Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3881

Appeal PA15-279

Independent Electricity System Operator

September 28, 2018

Summary: The appellant opposed the decision of the Independent Electricity System Operator to disclose certain records related to its contract for the Fairview Wind Project. It appealed the decision arguing that the records should be withheld under the mandatory third party information exemption in section 17(1) of the *Freedom of Information and Protection of Privacy Act*. The appeal is dismissed for lack of evidence establishing the section 17(1) harms required for the application of the exemption.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, as amended, sections 17(1)(a) and (c).

Orders and Investigation Reports Considered: Orders PO-2010, PO-2965 and PO-3834.

Cases Considered: *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 (CanLII).

OVERVIEW:

[1] This is an appeal of the decision of the Independent Electricity System Operator (IESO) to disclose a number of records relating to feed-in-tariff contract 00672-WIN-130-601 (the FIT contract) to the original requester. The appellant, the company that signed the FIT contract with IESO, objects to the disclosure of the records based on the mandatory third party exemption in section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The Office of the Information and Privacy Commissioner (IPC) attempted to mediate the appeal, but a mediated resolution was not possible. The appeal was then moved to the adjudication stage of the appeal process for a written inquiry under the *Act.*

[3] I began my inquiry by inviting the representations of the appellant because it is the party resisting disclosure of the records and bears the onus of establishing the application of section 17(1) of the *Act*. The appellant provided representations in response to my Notice of Inquiry and requested that I keep portions of them confidential. After reviewing the appellant's representations, I decided that it was not necessary to seek representations from IESO or the original requester. As a result, I did not share any of the appellant's representations with IESO or the original requester.

[4] In this order, I uphold IESO's decision and dismiss the appeal.

RECORDS:

[5] At issue in this appeal are records 12, 14, 17, 26 and 30-34, which IESO decided to disclose in full, and records 1-5, 8-11, 13, 18, 20-24, 27-29 and 35-41, which IESO decided to disclose in part. All of these records are emails regarding the FIT contract passing between the appellant and IESO, IESO staff and IESO legal counsel, or simply between various IESO staff.

[6] Also at issue are two email attachments that IESO decided to disclose in full. The first attachment is a Force Majeure notice from the appellant to IESO that appears at pages 495 and 496 of record 93 (an email from IESO staff to IESO counsel). The second attachment is an email string between the appellant and various government representatives that appears at page 617 of record 102 (an email from IESO counsel to IESO staff). These two attachments are duplicated in records 96, 101, 104 and 105.

DISCUSSION:

[7] The sole issue in this appeal is whether the mandatory exemption at section 17(1) applies to the records and information IESO has decided to disclose. The paragraphs of section 17(1) that are relevant in this appeal 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;

> (c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[8] For section 17(1) to apply, the appellant 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

[9] Part 1 of the test requires that the information at issue qualify as one of the four types of listed information. The IPC has long accepted that information that relates solely to the buying, selling or exchange of merchandise or services qualifies as commercial information under part 1 of the section 17(1) test.[1] Because the records at issue all relate to the FIT contract, which is for the buying and selling of energy generation services, I find that they reveal commercial information in satisfaction of part 1 of the section 17(1) test.

[10] Having found that part 1 of the test is satisfied, I will address part 3 of the test, as that is where the appellant's position fails. I will not address part 2 of the test other than to say it is not satisfied for many of the records in this appeal.

Part 3: harms

[11] The Supreme Court of Canada has held that wherever the "could reasonably be expected to" language is used in access to information statutes, evidence well beyond or considerably above a mere possibility of harm must be provided to meet the standard of proof.[2] Accordingly, in this appeal, the appellant must provide evidence that demonstrates a risk of harm that is well beyond the merely possible or speculative to sastify part 3 of the section 17(1) test.

[12] The failure of the appellant to satisfy the standard of proof will not defeat the claim for exemption if the harms claimed can be inferred from the surrounding circumstances. However, the IPC has repeatedly affirmed that parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by

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[1] This definition was articulated in Order PO-2010 in 2002 and has been used by the IPC since then.

[2] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 (CanLII) paras. 197 and 199.

repeating the description of harms in the *Act.*[3]

The appellant's representations

[13] In its representations, the appellant specifies that it claims the harms in sections 17(1)(a) and (c). It begins by asserting it is apparent that disclosure of the records can reasonably be expected to interfere significantly with its contractual relationships, resulting in undue loss to it, thus satisfying the third part of the test.

[14] The appellant explains that it is in the business of wind energy projects in Ontario and other jurisdictions, and has a number of wind projects underway in Ontario. It states that there has been vocal resistance from anti-wind coalitions against wind energy projects in Ontario and against its projects in particular, including: lawsuits brought by anti-wind activists against it and against landowners who have entered into commercial agreements with it to host turbines and other infrastructure; multiple repetitive freedom of information requests to obtain information that it alleges would significantly prejudice it; and appeals of its renewable energy approvals in its other wind energy projects to the Environmental Review Board and the Divisional Court.

[15] The appellant continues that despite the provincial government's promotion of sustainable energy sources to improve Ontario air quality by streamlining the approvals process for energy development, anti-wind activists have gone out of their way to slow down or thwart wind energy projects. It argues that harm from the disclosure of the records at issue is not merely speculative. It states that it has experienced firsthand the attempts of anti-wind activists to delay and terminate its projects. It suggests that it is likely that anti-wind activists will continue to oppose its projects in the form of further litigation, regulatory proceedings, or lobbying for a governmental investigation. It argues that disclosing the records could prejudice it in future proceedings that are likely to arise and, therefore, disclosure represents a real risk of harm to it.

[16] The appellant submits that deciding on disclosure of information related to a commercial venture of a third party should be approached with a view to the commercial realities of the relevant industry and it cites Order PO-2965 in support. It asserts that the records contain commercially sensitive information that could be exploited by anti-wind activists to undermine and ultimately terminate the project. It explains that as it is in the business of developing wind projects, and this project was cancelled due to the fierce opposition it received, disclosure in this appeal presents a legitimate risk to the viability of any of its other projects. The appellant concludes by asserting that disclosure will prejudice it in similar approval and development processes in other jurisdictions, and that the undue losses to and prejudice against it that will result from disclosure of the records extend beyond Ontario and have far-reaching consequences for it.

[3] Order PO-2435.

Analysis and findings

[17] The summary of the appellant's representations that I include in the preceding section is the totality of the evidence the appellant provides in support of its position; the confidential representations it provides are no more specific or probative than the general and speculative assertions that it provides in its non-confidential representations.

[18] The appellant does not explain in any detail how disclosure of the records at issue could reasonably be expected to: significantly prejudice its competitive position or interfere significantly with its contractual or other negotiations; or result in undue loss or gain to it or to another entity. Instead, it makes repeated assertions about litigation that has been brought against it and other entities by what it calls "anti-wind coalitions," but provides no details about or evidence of this litigation, or how any such litigation is relevant to a reasonable expectation of harm following the disclosure of the records. Oddly, it submits in one sentence that the records could be used to end the project and in the next sentence, it states that the project has been cancelled. It refers to possible litigation and other actions that could be brought in the future against it, again, without describing how the information in the records could reasonably be expected to result in any alleged harm. It argues that disclosure of the records could possibly result in the cancellation of a future project, however, it does not describe what specific information from the records could be used, and how, to bring about the alleged harm. Tellingly, the appellant does not address the records at issue individually or specifically in its representations.

[19] I am not persuaded by the appellant's speculative and unsupported assertions that disclosure of the records at issue could reasonably be expected to cause it section 17(1)(a) and/or (c) harms because of the existence of strong and vocal opposition to wind projects from anti-wind coalitions. I am also not satisfied on my review of the records that any of the section 17(1) harms can be inferred from the surrounding circumstances or established by the records themselves.

[20] I note that the appellant relies on Order PO-2965 in its representations and submits that disclosure decisions should be approached with a view to the commercial realities of the relevant industry. It says nothing more about why Order PO-2965 should be followed in this appeal. Unlike in this appeal, where IESO did not claim the application of section 17(1), the institution in Order PO-2965 claimed the application of section 17(1) to certain records. As well, the representations provided in PO-2965 were detailed and addressed the nature of the information that was ultimately held to be exempt under section 17(1); they described the specific harms that could reasonably be expected to result if the substantive terms of a private contract between third parties were disclosed. The circumstances, nature of the withheld information and quality of the evidence in Order PO-2965 distinguish it from and make it inapplicable to this appeal.

[21] An order whose findings are applicable to this appeal is Order PO-3834, which I issued on March 29, 2017. In that order, I found that a wind energy company's

representations on its claimed section 17(1) harms were broad unsupported assertions that did not address the records specifically, but, rather, attempted to persuade with overstated general concerns of the type that have been dismissed repeatedly by the IPC. I found that certain records, including Force Majeure notices and correspondence between IESO and that wind energy company, were not exempt under section 17(1) and I ordered them disclosed. My findings in Order PO-3834 are consistent with my findings in this appeal that the records at issue are not exempt under section 17(1) and should be disclosed.

[22] For the foregoing reasons, I uphold IESO's decision and dismiss the appeal.

ORDER:

I dismiss the appeal and order the IESO to disclose the records at issue to the requester by **November 5, 2018, but not before October 29, 2018.**

Original Signed by: September 28, 2018
Stella Ball
Adjudicator