

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## **ORDER PO-3884**

Appeals PA14-425 & PA14-472

Independent Electricity System Operator

October 3, 2018

**Summary:** An individual submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Independent Electricity System Operator (IESO) for records relating to a “feed-in-tariff” (FIT) contract between a wind energy company and the IESO. The IESO decided to disclose some records to the requester but withheld others under the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in section 19 (solicitor-client privilege) of the *Act*. Both the requester and the wind energy company appealed the IESO’s access decision. There are 21 records remaining at issue in the two appeals. In his order, the adjudicator does not uphold the IESO’s decision to withhold parts of one record under section 17(1). In addition, he upholds the IESO’s decision to disclose other records and parts of records to the requester because they are not exempt from disclosure under section 17(1). Finally, he upholds the IESO’s decision to withhold some records and parts of records under section 19(a). He orders the IESO to disclose a number of records and parts of records to the requester.

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

## OVERVIEW:

[1] An individual who opposed a proposed wind energy facility in Clearview Township submitted a number of access requests to the Ontario government under the *Freedom of Information and Protection of Privacy Act* (the *Act*), including one to the Independent Electricity System Operator (IESO)<sup>1</sup> for records covering the time period of February 18 to June 23, 2014 that relate to the “feed-in-tariff” (FIT) contract between a wind energy company and the IESO.

[2] A FIT is a policy mechanism designed to accelerate investment in renewable energy technologies. It achieves this by offering long-term contracts to renewable energy producers, typically based on the cost of generation of each technology.<sup>2</sup> In Ontario, the FIT was developed to encourage and promote greater use of renewable energy sources including on-shore wind, waterpower, renewable biomass, biogas, landfill gas and solar photovoltaic (PV) for electricity generating projects.<sup>3</sup> It appears that the wind energy company that proposed to construct and operate a wind energy facility in Clearview Township filed a FIT application with the IESO, which resulted in a contract between these two parties.

[3] The IESO located 107 records that are responsive to the requester’s access request. It then notified the wind energy company under section 28(1)(a) of the *Act* that these records might contain information referred to in the mandatory exemption in section 17(1) (third party information) that affects its interests and invited the company to submit representations. In addition, the IESO notified the Ministry of the Environment, Conservation and Parks (the ministry)<sup>4</sup> about some records and asked for its views about whether these records should be disclosed.

[4] The wind energy company objected to the disclosure of specific records, while the ministry stated that the records that originated with it could be disclosed. The IESO then issued a decision letter to the requester that denied him access to 77 records in full under the mandatory exemption in section 17(1) and the discretionary exemption in section 19 (solicitor-client privilege) of the *Act*. In addition, it advised him that it intended to disclose 30 records to him but would be withholding parts of these records under section 17(1) and because some information was not responsive to his access request. It issued a similar decision letter to the wind energy company.

[5] In response, both the requester and the wind energy company appealed the

---

<sup>1</sup> The request was actually filed with the Ontario Power Authority (OPA). However, on January 1, 2015, the OPA merged with the IESO. The newly merged organization is called the IESO.

<sup>2</sup> [https://en.wikipedia.org/wiki/Feed-in\\_tariff](https://en.wikipedia.org/wiki/Feed-in_tariff).

<sup>3</sup> [www.ieso.ca/sector-participants/feed-in-tariff-program/overview](http://www.ieso.ca/sector-participants/feed-in-tariff-program/overview)

<sup>4</sup> At that time, it was called the Ministry of the Environment and Climate Change.

IESO's access decision to the Information and Privacy Commissioner (IPC). The requester appealed the IESO's decision to deny him access to records and parts of records (appeal PA14-425). The wind energy company appealed the IESO's decision to disclose parts of some records to the requester (appeal PA14-472) because it believes that the information in those records is exempt from disclosure under section 17(1).

[6] The IPC assigned both appeals to a mediator, who attempted to resolve the issues in dispute between the parties. During mediation, the requester clarified that he is not seeking information in the records that the IESO has identified as being non-responsive to his access request. In addition, he specified that he was pursuing access to only the following 21 records: records 19, 30, 37, 38, 39, 47, 56, 62-65, 67, 69, 72-74, 76, 77, 82, 86 and 89. Therefore, the other 86 records are not at issue in these appeals.

[7] The mediator informed the IESO that the requester had narrowed his appeal to those 21 records. In response, the IESO revisited its access decision on all 21 records and advised the mediator that its position remained the same with respect to the application of the solicitor-client exemption in section 19 of the *Act* to the records remaining at issue. As a result, the information that the IESO withheld under section 19 in records 37-39, 73, 77, 82, 86 and 89 remains at issue in the requester's appeal.

[8] However, the IESO revised its position with respect to the third party information exemption in section 17(1). It was no longer claiming that this exemption applies to the records at issue, except for a part of record 19. As a result, with respect to section 17(1), only a part of record 19 remains at issue in the requester's appeal.

[9] The IESO then informed the wind energy company that it had changed its position about section 17(1) and provided it with a copy of the records it had decided to disclose to the requester. The wind energy company then emailed the mediator a copy of the records in which it identified those parts of the following records that it objects to the IESO disclosing: records 19, 30, 47, 56, 62-65, 67, 69, 72, 74, 76 and 77. The wind energy company believes that the information in those parts of the records is exempt from disclosure under section 17(1). Accordingly, these are the only records which remain at issue in the third party appeal.

[10] However, the wind energy company consented to the IESO disclosing limited parts of these records to the requester. The mediator relayed the company's email and the accompanying records to the IESO. The IESO then issued a revised decision letter to the requester which stated that the wind energy company had consented to the disclosure of some parts of the records remaining at issue, and it disclosed a severed version of those records to him.

[11] These appeals were not fully resolved during mediation and were moved to adjudication for an inquiry. I solicited and received representations from the parties on the issues to be resolved in these appeals.

[12] During the course of these appeals, the ministry issued a Renewable Energy Approval (REA) to the wind energy company for the construction, installation, operation, use and retiring of a Class 4 wind facility with eight wind turbines in Clearview Township.<sup>5</sup> However, in a decision dated August 16, 2017, the Environmental Review Tribunal (ERT) revoked the REA because neither the wind energy company nor the ministry “proposed effective means to mitigate the serious harm to human health that would be caused by the Project.”<sup>6</sup> The wind energy company decided not to appeal the ERT’s decision, and its proposed wind energy facility in Clearview Township is not moving forward.<sup>7</sup>

[13] In this order, I do not uphold the IESO’s decision to withhold pages 100 to 102 of record 19 under section 17(1) of the *Act*. However, I uphold its decision to disclose the remainder of record 19 and the responsive parts of records 30, 47, 56, 62-65, 67, 69, 72, 74, 76 and 77 to the requester because they are not exempt from disclosure under section 17(1). In addition, I uphold its decision to withhold the following records under section 19(a) of the *Act*: records 37, 38, 39, 82, 86 and 89 (in full) and records 73 and 77 (in part). I order the IESO to disclose a number of records and parts of records to the requester.

**RECORDS:**

[14] The following 21 records remain at issue in this appeal:

<b>Record number</b>	<b>Page numbers</b>	<b>General description of record</b>	<b>IESO’s decision</b>	<b>IESO’s reasons for withholding</b>	<b>Wind energy company’s position</b>
19	97-110	-Emails regarding contractual issue  -Notice form regarding contractual issue  -Handwritten notes  -Chart	Disclose in part	s. 17(1) exemption	Appealing IESO’s decision to disclose parts of this record  Claims that s. 17(1) applies to most of record

<sup>5</sup> The REA was issued on February 11, 2016.

<sup>6</sup> *Wiggins v Ontario (Environment and Climate Change)*, 2017 CanLII 70687 (ON ERT).

<sup>7</sup> [www.clearview.ca/home/information/general-notices/notice-wpdcanadafairviewwindprojectupdate](http://www.clearview.ca/home/information/general-notices/notice-wpdcanadafairviewwindprojectupdate)

		-Emails regarding progress of wind energy company's project			
30	211-262	-Email and meeting agenda  -REA Projects – Weekly Awareness Reports	Disclose in part	Non-responsive <sup>8</sup>	Appealing IESO's decision to disclose parts of this record  Claims that s. 17(1) applies to most of record
37	279-281	-Email and chart regarding contractual issue	Withhold in full	s. 19 exemption	IESO did not seek wind energy company's position
38	282-283	-Email and chart regarding contractual issue	Withhold in full	s. 19 exemption	IESO did not seek wind energy company's position
39	284-286	-Email and chart regarding contractual issue	Withhold in full	s. 19 exemption	IESO did not seek wind energy company's position
47	315-317	-Email and letter regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full

---

<sup>8</sup> As noted above, the requester is not seeking information in the records that the IESO has identified as being non-responsive to his access request.

					Claims that s. 17(1) applies to most of record
56	340	-Emails regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full  Claims that s. 17(1) applies to most of record
62	366-368	-Emails and letter regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full  Claims that s. 17(1) applies to most of record
63	369-371	-Emails and letter regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full  Claims that s. 17(1) applies to most of record
64	372-375	-Emails and letter regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full  Claims that s.

					17(1) applies to most of record
65	376-379	-Emails and document regarding contractual issue	Disclose in part	Non-responsive	Appealing IESO's decision to disclose parts of this record  Claims that s. 17(1) applies to most of record
67	383-385	-Email and letter regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full  Claims that s. 17(1) applies to most of record
69	387-389	-Emails and letter regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full  Claims that s. 17(1) applies to most of record
72	394-395	-Letter regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full  Claims that s. 17(1) applies

					to all of record
73	396-400	-Emails and letter regarding contractual issue	Withhold in part	s. 19 exemption Non-responsive	IESO did not seek wind energy company's position
74	401-402	-Letter regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full  Claims that s. 17(1) applies to most of record
76	405	-Document regarding contractual issue	Disclose in full	None	Appealing IESO's decision to disclose this record in full  Claims that s. 17(1) applies to most of record
77	406-407	-Emails regarding contractual issue	Disclose in part	s. 19 exemption	Appealing IESO's decision to disclose parts of this record  Claims that s. 17(1) applies to parts of record
82	418-419	-Emails regarding contractual issue	Withhold in full	s. 19 exemption Non-	IESO did not seek wind energy



				responsive	company's position
86	428-430	-Emails regarding contractual issue	Withhold in full	s. 19 exemption Non-responsive	IESO did not seek wind energy company's position
89	436-440	-Emails and letter regarding contractual issue	Withhold in full	s. 19 exemption Non-responsive	IESO did not seek wind energy company's position

**ISSUES:**

- A. Does the mandatory exemption at section 17(1) apply to the records?
- B. Does the discretionary exemption at section 19 apply to the records?

**DISCUSSION:**

**THIRD PARTY INFORMATION**

***A. Does the mandatory exemption at section 17(1) apply to the records?***

*Introduction*

[15] The IESO claims that parts of record 19 are exempt from disclosure under section 17(1) of the *Act*. The requester is appealing the IESO's decision to withhold those parts of record 19.

[16] The wind energy company is appealing the IESO's decision to disclose records 19, 30, 47, 56, 62-65, 67, 69, 72, 74, 76 and 77 (some in part, others in whole) to the requester because it claims that they are exempt from disclosure under section 17(1). The requester submits that none of the information in these records is exempt from disclosure under section 17(1).

[17] Section 17(1) 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] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>9</sup> 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.<sup>10</sup>

[19] For section 17(1) to apply, the institution and/or the third 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.

[20] For the reasons that follow, I find that although the records at issue reveal commercial information that was implicitly supplied in confidence to the IESO, disclosing such information could not reasonably be expected to lead to the harms set out in

---

<sup>9</sup> *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.*).

<sup>10</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

sections 17(1)(a) or (c), which are the parts of the section 17(1) exemption claimed by the IESO and the wind energy company.

[21] Both the IESO and the wind energy company provided me largely with non-confidential representations on section 17(1) but some parts of their representations were not shared with the requester because they fall within the confidentiality criteria in *IPC Practice Direction Number 7*. I will not be referring to the confidential parts of their representations in my analysis of section 17(1) but I have taken them into account in reaching my decision.

*Part 1: type of information*

[22] Both the IESO and the wind energy company submit that part 1 of the section 17(1) test is met because the records at issue reveal “commercial information.” The requester’s representations do not directly address whether the records contain any of the types of information listed in the opening wording of section 17(1), although he suggests that they do not reveal “commercial information.”

[23] “Commercial information” is information that relates solely to the buying, selling or exchange of merchandise or services.<sup>11</sup> The records at issue in these appeals all relate, either directly or indirectly, to the FIT contract between the IESO and the wind energy company, which sets out terms for the buying and selling of wind power. In these circumstances, I find that all of these records reveal “commercial information,” and part 1 of the section 17(1) test is, therefore, met.

*Part 2: supplied in confidence*

[24] Both the IESO and the wind energy company submit that part 2 of the section 17(1) test is met because the wind energy company supplied the commercial information in the records at issue in confidence to the IESO. The requester’s representations do not directly address whether the information in the records subject to a section 17(1) exemption claim was supplied in confidence to the IESO.

[25] 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.<sup>12</sup> In order 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,

---

<sup>11</sup> Order PO-2010.

<sup>12</sup> Orders PO-2020 and PO-2043.

implicit or explicit, at the time the information was provided.<sup>13</sup>

[26] The records at issue include information that the wind energy company supplied directly to the IESO with respect to a specific contractual issue. Based on my review of the records, I am satisfied that the wind energy company supplied such information to the IESO with an implicit expectation of confidentiality and part 2 of the section 17(1) test is, therefore, met.

*Part 3: harms*

[27] To meet part 3 of the section 17(1) test, a party resisting disclosure must demonstrate a risk of harm that is well beyond the merely possible or speculative although it 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.<sup>14</sup>

[28] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties 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*.<sup>15</sup>

*Position of IESO*

[29] The IESO submits that disclosing the information on pages 100 to 102 of record 19 could reasonably be expected to lead to the harms set out in sections 17(1)(a) and (c). These pages of the record are a letter from the wind energy company to the IESO about a specific contractual issue.

[30] Under section 17(1)(a), the commercial information in this record must be withheld if disclosing it 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. Section 17(1)(c) requires that such information be withheld if disclosing it could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

[31] The IESO submits that disclosing the information about the contractual issue to the requester is likely to interfere with the wind energy company's contractual relationship with the IESO, which is a reference to the harm set out in the latter part of

---

<sup>13</sup> Order PO-2020.

<sup>14</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>15</sup> Order PO-2435.

section 17(1)(a). It states that although it resolved the contractual issue raised by the wind energy company, disclosing this information is likely to “create difficulties” with the FIT contract between itself and the company.

[32] I do not find this argument to be persuasive. Given that the IESO resolved the contractual issue raised in the wind power company’s letter, I do not see how disclosing this part of record 19 could reasonably be expected to lead to the harm set out in the latter part of section 17(1)(a). Moreover, the IESO does not clearly explain how disclosing this letter could reasonably be expected to “interfere significantly” with the contractual or other negotiations between the wind energy company and itself, which is the standard required by the wording in section 17(1)(a).

[33] The IESO also submits that disclosing the information in this letter is likely to prejudice the wind energy company’s competitive position and cause it undue loss, which is a reference to the first harm set out in section 17(1)(a) and one of the harms set out in section 17(1)(c). It claims that other parties could use this information to undermine the wind energy company or wind power projects more generally.

[34] In my view, this submission is vague and amounts to speculation about the harms that could reasonably be expected to occur if the letter in record 19 is disclosed to the requester. The IESO does not explain how other parties, such as the requester, could specifically use the information in the letter to undermine the wind energy company or other wind power projects in a manner that could reasonably be expected to “prejudice significantly” the wind energy’s competitive position or result in a loss for the company that is “undue.”

[35] The IESO also submits that disclosing the information in this letter may interfere with other renewable energy suppliers’ valid operations under their respective FIT contracts. However, this letter contains the commercial information of the wind energy company, not other suppliers of energy. Moreover, the IESO’s claim that disclosing the information in this letter “may” interfere with these other suppliers’ operations is speculative. In these circumstances, I am not persuaded that the harms in sections 17(1)(a) or (c) could reasonably be expected to occur with respect to these other suppliers if the information in the letter is disclosed.

[36] Finally, the IESO claims that it could suffer “undue loss” as an institution if counterparties to FIT contracts believe that the exercise of contractual rights will be unduly disclosed. I do not find this argument persuasive, because the “undue loss” harm in section 17(1)(c) applies to third parties, not to institutions under the *Act*, such as the IESO.

[37] In short, I find that the IESO has not established that disclosing the letter found on pages 100 to 102 of record 19 could reasonably be expected to lead to the harms set out in sections 17(1)(a) or (c) of the *Act*.

*Position of wind energy company*

[38] At the outset of its representations, the wind energy company states that it consents to the IESO disclosing page 104 of record 19 and page 211 of record 30 to the requester. However, it submits that disclosing the remainder of records 19, 30, 47, 56, 62-65, 67, 69, 72, 74, 76 and 77 could reasonably be expected to lead to the harms set out in sections 17(1)(a), (b) and (c) of the *Act*. I note that its submissions focus on sections 17(1)(a) and (c), not section 17(1)(b).

[39] The wind energy company submits that disclosing the IESO Weekly Awareness Report, which appears in record 30, as well as private correspondence between the wind energy company and the ministry, may cause “undue harm” to the wind energy company’s competitive position, which appears to be a reference to both sections 17(1)(a) and (c). In particular, it claims that the wind energy company’s competitors and the project’s opponents may interfere with the processing of the wind energy company’s REA application.

[40] In my view, the wind energy’s company’s submissions with respect to the IESO Weekly Awareness Report are vague and amount to speculation about the harms that could reasonably be expected to occur if this part of record 30 is disclosed to the requester. The wind energy company does not explain how the project’s opponents could use the information in IESO Weekly Awareness Report to interfere with the processing of its REA application in a manner that could reasonably be expected to “prejudice significantly” the wind energy’s competitive position or result in a loss for the company that is “undue.” In any event, the ministry approved the company’s REA application,<sup>16</sup> which renders this particular argument obsolete.

[41] The wind energy company further submits that disclosing the information in the other records will assist anti-wind activists to slow down or thwart both this particular wind energy project and others, which could reasonably be expected to harm the wind energy company’s competitive position and cause it undue loss. In addition, it submits that disclosing the information in the records will prejudice it in similar approvals and in development processes in other jurisdictions.

[42] I do not find these arguments to be persuasive in establishing the harms in sections 17(1)(a) and (c). The wind energy company does not clearly explain how anti-wind activists might use the information in the records to slow down or thwart this particular project or others in a manner that meets the harms tests in those provisions. Furthermore, I find that its claim that disclosing this information will cause it prejudice in similar approvals in other jurisdictions amounts to speculation and is not sufficient to meet the harms tests in sections 17(1)(a) and (c).

---

<sup>16</sup> *Supra* note 5.

[43] Finally, it is important to note that the ministry-granted REA for the company's proposed facility in Clearview Township was eventually revoked, and the project is, therefore, not moving forward.<sup>17</sup> Given that the records at issue all relate to a wind energy facility that is now cancelled and will not be built, I find that there is no reasonable prospect that disclosing the information in the records could be expected to "prejudice significantly" the wind energy company's competitive position or "interfere significantly" with any contractual or other negotiations that it may have been involved in relating to the proposed facility. For the same reason, I find that disclosing such information could not reasonably be expected to result in an "undue loss" for the company.

[44] In short, I find that the wind energy company has not established that the information in the following records is exempt from disclosure under section 17(1) of the *Act*: records 19, 30, 47, 56, 62-65, 67, 69, 72, 74, 76 and 77.

## **SOLICITOR-CLIENT PRIVILEGE**

### ***B. Does the discretionary exemption at section 19 apply to the records?***

#### *Introduction*

[45] The IESO claims that the following records are exempt from disclosure under the discretionary exemption in section 19 of the *Act*: records 37, 38, 39, 82, 86 and 89 (in full) and records 73 and 77 (in part).

[46] Section 19 states, in part:

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;

...

[47] Section 19 contains two branches. Branch 1 (section 19(a) – "subject to solicitor-client privilege") is based on the common law. At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Branch 2 (section 19(b) – prepared by or for Crown counsel) is a statutory privilege.

---

<sup>17</sup> *Supra* notes 6 and 7.

[48] The common law and statutory exemption privileges, although not necessarily identical, exist for similar reasons. The IESO must establish that one or the other (or both) branches apply.

*Section 19(a)*

[49] All of the above records contain emails between the IESO's staff and its senior legal counsel about a specific contractual issue or discussions about the legal advice he provided. I will start by assessing whether these records fall within the common-law privilege at section 19(a) and particularly solicitor-client communication privilege. This type of privilege 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.<sup>18</sup>

[50] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>19</sup> The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.<sup>20</sup>

[51] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>21</sup>

[52] The IESO states that these emails relate to the provision of legal advice from its in-house counsel. It submits that they are confidential written communications between a legal advisor and IESO staff that are directly relating to the seeking, formulating or giving of legal advice, and are, therefore, exempt from disclosure under section 19(a). However, the IESO states that it has decided not to claim the section 19 exemption for pages 399-400 of record 73.

[53] The requester submits that the IESO's representations simply re-state the words of the section 19 exemption and do not shed light on its claim that the above records are covered by solicitor-client privilege.

[54] I have reviewed the emails in the above records and find that they constitute direct communications of a confidential nature between various IESO employees and in-house legal counsel that were made for the purpose of giving professional legal advice.

---

<sup>18</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>19</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>20</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

<sup>21</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.



Consequently, these records fall squarely within the ambit of the solicitor-client communication privilege aspect of section 19(a).

[55] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.<sup>22</sup>

[56] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.<sup>23</sup>

[57] The IESO states that it has not waived privilege over any of the emails in the above records. The requester claims that the privilege over these records may have been waived by the IESO through their disclosure to other parties beyond the solicitor-client relationship, but he did not provide any further evidence to support this claim.

[58] There is no evidence before me to suggest that the privilege with respect to the above records has been waived by the IESO, either expressly or implicitly. In these circumstances, I find that the following records are exempt from disclosure under section 19(a) because they are subject to solicitor-client privilege: records 37, 38, 39, 82, 86 and 89 (in full) and records 73 and 77 (in part).

[59] Given that I have found that these records and parts of records are exempt from disclosure under the solicitor-client communication privilege aspect of section 19(a), it is not necessary to consider whether they are also exempt under the common-law litigation privilege aspect of that provision or under the statutory privilege in section 19(b).

#### *Exercise of discretion*

[60] The section 19(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[61] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

---

<sup>22</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

<sup>23</sup> *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

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

[62] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>24</sup> The IPC may not, however, substitute its own discretion for that of the institution.<sup>25</sup>

[63] The IESO states that in exercising its discretion to withhold the above records under section 19, it was mindful of the purposes 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 further states that it also considered other factors, including:

- the wording of the section 19 exemption and the interests that it seeks to protect;
- the nature of the information and the extent to which it is significant and/or sensitive to the IESO, the requester or the wind energy company;
- the IESO's historic practice with respect to similar information;
- whether the requester has a compelling need to receive the information; and
- whether the requester is seeking his or her own personal information.

[64] The requester's representations do not address whether the IESO exercised its discretion appropriately in withholding the above records under section 19(a).

[65] I am satisfied that the IESO exercised its discretion in denying access to these records and parts of records under section 19(a) and did so appropriately. There is no evidence before me to suggest that the IESO exercised its discretion in bad faith or for an improper purpose or that it took into account irrelevant considerations. In short, I uphold the IESO's exercise of discretion under section 19(a).

---

<sup>24</sup> Order MO-1573.

<sup>25</sup> Section 54(2).

**ORDER:**

1. I do not uphold the IESO's decision to withhold pages 100 to 102 of record 19 under section 17(1) of the *Act*. The requester's appeal with respect to these parts of the record is allowed.
2. I uphold the IESO's decision to disclose the remainder of record 19 and the responsive parts of records 30, 47, 56, 62-65, 67, 69, 72, 74, 76 and 77 to the requester because they are not exempt from disclosure under section 17(1). The wind energy company's appeal of the IESO's decision to disclose these parts of the records to the requester is dismissed.
3. I uphold the IESO's decision to withhold the following records under section 19(a) of the *Act*: records 37, 38, 39, 82, 86 and 89 (in full) and records 73 and 77 (in part).
4. I order the IESO to disclose the non-exempt and responsive parts of the following records to the requester by **November 8, 2018**, but not before **November 5, 2018**: records 19, 30, 47, 56, 62-65, 67, 69, 72, 73 (only pages 399-400), 74, 76 and 77.

Original Signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

\_\_\_\_\_ October 3, 2018