

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3538

Appeal PA13-543

Independent Electricity System Operator

October 8, 2015

Summary: The Independent Electricity System Operator (the IESO), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a specific wind project. The IESO granted partial access to the responsive records, relying on the mandatory third party information exemption in section 17(1) and the discretionary solicitor-client privilege exemption in section 19. This order 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), 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:

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

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.

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 October 18, 2013.

[2] The IESO located 32 records responsive to the request and wrote to an 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 then 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 23 records, as well as denying access to nine records in their entirety, pursuant to 17(1) (third party information), 18(1)(e) (economic and other interests) and 19 (solicitor-client privilege) of the *Act*.

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

[5] When the third party did not file an appeal, the IESO provided the requester with a copy of the records denied in part. The IESO also provided the requester with an index of the responsive records which confirmed that some information in the records was being denied as it was 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 he was not interested in pursuing access to the information denied as non-responsive to the request. Therefore, this information is not at issue in this appeal.

[8] However, the appellant advised that he was interested in pursuing access to four records denied in part, specifically Records 3, 9, 15 and 18. Therefore, the other records denied in part are not at issue in this appeal.

[9] The appellant also advised that he wished to pursue access to Records 1, 4, 5, 6, 7, 8 and 9 of those denied in full. As a result, only these records denied in full are at issue in this appeal.

[10] In response, the IESO revisited its decision and advised the mediator that its position remained the same with respect to the records denied in part and Records 4, 5, 8 and 9 of those denied in full. The IESO is no longer relying on section 19 of the *Act* to deny access to Records 1, 6 and 7 of those denied in full. However, as Records 1, 6 and 7 are still denied pursuant to section 17(1) of the *Act*, those records remain at issue in the appeal.

[11] At the request of the appellant, the mediator contacted the third party in an

attempt to seek consent for the disclosure of those records denied pursuant to section 17(1) of the *Act*. The mediator was not successful in obtaining consent from the third party.

[12] 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*.

[13] With its representations, the affected party consented to disclosure of pages 48 to 50 and 57, 58, and 61 of Record 9 and pages 83 to 93 of Record 15 of the records denied in part, and pages 90 to 100 of Record 9 of the records denied in full. Therefore, these pages are no longer at issue in this appeal.

[14] In addition, page 63 of the records denied in part and pages 48, 70, 82, 111, and 124 of the records denied in full are blank pages or contain no responsive information.² I find that these pages are not responsive to the request and I have removed these pages from the scope of this appeal.

[15] In its reply representations, the affected party consented to disclosure of the corporate structure chart, which is Schedule A to Record 15 of the records that were denied in part. A duplicate copy of this chart is found at page 3 of Record 1 of the records denied in full. In his sur-reply representations, the appellant provided a copy of this corporate structure chart, which he obtained from a website. Therefore, Schedule A to Record 15 of the records denied in part and page 3 of Record 1 of the records that were denied in full are no longer at issue in this appeal.

[16] In its representations, the IESO raised the discretionary exemption in section 13(1) (advice or recommendations) to Record 3 of the records denied in part. This exemption and the late raising of it were added as issues in this appeal.

[17] All the parties provided confidential and non-confidential representations. Although I have considered the application of both the confidential and non-confidential representations, in this order I will only be explicitly referring to the non-confidential representations of the parties.

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

² These pages are either blank or contain a number unrelated to the contents of the records written in small font or the words "click here".

RECORDS:

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

ISSUES:

- A. Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 4, 8 and 9 (first email and attachment 2) of the records that were denied in full?
- B. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?
- C. Does the mandatory third party information exemption at section 17(1) apply to Records 3, 9, 15, and 18 of the records denied in part and Records 1 and 5 to 7 and the remaining information in Record 9 of the records that were denied in full?

DISCUSSION:

A. Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 4, 8 and 9 (first email and attachment 2) of the records that were denied in full?

[20] Section 19 of the *Act* states 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; or
- c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[21] 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.

[22] At common law, branch 1 solicitor-client privilege encompasses two types of

privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[23] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital “for use in giving legal advice or in contemplation of or for use in litigation.” The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[24] The IESO relies on both branches 1 and 2 solicitor-client communication privilege. It is claiming the application of section 19 to all of Records 4 and 8, and to the first email and attachment 2 of Record 9³ of the records that were denied in full.

[25] With respect to branch 1, it states that Records 4, 8 and 9 are confidential emails between its internal legal counsel and IESO staff that are directly related to the seeking, formulating or giving of legal advice.

[26] Concerning branch 2, the IESO states that its internal counsel is a Crown counsel within the meaning of section 19.

[27] The appellant did not provide representations on section 19.

Analysis/Findings

[28] Records 4 and 8 (denied in full) are identical email chains (each containing two emails). Record 8 has two draft agreements attached as well. The originating email in the email chains is from an IESO staff member to the IESO internal counsel seeking legal advice. The responding email is from the IESO counsel to the IESO staff member providing legal advice.

[29] Record 9 (denied in full) is an email exchange between the IESO counsel and an IESO staff member. The IESO has applied section 19 to the first email in this email chain and attachment 2, which is a draft agreement. The first email in Record 9 is the same email which is contained in the email chains in Records 4 and 8.

[30] 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.⁴ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁵ 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

³ Record 9 of the records denied in full consists of a covering email chain of three emails, and four attachments. Attachment 1 consists of pages 85 to 100. Attachment 2 consists of pages 101 to 110. Attachment 3 consists of page 112 and attachment 4 consists of pages 113 to 123.

⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁵ Orders PO-2441, MO-2166 and MO-1925.

keeping both informed so that advice can be sought and given.⁶

[31] 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.⁷ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁸

[32] Based on my review of the information at issue, I agree with the IESO that both branch 1 and branch 2 solicitor-client communication privilege apply to this information.

[33] All of the emails in Records 4 and 8 and the first email in Record 9, as well as the draft agreements that are the attachments to Record 8 and attachment 2 to Record 9, address the seeking or receiving of legal advice from the IESO's lawyers about the information in the emails or in the attachment at issue, where section 19 has also been claimed.

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

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

[35] 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 Records 4, 8, and 9 (first email and attachment 2) of the records that were denied in full are exempt under section 19.

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

[36] 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.

[37] 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

⁶ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

- it fails to take into account relevant considerations.

[38] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office may not, however, substitute its own discretion for that of the institution.¹⁰

[39] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹¹

- the purposes of the *Act*, including the principles that
- the wording of the exemption and the interests it seeks to protect
 - 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
- 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.

[40] The IESO states that in exercising its discretion it considered:

⁹ Order MO-1573.

¹⁰ Section 54(2).

¹¹ Orders P-344 and MO-1573.

1. whether disclosure will increase public confidence in the operation of the institution;
2. 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;
3. the historic practice of the institution with respect to similar information;
4. whether the requester has a compelling need to receive the information; and
5. whether the requester is seeking his or her own personal information.

[41] In particular, the IESO states that it considered that disclosure would not increase public confidence in it and even if it did, the privacy of solicitor-client communications ought to be respected. It states that the records are sensitive confidential communications with its legal counsel, which it does not generally disclose. It submits that there is no compelling need for the appellant to receive this information and that the appellant is not requesting his own personal information.

[42] The appellant states that the content of the records is significant to him in understanding and making informed comments to the decision-makers in their review of applications submitted for the wind project.

Analysis/Findings

[43] The information I have found to be subject to section 19 consists of privileged written communications between IESO legal advisors and IESO staff that are directly related to the seeking, formulating or giving of legal advice.

[44] 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.

[45] 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 with respect to 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. I find that Records 4, 8 and the first email and attachment 2 to Record 9 of the records that were denied in full are exempt under section 19.

C. Does the mandatory third party information exemption at section 17(1) apply to Records 3, 9, 15, and 18 of the records denied in part and Records 1 and 5 to 7 and the remaining information in Record 9 of the records that were denied in full?

[46] 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

[47] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹² 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.¹³

[48] 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.

¹² *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.*).

¹³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[49] The IESO states that the records at issue contain commercial information as they are all related to a particular FIT project and contract between it and the affected party.

[50] The affected party states that the records also include non-public information relating to its shareholders and certain affiliates, as well as information relating to certain wind turbines, including details of noise receptors.

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

Analysis/Findings re: part 1

[52] The IESO states that one of its primary objectives is to ensure a clean, reliable, cost-effective and sustainable supply of electricity for Ontarians. One of the ways it achieves this objective is through its FIT program, which encourages greater use of renewable energy sources including on-shore wind projects in Ontario. It states that the success of the FIT program depends on the IESO's ability to negotiate agreements for potential projects. The affected party is a supplier of energy to the IESO through the FIT Program.

[53] The records relate to the FIT contract for the wind project. I agree with the IESO and the affected party that the records contain commercial information. This consists of commercial information related to the buying and selling of services related to this contract. This type of information as listed in section 17(1) has 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.¹⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹⁵

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

Part 2: supplied in confidence

Supplied

[55] 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.

¹⁴ Order PO-2010.

¹⁵ Order P-1621.

[56] 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.¹⁶

[57] 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.¹⁷

[58] 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.¹⁸

[59] 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.¹⁹ 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.²⁰

[60] The IESO provided confidential representations on each record, except for Record 6 of the records that were denied in full and Record 18 of the records that were denied in part.

[61] The IESO states that Record 6 contains an email from a representative of the affected party directly supplying information about the affected party's corporate structure.

[62] The IESO states that the affected party has asked that the IESO claim the section 17(1) exemption for a "MCOD" - milestone date for commercial operation. A MCOD reflects a date by which a FIT project must reach a certain level of operation. The IESO believes that the information in Record 18 cannot be the subject of section 17(1) and proposes that such information be released to the appellant.

[63] The IESO states that it is impossible for the MCOD to have been "supplied in

¹⁶ Order MO-1706.

¹⁷ Orders PO-2020 and PO-2043.

¹⁸ 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*).

¹⁹ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

²⁰ *Miller Transit*, above at para. 34.

confidence" by the affected party, as it was determined by the IESO and may be varied for a variety of reasons. As a consequence, it states that even if the MCOB was not generated by IESO, it was certainly negotiated and not "supplied" for the purposes of section 17(1).

[64] The affected party submits that although the General Terms and Conditions of a FIT contract include 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 the affected party provided the records to the IESO with the understanding that they would only be publicly disclosed if required by law or court order.

[65] The appellant states that the records were not supplied in confidence as the FIT contract of the IESO and the affected party for the project contains the following clause:

Section 11 Confidentiality

(b) Information provided by an Applicant or a Supplier [the affected party] is subject to, and may be released in accordance with, the provisions of the FIPPA. Notwithstanding any confidentiality statement provided by the Applicant or Supplier, the [IESO] may be required to disclose information which is provided to the [IESO] by an Applicant or Supplier and is otherwise not protected from disclosure through an exemption in FIPPA or any other applicable legislation, regulation or policy. Applicants should not assume that such an exemption is available.

[66] In reply, the IESO states that its claim for the application of section 17(1) is consistent with both *FIPPA* and section 11(b) of the FIT contract, in particular with respect to Schedule B of Record 15. It states that section 11(b) does not preclude a supplier from forming a reasonable expectation of confidentiality and the information requested by the appellant does not form part of the public record.

[67] The IESO states that Schedule B of the agreement in Record 15 contains non-negotiated confidential information supplied to it by the affected party.

[68] In reply, the affected party states that there is no Section 11 Confidentiality clause in the FIT contract. Instead, the affected party states that the FIT contract contains a similar clause in section 7.5 of the contract, which 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 Supplier [the affected party] shall provide a copy of any FIPPA Records that it previously provided to the IESO if the Supplier continues to possess

such FIPPA Records in a deliverable form at the time of the IESO's request. If the Supplier does possess such FIPPA Records in a deliverable form, it shall provide the same within a reasonable time after being directed to do so by the IESO. 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.

[69] The affected party submits that there is no obligation on it to consent to the disclosure of any or all information supplied to the IESO; nor does this section automatically grant the appellant access to any information in connection with a request under FIPPA.

Analysis/Findings re: supplied

[70] The records at issue do not include a copy of the actual FIT contract. Nevertheless, even if that contract included language similar to the Sections 7.5 or 11 clauses set out above, the records at issue are subject to *FIPPA* and must be disclosed unless an exemption or exclusion under *FIPPA* applies.

[71] The records contain only one signed agreement between the IESO and the affected party, which is an attachment to the email, part of Record 15. All of Record 15 has been disclosed to the appellant except for Schedule B. Based on what is specifically set out in Schedule B and also considering it is part of an executed agreement between the IESO and the affected party, I find that Schedule B of Record 15 is not immutable information. I find that this document was not supplied and that part 2 of the test has not been met. Accordingly, section 17(1) does not apply to it. As no other mandatory exemptions apply and no discretionary exemptions have been claimed, I will order Schedule B of Record 15 disclosed.

[72] As stated above, in its representations the IESO withdrew its section 17(1) claim for the withheld MCOD in Record 18. The affected party did not provide specific representations on the MCOD in Record 18. I agree with the IESO that this date was not supplied by the affected party, as the MCOD was determined by the IESO. I find that part 2 of the test under section 17(1) has not been met for this information. Accordingly, section 17(1) does not apply. As no other mandatory exemptions apply and no discretionary exemptions have been claimed, I will order the information at issue in Record 18 disclosed.

[73] Based on my review of the information remaining at issue in the records, I find that it 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. Although there are agreements remaining at issue in the records, these are draft agreements. Therefore, these records have not been mutually generated between the IESO and the affected party such as to be considered not supplied.

[74] I will now consider whether the information at issue in the records that I have found to have been supplied was provided to the IESO in confidence.

In confidence

[75] 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.²¹

[76] 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.²²

[77] The IESO states that the affected party supplied the information at issue in confidence.

[78] The affected party 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, it 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. The affected party states that:

While none of the records were expressly marked "private and confidential", the records were supplied to the IESO pursuant to a business relationship in which correspondence and shared information were expected to remain confidential. In instances where the IESO created a specific record, such as Record 3 (partially redacted) on pages 12-14 relating to ..., such record would have only been generated from the information supplied by [the affected party] and, accordingly,

²¹ Order PO-2020.

²² 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.

disclosure would reveal the information originally supplied by [the affected party].

[79] The appellant states that the affected party's refusal to consent to the release of the IESO's FIT contract records is contrary to the provisions of the FIT contract and *FIPPA*. He states that a FIT contract is not "negotiated" and is not confidential. He states that a FIT contract provides the standard requirements and conditions applicable to all FIT projects, as well as renewable fuel-specific conditions.

Analysis/Findings re: in confidence

[80] Although the FIT contract referred to in the appellant's representations may not have been supplied in confidence, I do not agree with the appellant that records related to this contract are automatically not supplied in confidence.

[81] Based on my review of the records and the parties' representations, I find that the information remaining at issue was supplied in confidence to the IESO by the affected party. This information 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.

[82] Accordingly, part 2 of the test under section 17(1) has been met for the information that I have found to have been supplied, as this information was supplied in confidence.

Part 3: harms

[83] 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.²³

[84] 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

²³ *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*.²⁴

[85] 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).²⁵

[86] The IESO states that as it enters into substantial commercial contracts, it must retain the ability to perform the contracts entered into in good faith by being able to receive information and evaluate it in a commercial context. To hold otherwise, it would be stripped of its ability to act as a commercial actor and enter into commercial agreements, according to the IESO.

[87] The IESO states that if counterparties know that their confidential information may be disclosed when provided to the IESO, notwithstanding IESO’s agreement to exempt it from disclosure, they will be hesitant to, or refuse to deal with it. It states that:

There is likely to be undue loss to the IESO if it is not able to negotiate the best contracts with counterparties as a consequence of a loss of confidentiality. This loss would be contrary to the public interest.

[88] The affected party states it is in the business of developing wind energy projects, both in Ontario and other jurisdictions. It currently has six wind projects underway in Ontario and it states that it has experienced firsthand the attempts made by anti-wind activists to delay its projects. As a result, it is concerned that the disclosure could impact future negotiations with the IESO regarding ongoing and future wind projects and credit agreement assumptions with lenders providing financing for such projects.

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

[90] The affected party states that the records include shareholder information that is not publicly available and would compromise the anonymity of its or its affiliate’s shareholders. It states that the information was not provided to negotiate terms and conditions of the FIT contract or the associated assumption agreement. It states that the disclosure of any private commercial agreement terms would deter other parties from partnering with the affected party in the future.

[91] The affected party states that the records also include data relating to certain wind turbines, including details of noise receptors. It states that lawsuits have been filed against it. In addition, landowners have entered into commercial agreements with

²⁴ Order PO-2435.

²⁵ Order PO-2435.

it to host turbines and other infrastructure. It states that if information relating to cause of delays, operation dates and any non-public specifications of the wind turbines and the wind project was released, similar litigation could unfairly proliferate in the future.

[92] The appellant does not address the part 3 arguments directly, but instead primarily focuses on the harms to him personally that will result from the wind project.

Analysis/Findings

[93] Remaining at issue are Records 3 and 9²⁶ of the records denied in part, along with Records 1²⁷ and 5 to 7 and portions of Record 9 of the records that were denied in full.

[94] Both the IESO and the affected party provided confidential representations in addition to their non-confidential representations on part 3 of the test.

[95] I find that pages 1, 2, 4, and 5 of Record 1²⁸ do not meet the part 3 test under section 17(1). Page 3 of this record is the corporate structure chart, which is the same chart that the affected party has consented to in Schedule A to Record 15 of the records denied in part and is the same chart that the appellant already has a copy of.

[96] Pages 1, 2, 4, and 5 of Record 1 contain similar information to that in the corporate structure chart. I find that I do not have sufficiently detailed and convincing evidence that disclosure of these pages could reasonably be expected to cause the harms set out in sections 17(1) to (c). As only section 17(1) has been claimed for Record 1 of the records denied in full, I will order this record disclosed.

[97] Other than a brief email forwarding the email chain, Records 6 and 7 are identical email chains to pages 1 and 2 of Record 1. For the same reasons as set out above for pages 1 and 2 of Record 1, I find that Records 6 and 7 do not meet part 3 of the test under section 17(1) and I will order this information disclosed.

[98] Record 9²⁹ consists of a covering email chain of three emails, and four attachments. Attachment 1 consists of pages 85 to 100. Attachment 2 consists of pages 101 to 110. Attachment 3 consists of page 112 and attachment 4 consists of pages 113 to 123. Remaining at issue in Record 9 are two emails³⁰ and attachments 1, 3 and 4. Only pages 85 to 89 are at issue in attachment 1.

²⁶ Pages 48 to 50, 57, 58, and 61 of Record 9 of the records denied in part are not at issue, as noted above.

²⁷ Page 3 of Record 1 is not at issue, as noted above.

²⁸ Record 1 is a five-page record, consisting of a two-page covering email, a one page attachment, the affected party's corporate structure chart and two further pages of shareholder's registers.

²⁹ Record 9 of the records denied in full.

³⁰ The two emails were sent at 2:54 p.m. on July 25, 2013 and 3:09 p.m. on August 6, 2013.

[99] Based on my review of the remaining information in Record 9, I find that I do not have sufficient detailed and convincing evidence that this information meets part 3 of the test. The two emails at issue in this record contain very basic information related to who at the IESO will be reviewing the attachments.

[100] In addition, the information remaining at issue in the attachments to Record 9 is corporate structure information of the affected party very similar to that in the corporate structure chart at Schedule A to Record 15 and page 3 of Record 1, as well as the corporate information in pages 90 to 100 of Record 9,³¹ all of which the affected party has consented to disclose. Much of this information also appears to be publicly available information, such as the Certificate of Incorporation at page 113 and the Articles of Incorporation at pages 114 to 122.

[101] Therefore, I have found that Records 1, 6, and 7 and all of the information in Record 9³² (except for the first email and attachment 2) of the records denied in full are not exempt by reason of section 17(1). As no other exemptions apply, I will order this information disclosed.

[102] I find that the remaining information for which section 17(1) has been claimed meets part 3 of the test. In particular, I find that Records 3 and 9³³ of the records that were denied in part and Record 5³⁴ of the records that were denied in full meet part 3 of the test and are exempt by reason of section 17(1)(c). I accept the affected party's submission that disclosure of this information could reasonably be expected to cause it undue loss under section 17(1)(c). The information for which I have found this section applies to could reveal the causes of delays and non-public specifications of the wind turbines and the wind project, which may result in further litigation against the affected party.

[103] As I have found the information at issue in Record 3 of the records denied in part exempt under section 17(1), it is not necessary for me to also consider whether it is exempt under sections 13(1) or 18(1).

Appellant's Claim of Public Interest in his Representations

[104] The appellant appears to raise the applicability of the public interest override in section 23³⁵ for the first time at the adjudication stage of the appeal. This claim is more

³¹ Record 9 of the records denied in full.

³² Record 9 of the records denied in full.

³³ As noted above, pages 48 to 50 and 57, 58 and 61 of Record 9 of the records denied in part are no longer at issue.

³⁴ Record 5 of the records denied in full is a letter and is the same letter that is one of the attachments to Record 9 of the records denied in part.

³⁵ Section 23 reads:

appropriately raised at the mediation stage or earlier.

[105] The appellant's representations focus on the effect the wind project will have on his property. He is seeking disclosure of information about executed agreements in order that he can submit "...informed representations respecting compliance with the applicable Acts and Regulations for an application for Renewable Energy Approval for the wind project."

[106] The records that I have found exempt in this order are email chains, some with attachments concerning the negotiation of draft agreements. These records are being withheld under sections 17(1) or 19. The withheld records are not executed agreements related to the wind project. None of the information at issue in this appeal appears to address the concerns of the appellant in his representations about the wind project.

[107] The appellant has received disclosure of a significant number of records. He has also received an Index of Records concerning all of the records responsive to his request. He should review the actual information he has received from the IESO, or any other institution he has made a request to, and determine what information he is missing and wants access to.

[108] Instead of focusing his request on the specific information that he wants as set out in his representations, the appellant has submitted a broad request covering almost all of the records related to the wind project. As such, it is difficult to ascertain if any of the withheld information actually addresses the concerns that he sets out in his representations. A specific request for the exact information of interest to the appellant would allow an institution to provide a more focused response.

ORDER:

1. I order the IESO to disclose to the appellant by **November 13, 2015** but not before **November 9, 2015**, the following information:
 - the information at issue in Record 18 and in Schedule B of Record 15 of the records denied in part,
 - Records 1, 6 and 7 of the records denied in full, and
 - Record 9 of the records denied in full, except for the first email and attachment 2.

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.

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

_____ October 8, 2015