

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3955

Appeal PA17-207

Independent Electricity System Operator

May 16, 2019

Summary: The appellant submitted an access request to the Independent Electricity System Operator (the IESO) for annual pricing information from 2016 until 2064 for energy services that will be paid to Bruce Power for the Bruce Nuclear Generating Station. The IESO denied access to the information in two records under section 20(1) of the *Electricity Act, 1998* (the *EA*), which deems certain information to be exempt under the mandatory third party information exemption in section 17(1) of the *Freedom of Information and Protection of Privacy Act (FIPPA)*. The IESO also denied access to the information in three other records, citing the application of both section 17(1) and the discretionary economic and other interests exemption in section 18(1) of *FIPPA*.

In this order, the adjudicator finds that section 17(1) of *FIPPA* applies to the information at issue in two records by reason of the deeming provision in section 20(1) of the *EA* and finds that the public interest override in section 23 does not apply to this information. She also finds that neither sections 17(1) nor 18(1) apply to the annual pricing information in Records 4 to 6 and orders that information disclosed.

Statutes Considered: *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, section 20(1); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a) to (c), 18(1)(c) and (d), and 23.

Orders Considered: Orders PO-3800 and PO-3801.

OVERVIEW:

[1] The appellant submitted an access request to the Independent Electricity System

Operator (the IESO) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*). The request was for:

Any records that contain a forecast of the rates (\$ per kWh or other unit of energy) that will be paid to Bruce Power for the Bruce Nuclear Generating Station [Bruce NGS or the station] in each year from 2016 until 2064. If no records exist with this data on an annual basis, please provide records with the forecast rates on an alternative basis (e.g. quarterly) for which data is available.

[2] The IESO issued a decision, followed by a revised decision, granting full access to one record (the IESO - Bruce Power Refurbishment Implementation Agreement, Technical Briefing for Media, dated December 3, 2015).

[3] The IESO denied access to one record (Record 1) as containing information referenced in a Cabinet submission; and as such, the IESO claimed section 12 (Cabinet records) and section 13 (advice or recommendations), in addition to section 17(1) (third party information) and section 18(1) (economic and other interests) of the *Act*.

[4] The IESO denied access to two records (Records 2 and 3) as containing information that is in the technical schedule in the Amended and Restated Bruce Power Refurbishment Implementation Agreement (the ARBPRIA or the agreement). It advised that pursuant to Article 8.7 of the ARBPRIA, the IESO has designated the information in the technical schedule as being highly confidential commercial, financial, scientific, technical, and/or labour relations information for the purposes of section 20(1) of the *Electricity Act, 1998* (the *EA*)¹ and, therefore, it is exempt pursuant to section 17(1) of the *Act*.

[5] The IESO granted partial access to three records in part (Records 4 to 6), denying access to portions of these records pursuant to the exemptions in sections 17(1) and 18(1).

[6] The appellant appealed the IESO's access decisions and advised that it wished to pursue access to all withheld information in the six records and wished to proceed to the adjudication stage.

[7] During mediation of the appeal, the IESO advised that it considers Orders PO-3800 and PO-3801 to be dispositive of the release of Records 2 and 3.

[8] The IESO also advised that Bruce Power should be added as an affected party in this appeal. I added it as a party and sought representations of both these parties and the appellant. The parties' representations were exchanged between them in

¹ This section is set out later in the order in full.

accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] In its representations, the appellant stated that, based on the submissions of the IESO, it is no longer requesting access to Record 1. Therefore, sections 12(1) and 13(1) of *FIPPA* are no longer at issue in this appeal. The appellant also clarified that it was only seeking annual pricing information in the records.

[10] In this order, I find that section 17(1) of *FIPPA* applies to Records 2 and 3 by reason of the deeming provision in section 20(1) of the *EA* and find that the public interest override in section 23 does not apply to this information. I also find that neither sections 17(1) nor 18(1) apply to the annual pricing information at issue in Records 4 to 6 and order that information disclosed.

RECORDS:

[11] The following five records are at issue in this appeal:

- Record 2 - Financial model included in the technical schedule to the ARBPRIA (fully withheld)
- Record 3 - ARBPRIA Information for the Financial Accountability Office of Ontario (fully withheld)
- Record 4 - Review of Bruce Refurbishment Price Estimate and Comparison to Cost of Alternatives (partially withheld)
- Record 5 - Bruce Nuclear Refurbishment: Effectiveness of Off-Ramps (partially withheld)
- Record 6 - Impact of Bruce PPA (Power Purchase Agreement) "Step-Up" Price Scenarios on LTEP (Long Term Energy Plan) (2013) Customer Cost (partially withheld)

[12] The appellant is seeking access to the annual rates (i.e. price) in the records that Bruce NGS is forecast to charge Ontarians until 2064 based on the ARBPRIA.

ISSUES:

- A. Does the exemption provided by section 20(1) of the *EA* apply to Records 2 and 3?
- B. Does the mandatory third party information exemption at section 17(1) apply to the information at issue in Records 4 to 6?

- C. Does the discretionary economic and other interests exemption at sections 18(1)(c) or 18(1)(d) apply to the information at issue in Records 4 to 6?
- D. Is there a compelling public interest in disclosure of Records 2 and 3 that clearly outweighs the purpose of the section 17(1) exemption?

DISCUSSION:

Background

[13] The IESO has claimed the application of:

- Sections 17(1) and 18(1) for all of the records.
- Section 17(1) with section 20 of the *EA* for Records 2 and 3, which it describes as "the technical schedule records."

[14] The appellant relies on the public interest override in section 23 for all of the records.

[15] The IESO is responsible for the day-to-day operation of Ontario's electricity system, including contracting for the procurement of electricity.

[16] The IESO states that around December 2013, it entered into negotiations to amend its agreement with Bruce Power² to refurbish the Bruce NGS. As a part of these negotiations, Bruce Power provided the IESO with information, including forecasts of rates to be paid to Bruce Power for the provision of energy. The IESO and Bruce Power amended an existing confidentiality agreement to cover the provision of all confidential information during these negotiations.

[17] The IESO states that using Bruce Power's confidential information, the IESO conducted an internal analysis of various scenarios relating to the Bruce NGS refurbishment, including an evaluation of costs, alternative options for the provision of power, and ability of each party to terminate the refurbishment plans under certain circumstances (commonly called "off-ramps").

[18] The IESO and Bruce Power entered into the Amended and Restated Bruce Power Refurbishment Implementation Agreement dated December 3, 2015 (the ARBPRIA), which provides for the continued operation of the Bruce NGS until 2064. The appellant has a copy of the agreement, but not the technical schedule.

² The privately owned operator of the Bruce NGS.

Issue A: Does the exemption provided by section 20(1) of the *EA* apply to Records 2 and 3?

[19] Section 20 of the *EA* reads:

(1) A record that contains information provided to or obtained by the IESO or a predecessor relating to a market participant³ and that is designated by the head of the IESO as confidential or highly confidential is deemed for the purpose of section 17 of the *Freedom of Information and Protection of Privacy Act* to be a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, the disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization.

(2) In this section,

“head” means the person designated as the head of the IESO in the regulations made under the *Freedom of Information and Protection of Privacy Act*.⁴

[20] Section 17(1) states in part:

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.

[21] Section 17(1) is designed to protect the confidential “informational assets” of

³ Bruce Power is a market participant under the *EA*. See Order PO-3197.

⁴ The IESO is the institution in this appeal.

businesses or other organizations that provide information to government institutions.⁵ 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.⁶

[22] 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.

Preliminary Issue

[23] Record 2, which is the financial model, exhibit 1.1(c) to the ARBPRIA, was considered in Order PO-3800. In that order, section 20(1) of the *EA* was found to apply to the entire financial model as well as to nine other exhibits contained in the technical schedule to the ARBPRIA. Therefore, Record 2, as one of the exhibits at issue in Order PO-3800, was found to be exempt under section 17(1)(a) of the *Act*. Section 23 was found not to override this exemption.

[24] Normally, I would not revisit a finding made on the same record in a prior appeal with the same parties, as is the case here. However, I have decided to exercise my discretion to consider the application of section 20(1) of the *EA* to Record 2 because the appellant is now only seeking pricing information from this record and has made specific representations on the pricing information in this record.

Representations

[25] The IESO submits that Records 2 and 3 are exempt from disclosure under section 17(1)(a) of *FIPPA* by way of section 20(1) of the *EA*. It describes Record 2 as the financial model attached to the ARBPRIA and Record 3 as containing price forecasts and analysis derived directly from the financial model in Record 2.

⁵ *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.*).

⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[26] The IESO states that Record 2 is part of the Amended and Restated Technical Schedule to the ARBPRIA (the technical schedule) and contains highly confidential information in the ARBPRIA. A fundamental provision of the ARBPRIA is found in section 8.7, which expressly designated the information contained in the technical schedule to be confidential or highly confidential for the purposes of section 20(1) of the *EA*.

[27] The IESO submits that section 20(1) of the *EA* applies to both Record 2, the financial model in the technical schedule, and Record 3, the information derived from the financial model. It refers to the definition of "confidential information" in section 1.1 of the agreement, which states that confidential information includes:

... any document, electronic record, correspondence, note, extract or analysis containing, recalling or recording Confidential Information and **all new information which is derived at any time from or reflects the review of any such Confidential Information** described above, whether created by a Party or any third party at the request or direction of a Party and all copies and extracts thereof whether created by a Party or a third party at the request or direction of a Party... [Emphasis in original].

[28] The IESO states that Record 3 is comprised entirely of price forecasts and analysis derived directly from the financial model in Record 2.

[29] The IESO submits that the question of whether the information in Records 2 and 3 is exempt from disclosure has already been determined in Orders PO-3800 and PO-3801,⁷ where the adjudicator found that this information is exempt from disclosure under section 17(1) of the *Act* based on the operation of section 20 of the *EA*. It states that this section permits the head of the IESO to effectively deem that the requirements of section 17(1) of the *Act* are met with respect to designated confidential or highly confidential information that was "provided to or obtained by the IESO ... relating to a market participant," such as Bruce Power.

[30] In Orders PO-3800 and PO-3801, the adjudicator found that the technical schedule of the ARBPRIA was exempt under section 17(1) as the two-part test under section 20(1) of the *EA* was found to be met. This test was met because, in the view of the adjudicator:

- the records contained information provided to or obtained by the IESO relating to Bruce Power, which is a market participant and,

⁷ The IESO also relies on Order PO-3197, which was relied upon by the adjudicator in Orders PO-3800 and PO-3801.

- the CEO of the IESO, who is designated as the "head" of the IESO for the purposes of the *Act*, explicitly designated the information in the Technical Schedule as confidential or highly confidential for the purposes of the Deeming Provision in section 8.7 of the ARBPRIA.

[31] Bruce Power reiterates the submissions of the IESO on the applications of section 20(1) of the *EA*. It more particularly describes Record 2 as the financial model for the Bruce Power Transaction Model, which was appended to the technical schedule to the ARBPRIA.

[32] Bruce Power states that the cover page of Record 3 is stamped with a note indicating that it contains Bruce Power confidential information which has been designated under section 20(1) of the *EA* and that all of the information contained in Record 3 is derived from Record 2. It states that in this record, different numbers have been pulled from the technical schedule and used to run scenarios at different price points.

[33] The appellant states that section 20(1) of the *EA* does not apply to either record because the price forecast is not third party information provided to the IESO as required for the application of that section. It relies on Divisional Court decisions relating to section 17(1) of the *Act*, where it has been found that this section only applies to information provided to the government institution, not to mutually generated information.⁸

[34] The appellant submits that the findings in Order PO-3801 are not dispositive of this appeal. It disagrees with the finding in Order PO-3801 that section 20(1) of the *EA* includes not only information provided by Bruce Power, but also information "calculated by the IESO or calculated mutually by these two parties." It submits that this interpretation of PO-3801 is legally incorrect and irreconcilable with the legislative purpose as it would allow the IESO to exclude from public access almost all documents in its possession relating to electricity markets, including (but not limited to) any information it receives from market participants, any information it creates itself relating to market participants, and any information it creates jointly with market participants. It

⁸ The appellant relies on *Miller Transit Limited v. Information and Privacy Commissioner of Ontario*, 2013 ONSC 7139 (Div. Ct.), at paras. 27 & 37; *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), at para. 18; *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, 2015 ONSC 1392, at paras. 12-14; *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (Div. Ct.) at paras. 31 & 36; *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC), at paras. 46, 56; *Grant Forest Products Inc. v. Caddigan*, 2008 CanLII 27474 (ON SCDC), at para. 8; *Corporation of the City of Kitchener v. Information and Privacy Commissioner of Ontario*, 2012 ONSC 3496 (Div. Ct.), at para. 10; Order PO-3311; Order MO-2738; Order PO-3011; Order PO-3072-R; Order PO-2435; Order MO-1706; Order PO-2226; Order PO-2018; Order P-1545; Order PO-2497.

states that this interpretation conflicts with the actual wording in section 20 and also conflicts with numerous Divisional Court decisions.⁹

[35] Besides objecting to the treating of Order PO-3801 as a binding precedent as the IESO is requesting, the appellant points out that this appeal concerns different information not at issue in PO-3801, namely the price forecasts. It states that:

- The information sought in Order PO-3801 was found directly in the Technical Schedule. In contrast, the price forecasts are derived from a model in the Technical Schedule but cannot be used to infer the content of the Technical Schedule or to infer Bruce Power's confidential information.
- As a distinct piece of information, the price forecast requires a distinct analysis of whether it is provided/supplied to the IESO (per sections 20 and 17) and whether its release will cause harm.
- The price forecast is required for a distinct purpose (e.g. to allow the appellant and others to develop comparisons with alternatives), which requires a fresh analysis of the public interest in disclosure and whether already-public information is sufficient for those purposes.

[36] The appellant submits that the price forecast was not third party information provided to or obtained by the IESO. Instead, it was derived from a financial model in a contract that was the result of "extensive negotiations" (in the words of the IESO's affiant). It states that although the price forecast may be derived from the agreed-on financial model, this does not necessarily mean that this financial model or any other confidential information provided to the IESO can be inferred from the price forecast.

[37] In reply, the IESO disputes the appellant's argument and states specifically that confidential price forecast information in Records 2 to 6 was given directly from Bruce Power to the IESO and that only one of the Records (Record 3) contains information that was "derived from" confidential information given to the IESO by Bruce Power. It further states that only Record 2 (the financial model, which is reproduced in whole as a part of the Technical Schedule to the ARBPRIA) was a part of a contract between the IESO and Bruce Power and that although the ARBPRIA itself was negotiated, Record 2 was not negotiated, but rather was directly given to the IESO by Bruce Power.

[38] The IESO submits that section 20(1) of the *EA* is manifestly broader than section 17(1) of *FIPPA*. It states that Record 2 relates to Bruce Power, a market participant. It submits that the appellant's argument that information contained in contracts is not

⁹ The appellant relies on *Miller Transit Limited v. Information and Privacy Commissioner of Ontario*, 2013 ONSC 7139 and Order PO-3311, paras. 29 & 31 (affirmed on appeal in *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, 2015 ONSC 1392).

“supplied” for the purposes of section 17(1) is inapplicable where section 20(1) of the *EA* applies.

[39] The IESO points out that Adjudicator John Higgins determined in Order PO-3801 that there is no “supplied” requirement for section 20(1) of the *EA*.

[40] The IESO states that although the ARBPRIA was negotiated, Record 2, which is attached to the ARBPRIA, was not negotiated.

[41] The IESO states that the only record in this appeal that does not contain forecast rate information directly given to the IESO by Bruce Power is Record 3, which consists entirely of the results of the IESO’s calculations based on the information in Record 2.

[42] Bruce Power states that section 20(1) of the *EA* is broader than section 17(1) of *FIPPA* and that it does not have to establish the elements of section 17(1) of *FIPPA*. Rather, if section 20(1) of the *EA* applies, the information is deemed to meet the criteria of section 17(1) of *FIPPA*. It states that section 17(1) of *FIPPA* does not inform the interpretation of section 20(1) of the *EA*.

[43] In sur-reply, the appellant reiterates that it is not seeking third party information provided to the IESO by Bruce Power. Instead, it states that it is only seeking the negotiated annual price and the price of energy alternatives that the IESO will pay to Bruce Power pursuant to their negotiated agreement.

[44] It submits that as the annual price is derived from the financial model (a negotiated item), all annual pricing information is negotiated regardless of which document that annual pricing information is included in.

[45] The appellant also submits that the slightly different wording between section 17(1) of *FIPPA* and section 20(1) of the *EA* was not intended to expand the application of section 20(1) of the *EA* beyond third party information provided to the IESO to any records held by the IESO. It states that the annual price was based on the negotiated financial model and the annual price itself, therefore, is a negotiated item, not third party information for the purposes of section 20(1) of the *EA*.

Analysis/Findings re: the application of section 20(1) of the EA to Records 2 and 3

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

for exemption under section 17(1)(a) of the *Act*, whose language it incorporates.¹⁰

[47] In Order PO-3800, the appellant sought access to the exhibits contained in the technical schedule to the ARBPRIA, including the following exhibits:

- Exhibit 1.1(a) Form of Basis of Estimate Report
- Exhibit 1.1(b) Building Trades
- Exhibit 1.1(c) Financial Model (Record 2 in this appeal)
- Exhibit 1.1(d) CAS Instructions
- Exhibit 2.11(b) Initial Lifetime Asset Management Plan
- Exhibit 2.11(c) N and N+1 Deliverables Report
- Exhibit 2.18(a) Specified Fuel Supply Arrangement
- Exhibit 4.7(a) Contract Price Adjustments for Changes to Operating Costs
- Exhibit 4.7(c) Contract Price Adjustment for Other Post-Employment Benefits and Burden Rate
- Exhibit 9.1: Unit Threshold Base Amount.

[48] In Order PO-3801, the appellant sought access to:

- The Counterparty Cost Thresholds for each reactor refurbishment; and,
- The targeted rate of return for and the underlying constituent figures, namely, the targeted rate of return on equity, the targeted rate of return on debt, and the assumed capital structure (i.e., the proportion of the capital costs that are financed by equity and debt respectively).

[49] In this appeal, the appellant is seeking pricing information. In particular, it is requesting the annual rates (i.e. price) that the Bruce NGS is forecast to charge Ontarians until 2064 based on its agreement with the Government of Ontario (the ARBPRIA).

¹⁰ See Order PO-3801.

[50] I will now review each record for which the IESO claims that the deeming provision in section 20(1) of the *EA* applies. Other than Record 2, the appellant is seeking different information from that at issue in Orders PO-3800 and PO-3801.

Record 2

[51] Record 2 is appended as Exhibit 1.1(c) to the technical schedule of the ARBPRIA. As set out above, access to this record was considered in Order PO-3800.

[52] Record 2 is the Bruce Site Transaction Model, a 613 page financial model, which is part of the Technical Schedule to the ARBPRIA. This record contains Bruce Power's budgets for conducting refurbishment work, salary information, trigger thresholds for exiting contracts and various other confidential information. The appellant is seeking pricing information from this record.

[53] I disagree with the appellant that the findings in PO-3800 should not apply to Record 2, which is part of the technical schedule, the record at issue in Order PO-3800. In that order, Adjudicator John Higgins stated:

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

- the record must contain information provided to or obtained by the IESO relating to a market participant, and
- the information must have been designated by the head of the IESO as confidential or highly confidential.¹¹

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

Under part 2, I am satisfied that the information in the Technical Schedule, including the information at issue, has been designated by the head of the IESO as confidential or highly confidential, based on the contents of the ARBPRIA referred to above, and the fact that it was signed

¹¹ See Order PO-3197.

by the CEO, who is the "head" for this purpose. Accordingly, part 2 of the test is also met.

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

[54] The appellant argues that section 20(1) of the *EA* should not apply as Record 2 was part of a contract and was negotiated between the IESO and Bruce Power.

[55] 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). The provisions of a contract, in general, have been treated as 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 single party.¹²

[56] 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.¹³ 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.¹⁴

[57] I disagree with the appellant that the financial model which comprises Record 2 was negotiated between Bruce Power and the IESO. Even though the ARBPRIA was negotiated, I find that the financial model in the technical schedule to the ARBPRIA is akin to information that is immutable, that is, information that is not susceptible to negotiation, and is information supplied to the IESO by Bruce Power.

[58] Therefore, Record 2 would meet the "supplied" test¹⁵ under section 17(1). In any event, and as discussed in more detail below, the language of the *EA* is broader than that in section 17(1). I agree with Adjudicator Higgins in Order PO-3800 that this record was "provided to or obtained by" the IESO within the meaning of section 20(1) of the *EA*, and, relates to Bruce Power, a market participant. Record 2 has been designated by

¹² 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*).

¹³ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹⁴ *Miller Transit*, above at para. 34.

¹⁵ The supplied test is more particularly described below under Issue B.

the head of the IESO as confidential or highly confidential. Accordingly, both parts of the test under section 20(1) of the *EA* have been met. As both parts of the test are met, I find that section 20(1) of the *EA* applies, and the information at issue is, therefore, exempt under section 17(1)(a) of the *Act*.

Record 3

[59] Record 3 does not contain forecast rate information directly given to the IESO by Bruce Power; rather, it consists of the results of the IESO's calculations based on the information in the financial model set out in Record 2.

[60] In Order PO-3801, the appellant sought access to information about "counterparty cost thresholds," which are also described as "off-ramps" to permit the IESO to opt out of the ARBPRIA if costs for the refurbishment of the Bruce NGS reactors exceed an identified level or "threshold," as well as seeking information as to how much profit will be paid to Bruce Power by the IESO under the ARBPRIA.¹⁶

[61] In Order PO-3801, Adjudicator Higgins determined that this calculated information fell within section 20(1) of the *EA*. He stated:

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

The information sought by the appellant in this case consists of financial data about the refurbishment of reactors at Bruce Power. **Whether that information was directly provided by Bruce Power (as the technical schedule declares that it was), or calculated by the IESO, or calculated mutually by these two parties, I am satisfied that it was "provided to or obtained by" the IESO within the meaning of section 20(1) of the EA.** I also find that it relates to Bruce Power, and that, based on Bruce Power's submissions to that effect, it is a market participant. Based on these findings, part 1 of the test is satisfied. (Emphasis in original).¹⁷

[62] I disagree with the appellant that the interpretation of section 20(1) of the *EA* in

¹⁶ See Order PO-3801, paragraphs 6, 76, 81, and 87 in particular.

¹⁷ Order PO-3801, paragraphs 50 and 51.

Order PO-3801 does not include information calculated mutually by the parties and that the approach to section 20(1) of the *EA* in Order PO-3801 is an overbroad interpretation of this section. In Record 3, different numbers have been pulled from the technical schedule and used to run scenarios at different price points. The technical schedule to the ARBPRIA was provided to the IESO by Bruce Power. Record 3 is comprised entirely of price forecasts and analysis derived directly from the technical schedule financial model in Record 2. I find that the information in Record 3 was, therefore, "provided to or obtained by" the IESO within the meaning of section 20(1) of the *EA*. Record 3 has been designated by the head of the IESO as confidential or highly confidential.

[63] Accordingly, I also find that section 20(1) of the *EA* applies to Record 3.

[64] Therefore, both Records 2 and 3 are deemed to be exempt under section 17(1)(a) of the *Act* by reason of the application of section 20(1) of the *EA*. I will consider below under Issue D whether the public interest override in section 23 applies to these two records.

Issue B: Does the mandatory third party information exemption at section 17(1) apply to the information at issue in Records 4 to 6?

[65] The IESO states that Records 4 to 6 were created by Power Systems Planning, a department of the IESO that is engaged in long term planning, and that they contain:

- a review of Bruce Power's price estimates as against the costs of alternatives (Record 4),
- the cost/benefit of economic off-ramps if the IESO chooses not to complete various refurbishments related to the Bruce NGS in the future (Record 5), and
- IESO's assessment of various energy price scenarios (Record 6).

[66] The IESO disclosed parts of those records, but withheld portions that it determined were exempt under section 17(1).

Part 1: type of information

[67] The IESO states that the records contain financial information, as the appellant has asked for forecasts of rates that will be paid to Bruce Power for the Bruce NGS.

[68] The appellant does not dispute that the first part of the test has been met. The information in question is financial information.

[69] I agree with the parties that Records 4 to 6 contain financial information. This type of information listed in section 17(1) has been discussed in prior orders:

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.¹⁸

[70] Therefore, as the records reveal financial information, part 1 of the test under section 17(1) has been met.

Part 2: supplied in confidence

[71] The IESO states that the Bruce Power information contained in Records 4 to 6 was derived from information supplied by Bruce Power in confidence pursuant to the confidentiality agreement and that each of these records states on its face that it is confidential and commercially sensitive. It states that these records contain information that is confidential to Bruce Power, including price, refurbishment costs, lease costs, various risks, and other confidential information provided by Bruce Power during the course of negotiations.

[72] The IESO states that, using Bruce Power's confidential information, it conducted an internal analysis of various scenarios relating to the Bruce NGS refurbishment, including an evaluation of costs, alternative options for the provision of power, and ability of each party to terminate the refurbishment plans under certain circumstances (commonly called "off-ramps").

[73] Bruce Power adopts the IESO's representations on part 2 of the test under section 17(1).

[74] The appellant disputes that any of the information at issue was supplied to the IESO and relies on the arguments set out above for Records 2 and 3.

[75] In reply, the IESO states that price forecast information in Records 4 to 6 primarily comes from the PPA price scenarios supplied to it by Bruce Power and that these records are examples of the IESO's internal analysis based in part on Bruce Power information.

[76] In sur-reply, the appellant states that presumably Records 4 to 6 were created to assess the draft ARBPRIA prior to government approval and that this does not change the fact that the annual price information contained therein was derived from a negotiated financial model and it is not confidential third party information.

Analysis/Findings re: supplied in confidence

[77] The requirement that the information was "supplied" to the institution reflects

¹⁸ Order PO-2010.

the purpose in section 17(1) of protecting the informational assets of third parties.¹⁹

[78] 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.²⁰

[79] 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, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.²¹

[80] 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.²²

[81] The appellant is seeking annual pricing information. This information is found at pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6.

[82] I agree with the IESO and Bruce Power that the information at issue in Records 4 to 6 was supplied by Bruce Power to the IESO in confidence. The information in these records includes numerous charts, graphs and tables and is a detailed analysis by the IESO of various estimated and assumed prices and other economic scenarios. This information pre-dates the ARBPRIA and was covered by the confidentiality agreement between the IESO and Bruce Power to cover the provision of all confidential information during these negotiations.

[83] I agree with Bruce Power and the IESO that Records 4 to 6 contain information that is confidential to Bruce Power, including PPA price information, refurbishment cost information, lease cost information, various PPA risks, and other confidential

¹⁹ Order MO-1706.

²⁰ Orders PO-2020 and PO-2043.

²¹ Order PO-2020.

²² Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

information provided by Bruce Power during the course of the negotiations between the IESO and Bruce Power.

[84] I find that the information at issue in Records 4 to 6 was supplied by Bruce Power to the IESO on the basis that it was confidential and that it was to be kept confidential, treated consistently by Bruce Power in a manner that indicates a concern for confidentiality, not otherwise disclosed or available from sources to which the public has access and prepared for a purpose that would not entail disclosure.

[85] Therefore, I find that part 2 of the section 17(1) test has been met for Records 4 to 6.

Part 3: harms

[86] The IESO argues that disclosure of the information at issue in Records 4 to 6 could reasonably be expected to result in the harms set out in sections 17(1)(b) and (c).

[87] The IESO states that section 17(1)(b) applies as its relationship with Bruce Power requires close cooperation, which allows for the free flow of information between the parties on an ongoing basis and also allows the IESO to carry out its mandate in managing the ARBPRIA. It states that on a regular basis, Bruce Power provides the IESO with sensitive information such as cost estimates and technical information related to refurbishment, asset management and operation, vendor quotes, and contracts.

[88] IESO submits that disclosure of Bruce Power's information will harm their relationship, hinder information-sharing and the effectiveness and efficiency of the IESO to oversee refurbishment projects, and could also potentially lead to increased costs.

[89] The IESO further submits that disclosure of Bruce Power's information will have a chilling effect on other parties' willingness to share information with the IESO in the future. It states that while parties may be forced to deal with the IESO concerning particular contracts, reluctance to share information can increase the amount of time it takes to conclude agreements and ultimately complete energy projects.

[90] The IESO states that section 17(1)(c) applies as Bruce Power has not consented to disclosure of its information, and has represented to the IESO that it is concerned that disclosure of Records 4 to 6 would have an indirect impact on the IESO, as increased costs to Bruce Power can be passed on to the IESO, and, ultimately, to ratepayers.

[91] The IESO submits that it is in the financial interests of the Government of Ontario for refurbishments to be completed on budget and on schedule and that disclosure of the Bruce Power information would undermine these interests.

[92] Bruce Power generally adopts IESO's representations on part 3 of the test under

section 17(1). Bruce Power states that it has not been provided by the IESO with a copy of the information at issue in Records 4 to 6, other than that at page 11 of Record 4.²³ It states that page 11 of Record 4 contains a price curve derived from assumptions taken from a late draft of the financial model found at Record 2.

[93] The appellant states that neither the IESO nor Bruce Power provided sufficient evidence on the harm that would result from disclosing the price forecast. It states that information on when Bruce Power's reactors will be off-line is already publicly available; as well, Ontario Power Generation (the OPG) periodically publicly releases a 5-year planned outage schedule.

[94] The appellant states that, in any event, the price forecast does not reveal outage information or the kind of information that could be used for market manipulation. It also argues that the annual price forecast cannot be exploited by suppliers or employees as it is far too high-level to be useful to these parties.

[95] The appellant submits that market participants can still share confidential information with the IESO without fear that it will be released publicly and that Bruce Power and other participants have a major profit incentive to contract with the IESO.

[96] Finally, the appellant submits that releasing the forecast annual rates for Bruce Power's nuclear reactors cannot be said to cause harm seeing as the forecast annual rates (\$/MWh) for OPG's nuclear reactors are routinely released and publicly available via the Ontario Energy Board processes that set those rates.

[97] In reply, the IESO states that Bruce Power, and other similar market participants who still choose to contract with the IESO, could take any number of steps to preserve their confidentiality: by providing the IESO with less information; by requiring the IESO to immediately return any confidential documents as soon as they had been reviewed; or by taking any number of similar approaches that would raise the cost of doing business with such market participants, and prejudice the IESO's ability to negotiate or manage relationships with contract counterparties. It states that this would ultimately impede the IESO's ability to carry out its mandate, to the detriment of all Ontario ratepayers.

[98] The IESO further states that Ontario Power Generation is regulated and owned by the Province, whereas Bruce Power is a private partnership, therefore, the considerations about harm to these entities are different.

[99] In sur-reply, the appellant states that annual pricing information is not confidential third party information. It also submits that regardless of whether the OPG

²³ Bruce Power would like page 11 of Record 4 deemed under section 20(1) of the *EA*, however, this can only be done by the head and the head of the IESO has not done so.

is government owned, the OPG is required by a binding agreement to “operate as a business enterprise with a commercial mandate” and the OPG is equally interested in protecting its business and commercial interests, but is able to release forward-looking annual nuclear prices without harming those interests.

Analysis/Findings re: harm

[100] The party resisting disclosure must provide detailed evidence about the potential for harm. It 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.²⁴

[101] The failure of a party resisting disclosure to provide detailed 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*.²⁵

[102] 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 evidence to support the harms outlined in section 17(1).²⁶

[103] At issue is the annual price to be paid by the IESO to Bruce Power for the provision of energy from 2016 until 2064 in Records 4 to 6.

[104] At page 25 of Record 4, the IESO has disclosed to the appellant a chart entitled, “Annual details: total cost of electricity service, residential monthly bill, industrial electricity price.” This chart sets out the total cost of electricity services from 2015 until 2032. Record 4 is dated March 24, 2015 and contains a review of Bruce Power's price estimates as against the costs of alternatives. A chart with the same title with the same information plus the “step-up” information has been withheld on page 12 of Record 6, which is dated January 28, 2015.

[105] Neither the IESO nor Bruce Power has provided an explanation as to why this information has been withheld in one record but not in another. Nor have they provided an explanation of why certain charts and graphs with calculations as to energy prices has been withheld and others have been disclosed. Furthermore, neither of these parties have specifically addressed the specific pricing information that the appellant is

²⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²⁵ Order PO-2435.

²⁶ Order PO-2435.

seeking access to.

[106] I find that neither the IESO nor Bruce Power has provided me with sufficient evidence as to the harms under sections 17(1)(b) or (c) that may ensue should pricing information from Records 4 to 6 be disclosed.

[107] I find that IESO's arguments on harm are general arguments and I specifically do not accept under section 17(1)(b) that if the annual prices until 2064 for the Bruce NGS are disclosed, the future market participants will not provide the IESO with pricing information. Pricing information is information that must be provided to the IESO should a market participant wish to enter into an agreement with the IESO for the provision of energy services.

[108] I do not accept that Bruce Power, as the operator of Bruce NGS, or any other operator that needs to contract with the IESO, would not in the future share information with the IESO if the pricing information at issue were disclosed. The IESO is responsible for the day-to-day operation of Ontario's electricity and is tasked with contracting for the procurement of electricity supply. Specifically, in order to conduct business at the Bruce NGS, Bruce Power would have to exchange information required by the IESO with the IESO.

[109] Bruce Power's representations on section 23 contain submissions on how the information in the records about refurbishment and capital costs, and budgeted, procurement, and contingency amounts, could be exploited by its suppliers, contractors or competitors resulting in increased power costs. However, it did not provide submissions specifically addressing the application of part 3 of the test under sections 17(1)(b) or (c) to the annual pricing information in Records 4 to 6.

[110] As well, although Bruce Power is concerned about its competitors, suppliers and/or employees exploiting the above-noted information from Records 4 to 6, it has not specifically addressed how the annual pricing information at issue could result in the harms set out in sections 17(1)(b) or (c). It is aware of this pricing information since, as stated above, it supplied it to the IESO.

[111] As noted above, according to the appellant's representations, only pricing information is at issue in this appeal. I find that I do not have sufficient evidence to conclude that disclosure of the specific annual pricing information for the Bruce NGS can be exploited by Bruce Power's competitors, suppliers and/or employees.

[112] As part 3 of the test under section 17(1) has not been met for this information, the annual pricing information in Records 4 to 6 is not exempt under section 17(1). I will next consider whether this information is exempt under sections 18(1)(c) or 18(1)(d).

Issue C: Does the discretionary economic and other interests exemption at sections 18(1)(c) or 18(1)(d) apply to the information at issue in Records 4 to 6?

[113] The IESO claims the application of sections 18(1)(c) and (d) to almost all of the information withheld in Records 4 to 6, including the pricing information at issue. These sections read:

A head may refuse to disclose a record that contains,

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[114] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.²⁷

[115] For sections 18(1)(c) or (d) to apply, the institution must provide detailed evidence about the potential for harm. It 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.²⁸

[116] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.²⁹

[117] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial

²⁷ Toronto: Queen's Printer, 1980.

²⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²⁹ Order MO-2363.

interests.³⁰

Section 18(1)(c): prejudice to economic interests

[118] Concerning section 18(1)(c), the IESO states that it manages Ontario's power system and its plans for the province's future energy needs. Accordingly, it negotiates, enters into agreements, conducts procurements, and administers contracts as a commercial actor.

[119] The IESO provided similar general arguments that it did for section 17(1)(b). It also submits that disclosure would prejudice it economically as it would hurt current and future negotiations between the IESO and other energy industry players. It states that disclosure would reveal the IESO's analysis and comparison of alternatives to the Bruce NGS (Record 4), and economic thresholds for exercising off-ramps to the current Bruce NGS refurbishment (Record 5).

[120] The IESO states that disclosure would create an information asymmetry, giving market players an understanding of IESO's basic economic business plans and strategy, which would give such players an advantage in future negotiations with it.

[121] The appellant submits that the IESO's arguments under section 18 are the same as those under section 17(1) and relies on its section 17(1) representations.

Analysis/Findings re: section 18(1)(c)

[122] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.³¹

[123] Again, I find that the IESO has not addressed the specific information at issue in the records, namely, annual pricing information. From my review of the annual pricing information in Records 4 to 6, I do not find that disclosure could reasonably be expected to prejudice the economic interests or competitive position of the IESO. This pricing information is specific to the Bruce NGS and the IESO does not compete for business with other organizations. Nor is it apparent to me how this alleged information asymmetry referred to by the IESO in its representations could reasonably be expected to result in the harms set out in section 18(1)(c).

³⁰ See Orders MO-2363 and PO-2758.

³¹ Orders P-1190 and MO-2233.

[124] Therefore, I find that section 18(1)(c) does not apply to the information at issue in Records 4 to 6.

Section 18(1)(d): injury to financial interests

[125] The IESO did not provide specific representations on the application of section 18(1)(d). Instead it relies on its general harms argument.

Analysis/Findings re: section 18(1)(d)

[126] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.³² For the same reasons as set out above for section 18(1)(c), I find that disclosure of the annual pricing information in Records 4 to 6 could not reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

[127] Therefore, I find that section 18(1)(d) does not apply to the information at issue in Records 4 to 6. I will, therefore, order the IESO to disclose the pricing information in these records to the appellant.

Issue D: Is there a compelling public interest in disclosure of Records 2 and 3 that clearly outweighs the purpose of the section 17(1) exemption?

[128] Section 23 states:

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

[129] Both Bruce Power and the IESO provided extensive initial representations as to why there is not a public interest in disclosure of the records in general. I do not need to reproduce these arguments here.

[130] The appellant is a non-profit organization that produces research and educational materials on how Ontario can move to a 100% renewable electricity system.

[131] The appellant states that the forecast price of electricity from Bruce Power's refurbished reactors is essential for an evidenced-based discussion of how Ontario can reduce its electricity rates and whether billions of dollars should be spent refurbishing nuclear reactors versus pursuing other energy options. In particular, it states that the

³² Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

forecast annual prices are needed in order to develop a detailed and robust comparison of this nuclear refurbishment option with other options such as water power imports from Quebec.

[132] The appellant submits that without the underlying information to conduct a price comparison, civil society is denied the opportunity to advocate for better policy options and to conduct evidence-based research. In turn, citizens who care deeply about this subject will be denied access to this information and analysis, diminishing the strength and value of our democratic processes.

[133] The appellant states that although there is a publicly available estimate of Bruce Power's nuclear rate averaged over the lifetime of the agreement up to 2064, this single averaged figure is not sufficient and cannot serve as the basis of a robust or detailed cost comparison. It states:

First and foremost, there is a major public debate about how to reduce electricity rates over the next 10 years or so. It is important to know the annual forecast rate over those years to be able to compare the cost of Bruce Power versus alternatives during that key period. The [appellant] expects that the price of electricity from Bruce Power over the next 10 to 20 years will be substantially higher than the average figure that is publicly available. This is critical to know when comparing energy options.

Second, a comparison with alternatives over the lifetime of the agreement (up to 2064) requires figures and calculations at an annual level. This kind of cost/benefit analysis uses estimated discount rates to reflect the fact a dollar in hand today is worth more than the expectation of a dollar in the future. This requires cost comparisons and figures on an annual basis.

Third, it is not clear if the 50-year average figure includes or excludes inflation. If it does include inflation, it is not clear what year the figure is indexed to.

Fourth, it is not clear how the 50-year average figure has been calculated and what underlying assumptions have been used.

[134] The appellant states that the existing public reviews were not processes or forums where the public had a right to review information and participate (e.g. versus public hearings).

[135] The appellant submits that large volumes of documents and multiple reviews do not necessarily provide the public with the information needed to hold governments to account and to make informed voting decisions. Indeed, it submits that governments can easily decide to release information that supports their decision, withhold conflicting information, and craft the terms of reference and informational access for reviews in favour of the approach they have already adopted.

[136] The appellant states that the public still has not been provided with important information for a robust comparison of energy alternatives and has not been given the opportunity to review or critique the comparative information behind the government's decision.

[137] In reply, the IESO states that the appellant wants to conduct exactly the type of analysis that could harm the IESO in current and future negotiations with other industry players. This also includes the sole commercial counterparty that sells water power from Quebec, who would be able to analyse their business opportunities, with the added benefit of the IESO's confidential economic and business analysis. It submits that sufficient public information is already available to determine whether the ARBPRIA is fair to the Ontario ratepayer. These reviews, conducted by a consulting firm and Ontario's Financial Accountability Officer (FAO), reviewed the underlying rate forecast information being sought by the appellant.

[138] Bruce Power essentially adopts the IESO's reply representations.

[139] In sur-reply, the appellant states that the consulting firm did not assess the ultimate costs and benefits of the ARBPRIA or compare those to power from alternative sources.

Analysis/Findings

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

[141] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.³³

Compelling public interest

[142] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.³⁴ Previous orders have stated that in order to find a compelling public interest in disclosure, the

³³ Order P-244.

³⁴ Orders P-984 and PO-2607.

information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.³⁵

[143] A public interest does not exist where the interests being advanced are essentially private in nature.³⁶ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.³⁷

[144] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".³⁸

[145] Any public interest in non-disclosure that may exist also must be considered.³⁹ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".⁴⁰

[146] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation⁴¹
- the integrity of the criminal justice system has been called into question⁴²
- public safety issues relating to the operation of nuclear facilities have been raised⁴³
- disclosure would shed light on the safe operation of petrochemical facilities⁴⁴ or the province's ability to prepare for a nuclear emergency⁴⁵
- the records contain information about contributions to municipal election campaigns⁴⁶

³⁵ Orders P-984 and PO-2556.

³⁶ Orders P-12, P-347 and P-1439.

³⁷ Order MO-1564.

³⁸ Order P-984.

³⁹ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

⁴⁰ Orders PO-2072-F, PO-2098-R and PO-3197.

⁴¹ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

⁴² Order PO-1779.

⁴³ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

⁴⁴ Order P-1175.

⁴⁵ Order P-901.

[147] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations⁴⁷
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations⁴⁸
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding⁴⁹
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter⁵⁰
- the records do not respond to the applicable public interest raised by appellant.⁵¹

[148] Record 2 is the Bruce Site Transaction Model, a 613 page financial model, which is part of the technical schedule to the ARBPRIA. This record contains Bruce Power's budgets for conducting refurbishment work, salary information, trigger thresholds for exiting contracts and various other confidential information. The appellant is seeking pricing information from this record.

[149] Record 2 was considered in Order PO-3800. In that order, the parties made similar representations to those made in this appeal. Adjudicator Higgins in that order determined that there was not a compelling public interest in the disclosure of the information the appellant had requested. This finding was based on the significant amount of information that is already publicly available concerning the ARBPRIA, as well as the existence of other mechanisms to protect the public interest.

[150] I agree with and adopt the findings of Adjudicator Higgins concerning Record 2, which is part of the technical schedule to the ARBPRIA. I find that with respect to this record, there is no compelling public interest in disclosure and that there is also a public interest in non-disclosure. As determined by Adjudicator Higgins in Order PO-3800:

Despite the "open book" provisions in the ARBPRIA, I am satisfied that disclosure of the technical schedule, in whole or in part, where section 20(1) of the *EA* has been claimed and upheld, could reasonably be expected to interfere with the optimal functioning of this feature of the

⁴⁶ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

⁴⁷ Orders P-123/124, P-391 and M-539.

⁴⁸ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁴⁹ Orders M-249 and M-317.

⁵⁰ Order P-613.

⁵¹ Orders MO-1994 and PO-2607.

ARBPRIA. On this basis, I also find that there is a public interest in non-disclosure.

[151] As well, not only is there a significant amount of information that has already been disclosed which is adequate to address any public interest considerations; moreover, by virtue of this order, additional information will be disclosed from Records 4 to 6, which will add to the information available to address public interest considerations.

[152] Record 3 is comprised entirely of price forecasts and analysis derived directly from the financial model in Record 2. This is an extremely detailed analysis of various scenarios at different price points.

[153] Record 3 is similar to the record at issue in Order PO-3801, which also included information calculated from the technical schedule of the ARBPRIA. In Order PO-3801, the information at issue was financial data about the refurbishment of reactors at Bruce Power. In that case, as in this appeal, the appellant sought the information at issue to compare the cost to energy alternatives including water power imports from Quebec.

[154] In Order PO-3801, using a similar analysis to that in Order PO-3800, Adjudicator Higgins also found that a compelling public interest in the disclosure of the particular information the appellant sought in that case had not been established.

[155] I adopt this analysis of Adjudicator Higgins in Orders PO-3800 and PO-3801 and my analysis above for Record 2. I also find that a compelling public interest in disclosure of the detailed calculations in Record 3 has not been established because of the significant amount of information already available and the interest in non-disclosure, as set out above for Record 2.

[156] In this appeal, Record 3 consists of extremely detailed financial analysis of various projected scenarios. It appears to include more detailed information than the appellant is seeking, the annual electrical cost paid to Bruce Power. I am not satisfied that there is a public interest in disclosure of the extremely detailed calculations in Record 3, nor can I ascertain how this information would assist the appellant in using this information as a comparison to the cost of alternative energy sources. As well, given the information already available to address public interest considerations, I find that any public interest in the disclosure of this information is not compelling.

[157] In conclusion, I have found that there is not a compelling public interest in disclosure of the pricing information in Records 2 and 3 and section 23 does not apply to this information. As I have found that there is not a compelling public interest in disclosure of this information, it is not necessary for me to also consider whether the

compelling public interest clearly outweighs the purpose of the established section 17(1) exemption claim in the specific circumstances.⁵²

ORDER:

1. I order the IESO to disclose to the appellant by **June 24, 2019** but not before **June 18, 2019**, pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6.
2. I uphold the IESO's decision to withhold access to the remaining information at issue in the records.

Original Signed by: _____

Diane Smith
Adjudicator

_____ May 16, 2019

⁵² An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption. See Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.