 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.

Analysis/Findings re: part 3

[76] Under the terms of the FIT program, the IESO procures energy from renewable energy projects through various suppliers. The affected party is a supplier of energy to the IESO through the FIT Program.

[77] The appellant has sought access to records relating to "Force Majeure, delays, waivers and extensions" in the affected party's FIT contract with the IESO.

[78] The information remaining at issue in the records for which section 17(1) has

been claimed was supplied by the affected party to the IESO as part of its FIT application and subsequent contract in connection with a specific wind project.

[79] The IESO did not provide representations on the specific section 17(1) severances on each page of the records denied in part. Nor did it provide specific representations on each of the records denied in full under section 17(1).

[80] The affected party did group the records together in its representations, identifying them as Tab A-1 to A-6. The affected party provided one paragraph of confidential representations on part 3 of the test addressing the information in the records it identified as Tab A-1 to A-4. Tabs A-1 to A-4 cover the majority of the records. Tab A-5 only covers about 100 pages of records and Tab A-6 only covers 1 page of records.

[81] Tabs A-1 to A-4 cover approximately 500 pages of records. Other than a specific representation covering pages 567 to 570, 681 to 682, 903 to 905, and 1427 to 1428, the affected party did not provide representations respecting the application of part 3 of the test to the specific information at issue on the pages or severances of the Tab A-1 to A-4 records.

[82] Based on my review of the records and the confidential and non-confidential representations of the IESO and the affected party, I find that the disclosure of certain information in the records could not reasonably be expected to cause the harms set out in sections 17(1)(a) to (c). These records include emails that are several years old that refer to the presence of certain attachments or letters. As well, there are general response letters from an institution concerning FOI requests. These pages are found at:

- Pages 172 to 175, 573 to 576, and 685 to 688 of the records denied in part, and
- Pages 2069 to 2072, and 2147 of the records denied in full.

[83] The IESO applied section 17(1) to page 2178 which is a shareholder register. 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.

[84] The shareholder register at issue merely list a shareholder as of 2012 and the amount and class of shares held. The information at page 2178 (of the records denied in part) is similar to that found in the Corporate Profile documents at pages 2152 to 2155 (of the records denied in part), which the affected party has consented to disclose. I find that I do not have sufficient evidence to find that part 3 of the test has been met for page 2178. As no other exemptions have been claimed for this page, I will order it disclosed. Similarly, the information withheld from page 2140 (denied in part) concerns the same information as that on page 2178. For the same reasons, I will order disclosure of the responsive information on pages 2140 and 2178 of the records denied in part.

[85] I find that part 3 of the test under sections 17(1)(a) and (c) has been met for copies of the agreements between the affected party and private landowners or records containing details of these agreements. I 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.

[86] The information remaining at issue in the records includes:

- drafts of agreements between the IESO and the affected party,
- specific exchanges between the IESO and the affected party or within the IESO about possible difficulties with the project,
- discussions of various options about the affected party's plans for the project,
- certain information about interactions between the affected party and other third parties concerning the project, and
- details about the affected party's plans in the future about its business in general.

[87] Addressing the remaining information in the records, I agree with the IESO that disclosure could reasonably be expected to cause difficulties within the administration of the FIT contract and with its ability to finance its wind projects, as well as cause delays in the affected party obtaining approvals for wind and other projects. This information meets part 3 of the test under section 17(1)(a) and (c).

[88] In so far as section 17(1)(b) is concerned (which was only relied upon by the IESO), it submits that disclosure may interfere with other parties' valid operations under their respective FIT contracts. Based on my review of the records, I find that I do not have sufficiently detailed and convincing evidence to satisfy me that part 3 of the test under section 17(1)(b) has been met.

[89] I have found that part 3 of the test has been met under sections 17(1)(a) and (c) for the remaining information at issue in the records, with the exception of:

- Pages 172 to 175, 573 to 576, 685 to 688, 2140 and 2178 of the records denied in part, and

- Pages 2069 to 2072, 2147, 2367, 2368, and 2392.²²

[90] I will order these pages disclosed, except for pages 2367, 2368 and 2392. I will consider the application of section 19(a) to these three pages.

[91] As I have found that section 17(1) applies to all of the information for which the discretionary exemptions in sections 18(1)(a) or (e) exemptions have been claimed, it is not necessary for me to consider the possible application of these section 18(1) exemptions.

B. Does the discretionary solicitor-client privilege exemption at section 19(a) apply to pages 1652 (first 3 severances), 2367, 2368, 2392, 2967 to 2968, 3049, 3052, 3053, 3054 (first severance), and 3085 (first two severances) of the records?²³

[92] The IESO relies on section 19(a) of the *Act*, which reads as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

[93] The IESO provided both confidential and non-confidential representations on this issue. In its non-confidential representations it states that the information at issue contains confidential email exchanges between it and its external counsel that are directly related to the seeking, formulating or giving of legal advice.

[94] The appellant states that with the information available to it, it is unable to respond to the claim of privilege.

Analysis/Findings

[95] 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. In this appeal, the IESO relies on branch 1 solicitor-client communication privilege.

[96] Solicitor-client communication privilege protects direct communications of a

²² Section 19(a) has been claimed for pages 2367, 2368, and 2392. I will consider the application of this exemption below to these pages.

²³ Although the IESO had claimed the application of section 19 to pages 31, 136, 204, 804, 814, 935-938, 954-955, 984-987, 1092-1095, 1098-1121, 1652-1654, 2367, 2392, 2399, 2967-2970, 3049-3082, and 3085, I have found that most of these pages are subject to the mandatory third party exemption in section 17. I need now only determine the applications of section 19 to pages 1652 (first 3 severances), 2367, 2368, 2392, 2967-2968, 3049, 3052, 3053, 3054 (first severance), and 3085 (first two severances).

confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.²⁴ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.²⁵ 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.²⁶

[97] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.²⁷

[98] 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.²⁸ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.²⁹

[99] Based on my review of the information at issue in the records and the confidential representations of the IESO, I agree with the IESO that most of this information is subject to solicitor-client privilege under branch 1 of section 19(a). 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. Subject to my review of the IESO's exercise of discretion, this information is exempt by reason of section 19(a).

[100] However, I do not find the information found at the first three severances of page 1652 is subject to solicitor-client privilege. This is an email exchange about a general question unrelated to the appellant's request. I find that I do not have sufficient evidence to enable me to find that this exchange was of a confidential nature such as to invoke the application of the section 19(a) exemption. As no other exemptions apply, I will order the first 3 severances on page 1652 disclosed.

C. Did the institution exercise its discretion under section 19(a)? If so, should this office uphold the exercise of discretion?

[101] The section 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.

²⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

²⁵ Orders PO-2441, MO-2166 and MO-1925.

²⁶ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

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

²⁸ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

²⁹ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

[102] 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.

[103] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁰ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[104] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³¹

- 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

³⁰ Order MO-1573.

³¹ Orders P-344 and MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

[105] The IESO provided both confidential and non-confidential representations on this issue. In its non-confidential representations, it states that the proper review of documents by legal counsel is a valid component of its business practices and should be afforded a sphere of protection. It submits that privilege has not been waived and it should not be compelled to release the information. It further submits that it has never disclosed privileged information about the matters in the records at issue to external parties, and that doing so would compromise its ability to obtain legal advice on the subject matter of the records. It further states that the appellant does not have a compelling need to receive the records and that the appellant is not seeking his or her own personal information.

[106] 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.

[107] 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.

[108] 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

[109] The records concern force majeure, delays, waivers and extensions 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.

[110] I find that the information at issue in the records which I have found exempt under section 19 is not information that is concerned directly with regulatory approval as submitted by the appellant.

[111] 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 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(a).

ORDER:

1. I order the IESO to disclose to the appellant by **October 9, 2015**, but not before **October 2, 2015**, the responsive information in the records at:
 - pages 146 to 161, 172 to 175, 273 to 275, 299 to 302, 351 to 353, 482 to 490, 573 to 576, 590 to 601, 685 to 688, 1051 to 1059, 1149 to 1152, 1393 to 1396, 1407 to 1409, 1415 to 1418, and 1422, 2140, 2152 to 2179, and 2242 to 2244 of the records denied in part, and
 - pages 1652 to 1654, 2038 to 2040, 2053 to 2056, 2069 to 2072, 2101 to 2103, 2147, 2367, 2368, 2392, 3085, and 3086 of the records denied in full.
2. I uphold the IESO's decision to withhold access to the remaining responsive information 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 3, 2015 _____