

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3614

Appeal PA13-442-2

Independent Electricity System Operator

May 27, 2016

Summary: The Independent Electricity System Operator (the IESO) received a multipart request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for access to records regarding a wind farm project. In this order, the adjudicator allows the late raising of the advice or recommendations exemption in section 13(1). She upholds the application of the discretionary exemptions in sections 13(1) and 19 (solicitor-client privilege) and partially upholds the application of the mandatory third party information exemption in section 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 17(1), 19.

OVERVIEW:

[1] The Independent Electricity System Operator (the IESO) received a multipart request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to records regarding a wind farm project (the project) for the time period of January 1, 2009 to the date of the request, August 14, 2013.

[2] The IESO located 652 records responsive to the request and wrote to a third party (the affected party) to seek its position on the disclosure of the records. In response, the affected party provided submissions on the disclosure of the records.

[3] The IESO 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 480 records and full access to 172 records pursuant to sections 17(1) (third party information), 18(1)(a) and (e) (economic and other interests), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*.

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

[5] When the 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 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 pursuant to section 21(1) or 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 three records denied in part, specifically Records 161 (only page 993, information denied pursuant to section 18 of the *Act*), 165 (only page 1003), and 196 (only page 1270).

[9] The appellant also advised that he wished to pursue access to Records 1, 3, 28, 29, 31, 32, 37, 38, 49, 53, 69, 71, 74, 78, 129, 131, 150 and 164 of those denied in full.

[10] In response, the IESO revisited its decision and advised the mediator that its position remained the same with respect to all records except Records 129 and 131 of those denied in full. The IESO advised that it is no longer relying on section 19 of the *Act* to deny access to these records. However, as Records 129 and 131 are still denied pursuant to section 17(1) of the *Act*, those records remain at issue in the appeal.

[11] In addition, the IESO advised that it was intending on relying on section 13(1) (advice or recommendations) to deny access to the information in Record 161 and Record 53 and as a result, the late raising of this discretionary exemption is also at issue.

[12] As well, at the end of mediation section 18(1)(a) was no longer at issue.

[13] As no further mediation was possible, this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sought the representations of the IESO and the affected party. In its representations, the affected party withdrew its claim of section 17(1) to certain portions of the records. As well, the IESO no longer claimed the application of section 17(1) to any of the information in the

records.

[14] The affected party provided both confidential and non-confidential representations on the application of section 17(1).¹ As well, in its representations it consented to disclosure of Records 71, 129, 131 and 164, which were sent to the appellant by the IESO. Therefore, these records are no longer at issue in this appeal.

[15] I then sought the representations of the appellant. In his representations, the appellant stated that he was not interested in receiving shareholder information, therefore, the shareholder register which comprises Record 165 is no longer at issue.

[16] In this order, I uphold the application of the sections 13(1) and 19 exemptions and partially uphold the application of the section 17(1) exemption.

RECORDS:

[17] The information remaining at issue are the responsive portions of the records as set out in the following Index of Records:

Record No.	Description	Exemptions	Page Numbers
1	Email to affected party from IESO	17(1)	Portions of pages 1 and 2
3	Email to and from IESO staff	17(1)	Portions of pages 7 and 9 and all of page 8
28	Email to and from IESO staff	17(1)	Portions of pages 994 and 995
29	Email to and from IESO staff	17(1)	Portions of pages 996 and 997
31	Email to and from IESO staff	17(1)	Portions of pages 999 and 1000
32	Email to and from IESO staff	17(1)	Portions of page 1001
37	Email to and from IESO staff	17(1)	Portions of page 1024

¹ In this order, I will only be reproducing information from the affected party's non-confidential representations.

38	Email to IESO and Hydro One staff from Hydro One with letters attached	17(1)	Portions of pages 1025 to 1030 and 1033 and all of page 1031
49	Email to and from IESO staff	17(1)	Portions of pages 1143 and 1144
53	Email to and from IESO staff	17(1), 13(1), 18(1)(e)	Section 17(1) to portions of pages 1217 and 1218 and section 18(1)(e) to portions of page 1217
69	Email to affected party from IESO	17(1)	Portions of page 1989
74	Note	17(1)	All of pages 2043 to 2047
78	Amending Agreement	17(1)	All of pages 2052 to 2056
150	Email to IESO Counsel from IESO staff	19	All of pages 3156 and 3157
161	Email to and from IESO staff	The information severed by the IESO under sections 13(1) and 18(1)(e)	A portion of page 993
196	Schedule C of Waiver Agreement	17(1)	All of page 1270

ISSUES:

- A. Does the mandatory third party exemption at section 17(1) apply to Records 1, 3, 28, 29, 31, 32, 37, 38, 49, 53, 69, 74, 78, and 196?
- B. Should the institution be allowed to raise the discretionary advice or recommendations exemption in section 13(1) for Records 53 and 161?

- C. If the institution is allowed to raise section 13(1) (advice or recommendations), does the discretionary exemption at section 13(1) apply to Records 53 and 161?
- D. Does the discretionary solicitor-client privilege exemption at section 19 apply to Record 150?
- E. Did the institution exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the mandatory third party exemption at section 17(1) apply to Records 1, 3, 28, 29, 31, 32, 37, 38, 49, 53, 69, 74, 78, and 196?

[18] Section 17(1) states:

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
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[19] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.² 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

² *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.*).

parties that could be exploited by a competitor in the marketplace.³

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

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

Part 1: type of information

[21] As stated above, the IESO did not provide representations on the section 17(1) exemption.

[22] The affected party is a supplier of energy to the IESO through the Feed-in-Tariff (FIT) program. The affected party states that records relate to and facilitate its commercial enterprise of developing wind energy projects for profit. It submits that "commercial information" should be broadly construed to include any and all information dealing with commerce. It also submits that the records contain financial information. It describes some of the information as:

- financial and banking information, such as information related to a draft letter of credit,
- contractual agreements entered into with private landowners to host wind turbines and related infrastructure:

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

Analysis/Findings re: part 1

[24] 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 FIT Program, where the IESO procures energy from renewable energy projects. The

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

affected party is a supplier of energy to the IESO through the FIT Program.⁴

[25] I agree with 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 and emails 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 letters of credit.

[26] 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.⁵ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁶

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.⁷

[27] 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.

[28] 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

[29] The affected party states 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 it provided the records to the IESO with the understanding that they would only be publicly disclosed if required by law or court order.

⁴ Representations of the IESO.

⁵ Order PO-2010.

⁶ Order P-1621.

⁷ Order PO-2010.

[30] The affected party states that the records were submitted to facilitate the development of the 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 states that the records are not otherwise available from sources to which the public has access.

[31] The affected party states that where the IESO created a specific record such record would have only been generated from the information supplied by it and, accordingly, disclosure would reveal the information originally supplied by it.

[32] The appellant states that the records pertain to a renewable energy proposal under the FIT Program for the affected party to generate electricity from wind energy and supply that energy to the public power grid. The appellant submits that the application of *FIPPA* is specifically provided for in the affected party's FIT Contract and rules.

Analysis/Findings re: part 2

[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.⁸

[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.⁹

[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.¹⁰

[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.¹¹ 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,

⁸ Order MO-1706.

⁹ Orders PO-2020 and PO-2043.

¹⁰This 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*).

¹¹ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

underlying fixed costs and product samples or designs.¹²

[37] 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.¹³

[38] 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.¹⁴

[39] As set out above in the index, the records consist of information severed from emails, a note, an agreement, and a schedule to another agreement.

[40] With respect to the emails and a note, they all contain information that was directly supplied by the affected party to the IESO in confidence or reveal information that was information supplied by the affected party to the IESO in confidence.

[41] With respect to the other documents, I find that both Records 78 and 196 contain information that was supplied in confidence to the IESO by the affected party.

[42] One is Record 78, which is an Amending Agreement between the affected party and a landowner. The IESO is not a party to Record 78. Therefore, it is not a contract involving an institution and a third party.

[43] The other is Schedule C of the Waiver Agreement between the IESO and the affected party, which is Record 196. This schedule contains information about the affected party’s business unrelated to the provision of services to the IESO by it. Concerning the information at issue in Record 196, I find that the immutability exception applies to this discreet information.

¹² *Miller Transit*, above at para. 34.

¹³ Order PO-2020.

¹⁴ 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.

[44] I find that part 2 of the test has been met for the records in this appeal.

Part 3: harms

[45] 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.¹⁵

[46] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁶

[47] 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).¹⁷

[48] The affected party relies on sections 17(1)(a) and (c).

[49] The affected party states that it is in the business of developing wind energy projects, both in Ontario and other jurisdictions and that there has been vocal resistance from anti-wind coalitions against its own projects and other wind energy projects in Ontario.

[50] The affected party states that the banking and financial information in the records relates to contractual agreements between private parties, the release of which could detrimentally affect its competitive position as disclosure would deter lenders from providing financing to it for similar projects in the future.

[51] The affected party submits that disclosure of contractual arrangements would interfere with ongoing negotiations between it and the IESO and could deter other parties from partnering with it in the future.

[52] The affected party further submits disclosure of the contractual agreements entered into with private landowners to host wind turbines and related infrastructure could detrimentally affect its competitive position as it would deter other parties from partnering with it in the future. It also states that since there have been lawsuits filed against landowners who have partnered with it, those landowners are also extremely

¹⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁶ Order PO-2435.

¹⁷ Order PO-2435.

sensitive about publicly releasing the terms of their arrangements with it.

[53] The appellant disputes the affected party's claim of harm and focuses his representations on information that is not in the records, namely whether the FIT contract terms were satisfied.

Analysis/Findings re: part 3

[54] I will consider the records individually, as follows:

Records 1 and 3 are email chains dated 2010 between the IESO and the affected party seeking approval of a draft letter of credit. These records do not contain any dollar amounts. I find that these records do not contain, as alleged by the affected party, information whose disclosure would deter lenders from providing financing to the affected party for similar projects in the future. Based on the age and contents of these records, I find that I do not have sufficient evidence that part 3 of the test under section 17(1) has been met for these records. Therefore, as no other mandatory exemptions apply to these records, I will order the responsive information in them disclosed.

Records 28, 29, 31, 32, 49, 53, and 69. At issue in these records is the severed information from email chains. Record 196 is a schedule to an agreement. I agree with the confidential representations of the affected party that the disclosure of the responsive information in these records could reasonably be expected to cause the harms set out in sections 17(1)(a) and (c). Therefore, part 3 of the test has been met for these records.

Records 37 and 38 are email chains concerning contractual arrangements with private landowners. Record 78 is an agreement between the affected party and a private landowner. I agree with the affected party that disclosure of the information at issue in these records could reasonably be expected to deter other parties from partnering with it in the future, as well it would be prejudiced in its current and future contractual relations. Therefore, I find that part 3 of the test under sections 17(1)(a) and (c) has been met for these records.

Record 74 is described as a note from the affected party. The affected party provided specific representations on this detailed 5-page record. Based on my review of the affected party's confidential representations and the information in this record, I agree with the affected party that disclosure of this record could reasonably be expected to impact future negotiations with the IESO regarding ongoing and future wind projects, as well as impact credit agreement assumptions with lenders providing financing for such projects. Therefore, I find that part 3 of the test under sections 17(1)(a) and (c) has been met for this record.

Conclusion

[55] In conclusion, I have found the information at issue for which sections 17(1)(a) and (c) have been claimed in all of the records is exempt under these exemptions, except for the information in Records 1 and 3.

B. Should the institution be allowed to raise the discretionary advice or recommendations exemption in section 13(1) for Records 53 and 161?

[56] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[57] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.¹⁸

[58] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the Ministry and to the appellant.¹⁹ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.²⁰

[59] The parties were asked to consider the following:

1. Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption or exemptions. If so, how? If not, why not?

¹⁸ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.); see also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

¹⁹ Order PO-1832.

²⁰ Orders PO-2113 and PO-2331.

2. Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal. If so, how? If not, why not?
3. By allowing the institution to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process be compromised in any way? If so, how? If not, why not?

[60] The IESO states that the basis for its section 13(1) claim is similar in nature to its section 18(1)(e) claim. It relies on Order PO-2598, where the adjudicator permitted a late raising of a discretionary exemption where the basis for raising the exemption is "similar in nature to their original claim that the exemption applies." It submits that no delay resulted from notifying the appellant of the IESO's late claiming of this exemption, as the IESO was already claiming section 18(1)(e) over this information.

[61] The appellant states that the late raising of section 13(1), and associated delays, will prejudice his rights and interests as it will delay the processing of his appeal.

Analysis/Findings

[62] I agree with the IESO that the late raising of the section 13(1) claim for the same portions of two records that it has claimed section 18(1)(e) will not, in the circumstances of this appeal, prejudice the appellant. This will not delay the processing of this appeal. Accordingly, I will allow the IESO to raise the section 13(1) discretionary exemption for part of Records 53 and 161.

C. If the institution is allowed to raise section 13(1) (advice or recommendations), does the discretionary exemption at section 13(1) apply to Records 53 and 161?

[63] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[64] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.²¹

[65] "Advice" and "recommendations" have distinct meanings. "Recommendations"

²¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[66] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²²

[67] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[68] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.²³

[69] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.²⁴

[70] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 13(1).²⁵

[71] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

²² See above at paras. 26 and 47.

²³ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

²⁴ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

²⁵ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

- factual or background information²⁶
- a supervisor's direction to staff on how to conduct an investigation²⁷
- information prepared for public dissemination²⁸

[72] The IESO states that, in the portion of Record 53 over which section 13(1) is claimed, a manager at the IESO is making recommendations and giving advice. The manager provided this recommendation and advice to the Director of Contract Management at the IESO, as well as two other managers and a contract analyst at the IESO. The Director of Contract Management then replied to the manager's earlier email message. Therefore, it states that disclosure would expose the IESO's deliberative process.

[73] The IESO states that in the portion of Record 161 over which section 13(1) is claimed, a contract analyst at the IESO is making recommendations to another IESO employee.

[74] The appellant disputes the application of section 13(1) to the records at issue.

Analysis/Findings

[75] Based on my review of the information at issue in Records 53 and 161 and the confidential and non-confidential representations of the IESO, I agree with the IESO that the information at issue in these records is advice or recommendations within the meaning of section 13(1). In each of these records, this advice or recommendations is given by a public servant and involves an evaluative analysis of information. None of the exceptions to section 13(1) in section 13(2) apply to this information.

[76] Therefore, subject to my review of the IESO's exercise of discretion, the information at issue in Records 53 and 161 is exempt under section 13(1). As this information is subject to section 13(1) there is no need for me to also consider whether it is exempt under section 18(1).

D. Does the discretionary solicitor-client privilege exemption at section 19 apply to Record 150?

[77] Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

²⁶ Order PO-3315.

²⁷ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

²⁸ Order PO-2677.

- 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.

[78] 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.

[79] The IESO relies on both branch 1 and 2 solicitor-client communication privilege of section 19 and describes Record 150 as an email chain between the Director of Contract Management at the IESO and the Associate General Counsel at the IESO.

[80] The appellant states that Record 150 pertains to actions by the IESO and the affected party that affect his personal interests and should not be withheld from him.

Analysis/Findings

[81] Branch 1 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.²⁹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³⁰ 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.³¹

[82] 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.

[83] Confidentiality is an essential component of the solicitor-client communication privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.³² The privilege does not cover

²⁹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³⁰ Orders PO-2441, MO-2166 and MO-1925.

³¹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

³² *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

communications between a solicitor and a party on the other side of a transaction.³³

[84] I find that the information at issue in Record 150 is subject to both branch 1 and 2 solicitor-client communication privilege. It is information prepared by or for the IESO's in-house lawyer, a Crown counsel, for use in giving legal advice. I find that this privilege has not been waived or lost. Therefore, the responsive information in this record is exempt under section 19, subject to my review of the IESO's exercise of discretion.

E. Did the institution exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

[85] The sections 13(1) and 19 exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[86] 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.

[87] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁴ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[88] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁵

1. the purposes of the *Act*, including the principles that
 - a. information should be available to the public
 - b. individuals should have a right of access to their own personal information
 - c. exemptions from the right of access should be limited and specific
 - d. the privacy of individuals should be protected

³³ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

³⁴ Order MO-1573.

³⁵ Orders P-344 and MO-1573.

2. the wording of the exemption and the interests it seeks to protect
3. whether the requester is seeking his or her own personal information
4. whether the requester has a sympathetic or compelling need to receive the information
5. whether the requester is an individual or an organization
6. the relationship between the requester and any affected persons
7. whether disclosure will increase public confidence in the operation of the institution
8. 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
9. the age of the information
10. the historic practice of the institution with respect to similar information.

[89] The IESO states that in exercising its discretion, it considered in particular factors 3, 4, 7, 8, and 10. It states that the appellant does not have a compelling need to receive the withheld information in the three records at issue, namely Records 53, 150 and 161. It states that disclosure will not increase public confidence in the operation of the institution. As a commercial party to the FIT Contracts, the IESO submits that it must be able to negotiate these contracts without disclosing its standards to counterparties. It states that permitting the IESO to act as a proper commercial actor benefits the public far more than requiring the IESO to negotiate contracts and amendments without due consideration.

[90] The IESO states that the information for which section 13(1) has been claimed is closely held by the IESO and is not known by the appellant. It states that it does not release its advice or recommendations of its employees - particularly when third parties could actively use this information for FIT Contracts that remain in effect today.

[91] With regards to the section 19 claim, the IESO states that proper legal review is a valid component of its business practices and should be afforded a sphere of protection. It states that it does not disclose this type of privileged information to external parties, as doing so would compromise its ability to obtain legal advice on positions taken.

[92] The appellant states that the IESO's failure to acknowledge his Notices of Liability and documentation of harms that will result from the wind project is not evidence of the "exercise of discretion". He submits that the IESO failed to have regard for identified negative effects that will result to his family, the environment and the

economy of the township, and regional airport.

Analysis/Findings

[93] Withheld under section 13(1) are the portions of Records 53 and 161 that contain an evaluative analysis of information. In Record 53, a contract analyst is providing lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. In Record 161, the internal advice of a manager in the Contract Management division of the IESO has been withheld under section 13(1).

[94] In Record 150, the legal advice of an internal lawyer for the IESO has been sought. This record does not reveal the actual advice given. I have found the portion of Record 150 that reveals the legal advice being sought as being information that is subject to section 19.

[95] None of these three records address the appellant's concerns as set out in his representations. I find in denying access to the information at issue for which sections 13(1) and 19 have been claimed, that the IESO exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[96] Accordingly, I am upholding the IESO's exercise of discretion under sections 13(1) and 19 and find that the information at issue in Records 53, 150 and 161 is exempt.

ORDER:

1. I order the IESO to disclose to the appellant the responsive information at issue in Records 1 and 3 by **July 4, 2016** but not before **June 27, 2016**.
2. I find that the remaining information in the records is exempt.
3. I reserve the right to require the IESO to provide me with a copy of the information disclosed to the appellant pursuant to order provision 1.

Original Signed by: _____

Diane Smith
Adjudicator

_____ May 27, 2016