

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **ORDER PO-4051**

Appeals PA14-311 and PA14-406

Independent Electricity System Operator

July 21, 2020

**Summary:** The IESO received a request for access to records relating to its FIT contracts for a number of wind energy projects and decided to disclose records in full and others in part, withholding some information on the basis of section 17(1) (third party information). Some information was also withheld as not responsive to the request. Both the requester and an affected party appealed the IESO's decision. During mediation of the appeals, the requester raised the issue of whether additional responsive records exist and the reasonableness of the IESO's search was added to the scope of the appeal. The requester also indicated that she believes there was a compelling public interest in the records such that section 23 applied to the withheld information. In this order, the adjudicator finds that the withheld information is not exempt under section 17(1) and the withheld information identified as not responsive is not responsive to the request. She orders the IESO to disclose the non-exempt information at issue.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, section 17(1).

### **OVERVIEW:**

[1] The Feed-in-Tariff (FIT) program was launched following the enactment of the *Green Energy and Green Economy Act*.<sup>1</sup> Pursuant to the direction from the Minister of Energy, the Independent Electricity System Operator (IESO) developed a FIT program to procure energy from a wide range of renewable energy sources and develop commercial relationships with third party suppliers of such energy.

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<sup>1</sup> 2009, S.O. 2009, c. 12, SCH A.

[2] The IESO received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the FIT contracts for a number of wind energy projects. The IESO's decision letter describes the clarified request as being for:

Copies of the following documents regarding the FIT contract for Settler's Landing, Snowy Ridge, Sumac Ridge and Whispering Woods and/or Stoneboat.

1. FIT contract form of Company Representative Notice(s).
2. FIT contract form(s) of Notice re: Change of Control (under 15.6(b));
3. FIT contract facility amendment request form(s);
4. FIT contract form of force majeure notice(s);
5. FIT LDC prescribed form – authorization letter(s); and
6. MCOB – milestone commercial operation date

[3] The IESO notified three affected parties (the counterparties to the contracts in question) before issuing its decision regarding disclosure of the records responsive to the request. Two of the affected parties provided submissions regarding the disclosure of the records relating to them.

[4] The IESO issued a decision to the requester and the affected parties advising that it was providing access in full or in part to some records. The IESO withheld some information under the sections 17(1)(third party information), 18(1) (economic or other interests) and 21(1) (personal privacy) exemptions and withheld some information it deemed not responsive to the request<sup>2</sup>.

[5] The requester appealed IESO's decision (PA14-406) and the matter proceeded to mediation. The records responsive to each wind project are separately numbered and are discussed by project below. As seen below, an affected party also appealed the IESO's decision to disclose certain information (Appeal PA14-311).

### **Whispering Woods wind project records**

[6] The requester clarified that she was not pursuing access to the withheld

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<sup>2</sup> The information withheld under sections 18(1) and 21(1) were removed from the scope of the appeal by the requester.

information in these records. However, the requester advised the mediator that she believed additional records responsive to her request still existed. Specifically, the requester believed that additional records regarding the name change and ownership of the project should exist. IESO found further records during a further search at mediation and disclosed them to the requester, but the requester maintains that additional records should still exist. Therefore, whether IESO has conducted a reasonable search for records related to the name change and ownership of the Whispering Woods wind project is an issue on appeal.

### **Sumac Ridge wind project records**

[7] The IESO withheld access to records 1-18 and 20-22 (in full) and Record 23 (in part) pursuant to section 17(1) of the *Act*. The IESO decided to disclose the Milestone Commercial Operation Date for the Sumac Ridge wind project contained in Record 24. The remaining information in Record 24, the IESO withheld as not responsive to the request.

[8] The requester is seeking access to all of the information withheld regarding the Sumac Ridge wind project except the information in Record 24 withheld as non-responsive.

[9] An affected third party (the third party appellant) appealed IESO's decision to disclose portions of records 23 and 24 (resulting in appeal PA14-311).

### **Records regarding the Settler's Landing and Snowy Ridge Projects**

[10] The IESO withheld access to Record 10 and portions of records 11, 12 and 14 relating to Settler's Landing, and records 11, 13 and 14 relating to Snowy Ridge under section 17(1) of the *Act*. The affected party also takes the position that this information should be withheld under section 17(1) of the *Act*.

[11] The requester confirmed that she wished to pursue access to all the records responsive to this part of the request.

[12] The IESO withheld an email in Record 7 as non-responsive. The requester is seeking access to that information, so the responsiveness of the email is at issue in this appeal.

[13] Also, during mediation the requester advised that she believes that there is a public interest in disclosure of the records responsive to her request to which she is seeking access. The application of the public interest override in section 23 was added as an issue on appeal.

[14] As mediation did not resolve the appeals, both appeals PA14-406 and PA14-311 were forwarded to adjudication where an adjudicator may conduct an inquiry. The adjudicator conducted a joint inquiry into both appeals. He sought and received

representations from the requester, the third party appellant, the affected party and, the IESO. Representations were shared in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[15] The appeal files were then transferred to me to complete the inquiry and issue a decision. As there are a number of appellants in these appeals, I will refer to the parties as the requester, the third party appellant, and the affected party. The affected party submitted representations relating to the Settler's Landing and Snowy Ridge projects.

[16] In this order, I dismiss the third party appeal and find that section 17(1) does not apply to the records at issue. I further find that the withheld not responsive information is not responsive to the request. Finally, I uphold the IESO's search for the change of ownership or control records for the Whispering Woods project. I order the IESO to disclose the non-exempt information.

**RECORDS:**

[17] The IESO has already disclosed a number of records to the requester. The only information remaining at issue are set out in the following table.

<b>Project</b>	<b>Record Description</b>	<b>Page number</b>	<b>Exemption claim</b>
Sumac Ridge	1 – 18 – emails, FIT contract, timeline, service order, events and updates	1 - 54	17(1) – withheld in full
	20 – 22 – emails and correspondence	255-290	17(1) – withheld in full
	23 – contract facility amendment form	291	17(1) – withheld in part (third party appeal)
	24 – contract facility amendment form	292	17(1) – withheld in part (third party appeal)
Settler's Landing	10 – organizational chart	45	17(1) – withheld in full
	11 – FIT Contract Form of Notice (Change of Control)	48-49	17(1) – withheld in part
	12 – FIT Contract Form of	52-54	17(1) – withheld in

	Notice (Change of Control)		part
	14 – FIT Contract Form of Notice (Change of Control)	57-59	17(1) – withheld in part
Snowy Ridge	11 – FIT Contract Form of Notice (Change of Control)	41-43	17(1) – withheld in part
	13 – FIT Contract Form of Notice (Change of Control)	46-48	17(1) – withheld in part
	14 – FIT Contract Form of Notice (Change of Control)	50-52	17(1) – withheld in part
	7 – Email	27	Not responsive

[18] In its representations, the IESO reconsidered its decision regarding a number of records including the following:

- Records 23 and 24 (Sumac Ridge) – The IESO submits that section 17(1) does not apply to Record 23 as it is currently available to the public. For Record 24, the IESO decided that is not exempt under section 17(1).
- Record 10 (pages 45 and 46) (Settler’s Landing) – The IESO submits that it has withheld pages 43 – 44 of Record 10 as they are not responsive<sup>3</sup>. It is now prepared to disclose pages 45 and 46 of Record 10.

**ISSUES:**

- A. Does the mandatory exemption at section 17(1) apply to the records?
- B. Is the withheld information at page 27 of the Snowy Ridge records and pages 43- 44 of the Settler’s Landing records responsive to the request?
- C. Did the institution conduct a reasonable search for records?

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<sup>3</sup> I will consider whether these pages of Record 10 are responsive to the request under Issue B.

## **DISCUSSION:**

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

[19] The IESO has claimed the application of section 17(1) to the records specified above. The third party appellant claims that additional information should be withheld for the Sumac Project under section 17(1). For the Settler's Landing and Snowy Ridge records, the affected party supports the IESO's decision that section 17(1) should apply to the withheld information identified above.

[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; or

[21] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.<sup>4</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>5</sup>

[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

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<sup>4</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>5</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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 paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

***Part 1: type of information***

[23] The IESO, the third party appellant and, the affected party argue that the information at issue is commercial information for the purposes of section 17(1). The IESO submits that for the Sumac Ridge project, records 1 – 4, 11 – 18, 20, 21 and 22 contain commercial information as they relate to the commercial relationship between the IESO and the affected party for the purchase and sale of electricity under the FIT program. The IESO states:

...the records relate to the Sumac Project and more specifically to events and circumstances surrounding the notification by the third party of an event of Force Majeure. In notifying the IESO of the event of Force Majeure, the third party was acting pursuant to the FIT Contract and as such the information in the records arises by virtue of the commercial relationship between the third party and the IESO, and relate to the timelines for achieving commercial operation...

[24] In addition, the IESO submits that the records relating to the Sumac Ridge project also contain trade secret, scientific and/or technical information. The IESO states that records 1 and 3 contain trade secrets. The IESO submits that Record 1 is a timeline containing detailed information regarding the various stages of the Sumac project that reveals the process of how the project was to progress over time. For Record 3, the IESO submits that it is comprised of minutes of a meeting held to discuss particular issues around the project. The IESO explains that the purpose of the meeting was to provide a government ministry with a description of the proposed project and to provide an outline and a work plan for the Natural Heritage Assessment ("NHA") and Water report.

[25] The IESO states:

...the information contained in these two records should be considered trade secrets, as they deal with the business strategy of the third party for the Sumac Project and the records contain information on the precise steps that the third party planned to take to implement its strategy.

[26] Finally, the IESO submits that the records 4 – 10, 12 and 20 contain scientific and/or technical information. The IESO submits that the emails and documents contained in the records relate to aspects of the renewable energy approval process (REA) and more specifically to a component of that process, the NHA. The NHA is a

review that must be completed before a renewable energy development can be approved.

[27] The IESO submits that records 4 – 10 and 12 contain information that falls under the organized field of knowledge known as biology which is found in correspondence detailing the findings, suggestions and recommendations of a variety of scientists and experts.

[28] The requester disputes that the records relating to the Sumac project contain trade secret information and furthermore, notes that if the withheld records relate to the REA process they should be disclosed.

[29] For the Settler's Landing and Snowy Ridge projects, the IESO notes that the records at issue are Change of Control notices provided by the affected party when a change of control to the supplier had occurred. The IESO notes that the portions of records 11, 12 and 14 that it is not disclosing are the schedules to these forms.

[30] The IESO submits that the withheld information is commercial in nature as the affected party was required to provide the information relating to the change of control pursuant to section 15.6(b) of the FIT contract. The affected party also submits that as the records include certain ownership interests and structure, they reveal commercial information.

*Analysis and finding*

[31] I find that the records at issue all contain commercial information as that term has been defined by this office in past orders. Furthermore, while I do not find that records 1 and 3 contain trade secret information, I find that some of the records relating to the Sumac project contain scientific information.

[32] The types of information listed in section 17(1) have been discussed in prior orders:

*Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and



(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>6</sup>

*Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.<sup>7</sup>

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>8</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>9</sup>

[33] I do not find that records 1 and 3 contain a programme, method, technique or process in order to establish that the information is a trade secret. Record 1 is not a detailed schedule. In addition, the IESO has not established that the meeting minutes that comprise Record 3 have an economic value from not being known.

[34] However, I am prepared to find that all of the records at issue (for all the projects) relate to the purchase and sale of electrical power between the affected party, the third party appellant and the IESO and as such qualify as commercial information. Furthermore, I find that records 4 – 10 and 12 contain biological information that qualifies as scientific information for the purposes of section 17(1).

[35] As such, I find that part 1 of the section 17(1) test is established.

## ***Part 2: supplied in confidence***

### **Supplied**

[36] The requirement that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.<sup>10</sup>

[37] 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

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<sup>6</sup> Order PO-2010.

<sup>7</sup> Order PO-2010.

<sup>8</sup> Order PO-2010.

<sup>9</sup> Order P-1621.

<sup>10</sup> Order MO-1706.

inferences with respect to information supplied by a third party.<sup>11</sup>

### **In confidence**

[38] 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.<sup>12</sup>

[39] 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.<sup>13</sup>

### *Representations*

[40] The IESO submits that for the records relating to all the projects, the third party appellant or the affected party directly supplied the withheld information to it, and its disclosure would reveal or permit the drawing of accurate inferences with respect to the information supplied by the relevant counterparty. For the Sumac project, the IESO submits that the majority of the records are email chains, some of which enclose attachments that contain information that is referenced in the covering email.

[41] The affected party submits that the records pertaining to it contains certain ownership interests and structure which was disclosed by its counsel to IESO’s counsel in confidence.

[42] The third party appellant submits that the records relating to the Sumac project were directly supplied by it to the IESO in the course of ongoing correspondence, mainly in the form of in-person meetings, private letters, phone calls and emails. The third party appellant also submits that its information may still qualify as supplied as its

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<sup>11</sup> Orders PO-2020 and PO-2043.

<sup>12</sup> Order PO-2020.

<sup>13</sup> Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

disclosure would reveal or permit the drawing of accurate inferences with respect to the information it supplied. The third party appellant specifies that this applies to information in internal correspondences, notes, summaries, and reports circulating within the IESO, and IESO's correspondence with other agencies and bodies.

[43] On the issue of confidentiality, regarding the Sumac project, the third party appellant submits that the records were directly supplied by it to the IESO with a reasonable expectation that they would remain confidential. The third party appellant further submits that in determining whether it supplied the information at issue to the IESO in confidence, I should give weight to its subjective intentions.<sup>14</sup> The third party appellant confirms that its expectation when it supplied the records at issue to the IESO was subjectively held and objectively reasonable as several of the documents were marked *confidential*. For the records not marked confidential, the third party appellant submits that they were supplied to the IESO pursuant to a working relationship in which correspondence was expected to remain confidential. The third party appellant further notes that the records at issue were not supplied to the IESO as part of the formal REA application requirements and were instead supplied to address matters that arose through the course of the project's development.

[44] The requester challenges the third party appellant's position that the records supplied to the IESO are different from the ones supplied to the Ministry of Environment for an REA, many of which were publically disclosed or potentially disclosable. The requester submits that some of the records in the index of records relating to the Sumac project appear to be the same records that were supplied by the third party appellant to the Ministry of Natural Resources or the Ministry of the Environment.

#### *Analysis and findings*

[45] Based on my review of the information at issue, I accept that some of the records at issue were supplied to the IESO in confidence. In particular, I accept that the withheld information regarding the Settler and Snowy Ridge projects was supplied in confidence by the affected party to the IESO. Given the nature of the information and the representations of the affected party, I find that this information was supplied to the IESO for the purposes of informing the IESO of its change in ownership. Furthermore, I find that this information was supplied in circumstances that would not entail disclosure.

[46] On the other hand, it is unclear to me that all of the information relating to the Sumac project was supplied by the third party appellant to the IESO. Moreover, based on my review of the records, I am unable to find that disclosure of some of the

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<sup>14</sup> *Imperial Oil Ltd. v. Calgary (City)*, 2014 ABCA 231.

information would reveal or permit the accurate inference of information supplied by the third party appellant to the IESO. Many of the records at issue are emails exchanged between staff members at the Ministry of Natural Resources and representatives of the third party appellant. Some of the information that the third party appellant argues should be withheld are observations, responses and information provided by the Ministry of Natural Resources to its questions and draft report. I accept that some inference may be drawn about the information supplied by the third party appellant but the third party appellant has not made detailed representations on this issue. In any event, based on my finding on part 3 of the test to these records, I do not need to make a definitive finding on whether these records were supplied in confidence.

[47] For the rest of the records relating to the Sumac Project, I accept that they were supplied by the third party appellant in confidence to the IESO for the purposes of reporting milestone commercial operation date and the force majeure events. I do not find that these records or the records related to the Snowy Ridge or Settler's Landing projects contain the publically available records that were filed in the context of the REA application process.

### ***Part 3: harms***

[48] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.<sup>15</sup>

[49] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>16</sup> 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 records themselves and/or 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>17</sup>

### ***Representations***

[50] The IESO submits that the FIT program requires a significant amount of coordination and information sharing between itself and third party energy providers.

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<sup>15</sup> *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>16</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>17</sup> Order PO-2435.

And in order to successfully operate the FIT program, it is critical that the IESO obtain detailed information relating to the counterparty to the FIT contract. The IESO argues that disclosure of the records could reasonably be expected to result in the harms under sections 17(1)(a), (b) and (c).

[51] For sections 17(1)(a) and (c), the IESO's representations merely restate the wording of the exemption and I will not set them out here. However, the IESO's representations regarding section 17(1)(b) are more detailed. The IESO argues that disclosure of the withheld information would result in similar information not being provided to it in the future. The IESO notes that the information supplied to it by the affected party and the third party appellant is required to properly administer the FIT program. If this information is not supplied to the IESO, it argues that it would hinder its ability to administer the program and make it more difficult for the IESO to enter into FIT contracts in the future, thereby prejudicing its competitive position.

[52] The IESO also submits that disclosure of the information would likely interfere with its relationship with the affected party and the third party appellant as these parties would be less likely to provide the confidential information necessary in future contracts. Again, the IESO submits that this would harm its competitive position.

[53] The IESO states:

As is referenced above, Article 10 of the FIT contract sets out the contractual arrangement between IESO and the third party as it relates to events of Force Majeure. If the IPC compels the IESO to disclose the confidential and private information that the third party provided to the IESO in order to substantiate its claim that an event of Force Majeure occurred in relation to the Sumac Project, it will have a negative effect on the entire FIT program going forward.

[54] The IESO also argues that its ability to enter into future FIT contracts with energy suppliers would also be negatively impacted as these suppliers:

...will be forced to re-evaluate the utility of the Force Majeure clause, as they will undoubtedly become aware that any conditional information that is supplied to substantiate that an event Force Majeure has taken place, as well as the financial or temporal losses that may have been incurred, is likely to be made available to the public.

[55] Accordingly, the IESO notes that existing and future energy suppliers will be less inclined to invoke the Force Majeure clause which would be detrimental to their interests.

[56] Finally, the IESO notes that it is in the public interest that the FIT program functions well and that parties feel encouraged to enter into FIT contracts and exercise their rights thereunder.

[57] The third party appellant for the Sumac Project submits that disclosure of the records could reasonably be expected to significantly prejudice its competitive position and interfere significantly with its contractual relationships, resulting in undue loss to it. In particular, the third party appellant submits that it is in the business of developing wind energy projects in Ontario and other jurisdictions and there has been vocal resistance from anti-wind coalitions against wind energy projects. These anti-wind energy groups have filed lawsuits against the affected party and/or landowners who have entered into contracts with the affected party to host turbines or other infrastructure. The affected party further notes:

There have also been numerous freedom of information requests, often repetitive and duplicate in nature, to obtain information about [the affected party's] wind energy projects that would significantly prejudice [the affected party].

[58] The third party appellant asks that I take in to consideration the commercial realities of its industry in deciding whether to disclose information relating to its commercial venture with the IESO. The third party appellant submits that the information in the records could be exploited by anti-wind activists to undermine and ultimately terminate the project. The third party appellant notes that both it and the project have been the subject of two separate judicial reviews and its REA approvals of its other wind projects have also been the subject of appeals to the Environmental Review Tribunal. The third party appellant states that it is likely that anti-wind activists will continue to oppose the project through further litigation, regulatory proceedings or lobbying for governmental investigation. The third party appellant argues, "Disclosing the redacted records could prejudice [it] in future proceedings that are likely to arise as the development of the project progresses and, in effect, such disclosure represents a real risk of harm to [it]."

[59] Regarding the information in the records, the third party appellant submits that disclosure of this commercially sensitive information could reasonably be expected to prejudice its commercial relationships in the following manner:

The MCOD is the date at which the Project must enter commercial operation. Failure to do so results in [the third party appellant] having to pay liquidated damages to the IESO. If the Project fails to enter commercial operation within a certain timeframe after the MCOD, [the third party appellant] will be in default and at risk of having its Feed-in-Tariff Contract terminated by the IESO. The existence of a force majeure event allows for the extension of the MCOD.

Any reference to force majeure granted by the IESO to [the third party appellant] could also be used in the same prejudicial manner. Anti-wind activists can use the information related to force majeure to calculate what the MCOD date could potentially be. This information could be ultimately

used to delay and/or defer the ultimate completion of the project through further steps of obstruction by anti-wind activists.

[60] Regarding the Settler's Landing and Snowy Ridge projects, the affected party submits that disclosure of the records would significantly prejudice the competitive position of both its parent company as well as the suppliers' affiliates. Specifically, the affected party argues that it would affect their ability to negotiate contracts "with parties that the suppliers' affiliates or the parent company would conduct business with in the course of the development or acquisition of like projects". Moreover, the affected party argues that this would affect its competitive position as:

Specifics about the ownership structure of a project is one of several aspects in value creation for such infrastructure projects which are developed outside the public sector in a competitive environment designed to transfer risk away from public-sector entities, and ultimately maximize value to electricity ratepayers.

[61] The requester submits that the Sumac project third party appellant has not established the harm in section 17(1). The requester disputes the third party appellant's argument that there has been delay to the project due to the actions of the wind activists. The requester states:

Project delay is a further issue raised by [the third party appellant] in paragraphs 26 to 31 of its representations. On the one hand, delay for the Sumac project was in part due to the legitimate public right of appeal by local residents to the ERT (Environmental Review Tribunal) against the project. But such appeals are common and form a standard part of the preparatory process when communities object to the siting of projects. On the other hand, two lengthy delays in the Sumac project were occasioned by the corporate owner itself: first by holding up the same ERT appeal for more than six months; then by initiating a court case against a local municipality when the latter refused access to Sumac turbines by an unadopted municipal road allowance, a route causing environmental damage.

[62] Regarding the Settler's Landing and Snowy Ridge projects, the requester submits that the affected party has failed to establish that disclosing the information could reasonably be expected to result in the harms in section 17(1). The requester submits:

[The affected party] asserts that disclosure of the records "would prejudice significantly the competitive position of the both (sic) Parent Company as well as the Supplier's affiliates..." and goes on to specify that the disclosure would affect "their ability to negotiate contracts and maintain their competitive position with parties...in the course of development or

acquisition of like projects.” The statement fails to explain how value is added by withholding ownership information.

[The affected party’s] concerns therefore apply to future projects. The concern cannot apply to the current project because, as stated, once a contract is assigned, there is no competition. [The affected party’s] representations add that disclosure of “Specifics about the ownership structure is one of several aspects in value creation for such projects.” [The affected party’s ] “value creation” is taking place in the public sector. Change in control is obviously an issue IESO regards as highly significant. The public has a right to know who IESO is dealing with where public funds are at stake.

[63] The third party appellant and the affected party were given an opportunity to respond to the appellant’s arguments. The third party appellant for the Sumac Project submits that the prolonged litigation is a legitimate threat facing wind developers. The third party appellant states:

This is the same experience for most wind developers as it relates to the development of a new project. Challenges are made and debated before a court of law wherein a competent Tribunal, judge or panel of judges renders the final decision on the fate of a project. The potential for extensive litigation is a real possibility and the potential for litigants to cause unnecessary delays is a reality...

[64] The affected party for the Settler’s Landing and Snowy Ridge projects submits that the requester’s desire for information about its ownership can be found outside of the access to information regime and the information withheld in the records is legitimately exempt under section 17(1). The affected party states:

While certain confidential information relating to the FIT contract is exempt from disclosure in accordance with FIPPA, this does not mean that public information relating to project ownership is not available. From our perspective, the requester was seeking projects ownership information in the wrong location.

[65] The affected party concludes:

The requester has made claims regarding a supposed lack of transparency regarding “changes in corporate ownership”, but it is evident that the IESO had acted in accordance with the FIT contract, which stipulates when and how assignment and/or change of control may occur. The records exempt from disclosure pursuant to section 17 of the *Act* include details that would cause harm to [the affected party] if released, and do not pertain to the IESO and its actions.



*Analysis and Finding*

[66] Based on my review of the records and the parties' representations, I find that the exemption in section 17(1) is not established. The parties objecting to disclosure have not provided sufficient evidence of the harms set out in sections 17(1)(a), (b) or (c). The arguments advanced by the parties objecting to disclosure are speculative and do not provide the detail necessary to establish the harms from disclosure of the records at issue. I also find that the harms are not inferable from the records themselves and/or the surrounding circumstances.<sup>18</sup>

[67] The IESO's argument under section 17(1)(b) that the wind energy suppliers will not provide records to it in order to establish the force majeure event or would be less likely to invoke the force majeure are speculative and unsubstantiated. It is not reasonable for me to accept that wind energy suppliers would not invoke the force majeure clause because they would be required to substantiate it by providing the IESO with records. A force majeure clause is invoked when a party cannot fulfill its obligations under a contract and it is for their protection. I do not accept the IESO's argument that disclosure of the records relating to the Sumac project could reasonably be expected to result in similar information not being provided to it by wind energy suppliers with whom it has FIT contracts. Accordingly, I find that section 17(1)(b) is not established for the records at issue.

[68] Similarly, I do not accept the third party appellant's representations that disclosure of the information relating to the Sumac project could reasonably be expected to result in the harms set out in sections 17(1)(a) and (c). The third party appellant's representations focus on the possible use of the information by wind activists to delay the Sumac project and jeopardize the third party appellant's FIT contract with the IESO. The third party appellant's assertions that anti-wind activists can use the information are unsubstantiated by evidence or specific representations on how the information at issue could be used in order to prejudice its competitive position or interfere significantly with its contractual or negotiations with the IESO or any other organization. Moreover, the third party appellant also has not sufficiently established that disclosure of the information at issue could reasonably be expected to result in undue loss to itself or undue gain to any person. I find that the harms in sections 17(1)(a) and (c) are not established for the records relating to the Sumac project and will order this information disclosed.

[69] I also do not accept the affected party's representations regarding the harms

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<sup>18</sup> As of 2016, the FIT program is not accepting new applications. Arguably, this makes the potential for any of the section 17(1) harms even more remote. However, I have not factored these circumstances into my analysis as none of the parties addressed them in their representations and because I find that the harms are not established in any event.

for disclosure of information relating to the Settler's Landing and Snowy Ridge projects. The affected party submits that there would be harm to its ability (parent company and supplier affiliates) to negotiate contracts and maintain their competitive position with other parties. Moreover, the affected party argues that maintaining confidentiality over specifics of the ownership structure "ultimately maximize[s] value to electricity ratepayers". The affected party's submission provide little help in my determination of the harm in disclosure of the information at issue. It is not evident to me on the basis of the affected party's generalized statements or the records themselves that the harms in sections 17(1)(a) and (c) could reasonably be expected to occur. I find the harms in sections 17(1)(a) and (c) are not established for the information at issue relating to the Settler's Landing and Snowy Ridge projects and will order it disclosed.

[70] As I have found the information at issue not exempt under section 17(1), I do not need to consider the possible application of the section 23 public interest override.

**Issue B: Is the withheld information at page 27 of the Snowy Ridge records and pages 43 -44 of the Settler's Landing records responsive to the request?**

[71] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
  - (a) make a request in writing to the institution that the person believes has custody or control of the record;
  - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[72] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.<sup>19</sup>

[73] To be considered responsive to the request, records must "reasonably relate" to

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<sup>19</sup> Orders P-134 and P-880.

the request.<sup>20</sup>

[74] The IESO submits that the requester's request was for access to records relating to FIT contracts for several wind energy projects: Settler's Landing, Snowy Ridge, Sumac Ridge and Whispering Wood and/or Stoneboat. Further, the IESO notes it clarified the request with the requester. The IESO states, "The withheld email at page 27 of the Snowy Ridge records is not responsive to the request as it relates to an energy project outside the scope of the request and therefore does not reasonably relate to the request."

[75] The requester did not address this issue in her representations.

[76] I accept the IESO's characterization of the requester's request and note that while the requester's initial request was for FIT contracts for Wind Works, the clarified request was for the projects named above. I find the request to be detailed and specific providing sufficient detail about the records requested and naming the specific projects the requester was seeking records for. Based on my review of the withheld not responsive information at pages 27 (Snowy Ridge) and 43-44 (Settler's Landing), I find that these pages do not relate to any of the named projects and accordingly, do not reasonably relate to the request. I find that these pages (27, 43 -44) are not responsive to the request.

### **Issue C: Did the institution conduct a reasonable search for records?**

[77] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.<sup>21</sup> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[78] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>22</sup> To be responsive, a record must be "reasonably related" to the request.<sup>23</sup>

[79] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which

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<sup>20</sup> Orders P-880 and PO-2661.

<sup>21</sup> Orders P-85, P-221 and PO-1954-I.

<sup>22</sup> Orders P-624 and PO-2559.

<sup>23</sup> Order PO-2554.

are reasonably related to the request.<sup>24</sup>

[80] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>25</sup>

[81] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>26</sup>

[82] The IESO was asked to provide a written summary of all steps taken in response to the request and provided an affidavit from its Freedom of Information Administrator. The administrator reviews the steps taken to search for records relating to the Whispering Wood project at mediation:

I contacted a Senior Analyst at the IESO Electricity Resources Department to inquire whether any further records existed...The analyst advised me, and I subsequently advised the mediator, that one additional record was located, but the remaining three were not in the IESO's possession. The additional record was the FIT Contract Facility Amendment Request Form, which I sent to the mediator.

[83] The administrator further notes that she coordinated the search for records with the assigned Contract Analyst who searched the folders in the network drives and email databases. The types of files that were searched include PDF's and emails. The administrator submits that if certain records are not in the IESO's possession it is because those records were never received from the third party.

[84] The requester submits that there are missing documents from the Whispering Woods project including the Force Majeure No 1 form and a missing change of ownership form if ownership was transferred<sup>27</sup>. The requester also argues that there are records missing for the Settler's and Snowy projects. The requester states:

It is possible that IESO staff did not conduct reasonable searches for records relating to all three projects. Or, that archived records held by IESO may be

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<sup>24</sup> Orders M-909, PO-2469 and PO-2592.

<sup>25</sup> Order MO-2185.

<sup>26</sup> Order MO-2246.

<sup>27</sup> The requester provided a background of the Whispering Wood project and detailed that the three Whispering Woods documents in the IESO's index of records were signed by a named individual. The requester notes that the Woods project disappeared in 2013 but a new project named "Stoneboat" appeared and a public meeting was held. At that meeting, the head of a natural heritage consulting firm working on the project announced that he was the new owner of the project. The named individual, however, continued to sign IESO-related documents in 2013.

incomplete. As an institution responsible for awarding and managing major government contracts, IESO would be expected to preserve and maintain full sets of project records.

[85] The IESO responded to the requester's representations on its search and stated the following:

Whispering Woods Wind Farm LLP The Supplier may have discussed potential transactions with the community and other stakeholders, but no such information was submitted to the Ontario Power Authority (OPA, now the IESO) in connection with this FIT contract. Accordingly, the IESO is not aware of any assignments or changes of control in connection with this FIT contract. The IESO has no record of any assignments or changes in control.

[86] Later on its reply submissions, the IESO notes that it has provided all relevant documents in its possession that were requested and notes that they are unable to disclose additional documents if they were not provided to the IESO. The IESO states:

For example, and as noted above, the IESO is not aware of a change of ownership because it did not receive a change of control/assignment document from Whispering Woods. The IESO does have a Supplier Information Update form which was previously disclosed to the requester.

This update form is different from a change of control form, and states that the contact information for the Supplier has changed.

[87] The IESO also responded to the requester's concerns that information relating to Force Majeure 1 was not provided to her:

With respect to the requester's concerns regarding the Force Majeure claims and missing documents or explanations, in the case of all three projects, Force Majeure relief was granted for Force Majeure 1 due to delays in the Environmental Review Tribunal "ERT" process.

The OPA (now IESO) recognizes that it is preferable from a community perspective if construction activities do not proceed during the Environmental Review Tribunal's proceedings and deliberations. Therefore, as noted above, if a Supplier's Renewable Energy Approval was appealed to the Environmental Review Tribunal, the OPA as a matter of policy would adjust a Supplier's Milestone Date for Commercial Operation for a period equal to the appeal period.

### ***Analysis and finding***

[88] I accept the IESO's explanation regarding the Force Majeure relief granted to the affected parties and further, I accept that there are not additional records relating

to Force Majeure 1.

[89] The requester specified during mediation that she was particularly concerned about records regarding the name change and ownership of the program that she believed should exist.

[90] The requester's reasonable basis that change of ownership records should exist appears to be based on the information she observed at a public meeting. The IESO's affidavit and representations indicate that additional searches were conducted in order to locate the records the requester had identified but only one record was found. This record does not appear to be the one that the requester is looking for.

[91] However, on the basis of the IESO's representations and affidavit evidence, I find that it has provided sufficient evidence to establish that it has conducted a reasonable search for the change of ownership records relating to the Whispering Woods project, and for the other records specified in the request. I also accept the IESO's explanation why there may not be any records within its custody.

[92] I uphold the IESO's search as reasonable and dismiss the requester's appeal on this issue.

**ORDER:**

1. I order the IESO to disclose the records I have found are not exempt under section 17(1) by providing a copy of them to the requester by **August 26, 2020** but not before **August 20, 2020**.
2. I uphold the IESO's decision that the information identified as not responsive to the request is not responsive.
3. I uphold the IESO's search as reasonable and dismiss this part of the appeal.
4. In order to verify compliance with order provision 1, I reserve the right to require the IESO to provide me with a copy of the records disclosed to the requester.
5. The timelines noted in order provision 1 may be extended if the IESO is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

July 21, 2020 \_\_\_\_\_