

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3834

Appeal PA14-202

Independent Electricity System Operator

March 29, 2017

Summary: The appellant sought access to information about two wind farm projects. After receiving partial access to many records, the appellant filed this appeal to gain access to the remaining information withheld under the solicitor-client privilege exemption in section 19 and the mandatory third party information exemption in section 17(1) of the *Freedom of Information and Protection of Privacy Act*. The Independent Electricity System Operator's decision to withhold information under section 19 is upheld as is the reasonableness of its search for records, but its decision under section 17(1) is not upheld and the corresponding records are ordered disclosed.

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

Orders and Investigation Reports Considered: PO-2435, PO-3078, PO-3574 and MO-3311.

Cases Considered: *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23; *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and*

Protection of Privacy Act (the *Act*) to the Independent Electricity System Operator (IESO),¹ for access to the following information:

... the original milestone dates, including the commercial operation dates, in relation to [FIT² contracts for two identified wind farm projects undertaken by a third party]. If any of the original dates have changed, please provide each change with a summary explaining the reason for the change. Relative to any milestones that have been completed please provide the date that they were deemed completed by the OPA. Please ensure that the response includes the current milestone dates, including the commercial operation dates, for all milestones not yet completed. ...

[2] Prior to issuing its decision, IESO notified the third party whose interests might be affected by disclosure of the requested records (the affected party), in accordance with section 28(1) of the *Act*. The affected party did not consent to disclosure of the records and provided submissions in response to IESO's notice. IESO subsequently issued a decision granting the appellant access to two records, in their entirety, while denying access to 14 other records pursuant to the mandatory exemption in section 17(1) (third party information) of the *Act*. This decision letter was accompanied by Index #1.

[3] The appellant was not satisfied with IESO's decision and appealed it to the Office of the Information and Privacy Commissioner (IPC or this office), which attempted to mediate the appeal. During mediation, the appellant asserted that more records responsive to his request should exist, particularly correspondence about changes to the milestones. IESO stated that it had not searched for correspondence and it agreed to expand the scope of the request, in accordance with the appellant's wish, and search for responsive correspondence.

[4] IESO's new search was based on the revised request for "all documents and correspondence related to the change in the Milestone Date for Commercial Operation ("MCOD") for the [two identified contracts with the affected party]." The appellant confirmed that the new search would "not include force majeure³ requests that were not approved or discussions with the supplier relating to issues other than changes to the MCOD." In the first of two supplementary decisions, IESO disclosed five records to the appellant that were not subject to third party consultation and provided Index #2.

[5] IESO subsequently identified 156 records responsive to the revised request. Prior to issuing its decision on these records, IESO notified the affected party to seek its views on disclosure. The affected party objected to disclosure. IESO then issued a second supplementary decision to partially disclose 105 records, relying on the

¹ At the time of the request, the IESO was known as the Ontario Power Authority (OPA).

² FIT stands for Feed-In-Tariff.

³ For the remainder of this order, the term "force majeure" will be abbreviated to "FM."

exemptions at sections 13(1) (advice or recommendations), 17(1), 18 (economic or other interests) and 19 (solicitor-client privilege) of the *Act* to deny access to the withheld portions. IESO enclosed an index of records for the appellant with this second supplementary decision, Index #3. IESO also advised that the remaining 51 records were being withheld under sections 17(1) and 19 of the *Act*. IESO severed some information in the records as not responsive to the request or exempt under the mandatory personal privacy exemption in section 21. The third party did not appeal IESO's decision and IESO disclosed the records to which it had granted the appellant full or partial access.

[6] During mediation, the appellant confirmed he does not seek access to duplicate records, records identified as not responsive to his request, and the personal email addresses withheld under section 21. As a result, duplicate⁴ and non-responsive records, and the section 21 exemption are no longer an issue in this appeal. The appellant also indicated he believes there is a public interest in disclosure of the information withheld under sections 13(1) and 17(1) of the *Act*⁵ and that additional responsive correspondence should exist. Since IESO maintains that no further records responsive to the request exist, the reasonableness of its search remains at issue in this appeal. Also during mediation, IESO withdrew its reliance on section 18 and, accordingly, this section of the *Act* is no longer at issue in this appeal.

[7] A mediated resolution of the appeal was not possible and it was transferred to the adjudication stage of the appeal process for a written inquiry under the *Act*. The IPC sought and received representations from IESO, the affected party and the appellant, and shared them with the parties in accordance with the sharing criteria set out in *IPC Practice Direction Number 7*. The appeal was then transferred to me.

[8] In this order, I uphold IESO's decision under section 19 and the reasonableness of its search, but I do not uphold its decision under section 17(1) and I order the records withheld under that section disclosed.

⁴ From Index #1: record 4 (duplicate of record 3 signed by the affected party); record 11 (duplicate of record 4); record 12 (duplicate of record 3); record 13 (duplicate of record 5); record 15 (duplicate of record 7) and record 16 (duplicate of record 8) are no longer at issue. Some records from Index #3 contain duplicate portions – the email strings in records 63 to 66, 77, 78, 90, 92 and 93 – however, they are not complete duplicates so they remain at issue in this appeal.

⁵ Although the appellant included the information withheld under section 19 in his submission, the public interest override in section 23 of the *Act* does not apply to the solicitor-client privilege exemption. I address this further in paragraphs 20, 77 and 78 below.

RECORDS:

[9] The records at issue from Index #1 are:⁶

- offer letters from IESO to the affected party (records 3 and 7)
- signed amending agreements between the affected party and IESO (records 5 and 8).

The records at issue from Index #3 are:

- FM notices submitted by the affected party to IESO (records 2, 7, 9, 14, 15, 18 and 20)
- letters between the affected party and IESO (records 19, 26, 28, 33 and 34)
- a memo by the affected party (record 17)
- internal IESO emails, and emails between IESO and its external legal counsel (records 1, 41, 43, 49, 51, 66, 67, 71, 90, 92, 93, 115, 117, 118, 119, 124, 126, 127, 134, 135, 138, 140, 145, 147, 149, 153, 155)
- emails between IESO and the affected party (records 50, 53, 61, 63, 64, 65, 74, 77, 78, 80, 84, 94)
- draft agreements between IESO and the affected party (records 111 to 114).⁷

ISSUES:

- A. Does the discretionary exemption at section 19 apply to the 21 records that IESO has withheld as solicitor-client privileged?
- B. Does the mandatory exemption at section 17 apply to the 39 records that remain at issue?
- C. Was IESO's search for records responsive to the request reasonable?
- D. Did IESO exercise its discretion under section 19, and if so, should the IPC uphold the exercise of discretion?

⁶ Records 1, 2, 9 and 10 from Index #1 are not at issue because IESO has disclosed them to the appellant.

⁷ For ease of reference, the records at issue in numerical order are: 3, 5, 7 and 8 from Index #1; and 1, 2, 7, 9, 14, 15, 17-20, 26, 28, 33, 34, 41, 43, 49-51, 53, 61, 63-67, 71, 74, 77, 78, 80, 84, 90, 92-94, 111—115, 117-119, 124, 126, 127, 134, 135, 138, 140, 145, 147, 149, 153 and 155 from Index #3.

DISCUSSION:

A. Does the discretionary exemption at section 19 apply to the 21 records that IESO has withheld as solicitor-client privileged?

[10] IESO claims that records 17, 41, 111-115, 117, 119, 124, 126, 127, 134, 135, 138, 140, 145, 147, 149, 153 and 155 of index #3 are solicitor-client privileged records and relies on section 19 to withhold them. The discretionary solicitor-client privilege exemption in section 19 protects privileged records from disclosure under the *Act* and states, in part, as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation[.]

[11] The privilege set out in section 19(a) is based on the common law, while that set out in section 19(b) is statutory. In order for me to uphold the application of this exemption, IESO must establish that either section 19(a) or (b) applies to the relevant records. The privilege in both sections 19(a) and (b) encompasses solicitor-client communication privilege, which protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.⁸ The privilege covers the document containing the legal advice, the request for advice, and the information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.⁹

[12] Only IESO and the appellant were invited to provide representations on this issue.

IESO's Representations

[13] In its representations, IESO submits that records 17, 111-114, 140, 149 contain solicitor-client privileged information that is exempt under section 19(a), while the remaining withheld records contain privileged information that is exempt under both sections 19(a) and (b). In respect of the common law privilege under section 19(a), IESO states that all of the records relate to the provision of legal advice, either from its in-house legal counsel (senior legal counsel) or external legal counsel, and are confidential written communications between a legal advisor and IESO staff that are directly related to the seeking, formulating or giving of legal advice. More specifically, it

⁸ *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

⁹ *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).

states that:

- Record 41 is an internal IESO email from a contract analyst to senior legal counsel seeking legal advice on an FM claim made by the affected party. Record 17 is an internal IESO briefing note, about the FM claim that was prepared by a contract analyst and attached to record 41.
- Records 111 through 114 are draft amending agreements exchanged between IESO and its external counsel in connection with the seeking and obtaining of legal advice on the language of the draft amending agreements.
- Record 115 is an internal IESO email exchange regarding an FM claim made by the affected party. The section 19 exemption applies to the bottom two emails in the chain: the contract analyst contacted the senior legal counsel seeking legal advice on the affected party's claim and the senior legal counsel provided this legal advice to the contract analyst and to the manager of renewable energy contracts.
- Records 117, 119, 124, 126, 127, 134, 135, 138, 147, 153 and 155 are a series of internal IESO emails between the manager of renewable energy contracts, senior legal counsel and other staff regarding IESO's response to the affected party's FM claims. In these emails, the manager of renewable energy contracts and others are seeking, and the senior legal counsel is providing, legal advice on the various draft letters responding to the affected party's claims.
- Records 140 and 149 are email correspondence between a contract analyst and IESO's external legal counsel about the language of a draft agreement to amend some of IESO's FIT contracts with the affected party.
- Record 145 is internal IESO email correspondence between a contract analyst and senior legal counsel sent for the purpose of obtaining legal advice on the milestone dates for two of the affected party's wind farm projects.

[14] IESO also submits that common-law communication privilege applies to the "continuum of communications" such that information passed between the solicitor and client is privileged where it is being shared to keep both of them informed, so that advice may be given or sought as necessary. Finally, IESO submits that it has not waived its privilege in any of these records.

The Appellant's Representations

[15] In his representations on section 19, the appellant asks me to review the relevant records and rule on whether they qualify for exemption. He notes the discretionary nature of the exemption and the fact that it is not mandatory. He also submits that the information may not be confidential. Finally, the appellant asserts that there is a compelling public interest in disclosure of the information withheld under

section 19 and it must, therefore, be released in its entirety.

Analysis and findings

[16] I have reviewed records 17, 41, 111-115, 117, 119, 124, 126, 127, 134, 135, 138, 140, 145, 147, 149, 153 and 155 in conjunction with IESO's corresponding representations, and I accept IESO's representations as an accurate description of the records and why they qualify for exemption under sections 19(a) and (b). All of these records relate to legal issues arising from IESO's contractual relationship with the affected party, and they all constitute direct communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving legal advice. Although the appellant submits that the information in these records may not be confidential, he provides no details to support his submission. There is no evidence before me that the records are not confidential. I am satisfied that the IESO staff members who sought and received legal advice in these records from IESO's senior legal counsel and external legal counsel did so within a confidential solicitor-client relationship and within the continuum of communications as described by IESO.

[17] Having accepted IESO's representations on each of the records, I need not repeat them here. The only record I must address specifically is record 115, which is an email exchange containing three emails. IESO addresses only the last two emails in record 115 – which are direct communications between IESO staff and senior legal counsel – in its section 19 representations and claims that the first email – which is an email between IESO staff only concerning the legal advice they received – is exempt under the advice or recommendations exemption in section 13(1). Looking at record 115 as a single record, I find that it is exempt under sections 19(a) and (b) in its entirety because it forms part of the continuum of communications in which IESO sought, received and considered legal advice from its senior legal counsel. My finding is consistent with the approach taken in previous IPC orders, including Orders PO-3078 and MO-3311. As I have found record 115 to be exempt in its entirety under section 19, I need not consider the possible application of section 13(1) to part of it.

[18] I also note that record 127 is missing some information. This record is an email addressed to IESO's senior legal counsel regarding legal advice on an attached draft letter to the affected party. The email does not include the date or the sender's name, which is odd considering this information normally appears in the header of email printouts. Although not the case in this appeal, sender and date information can be determinative in assessing solicitor-client privilege claims and I encourage IESO to include it or address its absence in situations where it is excluded from the record. In this appeal, it is clear from the content and context of the email that an IESO staff member sent the email on, or close to, the date that appears in the attached draft letter, which permits me to make a finding that it is exempt under section 19.

[19] I find that records 17, 41, 111-115, 117, 119, 124, 126, 127, 134, 135, 138, 140, 145, 147, 149, 153 and 155 all qualify for exemption under section 19(a) of the *Act*,

subject to my review of IESO's exercise of discretion below.

[20] I also note that although the appellant argues that the public interest in disclosure should override IESO's claim of the solicitor-client privilege exemption, the *Act* does not allow it. Section 23 is the public interest override mechanism of the *Act* and it applies only to records that are exempt from disclosure under sections 13, 15, 17, 18, 20, 21 and 21.1. Section 19 is not within the purview of section 23. However, I consider the appellant's public interest concerns below in my review of IESO's exercise of discretion with respect to section 19.

B. Does the mandatory exemption at section 17 apply to the 39 records that remain at issue?

[21] The records that remain at issue as a result of my findings above are records 1, 2, 7, 9, 14, 15, 18-20, 26, 28, 33, 34, 43, 49-51, 53, 61, 63-67, 71, 74, 77, 78, 80, 84, 90, 92-94 and 118 from Index #3. The records from Index #1 that remain at issue are records 3, 5, 7 and 8. IESO claims that all 39 of these records are exempt under sections 17(1)(a), (b) and/or (c), which state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (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[.]

[22] Section 17(1) protects the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹⁰ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.¹¹

¹⁰ *Boeing Co. v Ontario (Ministry of Economic Development and Trade)*, [2005] OJ No 2851 (Div Ct), leave to appeal dismissed, Doc M32858 (CA) (*Boeing Co.*).

¹¹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

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

Part 1: type of information

[24] The appellant asserts that the source and nature of the FMs that caused the adjustment of the MCODs, and the date on which IESO deemed an MCOD complete do not qualify as commercial or technical information. However, the IPC has accepted that the term “commercial information” is information “that relates solely to the buying, selling or exchange of merchandise or services.”¹² All of the records that remain at issue relate to IESO’s commercial relationship with the affected party for the buying and selling of wind power and they all contain commercial information. On this basis, I find that part 1 of the section 17 test is satisfied.

Part 2: supplied in confidence

Supplied

[25] The requirement that the information be “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.¹³ Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.¹⁴

[26] The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). In general, the IPC has treated provisions of a contract as having been mutually generated rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a

¹² Order PO-2010.

¹³ Order MO-1706.

¹⁴ Orders PO-2020 and PO-2043.

single party.¹⁵

[27] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.¹⁶ The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.¹⁷

In confidence

[28] To satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹⁸ In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.¹⁹

IESO’s representations

[29] IESO submits that the information it has withheld under section 17, about the existence of an FM, and further information and documents to support the FM claim, was supplied to it in confidence by the affected party. IESO explains that some of the third party information is contained in records that were prepared by the affected party, such as the affected party’s FM notices and correspondence with it. For example,

¹⁵ This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*). See also *Aecon Construction Group Inc. et al v IPC of Ontario*, 2015 ONSC 1392.

¹⁶ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹⁷ *Miller Transit*, above at para. 34.

¹⁸ Order PO-2020.

¹⁹ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

records 2, 7, 9, 26 and 74 of Index #3, among others.

[30] IESO states that the affected party “can also be said to have supplied” third party information even when that information is contained in IESO-prepared documents. IESO identifies the following as examples of records containing immutable information supplied by the affected party regarding its FM claim:

- correspondence from IESO to the affected party found in records 3²⁰ and 7 of Index #1 and records 19, 28, 33, 34, 43 and 61 of Index #3
- internal IESO email correspondence found in record 49 of Index #3²¹
- certain amending agreements in the records.²²

[31] IESO argues that the FM information in the amending agreements is immutable and was not mutually generated, and can therefore be properly characterized as having been supplied by the affected party.

[32] IESO argues that the affected party had a reasonable expectation of confidentiality in the third party information it supplied – even though this information was not marked as confidential at the time that it was supplied – because the third party prepared the information for a purpose that would not entail disclosure, supplied it in relation to an FM claim made under a FIT contract and has not otherwise disclosed it.

The affected party's representations

[33] The affected party asserts that it implicitly and explicitly provided its commercial information to the IESO in confidence as part of its application for a FIT contract as evidenced by the confidentiality and arbitration provisions in the FIT contracts. It also asserts that the MCODs and adjusted MCODs fall within the “inferred disclosure” exception developed by the IPC to protect information in contracts that is taken from and reveals confidential commercial and/or technical information supplied to an institution in confidence by a third party. Finally, the affected party states that the documents and correspondence comprising the records were prepared and exchanged among individuals who recognize the sensitivity of the information and are bound to keep them confidential.

The appellant's representations

[34] The appellant submits that MCOD dates, which may have been commercially

²⁰ IESO also makes this submission for record 4 of Index #1. See footnote 4 above.

²¹ IESO also cited records 115, 117 and 127 of Index #3 in its submissions, however, I have found these records exempt under section 19 of the *Act*.

²² In its confidential representations, IESO identifies two specific records in making this submission.

sensitive at the time of construction, are no longer sensitive, confidential, commercial and technical information of the affected party since those dates have passed. The appellant also disagrees with IESO's submission that the MCODs fall under the inferred disclosure exemption, and that MCODs include commercial and technical information developed and refined over the years by the affected party and provided to IESO. He asserts that the affected party publicly stated when certain milestones were reached and that this information was not secret. He adds that the affected party has "weak" justification for claiming confidentiality for information after starting the project and generating revenues from it because the information is not sensitive.

Analysis and finding

[35] From my review of the records, I am not satisfied that all of the withheld information qualifies as having been supplied in confidence by the affected party. To begin, the correspondence in records 3 and 7 from Index #1 and 19, 28, 33, 34 and 61 from Index #3 was not supplied by the affected party; it is correspondence that IESO sent to the affected party. While IESO and the affected party argue that these records contain confidential third party information supplied by the affected party, I do not agree. The information contained in these records that was "supplied" by the affected party about its FM claims does not belong to the affected party and does not comprise the confidential informational assets of the affected party that section 17(1) of the *Act* seeks to protect. I am not able to describe this withheld information in this order; however, I confirm that it relates to events and circumstances external to the affected party that cannot be said to form part of the affected party's informational assets. Because the affected party's informational assets are not at play in the correspondence in these records, the immutability and inferred disclosure exceptions cannot apply to records 3 and 7 from Index #1 and 19, 28, 33, 34 and 61 from Index #3.

[36] Some of the records are internal IESO emails, including records 43, 49, 51, 71, 84 and 93 of Index #3. Based on my review of these records and the representations of IESO and the affected party, it does not appear that these records contain informational assets of the affected party supplied confidentially by it to IESO. Again, I am not able to discuss the withheld information in this order in detail and can only say that the FM related information therein cannot be said to form part of the affected party's confidential informational assets.

[37] While some of the records can be said to qualify as having been supplied in confidence by the affected party to IESO in satisfaction of part 2 of the test, there is no need to consider them in detail because the section 17 claim in this appeal fails at part 3.

Part 3: harms

[38] To satisfy part 3 of the test, IESO and the affected party must provide detailed and convincing evidence about the potential for harm to demonstrate a risk of harm

that is well beyond the merely possible or speculative. They need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²³

[39] Because of the mandatory nature of the section 17(1) exemption, I may find that part 3 of the test is satisfied if I can infer harm from the surrounding circumstances. However, IESO and the affected party should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.²⁴

[40] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 17(1).²⁵

IESO's representations

[41] IESO submits that disclosure would likely result in the harms envisioned by sections 17(1)(a), (b) and (c). Specifically:

- Disclosure is likely to interfere with the affected party's contractual relationship with it and create difficulties with the FIT projects because it will provide the appellant and his associates, who IESO asserts have “spent considerable resources opposing the affected party's FIT project,” with detailed information on the FM claims that will add to the appellant's efforts.
- Disclosure is likely to prejudice the affected party's competitive position and cause undue loss. IESO provides confidential submissions to support its assertion.
- The affected party's FM claims reflect externalities that are outside of the affected party's control but may be in the control of the appellant or others who could use information about the FM claims to create or prolong FM situations, or otherwise undermine the affected party's FIT projects. Such information could also be used to undermine the affected party or wind power projects more generally.

[42] IESO concludes by stating that if governments cannot provide the confidentiality assurances that suppliers expect and routinely obtain from the private sector, then dealing with government institutions becomes inherently more problematic for the private sector.

²³ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras 52-4.

²⁴ Order PO-2435.

²⁵ Order PO-2435.

The affected party's representations

[43] The affected party asserts that the records at issue could be used to undermine its investment in wind projects by revealing its methodology and that information about its methodology, FMs and its FM mitigation strategies could be used to delay or otherwise disrupt other wind projects and its current contractual negotiations, resulting in a loss to its business. It argues that sensitive, confidential commercial information can be inferred from the information relating to a change in MCOD, even absent all the details about the delay.

[44] The affected party submits that the information at issue about MCODs, FMs and changes to MCODs, is of such a nature that its commercial significance is obvious and that the section 17 harms can be inferred from the circumstances. It states that each change to an MCOD is preceded by a detailed explanation of the cause of the FM which gave rise to it, and the mitigation strategy it developed and employed to limit the impact of the FM. It asserts that its strategy for managing contingencies that arise in the implementation of wind power projects is proprietary commercially valuable information and, for this reason, it has consistently treated the information in the records and similar information in other records as confidential.

[45] The affected party asserts that its approach to MCODs, which are established on the basis of commercial, financial and technical information it provides in confidence to IESO when applying for a FIT contract, distinguishes it from its competitors. It states that knowledge of its strategy would allow competitors to "free ride" on its methodology and/or use the information to "create barriers" to its timely completion of projects. It adds that disclosure of the MCODs would permit others to undermine its competitive position in the wind power industry, to interfere with its contractual commitment to deliver wind power projects, and to profit unduly at its expense.

[46] The affected party explains that its negotiations surrounding adjustments to the MCODs are confidential and their outcome is of financial and commercial significance to a supplier. It states that a supplier exposes itself to liabilities, including penalties and contract termination, if it fails to meet its MCODs.

[47] It continues that relief from the effects of an FM can only be obtained on the basis of detailed information, which may provide insight into a formerly unknown or unanticipated vulnerability presented by a site, equipment, process or governmental decision. It notes that the rationale for the section 17 exemption is to permit suppliers to take steps that are essential for their business in the short term without causing harm to their business in the longer term. The affected party submits that third parties can influence the time it takes a supplier to address an FM by obstructing or unnecessarily prolonging negotiations, making unreasonable demands or distributing information. It adds that delay can increase the cost of a project by interfering with subcontractor agreements or forcing a supplier to renegotiate financing and insurance contracts. For these reasons, it argues that the start and end dates of FMs, dates of

negotiations, dates that reveal the length of any extension that it anticipates requiring to compensate for an FM, and the length of any extension granted by the IESO are commercially sensitive and valuable information.

[48] The affected party states that although the projects have been completed, it is still managing the fall-out from some of the FMs and related delays. It states that as of the date of its representations, June 2015, it is in negotiations and it would be prejudicial to it if the records were made public.

[49] The affected party's representations include confidential submissions that were not shared with the appellant and that I am not able to describe in this order.

The appellant's representations

[50] The appellant asserts that the affected party has not demonstrated harms in satisfaction of the section 17(1) test. He argues that the harms claims are not warranted because the project is already completed with secured 20-year contracts and land leases. He states that his request seeks only to document historic decisions. In light of the secured contracts, the appellant states that he does not believe that disclosure of third party information would affect any contractual relationship with IESO. The appellant states that he does not understand how IESO can state that the affected party's FM claims reflect externalities that are outside of the affected party's control but may be in his control or in the control of others. He argues that IESO is grasping at straws attempting to keep information about its own actions from being released. He adds that in general, dealings and contracts between the government and the private sector should be fully transparent for accountability and a "vague reference to section 17(1) should not shield the IESO from accountability."

[51] The appellant concludes by stating that the affected party has not had any undue loss that he is aware of and he does not expect that any undue loss would result from disclosure of the records. In response to the affected party's submissions that a supplier exposes itself to liability if it fails to meet its MCODs, he asserts that that this has not happened and that the affected party has taken action against its contractor for this project and dissolved relations with it post construction. He states that the balance of the affected party's harms arguments are speculation of impending harm or contractor actions during construction and that there is no justifiable reason why after years of operation, the affected party insists on claiming section 17(1). He states that there is no information in the withheld records that reveals the methodology or FM mitigation strategies as argued by the affected party.

Analysis and findings

[52] The representations of IESO and the affected party, including the confidential representations, do not provide evidence about the potential for harm that demonstrates a risk of harm that is well beyond the merely possible or speculative as

required for me to conclude that any of sections 17(1)(a), (b) or (c) applies. Nor do the records themselves lead me to infer that the harms in sections 17(1)(a), (b) and/or (c) could reasonably be expected to result from disclosure of the records. All of the harms arguments from IESO and the affected party are assertions without detailed and convincing evidence to demonstrate that it is reasonable to expect the alleged harms to result from disclosure.

[53] The affected party does not address each record individually, nor does it address specific records when making its harms argument. Rather, it makes general arguments about the commercially valuable information it claims is contained in the records at issue. For example, the affected party refers repeatedly to its "methodology" and claims this is commercially valuable, however, it does not indicate which specific records or parts of the records set out its "methodology," nor does it explain what this supposedly commercially valuable "methodology" is. The affected party could have described its methodology in its confidential representations, but it does not. The affected party also does not provide any specific arguments about specific records in its confidential representations.

[54] Similarly, the affected party provides no evidence of its allegedly proprietary and commercially valuable "mitigation strategies." Moreover, there is no evidence before me of the affected party's "mitigation strategies" in the records themselves. The affected party does not identify or discuss its "mitigation strategies" in its confidential representations nor does it indicate where in the records its "mitigation strategies" are set out.

[55] I would expect that its confidential representations would be the appropriate place for it to provide evidence of why the alleged harms could reasonably be expected to result from disclosure. For example, the affected party could have articulated in its confidential representations how and why disclosure of the records could be prejudicial to its negotiations with suppliers, which it stated were ongoing in June 2015. However, the affected party provides no such explanation or information in its confidential representations.

[56] Although the affected party states that MCOB changes in the records are preceded by a detailed explanation of the cause of the underlying FM and the mitigation strategy it developed and employed to limit the impact of the FM, this is not reflected in the records. In Record 2 of Index #3, for example, the affected party does not describe its mitigation strategy, but rather, indicates that its mitigation strategy is confidential. This is clearly not commercially valuable information that could reasonably be expected to result in section 17 harms.

[57] Both IESO and the affected party allege that the appellant could use the information in the records to cause the affected party the harms alleged under section 17(1). There is no evidence that this could be the case. This is a bald assertion by IESO and the affected party with no supporting information, and I reject it as speculative.

[58] I also note that the affected party argues that the harms can be inferred from the records themselves. I disagree. In addition to considering the evidence and submissions of IESO and the affected party, I reviewed all of the remaining records at issue to determine if they demonstrate, on their face, that any of the harms claimed could reasonably be expected to result from disclosure. The records do not contain any commercial or financial information that is commercially valuable such that its disclosure could reasonably be expected to result in any of the section 17(1) harms.

[59] Ultimately, the withheld information is about the FIT project contracts and changes to the construction schedule for the projects. It is similar to the information that was found not to qualify as exempt under section 17(1) in Order PO-3574.²⁶ There is no immutable commercial information or commercial information that, if disclosed, would allow the public to infer sensitive third party information. Also, there is no evidence that the specific circumstances of the FIT project are universally applicable to other wind projects or applicable to any specific other wind project such that the terms of the FIT contracts at issue in this appeal and the events that comprise it could be used by another entity to: significantly prejudice the affected party's competitive position or negotiations; result in similar information no longer being supplied to IESO; or result in undue loss or gain.

[60] Overall, the harms claims are broad unsupported assertions that do not address the records specifically, but rather, attempt to persuade with overstated general concerns of the type that have been dismissed repeatedly by this office. I find that IESO and the affected party have not established part 3 of the section 17(1) test in their representations. Since IESO has not claimed any other exemptions for these records, and no other mandatory exemptions apply to them, I will order all of the remaining records at issue disclosed.

C. Did IESO conduct a reasonable search for records?

[61] Because the appellant claims that additional records exist beyond those identified by IESO, I must decide whether IESO conducted a reasonable search for records as required by section 24 of the *Act*. To establish that it conducted a reasonable search, IESO must provide sufficient evidence to show that it made a reasonable effort to identify and locate responsive records,²⁷ which are records that are "reasonably related" to the request.²⁸ The IPC has found that a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²⁹ The

²⁶ Paragraph 73 of Order PO-3574 describes the content of the non-exempt information as including: conditions relating to commercial operation dates, project timelines/schedules, notice documents and amendment forms submitted to IESO by the third party and emails from IESO to the third party.

²⁷ Orders P-624 and PO-2559.

²⁸ Order PO-2554.

²⁹ Orders M-909, PO-2469 and PO-2592.

IPC has also found that a requester must provide a reasonable basis for concluding that additional records exist.³⁰

[62] Absent sufficient evidence from IESO to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control, I will order it to conduct a further search.³¹

Representations

IESO

[63] In response to this issue, IESO provides an affidavit sworn by its Freedom of Information Coordinator who, it states, conducted the searches in response to the appellant's request. In that affidavit the affiant states:

- As IESO's Freedom of Information Coordinator, she is familiar with the flow of information within IESO and knew, based on her experience, that the Contract Management group would have the information sought by the appellant in its project database.
- The Contract Management group gave her the names of the Project Analyst and Project Manager with knowledge of the relevant FIT contracts, and they, in turn, gave her the records containing the information the appellant sought in his request. These records were governed by the decision letter accompanying Index #1.
- When the appellant revised his request during mediation, a new search was conducted which identified two set of records. The first set related to a one-year extension that was offered to all suppliers in the FIT Program at the direction of the Ministry of Energy. IESO publicized on its web site the one-year extension directed by the Ministry of Energy. A decision letter about records related to this request was issued to the appellant with accompanying Index #2.
- The appellant is incorrect in his belief that a letter of direction or some communication between IESO and other government departments should exist for each extension granted and every change on an MCOD. IESO does not usually seek "direction" from another government department or agency about MCOD extensions related to particular contracts. She explained this to the appellant in an email.
- The second set of records related to changes to the MCODs for the contracts relevant to this appeal. The Project Analyst advised her where any additional

³⁰ Order MO-2246.

³¹ Order MO-2185.

documents and correspondence that could be responsive to the appellant's request would be located. She searched IESO's database, which covered exchange email servers, exchange vault email databases, and the contents of shared network drives for both the Contract Management group and IESO's legal department. A decision letter on this second set of records was then delivered to the appellant in the form of Index #3.

- As a result of her discussions with the Project Analyst³² and her searches of IESO document sources, she is satisfied IESO has no additional documents responsive to the appellant's request. If such records existed, they would have been located from her discussions with the relevant people at IESO and through the searches that were carried out.
- She has no reasons to believe that there are records responsive to the appellant's request that existed but no longer exist. She has been advised by the Manager of Renewable Energy Contracts – who manages the group responsible for the contracts in this appeal – that, to the best of his knowledge, no relevant files have been deleted. As a result, she does not believe that records related to the appellant's request have been deleted.

The appellant's representations

[64] The appellant asserts that "there must be more documents, emails or direction given available from someone in authority" to allow the relevant contracts to proceed despite the FMs not having been met. He states that he does not believe that IESO's original and subsequent searches were conducted "reasonably" because IESO provided no summary of them. He argues that the volume of information disclosed (from Indexes #2 and #3) compared to what was disclosed from Index #1, is evidence that IESO's search was not reasonable. The appellant concludes by submitting that he has provided a reasonable basis that additional records must exist.

Analysis and finding

[65] The affidavit evidence of IESO's Freedom of Information Coordinator on the searches conducted in response to the appellant's original and revised requests demonstrates that IESO used an experienced employee knowledgeable in the subject matter of the request to search for responsive records. The evidence of the steps the Freedom of Information Coordinator took in conducting the searches, the knowledgeable staff she consulted about the searches, and the databases and network drives she searched, is sufficient for me to conclude that IESO's searches for responsive records were reasonable.

³² The affiant states "Program Analyst" here but "Project Analyst" elsewhere in her affidavit. I assume she means to consistently refer to "Project Analyst" and that "Program" is a typographical error.

[66] I reject the appellant's argument that the greater amount of information from Indexes #2 and #3 as compared to that from Index #1 is evidence of an unreasonable search. The appellant's revised request was broader than his original request and, as would be expected, resulted in more responsive records being located. The appellant has not provided a reasonable basis for believing that additional records exist. Accordingly, I uphold the reasonableness of IESO's searches and I decline to order any further searches.

D. Did IESO exercise its discretion under section 19, and if so, should the IPC uphold the exercise of discretion?

[67] The section 19 exemption is discretionary, and permits the IESO to disclose information, despite the fact that it could withhold it. The IESO must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so and may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[68] In either case the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.³³ The IPC may not, however, substitute its own discretion for that of the institution.³⁴

[69] Considerations that are relevant in exercising discretion may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁵

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

³³ Order MO-1573.

³⁴ Section 54(2) of the *Act*.

³⁵ Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

IESO's representations

[70] IESO submits that it properly exercised its discretion by claiming the section 19 exemption and that I should uphold its exercise of discretion. It explains that in exercising its discretion it was and remains mindful of the purpose of the *Act*, including the principles that information should generally be made available to the public and that exemptions from disclosure should be limited and specific. It adds that it also considered numerous factors as set out below.

- the wording of the section 19 exemption and the interest it seeks to protect.

[71] IESO states that it seeks to protect information that is subject to solicitor-client privilege which is properly exempt from disclosure. It adds that the Supreme Court of Canada found the purpose of the section 19 exemption is "clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship."³⁶

- the nature of the information and the extent to which it is significant and/or sensitive to it, the affected party and the appellant

[72] IESO submits that proper legal review is a valid component of its business practices and should be afforded a sphere of protection. It adds that it has not waived its privilege and it should not be compelled to release information over which it has claimed section 19.

- its historic practice with similar information

³⁶ *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 53.

[73] IESO states that it has never disclosed privileged information about contractual matters to external parties, as doing so would compromise its ability to obtain legal advice on positions taken by contractual counterparties. It asserts that when it does seek to protect privileged communications, the protection afforded by section 19 of the *Act* should be honoured.

- whether disclosure will increase public confidence in its operation

[74] IESO explains that its section 19 claims relate to legal advice on FM claims made by the affected party and on an amending agreement to its FIT contracts with the affected party. It states that its legal review of these documents, and the resulting advice, is privileged information that should be protected in order to allow it to act as a proper commercial actor, which in turn, is directly related to its objective of engaging in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario.

- whether the appellant has a compelling need to receive the information, and whether the appellant is seeking his own personal information

[75] IESO states that although this should not be a relevant consideration in a matter involving privilege, the appellant has no compelling need to receive the records, which contain information of the IESO or the affected party, and not the appellant's own personal information.

The appellant's representations

[76] The appellant does not directly address this issue in his representations, but he alludes to some factors that he believes are relevant, particularly in his submissions on the public interest in disclosure of the records. He refers to the age of the information and the fact that the project has been in operation since May 2014. He states that the contracts in question did not satisfy the agreed upon three-year commercial operation dates and the public has a right to know what happened and why they were not terminated. He also suggests that disclosure of the records would expand the public's understanding of how wind power contracts are managed by the Ontario government, since, he asserts, the public has limited ability to access details on the administration of public resources by government.

Analysis and finding

[77] It is clear from IESO's actions in this appeal and from its representations, that it exercised its discretion under section 19 when it decided to withhold the records that I have found exempt. The section 19 exemption protects the very important interest society has in ensuring that solicitor-client confidentiality is protected so that clients may freely confide in their lawyers on legal matters. As noted by IESO, the Supreme Court of Canada has recognized that solicitor-client privilege is almost absolute and that there is high public interest in maintaining the confidentiality of the solicitor-client

relationship.

[78] The appellant does not specifically address IESO's exercise of discretion under section 19 and I am not convinced that the factors that he alludes to in his representations are relevant in the context of solicitor-client privileged information. I am ordering disclosure of the information withheld under section 17, which will give the appellant a significant amount of information on the wind projects in question and the details that he argues the public should know.

[79] IESO's submissions demonstrate that it took relevant considerations into account in exercising its discretion. There is no suggestion that IESO took irrelevant considerations into account or that it exercised its discretion under section 19 in bad faith or for an improper purpose. I am satisfied that IESO exercised its discretion under section 19 appropriately and I uphold its exercise of discretion.

ORDER:

1. I uphold IESO's decision to withhold records 17, 41, 111-115, 117, 119, 124, 126, 127, 134, 135, 138, 140, 145, 147, 149, 153 and 155 of Index #3.
2. I uphold IESO's search for records as reasonable.
3. I do not uphold IESO's section 17(1) claim and I order it to disclose the following records to the appellant by **May 7, 2018, but not before May 2, 2018:**
 - Index #1
3, 5, 7 and 8
 - Index #3
1, 2, 7, 9, 14, 15, 18-20, 26, 28, 33, 34, 43, 49-51, 53, 61, 63-67, 71, 74, 77, 78, 80, 84, 90, 92-94 and 118.

Original Signed by: _____

Stella Ball
Adjudicator

_____ March 29, 2018