Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3801

Appeal PA16-227

Independent Electricity System Operator

December 29, 2017

Summary: The appellant submitted an access request to the Independent Electricity System Operator (the IESO) for financial information 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 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 financial information in the "Amended and Restated Bruce Power Refurbishment Implementation Agreement Between Bruce Power LP and Independent Electricity System Operator dated December 3, 2015." In this order, I will refer to this agreement as the "ARBPRIA."

[2] 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.

[3] 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 Bruce Power 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.)

[4] In its request, the appellant claimed that if an exemption is found to apply, the public interest override at section 23 of the *Act* should also apply to mandate disclosure.

[5] The IESO denied access to the record under 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) of the *Act*.

[6] The appellant appealed the IESO's access decision. In its notice of appeal, the appellant repeated its claim that section 23 of the *Act* applies. 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 [ARBPRIA]).

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 *EA*.

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

[10] 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.

[11] In response, the appellant submitted a request to cross-examine the affiant. The appellant also asked for an extension of time to provide representations until after the cross-examination issue had been decided. After submissions were exchanged on this request to cross-examine, I issued Order PO-3703-I. In that order, I determined that I would not grant the appellant's request to cross-examine. In relation to other issues raised by the parties at that time, I decided to hold the inquiry in writing, and to grant the appellant additional time to provide representations.

[12] 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.

[13] 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.

[14] 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) of the *Act*. I find further that section 23 does not apply. The appeal is dismissed.

RECORDS:

[15] 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?

[16] 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.

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;

[17] 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.

[18] 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.

[19] 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.[1]

Representations

Initial Representations of the IESO and Bruce Power

[20] 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.]

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

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[1] See Order PO-3197.

[22] 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.

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

[24] 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.

[25] The IESO also refers to Order PO-3197, which dealt with information in the Technical Schedule to an earlier reactor refurbishment agreement[2] 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*,[3] which contained exactly the same wording as section 20(1) except that it applied to the Ontario Power Authority.

[26] 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.

[27] 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.

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

[28] 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

[29] The appellant submits that, for section 20(1) to apply, the information must have been "provided to or obtained by" the IESO. Clearly, as reflected in the section itself and the two-part test set out above, this submission is correct.

[30] The appellant submits that the information was not supplied to or obtained by the IESO. The appellant says that "[i]nstead, they are the terms of an agreement between the two."

[31] In making this submission, the appellant seeks to import IPC and court jurisprudence relating to the term "supplied" in section 17(1) of the *Act*[4] into the interpretation of "provided to or obtained by" in section 20(1) of the *EA*. The established interpretation of "supplied" in section 17(1) of the *Act* holds that, with two exceptions, information in a contract between an "institution" under the *Act* and a third party contractor was "negotiated" and not "supplied" to the institution as required by section 17(1).[5]

[32] In discussing this issue, the appellant quotes the following passage from *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*:[6]

> The IPC adjudicator's approach in this case was consistent with the approach taken in other cases interpreting the same provision in FIPPA. Those cases have held that, absent evidence to the contrary, the content of a negotiated contract involving a government institution and a third party is presumed to have been generated in the give and take of

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[4] See, for example, Orders MO-1706 and PO-3311; *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.*); and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139.

[5] The exceptions are: (1) "inferred disclosure," which applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution; and (2) "immutability," which arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation.

[6] At para. 27. Citation at footnote 4, above.

negotiations, not "supplied" by the third party under s. 10(1) of the Act. This approach was approved of in *Boeing*[7] at paras 18-19 as follows:

> The Commissioner has consistently found that information in a contract is typically the product of a negotiation process between the parties and that the content of a negotiated contract involving a governmental institution and another party will not normally qualify as having been "supplied". Even where the contract is preceded by limited negotiation, or where the final agreement substantially reflects information that originated from a single party, the Commissioner has concluded that the information was not supplied….
>
> The Commissioner took the view that the records before him did not contain information which was supplied to the ministry because the information was found in complex contracts which were the subject of agreement by a number of parties…. His conclusion that complex and detailed agreements like the ones before him were the result of negotiations was a reasonable one. While the Ministry has suggested that its role was passive with respect to the Asset Purchase Agreement, it was reasonable for the Commissioner to conclude that the agreement was, nevertheless, negotiated and that it reflected all the parties' interests.

[33] The appellant submits that this jurisprudence also applies in the context of section 20:

> . . . because there is no distinction in the wording that would call for a different approach. Section 17 of the *Act* uses the term "supplied" and s. 20 of the [*EA*] uses the term "provided to or obtained by the IESO." In both cases it is completely clear that the exemption only applies to third party information provided to the institution, not mutually generated information. If anything, the wording in section 20 of the [*EA*] is even clearer in this respect.

[34] The appellant also argues that the two pieces of information at issue, the Counterparty Cost Thresholds and the rate of return, are ". . . high-level terms that were arrived at through extensive negotiations" and ". . . do not meet the mandatory precondition in s. 20 of being provided to or obtained by the IESO." I note, however, that the appellant was not a party to the negotiations. The source of the information behind the appellant's assertion of "extensive negotiations" is not cited.

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[7] Cited at footnote 4.

Reply representations of the IESO and Bruce Power

[35] The IESO submits, in reply, that the appellant's argument based on the "supplied" jurisprudence is wrong for two reasons: (1) it is contrary to the express language of the *EA* and (2) it is contrary to the principles of statutory interpretation.

[36] With respect to the statutory language, the IESO argues that the appellant's statement that "there is no distinction in the wording that would call for a different approach" is erroneous. The IESO says that "the wording is conspicuously distinct." In particular, the IESO focuses on "obtained," citing a definition of "obtain": "to get ahold of by effort; to get possession of, to procure; to acquire, in any way."[8] The IESO submits that this is a broad definition that "does not in any way exclude the information at issue in this appeal."

[37] On the subject of statutory interpretation, the IESO cites the well-known principles that:

- legislation is to be interpreted as remedial and "shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects"[9] and
- "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[10]

[38] The IESO argues that the appellant's interpretation is the opposite of "fair, large and liberal" and would narrow the application of section 20(1) so as to reduce and minimize the IESO's ability to rely on it.

[39] The IESO submits that, read in its entire context and grammatical and ordinary sense, section 20(1) of the *EA* permits the head of the IESO to deem information relating to market participants to meet each of the elements required under section 17(1). I have already noted that section 20(1) incorporates the language of section 17(1)(a).

[40] The IESO also reads section 20(1) as permitting the IESO to "deem that information is supplied in confidence." It says there would be no reason to deem information as having been "supplied" if that is also a prerequisite under section 20(1). For this reason, the IESO submits that the interpretation urged by the appellant is contrary to the grammatical and ordinary sense of the words of section 20(1).

[41] Bruce Power makes similar points in its reply representations. It submits that

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[8] Black's Law Dictionary, 4th ed.
[9] *Legislation Act, 2006*, s. 64(1).
[10] *Rizzo and Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 at para. 21.

section 20(1) of the *EA* "was created to enhance the protection provided to a market participant, not to replicate section 17 of *FIPPA*." It says that the appellant's interpretation would render section 20(1) of the *EA* redundant. It points out that there is no case law that supports the appellant's position that section 17 "supplied" jurisprudence should inform the interpretation of "obtained by or provided to" in section 20(1) of the *EA*. It submits further that the use of different words in the operative portion of section 20(1) of the *EA* – "provided to or obtained by" as opposed to "supplied in confidence" – signals that the legislature intended to apply different criteria.

The appellant's sur-reply representations

[42] At sur-reply, the appellant disagrees with the submissions of the IESO and Bruce Power concerning the interpretation of section 20(1) of the *EA*, arguing that the difference in wording between "provided to or obtained by the IESO" and "supplied" to the IESO is a "distinction without a difference." I disagree. "Supplied" connotes a movement in one direction only – from a third party to the IESO. "Provided to or obtained by" connotes more than one possible route by which information could come into the possession of the IESO.

[43] The appellant also submits that "provided to or obtained by" the IESO also does not mean "all information held by the IESO;" if that were the intended meaning, according to the appellant, section 20(1) would refer to information "held by" the IESO.

[44] Disagreeing with the argument that its interpretation would render section 20(1) of the *EA* redundant, or simply a replication of section 17 of the *Act*, the appellant submits that:

> Section 20 authorizes the IESO to deem a document as meeting the *confidentiality and harm requirements of s. 17*, obviating the need to establish those important parts of the s. 17 test. The continued need for the document to be provided to the IESO does not negate the important function of s. 20 in giving third parties confidence that confidential information they provide to the IESO will be protected. [Emphasis added.]

Analysis

[45] I note that in the submission I have just reproduced, the appellant concedes that the "deeming" effect of section 20(1) of the *EA* covers the "confidentiality and harm" requirements in section 17(1) of the *Act*. This submission is inconsistent with the actual wording of section 20(1), which deems that *all* requirements of section 17(1)(a), including the "supplied" requirement, are met. This is clear from the fact that if the two requirements under section 20(1) of the *EA*, outlined above, are met, the record is deemed to fall under the precise, complete language of section 17(1)(a), which (as I

observed earlier) is wholly incorporated in section 20(1) of the *EA*. In that regard, the language of these sections bears repeating.

[46] 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.* [Emphases added.]

[47] Section 17(1)(a) 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*; [Emphasis added.]

[48] To summarize, the effect of the statutory language is that where information about a market participant has been provided to or obtained by the IESO and designated by its CEO as confidential, it is deemed to meet all requirements for exemption under section 17(1)(a), including the requirement that it was "supplied in confidence." The effect of the appellant's interpretation is that there is no deeming regarding "supplied" – only the confidential character of the information, and harms caused by its disclosure, can be deemed. As a corollary, according to the appellant, the criteria for "supplied" under section 17(1)(a) must be established as part of the deeming process, where the issue of whether the information has been "provided to or obtained by" the IESO, as outlined in the early part of section 20(1) of the *EA*, is considered.

[49] In my view, this interpretation flies in the face of the intended effect of the deeming provision, which is to permit the IESO to designate information about market participants as confidential or highly confidential and to protect it from disclosure. Based on the wording of section 20(1) of the *EA*, I agree with Bruce Power's submission concerning its purpose, which appears in its submissions on the public interest override at section 23 of the *Act*:

> . . . [section 20(1) of the *EA*] was intended to be a broad protection of the confidentiality of contractual negotiations between the IESO and market participants. . . . The purpose of the exemption was to provide third parties with **greater certainty of protection** than that accorded by section 17 of *FIPPA* on its own. It provides third parties, like Bruce Power, with greater certainty that section 17 of *FIPPA* will apply to exempt the information from disclosure. [Emphasis added.]

[50] Moreover, I disagree with the appellant that any difference between "provided to or obtained by" in the first part of section 20(1), and the "supplied" requirement in section 17(1), is a distinction without a difference. As I observed earlier, "supplied" connotes movement in one direction only, from a third party to the IESO, whereas "provided to or obtained by" connotes more than one possible route by which information could come into the possession of the IESO. In my view, it encompasses a much broader class of information than "supplied."

[51] The information sought by the appellant in this case consists of financial data about the refurbishment of reactors at Bruce Power. Whether that information was directly provided by Bruce Power (as the technical schedule declares that it was), or calculated by the IESO, or calculated mutually by these two parties, I am satisfied that it was "provided to or obtained by" the IESO within the meaning of section 20(1) of the *EA*. I also find that it relates to Bruce Power, and that, based on Bruce Power's submissions to that effect, it is a market participant. Based on these findings, part 1 of the test is satisfied.

[52] 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.

[53] 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*.

[54] 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?

[55] 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.

[56] 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.

[57] 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 could seldom if ever be met by an appellant.[11]

[58] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[12] 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.[13] 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.[14]

[59] Any public interest in *non*-disclosure that may exist also must be considered.[15] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[16]

[60] 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.

[61] 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.[17]

[62] 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*?

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

Is there a "compelling public interest" in disclosure?

Initial representations of the IESO and Bruce Power

[63] 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."

[64] 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.

[65] 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:
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> • Developing and reviewing key economic terms of power contracts;
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> • Familiarity with Ontario power markets and the organization of the electricity sector in Ontario;
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> • 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; . . .

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

[67] 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.

[68] 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."

[69] 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. . . ."

[70] 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.

[71] In addition, Bruce Power states that the price paid for electricity generated by Bruce Power effective January 1, 2016 is publicly available information[18] that may be found on the IESO's website.

[72] 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[19] 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

[18] $65.73/MWh, subject to adjustment in accordance with the terms of the ARBPRIA.
[19] Ontario Power Authority, predecessor of and now merged with the IESO.

> 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.]

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

The appellant's initial representations

[74] The appellant's initial representations on section 23 highlight the particular information from the technical schedule that remains at issue, namely:

- Counterparty Cost Thresholds for each reactor refurbishment; and
- The targeted rate of return for Bruce Power 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.

[75] The appellant also submits that sufficient information is *not* already available, contrary to the positions taken by the IESO and Bruce Power.

[76] The appellant first addresses "counterparty cost thresholds," which are also described as "off-ramps" to permit the IESO to opt out of the agreement if costs exceed an identified level or "threshold." The appellant argues that these amounts are "incredibly important financial figures." It submits that, without knowing these numbers, ". . . the public cannot know the true extent of Ontario's potential liability under the agreement."

[77] Citing the NERA fairness opinion, the appellant makes the point that ". . . the IESO will be exposed to costs up to the level of the thresholds."

[78] According to the appellant, the actual costs of "completed nuclear projects" in Ontario had exceeded their cost estimates by 2.5 times. In the case of the Bruce refurbishments, where the estimate is $13 billion, the appellant submits that "[b]y that measure, the cost of refurbishment would skyrocket to over $32 billion."

[79] The appellant submits further that "[w]ithout knowing the Counterparty Cost Thresholds it is impossible to understand the true extent of Ontario's potential financial liability under the agreement." It also submits that "[t]he Counterparty Cost Thresholds are also needed for a fulsome comparison of the refurbishment of Bruce Power to potential alternatives." It argues that disclosure of this information is necessary for

transparency purposes because it will reveal Ontario's potential liability under the ARBPRIA.

[80] In addition, the appellant submits that this information will inform voting decisions, and that electricity rates, which can be driven up by overruns, are a subject of great interest to Ontarians. It describes this as the "most important political issue in the province."

[81] As regards the rate of return, the appellant submits that:

> The profit that Ontario will pay to Bruce Power is important information for the public to know. It is central to whether the agreement is a good deal for Ontario and fair to Ontarians who will be paying this cost. It is important for voters to know how much profit will be paid so that they can come to their own conclusions about whether this is a fair and a good use of their hard earned money.

[82] On the question of whether there is sufficient information already available, the appellant mentions that the NERA fairness opinion does not disclose the counterparty cost thresholds or Bruce Power's rate of return, the information it continues to seek. The appellant concedes that the fairness opinion ". . . examines whether the rate of return is reasonable and whether Ontario will have limited risk and financial exposure." However, it submits that "this is very different than providing the actual key information to civil society so that citizens can make their own assessments of these issues."

[83] The appellant seeks to undermine the fairness opinion by pointing out that NERA "consulted extensively with the IESO and not at all with advocates for alternative energy options."

[84] As also noted by the appellant, the fairness opinion acknowledges its own limits, including the fact that NERA has not "reviewed how the ultimate costs and benefits of power provided under the Agreement compare to the costs and benefits of power from alternate sources. . . ." The appellant submits that alternative power sources would include "water power imports from Quebec," and that from a public policy perspective, the most important question is: "Would there be cheaper, greener, and better ways for Ontario to supply its power needs?"

[85] The appellant also argues that the public interest in disclosure is supported by statutory objectives, including accountability in government contracts and the expenditure of public funds, and the important purpose of facilitating democracy that underlies access-to-information statutes.[20]

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[20] The appellant relies on the following authorities in making these arguments: *Miller Transit Limited v. Information and Privacy Commissioner of Ontario*, 2013 ONSC 7139 (Div. Ct.) at para. 44; *Dagg v.*

[86] The appellant describes the IESO as an "administrative agency" and says that "[t]he public cannot hope to participate in the decision-making process of this agency and contribute to the formation of policy if they cannot access the information that they need in order to do so." It submits further that "[i]f the true extent of potential liability under this agreement is kept secret, the public cannot hope to hold the government accountable for these important decision[s]. Perhaps even more importantly, without this information, civil groups and advocates will be hamstrung in their attempts to participate in our democratic processes to explore and push for better options."

[87] In summary, the appellant submits that disclosure "would tell Ontarians how much they are potentially liable for under the [ARBPRIA] (through the costs thresholds) and how much profit they will be paying to Bruce Power (through the rate of return). The public have the right to know these important facts relating to the most important political issue to Ontarians today."

Reply representations of the IESO and Bruce Power

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

[89] With respect to information already available, the IESO submits:

> The appellant proclaims that it is seeking to evaluate the "true extent of Ontario's potential liability under the Agreement". Yet the appellant (and any other member of the public) can already assess the total potential cost of the refurbishments contemplated under the publicly-available [ARBPRIA].

[90] It submits further:

> Substantial and significant information about the [ARBPRIA] has already been released to the public. The [ARBPRIA] has also been or is being examined by multiple entities including NERA and the Financial Accountability Office ("FAO").
>
> Ontario's FAO is presently investigating the market risks associated with the refurbishment of nuclear reactors at the Bruce Nuclear Generating Station.

[91] Bruce Power's reply representations also refer to the information available to the

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Canada (Minister of Finance), [1997] 2 S.C.R. 403, 1997 CanLII 358 (SCC) at paras. 60 and 61; *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, 2008 ONCA 366 at para. 31; and *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (Div. Ct.) at para. 36.

public, and the NERA fairness opinion, in support of its position that there is no compelling public interest in disclosure.

[92] With respect to the specific information from the technical schedule sought by the appellant, the IESO submits:

> First, the appellant seeks the "Counterparty Cost Thresholds" (the "Cost Thresholds") in the [ARBPRIA] Technical Schedule. The Cost Thresholds definition is a publicly-available percentage. This threshold can be applied to the total cost estimate of the 6 units to be refurbished, which has been publicly disclosed as $8 billion. As a result, the appellant and other rate-payers know the approximate cost threshold for possible termination of refurbishment of one or more units under the [ARBPRIA] (i.e. approximately $10 billion).
>
> The appellant also seeks Bruce Power's targeted rate of return ("Rate of Return"). This is highly confidential information of a market participant that is not publicly disclosed. If released, it is likely to cause irreparable harm to Bruce Power and seriously undermine the relationship between the IESO and Bruce Power. It is likely to increase costs of refurbishment and therefore increase costs of electricity to rate-payers.

[93] The IESO states that the entire ARBPRIA, except the technical schedule, is available. It states that the public already knows the cost of electricity arising from the ARBPRIA, as well as current estimated costs and the threshold percentage, and therefore "can reasonably assume the cost threshold across the refurbishment."

[94] The IESO refers to the NERA fairness opinion and the FAO report as "adequate mechanisms to fulfil the public interest argued by the appellant." It also says that "the reviews of the [ARBPRIA] performed by NERA and the FAO are independent reviews of the [ARBPRIA]."

The appellant's sur-reply representations

[95] At sur-reply, the appellant disputes that the public "already has sufficient information," and that the amount of private profits is important for public debate.

[96] It argues that the electricity price from January 1, 2016 does not incorporate refurbishment costs or potential cost overruns. It says that the forecast price of electricity is based on the unlikely scenario that the project comes in on budget. It states that the average price given by the IESO is averaged over the entire duration of the contract from 2016 to 2064, and there is no indication whether this takes account of inflation during that period. It notes that its access request for the annual forecast price arising from the ARBPRIA was recently denied by the IESO.

[97] The appellant also submits that the forecast price ignores cost overruns and off-

ramps, and that for this reason, the off-ramps provide valuable additional information. It also submits that off-ramps for the refurbishment of each unit "are needed for the public to more precisely evaluate the prudence of the overall contract and to more precisely evaluate the benefits of invoking the off-ramps for the subsequent refurbishments."

[98] With respect to Bruce Power's expected profits, the appellant submits that these are also of public interest because they are "relevant to the important public issue of *fairness*." [Emphasis in original.]

Analysis

[99] In all the circumstances of this appeal, and for the reasons that follow, I find that the first requirement under section 23 is not established. Specifically, I am not satisfied that there is a compelling public interest in the disclosure of the information the appellant has requested about off-ramps and Bruce Power's rate of return. 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.

[100] Whether or not electricity rates are "the most important political issue in the province" as the appellant claims, I agree that they are 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, which the appellant itself describes as "10 or so extremely high-level figures." Rather, in determining the first part of the section 23 test, I must assess whether there is a compelling public interest in disclosure of the specific information at issue, in all the circumstances of this appeal.

[101] 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.[21]

[102] 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

[21] This term of the technical schedule was quoted in the IESO's non-confidential representations and is reproduced, above, at para. 23.

> 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.

[103] 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[22] 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."[23] 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.

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

[105] As stated in Order PO-3480,[24] "[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[25] or where a significant amount of information has already been disclosed and this is adequate to address any public interest

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[22] 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.

[23] 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.

[24] At para. 145.

[25] Orders PO-3577, P-391 and M-539.

considerations."[26]

[106] 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.

[107] 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.

[108] 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[27] 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 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.

[109] 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

[26] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[27] See Article 3.1, and the definition of "Open Book Basis" in Article 1.1, of the ARBPRIA.