

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3668

Appeals PA15-39-2 and PA15-110

Independent Electricity System Operator

November 25, 2016

Summary: The Ontario Power Authority received a request for access to “copies of the currently available FIT [Feed in Tariff] contracts” for three identified industrial wind projects in the Municipality of Grey Highlands, Grey County. After notifying the affected parties, the IESO granted partial access to the responsive records, relying on section 17(1) (third party commercial information) of the *Act* to deny access to the portion it withheld. One of the affected parties appealed the decision and objected to disclosure of any of its information. This was the subject of appeal file number PA15-110. The two other affected parties did not appeal the IESO’s decision granting partial access to their information. The requester appealed the decision to withhold any information from disclosure. That appeal was the subject of appeal file number PA15-39-2. A number of matters were resolved at mediation and adjudication, with the IESO ultimately advising that it was prepared to disclose the only remaining information at issue to the appellant. At that stage the appellant sought to expand the scope of the request. This order denies any expansion of the scope of the request and upholds the decision of the IESO to disclose the entirety of the FIT contracts to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 24.

Order Considered: PO-1791.

OVERVIEW:

[1] The Ontario Power Authority received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to “copies of the currently available FIT [Feed in Tariff] contracts” for three identified industrial wind projects in the Municipality of Grey Highlands, Grey County.

[2] On Jan. 1, 2015, the Ontario Power Authority merged with the Independent Electricity System Operator (IESO). Accordingly, the request was processed by the IESO.

[3] The IESO identified three FIT contracts, without the attached schedules, as responsive to the request. After notifying three companies whose interests may be affected by disclosure of the requested information (the affected parties), the IESO issued its initial access decision. The IESO granted partial access to the responsive records, relying on section 17(1) (third party commercial information) of the *Act* to deny access to the portion it withheld, being a legal description contained in each of the FIT contracts.

[4] One of the affected parties appealed the decision granting access to any of its FIT contract. This is the subject of appeal file number PA15-110. The two other affected parties did not appeal the IESO’s decision granting partial access to their FIT contracts.

[5] The requester, now the appellant, appealed the decision to withhold any information from disclosure. That is the subject of appeal file number PA15-39-2.

[6] During the course of mediation, the appellant confirmed with the mediator that he was also seeking access to all the schedules/exhibits and attachments that accompanied the FIT contracts. The IESO referred the appellant to the contract information available online at its website (Contract Version 1.2 March 9, 2010) and identified Schedule 2 “Form of Special Terms and Conditions (Launch Applications)” to the FIT contracts as additional responsive records. The appellant confirmed it wished to pursue access to these additional responsive records. The IESO subsequently notified the affected parties, seeking their representations regarding disclosure of Schedule 2 to their FIT contracts. The IESO then issued a supplementary access decision. The IESO granted partial access to the information contained in Schedule 2 to the FIT contracts, again relying on section 17 of the *Act* to deny access to the portion it withheld. The appellant maintained its position that it should be granted access to all the information at issue and took the position that it was in the public interest that the information be disclosed. Accordingly, the possible application of the “public interest override” at section 23 of the *Act* was added as an issue in the appeal.

[7] Mediation did not resolve the appeals and they were moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I determined that both appeals should be heard together and I commenced my inquiry by seeking representations from the IESO and the affected parties on the facts and issues relating to both appeals as set out in a Notice of Inquiry.

[8] The IESO provided representations in response to the Notice of Inquiry. In its representations, the IESO advised that it was now prepared to disclose the entirety of Schedule 2 to the FIT contracts. Accordingly, after notifying all three affected parties under section 28(1) of the *Act*, the IESO issued a supplementary decision letter disclosing to the appellant the entirety of Schedule 2 to the FIT contracts. As a result, that information is no longer at issue. As set out above, only one of the affected parties objected to the disclosure of the entirety of its FIT contract, including the legal description that the IESO withheld, but provided no representations in support of its position. As a result, the entirety of that 3-page agreement remains at issue. The other two affected parties did not provide representations or object to the disclosure of their FIT Contracts. Accordingly, only the legal description in their FIT Contracts that the IESO withheld was at issue.

[9] I then sent the appellant a Notice of Inquiry along with a copy of IESO's representations. The appellant provided extensive representations in response, some of which appeared to expand the scope of the request. These representations were then shared with the IESO by way of reply. In reply, IESO objected to any expansion of the scope of the request but decided to disclose the legal descriptions that remained at issue.

[10] In this order, which resolves both appeals PA15-39-2 and PA15-110, I deny any further expansion of the scope of the request and I uphold the decision of the IESO to disclose the entirety of the FIT contracts to the appellant.

RECORDS:

[11] Remaining at issue are all or parts of the three FIT contracts.

ISSUES:

- A. What is the scope of the request?
- B. Does the mandatory exemption at section 17(1) apply to the records?

DISCUSSION:

Issue A: What is the scope of the request?

Scope of the request

[12] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹

[14] In its representations the appellant set out the results of some of its prior requests under the *Act* and explains that what it is seeking is:

... a comprehensive and cohesive history of the evolution of the three projects as would be revealed by each FIT contract and its related contract documents beginning with the awarding of the contracts in 2010 and running up to the present time.

[15] The appellant also lists 13 types of records, including FIT contracts and associated schedules that represent "examples of many types of documents it is requesting". It asks the IESO "to provide complete unsevered sets of records for each of the three projects beginning with the awarding of the FIT contracts in 2010 up to the

¹ Orders P-134 and P-880.

present day”.

[16] The IESO objects to such an expansion of the request and submits that:

The [appellant’s] written submission seeks materials that fall beyond the scope of this adjudication. The request is a broadening of the documentation at issue in the Notice of Inquiry. It is the IESO’s position that further production should only occur as a result of an additional [Freedom of Information] request and should, in any event, be deemed beyond the scope of these proceedings.

[17] I agree with the IESO’s position. The request was clear and unambiguous and was for copies of the three FIT contracts only. Although access to the accompanying Schedule 2 to the contracts was added as an issue and resolved, the processing of the request through to mediation and now adjudication was not expanded any further. Allowing a further expansion of the scope of the request as suggested by the appellant at this late date would not be appropriate.

[18] I now turn to the second issue in the appeal.

Issue B: Does the mandatory exemption at section 17(1) apply to the records?

THIRD PARTY INFORMATION

[19] Affected parties who rely on the exemption provided by section 17(1) of the *Act* to resist disclosure share with the institution the onus of proving that this exemption applies.²

[20] The relevant portions of section 17(1) of the *Act* state:

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;

² Order P-228.

- (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.

[21] 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

[22] For section 17(1) to apply, the institution and/or the affected 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) and/or (c) of section 17(1) will occur.

[23] In this case the objecting party provided no representations to explain its objection. The other two affected parties declined to submit representations. The IESO was always willing to disclose the FIT contracts except for the legal description and is now prepared to disclose that remaining withheld information.

[24] Assuming, without deciding, that the first two parts of the test have been established, I will address part three of the three-part test.

[25] To meet the third part of the test, the affected party 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

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.

needed will depend on the type of issue and seriousness of the consequences.⁵ 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*.⁶

[26] 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).⁷

[27] In Order PO-1791, this office discussed the impact on an appeal of this nature, of the failure by an affected party to submit representations:

... As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.

In the circumstances, I am unable to find that the submissions of MBS provide the “detailed and convincing evidence” which is required to support the application of section 17(1)(a) to this case.

[28] These comments have even more relevance to this appeal, where none of the affected parties provided representations. In the absence of any representations, I am similarly left without any evidence on the issue of reasonable expectation of harm from disclosure with respect to the information at issue. I have also reviewed the information that remains at issue and find nothing in it that would allow me to infer a reasonable expectation of harm from disclosure. As a result, I am unable to conclude that the harms described in section 17(1) could reasonably be expected to result from disclosure of the information at issue. As all parts of the three-part test for exemption under section 17(1) must be satisfied, I find that this exemption does not apply.

⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁶ Order PO-2435.

⁷ Order PO-2435.

[29] As I have found that none of the information remaining at issue qualifies for exemption under section 17(1) of the *Act*, I will order that it be disclosed to the appellant.

[30] As a result, it is not necessary to consider the application of the public interest override at section 23 of the *Act*, as also claimed by the appellant.

ORDER:

1. The appellant's request to expand the scope of the request is denied.
2. I order the IESO to disclose to the appellant the withheld portions of the three FIT Contracts, by sending them to the appellant by **January 3, 2017**, but not before **December 29, 2016**.
3. In order to ensure compliance with paragraph 2 of this order, I reserve the right to require the IESO to provide me with a copy of the three FIT contracts as disclosed to the appellant.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ November 25, 2016