Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3703-I

Appeal PA16-227

Independent Electricity System Operator

February 28, 2017

Summary: The appellant submitted an access request to the Independent Electricity System Operator (the IESO) for financial information regarding a refurbishment agreement about a nuclear power station. The IESO denied access to the information under section 20(1) of the *Electricity Act, 1998*, which deems certain information exempt under section 17(1) of the *Freedom of Information and Protection of Privacy Act*. The appellant appealed, and during the inquiry into the appeal, the appellant asked for an opportunity to cross-examine an IESO employee who submitted an affidavit as part of the IESO's representations. Several related issues also had to be addressed. In this interim order, the adjudicator determines that: the request to cross-examine will not be granted; the inquiry will proceed in writing; the decision regarding cross-examination will not be deferred; and the appellant will be permitted additional time to provide representations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 52(1), (2), (3), (4), (8), (9) and (13).

Cases Considered: *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (d) 309; *Prassad v. Minister of Employment and Immigration*, [1989] 1 SCR. 560; *British Columbia Health (Re)*, 2016 BCIPC 22; *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311; 1978 CanLII 24 (SCC).

OVERVIEW:

[1] This interim order deals with a procedural issue in an appeal from a denial of

access by the Independent Electricity System Operator (the IESO). The procedural issue is a request by the appellant to cross-examine an IESO employee whose affidavit accompanied the IESO's initial representations in this appeal. The order also addresses several related issues that arise from the request to cross-examine.

[2] The appellant's access request was made under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) and sought access to financial information regarding the "Amended and Restated . . . Refurbishment Implementation Agreement Between [the operator of the nuclear power station] and Independent Electricity System Operator dated [date of agreement]."

[3] More specifically, the appellant requested:

> Exhibits 1.1(a),1.1(b), 1.19c), 1.1(d), 2.11(b), 2.11(c), 2.18(a), 4.7(a),4.7(c) and 9.1 of the agreement.

[4] The appellant also noted that, to the extent that the information is not contained in these exhibits, it is also requesting records detailing:

1. The Counterparty Cost Thresholds for each reactor refurbishment (as described in section 9.1 of the agreement)

2. The targeted rate of return for [the operator of the nuclear power station] and the underlying constituent figures, namely, the targeted rate of return on equity, the targeted rate of return on debt, and the assumed capital structure (i.e. the proportion of the capital costs that are financed by equity and debt respectively.)

[5] The IESO issued an access decision in response to the request. In its decision, the IESO indicated that one record is responsive to the request. It denied access under section 20(1) of the *Electricity Act, 1998*, which deems certain information exempt under the mandatory third party information exemption at section 17(1) of the *Act*.

[6] The appellant appealed the IESO's access decision. The appeal was referred to a mediator pursuant to section 51 of the *Act*. During mediation, the appellant indicated that it wishes to limit its appeal to:

1. The Counterparty Cost Thresholds for each reactor refurbishment (As described in section 9.1 of the Amended and Restated . . . Refurbishment Implementation Agreement Between [the operator of the nuclear power station] and Independent Electricity System Operator, dated [date of agreement].)

2. The targeted rate of return for and the underlying constituent figures, namely, the targeted rate of return on equity, the targeted rate of return on debt, and the assumed capital structure (i.e., the proportion of the capital costs that are financed by equity and debt respectively).

[7] Mediation did not resolve this appeal, which therefore moved on to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[8] I began the inquiry by sending a Notice of Inquiry to the IESO, inviting it to provide representations. The IESO responded with representations that included an affidavit sworn by an employee of the IESO (the affiant). The affidavit includes the following: background information about the operator of the nuclear power station and the agreement referred to in the request; a general description of the information at issue; and information intended to demonstrate the application of section 20(1) of the *Electricity Act, 1998*.

[9] I also invited the operator of the nuclear power station (the affected party) to provide representations, which it did.

[10] I then sent a Notice of Inquiry to the appellant, including the affected party's representations and the non-confidential portions of the IESO's representations and affidavit, and invited the appellant to provide representations.

[11] In response, the appellant submitted a request to cross-examine the affiant. The appellant also asks for an extension of time to provide representations until after the cross-examination issue has been decided.

[12] The appellant provided copies of his request to cross-examine the affiant to counsel for the IESO and counsel for the affected party. Both counsel submitted representations opposing the appellant's request, which were copied to the appellant. The appellant then provided a reply to these representations and copied them to the IESO and the affected party. Counsel for the IESO provided sur-reply representations and copied them to the appellant. By a subsequent email, the appellant indicated that it does not intend to respond to the IESO's sur-reply. Subsequently, the affected party indicated that it still objects to the proposed cross-examination for the reasons it had already expressed.

[13] This interim order addresses the appellant's request to cross-examine. It also addresses the following related points that have been raised by the parties: Should an oral inquiry (as opposed to a written one) be held? Should the determination of the appellant's cross-examination request be deferred until after the representations of the parties have been delivered? Should the appellant be granted additional time to provide representations?

[14] For the reasons set out in this order, the request to cross-examine will not be granted. The inquiry will be held in writing. There is no reason to defer the determination of the request to cross-examine. The appellant will receive an extension of time to provide representations, which are now due three weeks from the date of this order.

DISCUSSION:

Should the appellant's request to cross-examine the affiant be granted?

Legislation

[15] The conduct of an inquiry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) is principally governed by the provisions of section 52 of the *Act*. This section states, in part, as follows:

> 52. (1) The Commissioner may conduct an inquiry to review the head's decision if,
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> (a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or
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> (b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.
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> (2) The Statutory Powers Procedure Act does not apply to an inquiry under subsection (1).
>
> (3) The inquiry may be conducted in private.
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> (4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.
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> . . .
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> (8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath.
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> (9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.
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> . . .
>
> (13) The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50 (3) shall be given an opportunity to

> make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made.
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> . . .

[16] These sections include a number of provisions that may be relevant to the issue being decided, which may be summarized as follows:

- the *Statutory Powers Procedure Act*, which assumes an adversarial model of adjudication, and codifies a right of cross-examination,[1] does not apply to an inquiry under the *Act*;
- the inquiry may be conducted in private;
- the Commissioner has significant powers of compulsion in relation to evidence, including the power to require production of documentary evidence, and the power to summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry;
- information provided to the Commissioner during an inquiry is privileged as it would be if the proceeding were in a court; and
- although the Commissioner has the discretion to order the exchange of representations[2], no party is entitled, as of right, to be present during or to comment on the representations (which include evidence) of another person.

Representations

The appellant's initial representations

[17] The appellant submits that although cross-examinations are not normally part of an inquiry under the *Act*, such a step would assist me in coming to a decision and would be in the interest of procedural fairness.

[18] More particularly, the appellant submits:

> Testimony from the IESO witness would be highly relevant and probative. For example, it would be extremely helpful to confirm that the figures requested by [the appellant], namely the counterparty cost thresholds and the targeted rate of return, can be severed from potentially sensitive

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[1] See section 10.1 (b) of the *Statutory Powers Procedure Act.*

[2] See *Toronto District School Board v. Ontario (Information and Privacy Commissioner)*, [2002] O.J. No. 4631, Tor. Doc. 200/02 (Div. Ct.)

> details in the technical schedule. We also anticipate that these figures could be found in documents other than the technical schedule itself, such as briefings and memos. If we can confirm this to be the case during cross-examinations, those other records could potentially be disclosed, which would avoid the need to even examine the technical schedule over which the IESO and [the affected party] have expressed so much concern. Through face-to-face cross-examination it may be possible to greatly reduce and simplify the issues to be decided and the extent of documents to be reviewed.
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> Cross-examination is also warranted from a fairness perspective. In this situation, where affidavit evidence has been submitted, the appellant cannot test or challenge that evidence without cross-examinations. In court processes there is a presumptive right to cross-examine on an affidavit (e.g. in a motion). Although the IPC does not need to follow court processes, the underlying fairness rational [sic] applies here as well.
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> Furthermore, cross-examination would help address a very problematic asymmetry of information. Only the IESO is aware of the various documents containing the information requested by the appellant. There is no way for the appellant to obtain information regarding the existence and nature of the requested information except through cross-examinations.

[19] The appellant then suggests that although the cross-examination could be part of a "formal hearing" under section 52 of the *Act*, that may not be necessary, and instead, the cross-examination could take place at a court reporter's office in the absence of the adjudicator.

The IESO's initial representations

[20] The IESO's initial representations address the following points:

- an adverse cross-examination of the sort contemplated by the appellant is not provided for in the *Act* or the IPC's *Code of Procedure* or at common law;
- such a process would be unprecedented, and is not the most just, expeditious or least expensive way to resolve the issues in this appeal;
- the appellant fundamentally misunderstands the nature of an IPC inquiry under the *Act*, and the procedure proposed by the appellant would infringe on the role of the IPC adjudicator; and
- the proposed cross-examination would also give the appellant access to information that it is not entitled to under the *Act*.

[21] More particularly, the IESO submits:

> The legislature has turned its mind to what forms of examination are appropriate to assist in adjudication of Freedom of Information matters. As further discussed below, *FIPPA* permits the Commissioner to examine a person under oath. No such right is afforded to parties to an appeal. Although less prominent than it once was, the maxim of *expressio unius est exclusio alterius* (the express mention of one person or thing is the exclusion of another) suggests that there is no right to Adverse Cross-Examination.
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> . . .
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> Meanwhile, the Deeming Provision in the *Electricity Act, 1998* permits the IESO to deem the information in the technical schedule confidential. It did so. The IPC will ultimately adjudicate the validity of the IESO's use of the Deeming Provision and other exemption claims. In the meantime, however, the legislative intent underlying the Deeming Provision should not be defeated by permitting Adverse Cross-Examination on the information at issue in this appeal.
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> . . .
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> Assuming that it has the authority to amend its procedures to permit Adverse Cross-Examination, there is no reason for the IPC to exercise its discretion to do so in this case. Any person may seek access to a record under *FIPPA*. This is a low bar. The record need not impact that person's rights, privileges or interests for it to be the subject of a request. In this appeal, the confidential information at issue does not belong to the appellant and does not impact the appellant's rights, privileges or interests. There is therefore no reason to afford the appellant any form of enhanced procedural rights.
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> Further, the Adverse Cross-Examination sought by the appellant is inconsistent with the purpose of *FIPPA*. Before the adjudicator has made any decision on disclosure of the record at issue, the appellant seeks the right to ask questions about a confidential document which the IESO and the affected party claim are exempt from disclosure. The appellant also apparently seeks the right to ask questions about records and information not at issue in this appeal. It even seeks to examine on information not addressed in the affidavit that has been filed.[3] No duty of fairness afforded to the appellant in this process should be construed to permit

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[3] Here, the IESO cites, by footnote, "the appellant's suggestion that it will examine upon figures found in briefings in memos, neither of which are referred to in [the affiant's] affidavit."

this kind of wide-ranging examination about information in the IESO's possession. Such an examination would be outside of the scope of this inquiry and abusive.

. . .

The IPC is the master of its own procedure. That said, Adverse Cross-examination is not the most just, expeditious or least expensive way to resolve the issues in this appeal and should not be ordered. It would not be useful. Many of the points made in [the appellant]'s letter can adequately be made in responding submissions from the appellant. For example, if the appellant believes that the information it is seeking is publicly available, it may make those arguments in its representations. Such arguments are common. The appellant may also argue that the information it seeks may be severed from other information in the technical schedule. Those arguments can effectively be evaluated by the adjudicator. There is no reason why Adverse Cross-Examination is necessary to make these arguments and there is no real issue of fairness that would be addressed by it.

. . .

There are sufficient procedural protections to ensure a fair disposition of this matter. The adjudicator has complete access to the records at issue. The adjudicator has the ability to do whatever is permitted by law to adjudicate the appeal.

Natural justice does not require cross-examination. Here the adjudicator's evaluation of the exemption claims made by the IESO and [the affected party] do not hinge on anything that could be gleaned by Adverse Cross-Examination. That is, there is no way in which Adverse Cross-Examination will assist the adjudicator.

If the Commissioner is of the opinion that any person has information relating to the inquiry, they may summon and examine that person. The reason that these powers have been afforded to the Commissioner and his delegates is clear. There may be situations where the adjudicator needs to obtain necessary information that has not been forthcoming from an institution or third party. These rights are intended to benefit the Commissioner, not to provide the appellant with broad discovery rights about confidential information which is at issue in a *FIPPA* appeal.

[Some footnotes omitted.]

The affected party's representations

[22] The affected party states that it opposes the appellant's request to cross-examine the affiant. Its position is summarized at the beginning of its representations:

> As the inquiry being conducted is an inquisitorial and not an adversarial process: there is no place for cross-examination. The procedure of the Information and Privacy Commissioner (the "IPC") does not provide for cross-examination of the kind sought here. The issues raised by the [appellant] are not ones that require cross-examination in order to be addressed. Most importantly, there is the very real risk that [the affected party]'s confidential information will be disclosed on cross-examination. Such disclosure would cause [the affected party] irreparable harm.

[23] On the issue of the inquiry being inquisitorial, the affected party submits further:

> . . . The review process under *FIPPA* is one led by the Adjudicator: it is inquisitorial and not adversarial.
>
> *FIPPA* and the IPC *Code of Procedure* provide the IPC with the ability to inspect records and conduct examinations under oath. Parties to an inquiry are not provided with these rights. The parties and interested persons are provided with the ability to make written representations.
>
> The IPC has consistently held that its process is inquisitorial in nature, not adversarial. This has also been recognized by the Ontario Court of Appeal, which has held that:
>
> > FIPPA provides that the process used by the Commissioner to decide the appeal is inquisitorial not simply adversarial. All of this shifts the nature of the tribunal somewhat away from a court-like model.[4]
>
> The duty of fairness does not require that the parties to an IPC appeal be permitted an opportunity to cross-examine opposing witnesses.

[24] The affected party refers to the appellant's two bases for seeking cross-examination: (1) to inquire around the severability of certain figures, such as the counterparty cost thresholds and targeted rate of return; and (2) to inquire whether there are other documents that contain these figures. It goes on to comment on these areas of potential cross-examination as follows:

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[4] *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 at para. 51 (C.A.).

The proper way to address the severance issue is to make submissions on the point. The IPC adjudicator has a great deal of expertise in determining what material is and is not severable. Cross-examination is not at all required to address the issue. [The affected party] for its part agrees that the requested data is "severable" in the sense that it can be physically isolated from the rest of the Technical Schedule. However and most importantly, this is the very information which [the affected party] argues is highly confidential. This is some of the key confidential information at issue on this appeal and was the subject of our earlier submission.

The bald assertion that the cross-examination is required to determine if there are other documents is nothing more than an improper fishing expedition.

In any event, neither of these issues is raised in the affidavit on which they seek to cross-examine. No issue of credibility is raised that calls for a cross-examination. The [appellant] is not left without means to respond to the arguments raised. Cross-examination is unnecessary and an inappropriate way to address the issues raised.

Permitting the [appellant] to cross-examine the IESO affiant creates an unacceptable risk that highly confidential and commercially sensitive information would be disclosed in the cross-examination. This is contrary to the purpose of FIPPA. As described by Justice Cromwell in *Nova Scotia v. O'Connor*,[5] when a record is disclosed, that improper disclosure cannot be undone and irreparable harm will have been suffered:

> [O]nce access to information is granted, it cannot be undone if the order for access is subsequently reversed on appeal. The harm is irreparable in the sense that a legal wrong has been committed which cannot be compensated or reversed. In some cases, the injury resulting from disclosure will be minimal, but that does not detract, in my view, from the proper characterization of the wrongful disclosure as constituting irreparable harm.

. . .

. . . Cross-examination is contrary to the inquisitorial nature of IPC inquiries, may result in the improper disclosure of commercially sensitive information and is not necessary to permit the [appellant] to respond to the arguments and assertions raised in the appeal. Recognizing the highly sensitive nature of the information at issue and the public interest at play, the government created the enhanced protection of section 20(1) of the

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[5] 2001 NSCA 47 at para. 16.

> *Electricty Act*. Full submissions have been made within this appeal on the applicability of the section 20(1) exemption. It would be wrong to risk the disclosure of **the very information** which is the subject of the appeal before a decision has been made by the [Adjudicator] on the merits. The request for cross-examination ought to be rejected.
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> [Emphasis in original. Some footnotes omitted.]

The appellant's reply representations

[25] In reply, the appellant submits:

> Contrary to the submissions of [the affected party] and the IESO, the Office of the Information and Privacy Commissioner (the "IPC") has control over its own procedure, including an ability to permit cross-examinations. This power flows from two independent sources – the *Freedom of Information and Privacy Act* and the common law.
>
> *FIPPA* s. 52 explicitly provides authority for the IPC to "conduct an inquiry." This power is not limited to an inquiry in writing only. Furthermore, s. 52(8) also provides the authority to "summon and examine on oath any person."
>
> Even if *FIPPA* did not explicitly provide for oral examinations, the IPC could permit cross-examinations because, under common law, administrative tribunals may control their own procedure. The Supreme Court has described this power as follows:
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> > As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.[6]
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> . . . *British Columbia (Health) (Re)*, 2016 BCIPC 22 . . . supports [the appellant's] position that privacy commissioners may permit cross-examinations. The adjudicator in that case expressly found that it was the master of its own procedure and could permit a cross-examination (but would only do so if necessary). The adjudicator stated as follows:
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> > As for whether I will permit the applicant to cross-examine the Ministry's lawyer, the OIPC, akin to a tribunal, is master of its own

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[6] *Prassad v. Minister of Employment and Immigration*, [1989] 1 S.C.R. 560 at p. 568-569.

> procedure, meaning that the opportunity to cross-examine a witness does not necessarily follow from the fact of a written inquiry, or the right to be represented by counsel. Having said this, cross-examination may be a necessary element of procedural fairness where important issues of credibility are raised, or where there is no other effective means of refuting the allegations or arguments of the other side.[7]

In that case, the adjudicator found that cross-examinations were not necessary, but on grounds totally unrelated to the [appellant]'s request. . . . *British Columbia (Health) (Re)* is only relevant to the present case in that supports the [appellant]'s assertion that the IPC can permit cross-examinations.

[The affected party] states that "Permitting the [appellant] to cross-examine the IESO affiant creates an unacceptable risk that highly confidential and commercially sensitive information would be disclosed in the cross-examination." This is not a real risk. Clearly the [appellant] would not be permitted to elicit through questioning the very information at issue in this appeal. To protect against this, objections could be made to any improper questions and the witness could be cautioned not to reveal the confidential information in his responses to questions.

The question for the IPC in this case is whether cross-examinations are warranted. For the reasons set out in our letter of December 1, 2016, we respectfully submit that they are. The [appellant] respectfully requests a direction permitting the cross-examinations sought in that letter, either by way of an oral hearing or at a private court reporter's office.

In the alternative, if the IPC does not have sufficient information regarding the specific issues in this case to determine whether cross-examinations are warranted, the [appellant] respectfully requests that the IPC reserve its decision regarding this issue until after reviewing the submissions of the parties on the merits of this appeal. Although there is benefit in having any cross-examinations prior to submissions, the main issues of contention will become more clear after submissions have been made, which may provide helpful information for the IPC in deciding whether cross-examinations are warranted.

The IESO's sur-reply representations

[26] At sur-reply, the IESO responds to the appellant's request in the alternative to defer the decision concerning the cross-examination until after the parties have filed

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[7] *British Columbia (Health) (Re)*, 2016 BCIPC 22 at para. 16.

their submissions on the merits, and states that the IESO opposes this alternative relief. The bases for this objection are:

- an inquiry is for the benefit of the adjudicator, not the appellant, and if the adjudicator requires clarification on any issue it is open to the adjudicator to seek clarification;
- cross-examination is no more appropriate after the representations are filed than it is now; and
- adjourning the determination of this issue would not serve the interests of justice and would add further delay and expense.

Analysis

[27] Based on the representations received concerning this request, I must determine whether to:

- permit the appellant to cross-examine the affiant;
- alternatively, hold an oral inquiry;
- defer the determination of this issue; and/or
- grant the appellant an extension of time to provide representations.

[28] I will now address these issues in turn.

Should the cross-examination be permitted?

[29] This issue may be divided into the following sub-issues:

- does the IPC have the discretion to permit a cross-examination?
- if so, is there an infringement of procedural fairness or natural justice if the request is denied?
- weighing the factors in favour of and against granting the appellant's request to cross-examine, should I grant it?

Does the IPC have the discretion to permit a cross-examination?

[30] As noted by the Court of Appeal in *Children's Lawyer for Ontario v. Goodis*,[8] the process used by the Commissioner is inquisitorial and not simply adversarial, which

[8] cited above.

shifts the nature of the IPC somewhat away from a court-like model.

[31] This is clear from the unique powers and provisions relating to the conduct of an inquiry found in section 52 of the *Act*. It is also clear that the Legislature intended the inquiry process to be controlled by the IPC, not the parties to an appeal, as demonstrated by the fact that the power to compel production of documents, or evidence under oath, is expressly given to the IPC, not to parties. The process is intended to allow the IPC to obtain the necessary evidence to decide appeals while also taking into account that in the great majority of appeals, the records must remain confidential while the appeal is ongoing, and arguments that disclose their contents must, of necessity, remain confidential.

[32] However, I agree with the appellant that the IPC is master of its own procedure and, in a suitable case, could authorize a cross-examination. I also agree with the appellant that although the adjudicator in *British Columbia (Health) (Re)*[9] denied the request to cross-examine, the decision overall supports this conclusion. However, such a procedure would be highly unusual, and given the added expense and potential delays that are likely to occur, such relief should not be granted lightly, and only where circumstances warrant. *British Columbia (Health) (Re)* provides criteria to consider in this regard. I will refer to these in more detail below.

Is there an infringement of procedural fairness or natural justice if the request to cross-examine is denied?

[33] The two well-known principles of natural justice state that a party must be given an opportunity to be heard and to respond to the issues raised ("*audi alteram partem*"), and that no one may be a judge in his or her own cause ("*nemo iudex in causa sua*"). As no allegation of bias has been put forward in this case, only the former principle requires consideration here. In that regard, I note that in *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*,[10] the Supreme Court of Canada refers to natural justice as "fair play in action."

[34] In furtherance of procedural fairness and natural justice, I have already provided the representations and affidavit provided by the IESO, with severances to protect confidential information, and the representations of the affected party, in their entirety, to the appellant. At the same time, I also provided the appellant with a Notice of Inquiry outlining the issues, and invited it to provide representations. If necessary, the inquiry may include a subsequent invitation to the IESO and the affected party to reply to the representations of the appellant once they are provided. After that, if necessary, I may invite the appellant to provide sur-reply representations. The whole point of exchanging representations in this fashion is to ensure procedural fairness. In these circumstances, I conclude that the appellant's procedural fairness and natural justice

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[9] cited above.
[10] [1979] 1 SCR 311, 1978 CanLII 24 (SCC) at p. 326.

interests are not breached if I deny the appellant's request to cross-examine the affiant.

Factors in favour of and against granting the appellant's request to cross-examine

[35] As regards the factors that could weigh in favour of and against granting the appellant's request to cross-examine the affiant, helpful guidance is provided by *British Columbia (Health) (Re).*[11] In that case, the British Columbia Information and Privacy Commissioner identified that cross-examination could be warranted where important issues of credibility are raised, or where there is no other effective means of refuting the allegations or arguments of the other side.

[36] In this case, the appellant does not argue that there are issues of credibility. However, it does refer to the "asymmetry" inherent in a situation where the IESO and the affected party are aware of the contents of the records, while it is not. However, this imbalance is an inevitable aspect of any access appeal under the *Act* because an inquiry under the *Act* must encompass a process whereby parties may refer to the contents of records in their representations in a confidential manner, while also allowing the IPC to obtain the necessary evidence and argument to fairly determine the issues. These objectives underlie both section 52 and the appeal process followed by this office, including the exchange of representations.

[37] In my view, the appellant has been and is being afforded the maximum degree of disclosure of the positions of the opposing parties that is possible under the circumstances, and I find that the appellant has been provided with the means to respond adequately to the arguments advanced by the IESO and the affected party.

[38] The appellant raises a number of other factors in support of its argument that it should be entitled to cross-examine the affiant, as described above, which I will now review.

[39] The appellant suggests that the cross-examination would assist me in determining the issues, stating that, "[f]or example, it would be extremely helpful to confirm that the figures requested by [the appellant], namely the counterparty cost thresholds and the targeted rate of return, can be severed from potentially sensitive details in the technical schedule. We also anticipate that these figures could be found in documents other than the technical schedule itself, such as briefings and memos."

[40] The suggestion that I will be assisted by the type of cross-examination contemplated by the appellant, based on this outline of what it would entail, must be rejected for the following reasons.

[41] The question of whether severances are possible depends on whether any information is exempt, which I will determine based on my review of the records, if

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[11] cited above.

necessary, and the arguments put forth by the parties. The IESO has already taken, and stood by, the position that the information in its entirety is exempt under section 20(1) of the *Electricity Act, 1998*, which deems certain records to be subject to the mandatory third party information exemption at section 17(1) of the *Act*. In these circumstances, it is hard to see how cross-examination could reasonably be expected to produce further information that would assist me in determining the severance issue.

[42] Moreover, the determination of whether section 20(1) of the *Electricity Act, 1998* applies must be determined in accordance with the criteria it sets out. This section states:

> A record that contains information provided to or obtained by the IESO or a predecessor relating to a market participant and that is designated by the head of the IESO as confidential or highly confidential is deemed for the purpose of section 17 of the Freedom of Information and Protection of Privacy Act to be a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, the disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization.

[43] In other words, the question is whether the information was provided by a market participant and whether it was designated by the "head" of the IESO[12] as confidential or highly confidential. The appellant does not explain how the proposed cross-examination would assist me in determining this issue, and based on the evidence and argument provided, I am not persuaded that it would. It is also not apparent how the cross-examination would produce relevant information about the other issue in this appeal, namely the possible application of the public interest override in section 23 of the *Act*. In my view, the written inquiry process normally followed by this office, including the exchange of representations, will permit a just and efficacious determination of these issues.

[44] The appellant also suggests that the cross-examination would provide an opportunity to probe the question of whether records other than the Technical Schedule containing the information sought by the appellant might exist. In that regard, the appellant is, in effect, seeking to raise the issue of reasonable search. I note that the appellant's request under the *Act* seeks access to identified "exhibits" to the *Amended and Restated . . . Refurbishment Implementation Agreement*, or, to the extent that the exhibits do not contain what the appellant later describes as the "key information"[13] at

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[12] identified as the IESO's Chief Executive Officer in the schedule to Regulation 460, made under the *Act*.
[13] The "key information" consists of: 1. The Counterparty Cost Thresholds for each reactor refurbishment (As described in section 9.1 of the "Amended and Restated . . . Refurbishment Implementation Agreement Between [the operator of the nuclear power station] and Independent Electricity System

issue, the request seeks access to records "detailing" this information. According to this wording, the responsiveness of additional records is conditional on the records identified at first instance *not containing* this information.

[45] As it has not been suggested that the technical schedule does not contain the "key information" identified by the appellant, there is no basis to conclude that other records have any relevance in this appeal.

[46] Moreover, the *Act* does not contemplate a situation in which a requester such as the appellant is given an opportunity to cross-examine an institutional representative under oath to delve into the detailed contents of the institution's broader record holdings, or to learn more about the contents of confidential records at issue. The appellant summarily dismisses the affected party's concerns that this line of questioning would pose a risk that the information it claims to be confidential could be prematurely disclosed. It acknowledges that, "[c]learly, the [appellant] would not be permitted to elicit through questioning the very information at issue in this appeal. To protect against this, objections could be made to any improper questions and the witness could be cautioned not to reveal the confidential information in his responses to questions."

[47] However, in my view, the proposed focus of the questions, as outlined above, does pose this risk. It is hard to imagine how the proposed questioning about severances, for example, could occur without detailed discussion of the contents of the records. I agree with the affected party that this would be an abuse. At a minimum, in the event of objections occurring, I would be required to rule on them, adding to the length and complexity of the process, in a situation where, for the reasons I have outlined, I am not persuaded that the proposed examination would assist me in determining the issues.

[48] The appellant also suggests that cross-examination would permit the simplification of issues and reduction of the extent of documents to be reviewed. In that regard, I note that the appellant has narrowed the appeal to what it calls the "key information,"[14] and I am at a loss to understand how the cross-examination could reasonably be expected to provide any further simplification of the issues or reduction of documents to review.

[49] In making this submission concerning simplification and reduction of the issues and the scope of the inquiry, the appellant also appears to suggest that the cross-examination might provide an opportunity for what would, in effect, amount to a further mediation. I note that the parties have already been through a mediation process

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Operator, dated [date of agreement].) 2. The targeted rate of return for [the operator of the nuclear power station] and the underlying constituent figures, namely, the targeted rate of return on equity, the targeted rate of return on debt, and the assumed capital structure (i.e., the proportion of the capital costs that are financed by equity and debt respectively).

[14] See footnote 13, above.

before the appeal was transferred to adjudication. Under the circumstances, I do not see the utility of attempting further mediation at a cross-examination.

[50] For all these reasons, I find that a cross-examination of the affiant is not warranted.

Should an oral, as opposed to a written inquiry, be held?

[51] As already alluded to, the normal practice of this office in conducting inquiries in access appeals is to hold them in writing, following the process outlined in the *Code of Procedure.* The appellant's arguments in favour of holding an oral hearing are essentially the same as those outlined above. For the reasons already given, I do not find these arguments persuasive.

[52] I will conduct this inquiry in writing, following the IPC's standard inquiry procedures as outlined in the *Code*.

Should the determination of the appellant's cross-examination request be deferred until after the representations of the parties have been delivered?

[53] This issue has now been argued in extensive fashion, with initial, responding, reply and sur-reply representations and the participation of all parties. From the foregoing analysis, it is clear that the issue can be decided now. I agree with the IESO that it would be inappropriate to defer this decision. If I require clarification on any issue, it is within my power to obtain it by inviting additional representations or utilizing the Commissioner's other powers set out in section 52, as necessary.

[54] Accordingly, I am deciding this issue now. Briefly stated, for the reasons set out above, I do not accept the appellant's request to cross-examine the affiant, and I will proceed by written inquiry.

Should the appellant be granted additional time to provide representations?

[55] The appellant has made a somewhat novel proposal to cross-examine, and has provided arguments in support of it. Although I have not accepted them, it would be manifestly unfair to deny the appellant additional time to respond to the Notice of Inquiry and the representations of the IESO and the affected party that I forwarded to the appellant on November 9, 2016. The IPC normally allows parties three weeks to provide their initial representations. Accordingly, the appellant's representations are now due on or before **March 21, 2017.**

ORDER:

1. The appellant's request to cross-examine the affiant is denied.

2. The appellant's request in the alternative for an oral hearing is also denied. A written hearing will be held in accordance with the IPC's *Code of Procedure*.

3. The time for the appellant to provide representations in response to my correspondence to it dated November 9, 2016 is extended. The representations are now due on or before **March 21, 2017.**

Original Signed by: February 28, 2017

John Higgins
Adjudicator