Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3800

Appeal PA16-220

Independent Electricity System Operator

December 29, 2017

Summary: The appellant submitted an access request to the Independent Electricity System Operator (the IESO) for information found in a refurbishment agreement relating to the Bruce Power nuclear station. The IESO denied access to the information under section 20(1) of the *Electricity Act, 1998*, which deems certain information to be exempt under section 17(1)(a) of the *Freedom of Information and Protection of Privacy Act*. The appellant disputes the application of the exemption and also claims that the public interest override in section 23 of the *Act* applies. In this order, the adjudicator finds that section 20(1) of the *Electricity Act, 1998* applies to exempt the information from disclosure, and that the public interest override does not apply. The appeal is dismissed.

Statutes Considered: *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, section 20(1); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1), 23.

Orders and Investigation Reports Considered: Orders PO-3197 and PO-3480.

OVERVIEW:

[1] The appellant made an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for the complete, amended Bruce Power refurbishment agreement which was announced in December 2015 (the "Amended and Restated Bruce Power Refurbishment Implementation Agreement," referred to in this order as the "ARBPRIA"), including the following exhibits:

- Exhibit 1.1(a) Form of Basis of Estimate Report
- Exhibit 1.1(b) Building Trades
- Exhibit 1.1(c) Financial Model
- Exhibit 1.1(d) CAS Instructions
- Exhibit 2.11(b) Initial Lifetime Asset Management Plan
- Exhibit 2.11(c) N and N+1 Deliverables Report
- Exhibit 2.18(a) Specified Fuel Supply Arrangement
- Exhibit 4.7(a) Contract Price Adjustments for Changes to Operating Costs
- Exhibit 4.7(c) Contract Price Adjustment for Other Post Employment Benefits and Burden Rate
- Exhibit 9.1: Unit Threshold Base Amount.

[2] The IESO responded by stating that the ARBPRIA is available online, and provided the website link to the appellant.[1] The IESO further indicated that it was denying access to the exhibits contained in the Technical Schedule to the ARBPRIA, citing section 20(1) of the *Electricity Act, 1998*, (the "*EA*"), which deems certain information exempt under the mandatory third party information exemption at section 17(1)(a) of the *Act*.

[3] 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*. During mediation, the appellant indicated that he objects to the IESO's access decision, and that he also relies on section 23 of the *Act*, the public interest override.

[4] 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 *EA*.

[5] I also invited Bruce Power to provide representations as an affected party. Bruce Power did so.

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[1] The Technical Schedule to the ARBPRIA is not included in the version that has been posted online.

[6] I then sent a Notice of Inquiry to the appellant, including Bruce Power's representations, in full, and the non-confidential portions of the IESO's representations and affidavit, and invited the appellant to provide representations. Once the appellant had provided representations, these were shared in full with the IESO and Bruce Power, who both responded with reply representations. I shared the reply representations of both these parties in full with the appellant, who responded with sur-reply representations.

[7] In its initial representations, the IESO argued that it should be permitted to raise sections 18(1)(c) and (d) (economic and other interests), which are discretionary exemptions it had not initially claimed. This raises the issue of whether the IESO should be permitted to do so, and if so, whether the exemptions apply. However, because of the way I have determined the issues in this appeal, it is not necessary to consider these issues.

[8] In the result, I find that section 20(1) of the *EA* applies, and as a consequence, the information at issue is exempt under section 17(1)(a) of the *Act*. I find further that section 23 does not apply. The appeal is dismissed.

RECORDS:

[9] The record at issue consists of parts of the technical schedule to the ARBPRIA.

ISSUES:

A. Does the exemption provided by section 20(1) of the *EA* apply?

B. If so, does the public interest override at section 23 of the *Act* apply?

DISCUSSION:

A. Does the exemption provided by section 20(1) of the *EA* apply?

[10] Section 20(1) of the *EA* 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.

[11] The term "market participant" is defined in section 2(1) of the *EA*:

> "market participant" means a person who is authorized by the market rules to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid;

[12] Section 17(1) of the *Act* 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.

[13] In summary, if section 20(1) of the *EA* applies, the record is deemed to be exempt under the mandatory third party information exemption found at section 17(1) of the *Act.* More specifically, the language of section 20(1) of the *EA* indicates that once information about a market participant supplied to or obtained by the IESO is "designated by the head of the IESO as confidential or highly confidential," it is deemed to meet the requirements for exemption under section 17(1)(a) of the *Act*, whose language it incorporates.

[14] For section 20(1) of the *EA* to apply in this appeal, each part of the following two-part test must be satisfied:

1. the record must contain information provided to or obtained by the IESO relating to a market participant, and

2. the information must have been designated by the head of the IESO as confidential or highly confidential.[2]

Representations

Initial Representations of the IESO and Bruce Power

[15] The IESO submits that section 8.7 of the ARBPRIA designates the information contained in the technical schedule as confidential or highly confidential for the purposes of section 20(1) of the *EA*. Section 8.7 of the ARBPRIA states, in part, as follows:

> *The [IESO] has reviewed the Confidential Information of [Bruce Power] contained in the Technical Schedule* and has considered such Confidential Information to be disclosed to the [IESO] in connection herewith. The Parties agree that such Confidential Information is highly confidential commercial, financial, scientific, technical, and/or labour relations information, and/or contains trade secrets and is supplied in confidence by [Bruce Power] to the [IESO] on that basis *and, for greater certainty, for the purposes of subsection 20(1) of the Electricity Act, the [IESO] hereby designates as confidential or highly confidential the Confidential Information of [Bruce Power] provided to the [IESO] up to and including the date of this Agreement* and acknowledges that [Bruce Power] has advised it that all Confidential Information to be provided to the [IESO] after the date of this Agreement is considered by [Bruce Power] to be confidential or highly confidential. [Emphases added.]

[16] This recital confirms that the confidential information contained in the Technical Schedule is designated as confidential or highly confidential by the IESO.

[17] The IESO states that the ARBPRIA was signed by its Chief Executive Officer (CEO). The CEO is designated as "head" of the IESO in the Schedule to Regulation 460, made under the *Act*. I have verified this submission by looking at the ARBPRIA. It was, in fact, signed by the President and CEO of the IESO.

[18] The IESO also quotes from the Technical Schedule itself:

> *This document was provided by Bruce Power LP to the [IESO] pursuant to restrictions on its use and further disclosure. The information contained herein is confidential* commercial, financial, scientific, technical, and/or labour relations information and/or contains trade secrets, and *is supplied on that basis*. Disclosure of this information could reasonably be expected to either cause material financial loss to us, to prejudice our economic

[2] See Order PO-3197.

> position, or to interfere with negotiations in which we are engaged. [Emphasis added.]

[19] This recital from the Technical Schedule asserts that the information it contains was "provided" by Bruce Power to the IESO, and confirms that the entire schedule consists of confidential information.

[20] The IESO also refers to Order PO-3197, which dealt with information in the Technical Schedule to an earlier reactor refurbishment agreement[3] involving Bruce Power and Ontario Power Authority (which has now merged with the IESO). Order PO-3197 upheld the application of the predecessor of section 20(1) of the *EA*,[4] which contained exactly the same wording as section 20(1) except that it applied to the Ontario Power Authority.

[21] The IESO submits that:

> By pursuing an appeal to obtain information contained in the Technical Schedule, the appellant is essentially asking the IPC to revisit its decision from three years ago. There is no reason to make an order differing in disposition from Order PO-3197.

[22] Bruce Power's representations echo and adopt those of the IESO. Bruce Power submits that:

> Whether by application of first principles or the IPC's past decisions, it is clear that section 20(1) of the [*EA*] applies and the record is exempt from disclosure, subject only to the public interest override analysis that follows.

[23] In addition, Bruce Power submits that it is a market participant under the *Electricity Act*, being an electricity generator licensed to convey power into the IESO-controlled grid and authorized by the IESO under the market rules to be a market participant. Bruce Power's status as a market participant under the *EA* was confirmed in Order PO-3197.

The appellant's initial representations

[24] The appellant's initial representations contain few express references to section 20(1) of the *EA*. They are more focused on section 17(1)(a) of the *Act*. The appellant refers to the burden of proof, which section 53 of the *Act* places on institutions to demonstrate that claimed exemptions apply, and argues that it has not been met.

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[3] The 2005 Bruce Power Refurbishment Agreement
[4] See the now-repealed section 25.13(3) of the *Electricity Act, 1998*.

[25] More specifically, the appellant states:

> The IESO has withheld the requested information, citing s. 17(1)(a) of FIPPA by way of section 20(1) of the [*EA*]. I do not see how disclosure of terms from a sole-sourced contract for a singular project that guarantees a set price for 49 years could affect the competitive position of a contractor that has no competitors, or affect negotiations that are now over.

[26] This submission misses the point of section 20(1) of the *EA*, which empowers the head of the IESO to "deem" that the elements of section 17(1)(a) (including competitive harm) are met by a record that meets the two requirements under section 20(1) as set out above.[5] This "deeming" provision obviates the need to prove section 17(1)(a) harms in cases where the two requirements are met. The IESO is not required to prove competitive harm where section 20(1) of the *EA* is claimed. Instead, the analysis will focus on the two requirements that must be satisfied for section 20(1) to apply.

Reply representations of the IESO and Bruce Power

[27] The IESO submits, in reply, that the appellant ". . . has not disputed that the deeming provision at section 20(1) of the [EA] applies. . . ." Bruce Power does not provide new arguments on this issue in its reply representations.

The appellant's sur-reply representations

[28] At sur-reply, the appellant again refers to the burden of proof, arguing that the "possibility" of harm does not meet it. The appellant also refers to the severability of information pursuant to section 10 of the *Act*, which mandates the disclosure of non-exempt severable portions of requested records. These submissions miss the point of section 20(1) of the *EA* in precisely the same way as the appellant's initial representations. As I have already noted, the IESO is required to demonstrate that the two requirements articulated above have been met.[6]

Analysis

[29] To reiterate, for section 20(1) of the *EA* to apply in this appeal, each part of the following two-part test must be satisfied:

1. the record must contain information provided to or obtained by the IESO relating to a market participant, and

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[5] To reiterate, these two requirements are: 1. the record must contain information provided to or obtained by the IESO relating to a market participant, and 2. the information must have been designated by the head of the IESO as confidential or highly confidential.

[6] See previous footnote.

2. the information must have been designated by the head of the IESO as confidential or highly confidential.[7]

[30] As noted earlier, the Technical Schedule itself states that it "*was provided by Bruce Power LP to the [IESO]* pursuant to restrictions on its use and further disclosure. The information contained herein is confidential commercial, financial, scientific, technical, and/or labour relations information and/or contains trade secrets. . . ." I am therefore satisfied that the information at issue was "provided to or obtained by" the IESO. I also find that it relates to Bruce Power, and that, based on Bruce Power's submissions, it qualifies as a market participant. Based on these findings, part 1 of the test is satisfied.

[31] Under part 2, I am satisfied that the information in the Technical Schedule, including the information at issue, has been designated by the head of the IESO as confidential or highly confidential, based on the contents of the ARBPRIA referred to above, and the fact that it was signed by the CEO, who is the "head" for this purpose. Accordingly, part 2 of the test is also met.

[32] As both parts of the test are met, I find that section 20(1) of the *EA* applies, and the information at issue is therefore exempt under section 17(1)(a) of the *Act*.

[33] The parties provided additional representations on whether, if section 20(1) of the *EA* does not apply, the requirements under section 17(1) of the *Act* are met. Because of the conclusion I have just reached, it is not necessary to consider those representations.

B. Does the public interest override at section 23 of the *Act* apply?

[34] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[35] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[36] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which

[7] See Order PO-3197.

could seldom if ever be met by an appellant.[8]

[37] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[9] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[10] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[11]

[38] Any public interest in *non*-disclosure that may exist also must be considered.[12] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[13]

[39] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[40] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[14]

[41] I will divide the analysis of this section into two sections: (1) is there a "compelling public interest" in disclosure? (2) If so, does it outweigh the purpose of section 20(1) of the *EA* and/or section 17(1) of the *Act*?

Is there a "compelling public interest" in disclosure?

Initial representations of the IESO and Bruce Power

[42] The IESO refers to Order PO-3197, in which the predecessor of section 20(1) of the *EA* was found to apply to part of the technical schedule of a previous refurbishment agreement relating to Bruce Power. In Order PO-3197, Adjudicator Diane Smith also found that section 23 did not apply. The IESO submits that "[t]he reasoning in Order PO-3197 applies equally to this appeal."

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[8] Order P-244.
[9] Order P-984.
[10] Orders P-984 and PO-2607.
[11] Orders P-984 and PO-2556.
[12] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[13] Orders PO-2072-F, PO-2098-R and PO-3197.
[14] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

[43] On the question of whether there is a compelling public interest in disclosure, the IESO submits as follows:

- there is no compelling public interest in the information in the technical schedule;
- the information is not related to public interests; for example, there is no relevant interest related to public safety; and
- general assertions about accountability are insufficient to ground a compelling public interest.

[44] The IESO also submits that a public interest will not exist where sufficient information is already available to the public. It cites the availability of the entire ARBPRIA (except the technical schedule) on its website. It also refers to a "fairness opinion" concerning the ARPBRIA that is also posted to its website. The fairness opinion was prepared by NERA Economic Consulting, and states:

> NERA is a firm of several hundred professional economists with offices located throughout the world. NERA's qualifications to provide this opinion stem from our extensive experience with respect to the following areas of expertise:
>
> • Developing and reviewing key economic terms of power contracts;
>
> • Familiarity with Ontario power markets and the organization of the electricity sector in Ontario;
>
> • Assessment of nuclear economics and finance and particularly the assessment of potential nuclear investments;
>
> • Experience in the modeling of financial projections for power plant investments and the analysis of customer rate impacts of commitments to support such investments;
>
> • Understanding of power system planning; . . .

[45] The fairness opinion also explains that "NERA has no conflicts that impair the objectivity and independence of this Opinion."

[46] As outlined in more detail later in this order, NERA's fairness opinion concludes that the ARBPRIA is fair to the IESO and satisfies the principles set forth in the Long-Term Energy Plan for Ontario released by Ontario's Minister of Energy in December 2013.

[47] The IESO also submits that disclosure will impact its counterparties (*i.e.* parties

such as Bruce Power with which the IESO makes contractual arrangements), arguing that the fear of disclosure of information provided by such parties "will hinder the IESO's ability to carry out its purposes and objects with respect to power procurement, which is performed in the public interest."

[48] It submits further that, without the protection of section 20(1) of the *EA*, ". . . Bruce Power would likely not have provided the IESO with full financial, commercial and technical information about its business operations and the refurbishment of its nuclear reactors." The affidavit that came with the IESO's representations also says that the disclosure of information intended to be confidential "will adversely affect the IESO's ability to protect the ratepayers' interest and may result in less ability to control costs. . .."

[49] For its part, Bruce Power refers to information that is publicly available. Like the IESO, Bruce Power refers to the ARBPRIA (minus the technical schedule) being available on the IESO's website, as well as Bruce Power's website, and the fairness opinion described above, that is available on the IESO's website.

[50] In addition, Bruce Power states that the price paid for electricity generated by Bruce Power effective January 1, 2016 is publicly available information[15] that may be found on the IESO's website.

[51] Bruce Power also notes the reliance on publicly available information in Order PO-3197 as the basis for finding no compelling public interest in disclosure. In that case, the publicly available information included the predecessor agreement to the ARBPRIA (except its technical schedule) and a fairness review:

> . . . I find that by reason of the public availability of the BPRIA (except for the Technical Schedule) and the OPA[16] website on this agreement there is another public process or forum to address public interest considerations concerning the prudency of the OPA's electricity supply contract with the Bruce Power for the output of the Bruce A nuclear station. The BPRIA was reviewed for fairness by the CIBC and auditor general. By reason of the BPRIA, a significant amount of information has already been disclosed and I find that this is adequate to address any public interest considerations. . . . [Footnotes from original omitted.]

[52] Bruce Power also notes that disclosure of information that has been designated as confidential and for which section 20(1) of the *EA* has been claimed would:

> . . . undermine Bruce Power's confidence in sharing information going forward with the IESO. . . . Open-book management is a key [principle] of

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[15] $65.73/MWh, subject to adjustment in accordance with the terms of the ARBPRIA
[16] Ontario Power Authority, predecessor of and now merged with the IESO.

> the ARBPRIA. . . . If open-book management is not possible an underlying cornerstone principle of the contract is at risk.

The appellant's initial representations

[53] The appellant submits:

- the Bruce nuclear station generates over a third of Ontario's electricity supply and is "critical to the economic and overall well-being of the province of Ontario";
- the IESO's estimated price over the life of the agreement cannot be verified based on currently available information;
- the public has no idea as to what happens in the event of the refurbishments costing more than the estimates;
- the public does not know the refurbishment price threshold beyond which the refurbishment may be canceled, or what the associated costs might be;
- the NERA fairness opinion is "heavily qualified" and states that it is for the benefit of the IESO only; and
- despite what the IESO claims, there remains no way for the public to verify the value-for-money of what the appellant says is the largest sole-sourced contract in Ontario's history, and it is "hard to imagine a more compelling public interest than allowing the independent verification" of this.

Reply representations of the IESO and Bruce Power

[54] At reply, the IESO submits that there is no compelling public interest in disclosure because there is sufficient information already available, and there is a public interest in non-disclosure.

[55] The IESO refers to the appellant's basis for arguing that there is a compelling public interest in disclosure as "allowing the independent verification" of the financial value of the ARBPRIA. In that regard, it submits that the "objective" financial review of the ARBPRIA is "already addressed in many ways that should satisfy Ontario rate-payers," and further:

> Ample independent verification of the [ARBPRIA] exists in the form of third-party analysis which has been and is being performed.

[56] It also submits:

- there are two third party evaluations of the ARBPRIA by NERA and Ontario's Financial Accountability Officer (FAO).

- the ARBPRIA is available on the internet (except the technical schedule) and that many of the appellant's concerns are addressed by disclosure of its terms; and

- there is a "plethora" of publicly available information about the ARBPRIA.

[57] The IESO also addresses the appellant's claims that the public has not been provided with necessary information to evaluate the ARBPRIA, and refers to various publicly available sections of the ARBPRIA. The IESO submits further that the appellant "has failed to understand the scope of information that is publicly available."

[58] Bruce Power's reply representations also address the public's ability to know the cost of the refurbishment project. It states:

> As the Appellant itself acknowledges, the initial price and estimated average price of power under the ARBPRIA has been made publicly available. The Appellant also acknowledges that the total estimated cost of refurbishment under the ARBPRIA has been made publicly available.
>
> The release of the Technical Schedule would not provide any further information that would be materially useful in ascertaining the actual cost of the refurbishment project.
>
> The Appellant argues that it is "possible that the final budgeted cost may be so high that refurbishment is no longer in the public interest, when compared to alternatives". The Appellant is seeking the actual cost of the project. The actual cost is an unknown at this time.
>
> The estimated or budgeted cost is known and is already public. As the Appellant implicitly acknowledges, the budgeted cost may not be the final actual cost. The cost inputs which will ultimately determine the price of the project have been estimated in the Technical Schedule. But those costs cannot be finally known until those costs are purchased or incurred.
> . . .

[59] As regards the appellant's arguments concerning limitations in the NERA fairness opinion, the IESO responds as follows:

> The appellant's representations complain about the IESO's reliance on the NERA report. Particularly, the appellant attacks the qualifications contained in the NERA report.
>
> It is true that the NERA Report contains qualifications. In Order PO-3197, Adjudicator Smith considered a similar argument about the fairness opinion given by CIBC with respect to an earlier version of the [ARBPRIA]. In that case, the CIBC letter stated that the fairness opinion "was not to be construed as an opinion to the fairness, from a financial point of view

or otherwise, of the Proposed Transaction relative to any such potential alternative."[17]

Notwithstanding this qualification, Adjudicator Smith held that the significant amount of information already disclosed was adequate to address any public interest considerations raised by the appellant.[18]

The issue is not whether the NERA report conclusively provides, without qualification, from any perspective, whether the [ARBPRIA] is fair. The issue is whether it provides the public with information which may preclude the need to disclose records which will be harmful if disclosed. As Adjudicator Smith held, even a fairness report with qualifications can be relied upon by an institution for this purpose.

[60] With respect to the FAO analysis, the IESO submits:

Additional information will soon be publicly available about the [ARBPRIA] in addition to the NERA Report. Ontario's FAO is investigating the market risks associated with the refurbishment of nuclear reactors at the Bruce Nuclear Generating Station.[19]

The FAO provides timely and relevant analysis to the Legislative Assembly. The FAO conducted its analysis without using confidential information from the Technical Schedule. The FAO was able to base its analysis on publicly available information, even though the FAO could have compelled IESO to release confidential information to it. The IESO understands that the FAO is able to complete its review by using only the publically available information and that the report will be released imminently.

The IESO did not want to unduly delay adjudication of this matter pending release of the FAO report. Nor do the FAO's conclusions particularly matter to the outcome of this appeal. Rather it is the FAO's ability to perform their work using publically available information, the existence of the FAO report, and the fact that rate-payers will have even more information about the value of the [ARBPRIA] that is important to the public interest override analysis.

In contrast to any form of review the appellant could provide, the reviews of the [ARBPRIA] performed by NERA and the FAO are independent reviews of the [ARBPRIA].

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[17] Order PO-3197 at para. 48.
[18] PO-3197 at para. 53.
[19] http://www.fao-on.org/web/default/files/Info%20Requests/FA1612-01%20Cover%20Letter.pdf

The appellant's sur-reply representations

[61] The appellant disputes the IESO and Bruce Power's submissions to the effect that publicly available information is sufficient, and submits that "the complete answer" to concerns about the agreement "turns out to require additional information that has not been disclosed." He cites a number of specific examples of cases where the ARBPRIA relies on information in the technical schedule, and in a further submission cites the large number of references in the ARBPRIA to information that is not public because it is in the technical schedule.

[62] Further, the appellant submits that Order PO-3197 is distinguishable and irrelevant because it relates to information about fuel cost reimbursements, which is "completely different" from the information requested here. While the information is different, however, I note that Order PO-3197 applied the predecessor of section 20(1) of the *EA* to information in the technical schedule to a predecessor of the ARBPRIA, and declined to apply section 23 based on publicly available information such as the agreement itself, and on the existence of independent analyses of the agreement. Accordingly, although the information may be somewhat different, the issues in the two cases are very similar and I disagree that Order PO-3197 is completely distinguishable, or irrelevant.

[63] The appellant also refers to the limitations of the NERA fairness opinion, and states:

> The fact is, according to its own stated qualifications, the NERA report does not provide the information that addresses the public's compelling interest in knowing how much the Bruce Power agreement could cost ratepayers. The fact that a previous adjudicator found that the unrelated qualifications in an unrelated fairness report provided sufficient grounds to preclude the disclosure of unrelated information is completely irrelevant to the current appeal.
>
> The publicly-disclosed estimates of estimates offered so far by the IESO similarly do not provide the information that addresses the public's compelling interest. There is abundant evidence within the [ARBPRIA] that these publicly-disclosed cost estimates are subject to revisions and adjustments of unknown magnitudes, based on rules, conditions, methodologies and other terms that have been withheld. The IESO's claim that all questions of compelling public interest have been answered is simply incorrect.

[64] The appellant also expresses concerns about whether the FAO has the necessary information to engage in its analysis. In my opinion, this allegation is speculative and not substantiated. The appellant also refers to an FAO report made in a different context (the proposed sale of Hydro One) which set out concerns about the degree of

government disclosure in relation to that issue, which is separate and distinct from the issue here. In that regard, however, the appellant concedes that no such issue has been raised here:

> This is not to say that the FAO has raised any such issues with respect to its requests for information from the IESO. However, it should be clear that the IESO is in no position to claim, on behalf of the FAO, that an unseen report, should it ever be published, will provide all the answers sought by the public, especially when the report remains unpublished nearly a year after the FAO had requested information for which there is no acknowledgement of receipt, and when so many other FAO reports have been forced to rely on partial government disclosures.

[65] The question here is not whether the FAO report provides "all the answers sought by the public," but rather, whether the FAO analysis and the NERA opinion, together with the other information that is public, are sufficient to satisfy any public interest in disclosure that may exist.

[66] The appellant concludes his sur-reply representations by summarizing the main points of his public interest argument:

> As mentioned in my earlier submission, the cost of electricity is currently as compelling a matter of public interest in Ontario as any issue can be. Anyone with a passing interest in current affairs cannot have failed to notice the many headlines that have appeared over the last few years reflecting the public's deep concern about the price of electricity. The terms of the [ARBPRIA] will directly affect a huge chunk of Ontario's future electricity costs, but many of these terms are tied to information that has been withheld. As new energy technologies emerge, it is important for the public to verify the current business case for ongoing nuclear refurbishment based on accurate cost and risk information, not preliminary guesstimates. No publicly-available information adequately addresses this compelling public interest, despite the IESO's claims. The public's interest in disclosure clearly outweighs the purpose of any exemption claimed by the IESO.

Analysis

[67] In all the circumstances of this appeal, and for the reasons that follow, I find that the first requirement under section 23 has not been established. Specifically, I am not satisfied that there is a compelling public interest in the disclosure of the information the appellant has requested. This finding is based on the significant amount of information that is already publicly available concerning the ARBPRIA, as well as the existence of other mechanisms to protect the public interest.

[68] I agree that the cost of electricity is of great interest to Ontarians. However, in and of itself, that does not mean that there is a compelling public interest in the disclosure of the specific information requested by the appellant. Rather, in determining the first part of the section 23 test, I must assess whether there is a compelling public interest in disclosure of that information, in all the circumstances of this appeal.

[69] As already noted, with the exception of the technical schedule, the entire ARBPRIA is available on both the Bruce Power and IESO websites. The highly detailed agreement and its exhibits together comprise 302 pages. The technical schedule to the ARBPRIA, which states that it contains confidential information provided by Bruce Power to the IESO, remains undisclosed.[20]

[70] In addition, the NERA fairness opinion concerning the ARBPRIA is available on both the Bruce Power and IESO websites. Its "Conclusion" section directly addresses public concerns about cost-effectiveness. It states:

> NERA concludes that the [ARBPRIA] is fair to the IESO and satisfies the principles set forth in [the Long-Term Energy Plan for Ontario]. This conclusion is reached as the [ARBPRIA] satisfies the evaluation criteria specified herein viewing the [ARBPRIA] in its entirety. The [ARBPRIA] is unique in that it enables the IESO to secure opportunity for the long term operation of all units at the Bruce Site while very effectively limiting exposure to unknown and open-ended costs and only pays for performance. The [ARBPRIA] provides the IESO off-ramps that can be realistically exercised if conditions change.

[71] As well, as noted by the IESO at reply, the FAO was asked to review market risks associated with the refurbishment of nuclear reactors at Bruce Power. The report itself[21] states that its purpose ". . . is to review how the Nuclear Refurbishment Plan will impact ratepayers and the Province and to identify how financial risk is allocated among ratepayers, the Province, OPG and Bruce Power."[22] Because it was issued after I received the final representations in this appeal, the parties have not made submissions on the report itself, but have had the opportunity to comment on the FAO review. For the purposes of this order, the FAO review is a second example of a process intended to protect the public interest, similar to the NERA fairness opinion. The FAO report reaches similar conclusions to those in the NERA fairness opinion.

[72] The FAO report identifies and addresses risks to the plan. For example, it notes

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[20] This term of the technical schedule was quoted in the IESO's non-confidential representations and is reproduced, above, at para. 18.

[21] The FAO's report, issued November 21, 2017, may be found online at http://www.fao-on.org/en/Blog/Publications/FAO-NR-Report-Nov-2017.

[22] The report addresses refurbishments at Bruce Power under the ARBPRIA and also at Darlington Nuclear Generating Station, as well as the extension of life of the Pickering Nuclear Generating Station.

that the "internal" risks are refurbishment cost and station performance risk. With respect to these two risks, the report states:

> The exposure of ratepayers to increases in [Bruce Power] refurbishment costs is mitigated by contract off-ramps and the Bruce Nuclear Price setting mechanism, which transfers the risk of cost overruns to Bruce Power 12 months prior to each refurbishment. . . .
>
> . . .
>
> Station performance risk refers to the risk that Nuclear Production will be lower, or post-refurbishment costs higher, than projected in the Base Case Plan. The Bruce Contract transfers most station performance risks to Bruce Power. . . .

[73] As stated in Order PO-3480,[23] "[a] compelling public interest has been found not to exist where, for example, another public process or forum has been established to address public interest considerations[24] or where a significant amount of information has already been disclosed and this is adequate to address any public interest considerations."[25]

[74] I have carefully considered the submissions of the parties, and in particular the appellant's concerns about the adequacy of the information disclosed to date. Despite those concerns, I conclude that a very substantial amount of detailed information is available to the public about the ARBPRIA, and two independent review mechanisms have already been employed. These reviews assess the fairness of the ARBPRIA and its consistency with the principles in Ontario's Long-Term Energy Plan, as well as risks to ratepayers and others. For this reason, I find that a compelling public interest in the disclosure of the particular information the appellant seeks has not been established.

[75] I also note that this conclusion is consistent with the decision in Order PO-3197, where similar information was at issue, and section 23 did not apply because of the extent of publicly available information and the existence of other mechanisms, similar to those that are present here, to protect the public interest.

[76] In addition, I have concluded that full and frank disclosure between Bruce Power and the IESO during the term of the ARBPRIA is a key feature of the agreement[26] and is intended to assist the IESO in protecting the interests of ratepayers. Despite the "open book" provisions in the ARBPRIA, I am satisfied that disclosure of the technical schedule, in whole or in part, where section 20(1) of the *EA* has been claimed and

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[23] at para. 145.
[24] Orders PO-3577, P-391 and M-539.
[25] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[26] See Article 3.1, and the definition of "Open Book Basis" in Article 1.1, of the ARBPRIA.

upheld, could reasonably be expected to interfere with the optimal functioning of this feature of the ARBPRIA. On this basis, I also find that there is a public interest in non-disclosure.

[77] For all these reasons, I find that the first requirement under section 23 of the *Act*, namely a compelling public interest in disclosure, has not been met. Under the circumstances, it is not necessary to consider the second requirement (whether a compelling public interest outweighs the purpose of the exemption).

ORDER:

This appeal is dismissed.

Original Signed by: December 29, 2017
John Higgins
Adjudicator