

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4101

Appeals PA16-657 and PA17-148

Independent Electricity System Operator

January 19, 2021

Summary: The requester, the municipality in which a wind energy project is located, submitted to the IESO a request under the *Freedom of Information and Protection of Privacy Act* for records relating to the project. The IESO issued decision letters to the requester and the affected party granting partial access to the responsive records. The requester and the affected party appealed.

At issue in this appeal are the IESO and affected party's claims that the exemptions under sections 17(1) (third party information) and 21(1) (personal privacy) apply to the records. The requester also argued that the section 23 public interest override applied to any exempt information. In this order, the adjudicator finds that sections 17(1) and 21(1) apply to some of the information at issue and orders the remainder disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 17(1), 21(1), and 23.

Orders and Investigation Reports Considered: Orders PO-3574, PO-3525, PO-2745, PO-1885 and MO-2927.

OVERVIEW:

[1] This order is best understood with some context as provided in the parties' representations in this appeal. The Independent Electricity System Operator (IESO) is responsible for procuring energy supply, including from producers of large grid scale generators. Further to this end, the IESO established the Large Renewable Procurement Program (the LRP Program) to procure large renewable energy projects. The affected

party, the third party appellant in this appeal, applied through the LRP Program to develop a specific project (the Project).

[2] The municipality in which the Project is located submitted to the IESO a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a variety of records relating to the Project. The IESO notified the affected party who then made representations to the IESO that all of the records should be withheld.

[3] After considering the affected party's arguments, the IESO issued decision letters to the municipality and the affected party granting partial access to the responsive records. The IESO claimed that the exemptions under sections 17(1) (third party information), 18 (economic and other interest), 19 (solicitor-client privilege) and 21(1) (personal privacy) applied to withhold some of the information. The IESO also claimed that some of the withheld portions of the records are not responsive to the request.

[4] The municipality appealed the IESO's decision to this office and appeal file PA17-148 was opened. In this order, the municipality appellant is referred to as the requester.

[5] The affected party also appealed the IESO's decision to this office and appeal file PA16-657 was opened (the third party appeal). In this order, the third party appellant is referred to as the affected party.

[6] A mediator was assigned to explore settlement. At the end of mediation, the requester advised that it was no longer seeking access to some records identified as being publicly available¹ and to portions of the records identified as non-responsive. The IESO advised that it does not rely on section 18(1) (economic and other interests) and therefore these issues are not before me in this appeal.

[7] Also during mediation, the IESO advised that it was prepared to release the portions of the records withheld under sections 17(1) and 21(1) upon consent of the parties. However, the affected party continued to oppose disclosure so this avenue was not pursued.

[8] No further mediation was possible and the files were transferred to the adjudication stage of the appeals process where the IPC adjudicator initially assigned to the appeal decided to conduct an inquiry and invited representations from the parties on all of the issues above and the possible application of public interest override.

[9] The IESO, requester and the affected party made representations, which were shared in accordance with the *Code of Procedure and Practice Direction 7*.

¹ Records 1.20-1.22, 1.27, 1.28, 1.30, 1.32, 1.33-1.35, 1.40 and 1.41.

[10] During the inquiry, the IESO issued a revised access decision withdrawing its reliance on section 19 of the *Act* and this section is therefore no longer at issue in this appeal.

[11] The appeal was transferred to me to conclude the inquiry. In this order, I find that sections 17(1) and 21(1) apply to some of the information at issue and that the public interest override does not apply, thereby partially upholding the decision of the IESO and granting part of the third party appeal. I order the remainder of the withheld information to be disclosed.

RECORDS:

[12] There are 47 records, totalling 272 pages. In some cases, the records consist of bundles of related documents. The IESO consecutively numbered all of the pages of the records from 1-272. References to page numbers in this order are to those applied by the IESO.

[13] The affected party claims that section 17(1) applies to the entirety of the records.

[14] Although the IESO only claims that the exemptions in sections 17(1) and 21(1) apply to the parts of the records set out in the chart below, it has not disclosed any of the records pending resolution of the third party appeal.

IESO Claim	Records
Section 17(1)	1.4 (part), 1.5, 1.6, 1.9 (part), 1.10 (part), 1.11 (part), 1.12 (part), 1.16 (part), 1.45 (part), 2 (part), 3 (part)
Section 21	1.9 (part), 1.43 (part), 1.44 (part)
Section 19 (no longer at issue)	3 (part)
Not responsive (not at issue)	1.10 (part)

ISSUES:

- A. Does the mandatory exemption for third party information at section 17(1) apply to the records?
- B. Do records 1.9, 1.43, 1.44, 2 and 3 contain personal information within the meaning of section 2(1) and if so, whose?

- C. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?
- D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purposes of the sections 17(1) and 21(1) exemptions?

DISCUSSION:

A. Does the mandatory exemption for third party information at section 17(1) apply to the records?

[15] The IESO relies on sections 17(1)(a), (b) and (c) to withhold some of the information. The affected party appealed the IESO's decision to disclose any of the records, arguing that section 17(1) applies to all of the records in their entirety.

[16] Section 17(1) is a mandatory exemption that states:

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

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

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[17] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.² 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.³

² *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.).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

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

Part 1 - Some of the information is commercial or technical information

Discussion

[19] The IESO argues that some of the information consists of trade secrets or commercial information. The affected party argues that all of the records consist of commercial information or technical information. Unable to review the records, the requester relies on my review of them to determine whether the information at issue constitutes trade secrets, technical or commercial information.

[20] The terms, "trade secrets," "commercial information," and "technical information" have been described as follows in prior orders of this office:

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.⁴

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to

⁴ Order PO-2010.

both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.⁵ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁶

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.⁷

[21] The parties referred to these definitions in their representations and I adopt them for the purpose of my findings in this order.

Representations

[22] As described above, the IESO explains that it is responsible for procuring energy supply, including from producers of large grid scale generators and that further to this end, it established the LRP Program to procure large renewable energy projects. The affected party applied through the LRP Program to develop the Project.

[23] The IESO argues that the information submitted to it by the affected party under LRP Program relates to the buying, selling or exchange of merchandise or services – in this case, the purchase and sale of electricity – and is therefore commercial information.

[24] The IESO also submits that some of the information consists of the affected party's trade secrets. It argues that the information relating to the ownership structure of the Project and the financial contributions of the "various partners and corporate entities" is of a nature that the affected party would reasonably consider it to be a "business secret" that they would not want their competitors to obtain. Further, the IESO argues that the confidential nature of this latter type of information has economic value and that efforts were undertaken by the affected party to reasonably keep the information confidential.

[25] The affected party argues that some of the information in the records consists of technical information about matters that I am not able to describe due to confidentiality concerns. It argues that the remainder of the information consists of commercial information pertaining to its bid under the LRP Program to develop the Project. The

⁵ Order PO-2010.

⁶ Order P-1621.

⁷ Order PO-2010.

affected party characterizes some of the components of the information that I am not able to repeat in this order due to confidentiality concerns. The affected party says that disclosure of this information would “allow insight into [its] negotiating position and strategy in respect of [similar projects].”

Analysis and finding

[26] The records consist of the affected party’s LRP Program proposal and – in Record 3 only – information authored by IESO staff in response to the proposal. The purpose of the LRP Program is to buy and sell renewable energy. Buying and selling renewable energy has previously been found by IPC adjudicators to qualify as commercial information and I agree with this conclusion.⁸

[27] Taking this into account and based on my review of each record, I find that several of them contain commercial information.

[28] I also find that several of the records contain technical information, consisting of information prepared by professionals describing different elements of the project.

[29] There is some overlap between records that contain commercial information and those that contain technical information. Without differentiating between the two types, I find that the following records contain commercial or technical information and for which the first part of the section 17(1) test has therefore been met: 1.1, 1.4, 1.5, 1.9-1.13, 1.15-1.17, 1.23, 1.24, 1.26, 1.29, 1.38, 1.39, 1.43, 1.44, 1.45, 2, and 3 (the records remaining at issue). I will consider whether the remaining parts of the section 17(1) test have been met in relation to these records below.

[30] I have considered but reject the argument made by the IESO that some of the information consists of trade secrets; the affected party makes no such claim and the information does not contain any proprietary information.⁹

[31] I also find that the first part of the section 17(1) test has not been met for some of the records. Several of the records do not contain any commercial or technical information, but rather consist of generic cover pages within the proposal, proposal boilerplate information such as tables of contents, or copies of public notices. For these records, which are 1.2, 1.3, 1.6, 1.7, 1.8, 1.14, 1.18, 1.19, 1.25, 1.31, 1.36, 1.37, and 1.42, I find that the first part of the section 17(1) test has not been met without any alternative arguments to consider, I will order them disclosed.

⁸ Orders PO-3534, PO-3525, PO-3530, PO-3538, PO-3574, and PO-3614, relating to different procurement programs for renewable energy managed by the IESO, and PO-3790.

⁹ Order PO-2010.

Part 2 - The commercial and technical information was supplied in confidence

Discussion

[32] The requirement that the information was “supplied” to the IESO reflects the purpose in section 17(1) of protecting the informational assets of third parties.¹⁰ 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.¹¹

[33] 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.¹²

[34] To determine 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 IESO on the basis that it was confidential and that it was to be kept confidential,
- treated consistently by the affected 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.¹³

Representations

[35] The IESO submits that the information at issue was supplied to it in confidence by the affected party within the confines of the LRP Program. Regarding the requirement that it be supplied in confidence, it submits that based on the content of the records there was an implicit expectation of confidentiality on the part of the affected party. It submits that the information has not otherwise been disclosed publicly and was prepared for a purpose that would not entail disclosure.

¹⁰ Order MO-1706.

¹¹ Orders PO-2020 and PO-2043.

¹² Order PO-2020.

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

[36] The affected party argues that the records were supplied in confidence to the IESO. First, it submits that the entire proposal was marked "confidential." Next, it submits that the information at issue qualifies as "confidential information" as that term is defined in the contract between it the IESO to provide renewable energy. The affected party also points to the sensitive nature of the information and argues that this suggests that it was supplied with the expectation that it would remain confidential. It argues that details within the records "reveal critical commercial elements of [its] bid to the IESO in a competitive procurement process." The affected party also submits that it has consistently treated the information in a confidential manner, even within its own organization where it is only available to employees on a "need to know" basis and only with those bound by a duty of confidentiality.

[37] Unable to review them, the requester asks this office to determine whether the records were "supplied" within the meaning of the *Act*.

[38] However, the requester disputes that the records were supplied "in confidence." They disagree that the affected party had an expectation that all information it provided to the IESO would be kept confidential. They state that the affected party knew or should have known that the IESO was an institution subject to the *Act*. In support of this point, the requester refers to Order PO-3574 and submits that this is made clear by the following term included in the publicly-available "standard contract" to be entered into by successful proponents under the LRP Program,

The Parties acknowledge and agree that the Buyer [IESO] is subject to [the *Act*] and ta [the *Act*] applies to and governs all Confidential Information in the custody or control of the [IESO]... and may subject to [the *Act*], require the disclosure [of records] to third parties."

Analysis and finding

[39] I find that the records remaining at issue were *supplied* by the affected party to the IESO. As noted, the records consist of the affected party's proposal under the LRP Program.

[40] I also find that the information at issue was supplied *in confidence*. I find on an objective basis that the affected party had a reasonable expectation of confidentiality at the time the information was provided. I reach this conclusion on the basis of my review of the records, the level of detail contained in them, and the evidence provided by the affected party and the IESO.

[41] I have considered the requester's argument regarding the clause in the standard contract stipulating that information provided to IESO is subject to the *Act* and Order PO- 3574. I do not accept this argument for the following reasons.

[42] The circumstances in Order PO-3574 are distinguishable from the present appeal. The adjudicator in Order PO-3574 concluded that the existence of a similar

clause put the affected party in that case “on notice” that information could be disclosed. However, the affected party in that case argued that the clause in question had the effect of protecting confidential information from disclosure including under freedom of information legislation. The affected party makes no similar claim in this case; rather, it seeks to rely on the protection provided by section 17(1) of the *Act*. Further, in Order PO-3574 the adjudicator concluded that a third party’s expectation of confidentiality may still be found to be reasonable despite a clause like the one referred to by the requester in this appeal especially where it provides evidence of its expectation of confidentiality.¹⁴

[43] I also agree with the reasoning of the adjudicator in Order PO-3525 in response to a similar argument raised and also involving the IESO:

I agree with the IESO and the affected party that this clause only speaks to compliance with [the *Act*] and does not automatically result in disclosure of information supplied by the affected party to the IESO. Disclosure of the records is still subject to the application of any exemptions set out in [the *Act*].

[44] Some additional explanation is required regarding Record 3 because it contains information authored by IESO employees, which was therefore not supplied by the affected party; however, Record 3 includes a duplicate of one of the other records and in any event reveals the above-described commercial or technical information provided in confidence by the affected party.

[45] In summary, I find that the records remaining at issue were supplied in confidence by the affected party and that therefore the second part of the section 17(1) test has been met.

Part 3 – the harms are present in some instances

Discussion

[46] Parties should provide detailed evidence to demonstrate the harms set out in section 17(1). How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁵ 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 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

¹⁴ See also Orders PO-3525, and PO-3545.

¹⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674.

Act.¹⁶

Representations

[47] The IESO explains that for the LRP Program and other similar procurement programs to be successful, it is essential that it obtains detailed information from third parties like the affected party. It states that providing this level of detail is usually at great expense to third parties.

[48] The IESO acknowledges that the *Act* curtails the level of confidentiality that a third party could expect in the private sector. However, it argues that the transparency provided by the *Act* must be balanced against the IESO's ability to engage with private sector third parties in a confidential manner and that the inability to do so could impact the ability of the IESO to fulfill its statutory mandate to help the province meet its energy needs.

[49] Regarding section 17(1)(a) (prejudice to competitive position), the IESO submits that disclosure of some specific portions of the record could reasonably be expected to significantly prejudice the affected party's competitive position and interfere with its contractual or other negotiations.

[50] Regarding section 17(1)(b) (similar information no longer supplied), the IESO says that if the records are ordered disclosed, other similarly-situated third parties will refuse to provide the information required by the IESO to administer similar programs and therefore carry out the IESO's mandate. It submits that this outcome would negatively impact the broader vision of "powering a reliable and sustainable energy future for Ontario." The IESO also submits that any hindrance of the IESO's ability to carry out such projects would impact its "competitive position."

[51] Further, it submits that if the records are ordered disclosed, its relationship with the affected party will suffer.

[52] Lastly, the IESO submits that it is in the public interest that current and future counterparties to its procurement projects be confident that confidential documents and information provided to the IESO will not be made public without compelling reasons for doing so.

[53] Regarding section 17(1)(c) (undue loss or gain), the IESO submits that disclosure would likely result in undue loss to the affected party. In particular, it says that disclosure of documents containing the description of financial exposure of the Project owners would "likely impact current and/or future investments of the third party as it would provide confidential information to its competitors." It also says that detailed

¹⁶ Order PO-2435.

locational information about the Project may hinder the affected party's ability to maintain a competitive advantage in the market place.

[54] Lastly, it says that disclosure could unduly impact the relationship between the IESO and the affected party and between the affected party and other stakeholders, such as its investors and lenders.

[55] The affected party submits that "very significant" harms would flow if the IESO disclosed the information. It argues that disclosure would result in "undue loss" to itself or gain to potential litigants. The affected party submits that it is concerned that the records are sought for use in litigation, a risk that it argues is heightened because of widespread opposition to wind energy projects in general in Ontario. Specifically, it says that if a potential litigant obtained the records using an access request under the *Act*, it would be an "end-run around the normal, court supervised, documentary discovery process" which, it argues, gives an undue advantage to litigants that would not otherwise be available to them if the normal litigation process was followed.

[56] It also submits that disclosure would cause very significant harm because it would "reveal highly commercially sensitive information to third parties and competitors." It says that third parties and competitors could use the information to gain a better understanding of the commercial position of the Project and the affected party's commercial strategy in connection with the LRP Program, prejudicing its competitive position in the future. It says that disclosure would unfairly advantage competitors, which "qualifies as one of the enumerated harms under Section 17 of the *Act*."

[57] The requester submits that neither the affected party nor the IESO have provided sufficiently detailed and convincing evidence of probable harm required to establish that section 17(1) applies to the records. The requester refers to Order PO-3545, where the adjudicator found that claims of significant resistance to wind energy projects is not sufficient to establish the harms in section 17(1).

Analysis and finding

[58] For section 17(1) to apply, I must be satisfied one of the stated harms "could reasonably be expected to" occur. This means that the risk must be well beyond or considerably above a mere possibility of harm.¹⁷

[59] Generally speaking, the following types of information are contained in the records: information about the ownership and equity of the affected party; information about the location and technical elements of the Project, as well as other activities

¹⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above, at paras. 52-4.

undertaken by the affected party to meet the requirements of the LRP Program; and, information about the affected party's interactions with other third parties. There is also information authored by employees of the IESO. Some of the records contain information falling into more than one category.

[60] I will deal first with the affected party's general argument that disclosure would cause an undue advantage to potential litigants. As I understand the argument, the affected party perceives a risk that groups opposed to wind farms in Ontario will commence litigation to attempt to impede wind farm projects. The harm of disclosure, says the affected party, is that these groups will be able to access information relevant to these potential law suits through the access to information system, rather than through the litigation discovery process.

[61] After considering this argument and the records, I am not satisfied that a risk, however certain that it is, that a potential litigant could receive information through the *Act* rather than the discovery process is an undue "gain" within the meaning of section 17(1)(c) or a harm within the meaning of sections 17(1)(a) or (b). There are a myriad of methods outside of the litigation discovery process that a potential litigant may access or gather information relevant to a potential law suit. That a potential litigant chooses to access government information does not create any undue or improper advantage; it is merely an exercise of their statutory rights under the *Act*.

[62] I also reject the section 17(1)(b) argument made by the IESO that disclosure would cause other similarly-situated third parties to provide similar information to it in the future. In my view, the IESO has not provided evidence to demonstrate that this risk is well beyond a mere possibility of harm. The IESO, as it says in its representations, has responsibility for procuring all of the Ontario's renewable energy supply. Yet, it has provided no evidence other than speculation that there is a risk that information similar to that at issue in this appeal will be supplied in future.

[63] However, I find that some of the information is exempt under section 17(1).

[64] First, I find that disclosure of some of the information pertaining to the ownership of, equity in, or debt holder(s) of, the Project could reasonably be expected to prejudice significantly the affected party's competitive position within the meaning of section 17(1)(a). I have reached this conclusion in consideration of the level of detail contained within the records and that this information could reveal the approach taken by the affected party in developing its proposal or otherwise developing the Project.

[65] Second, I am persuaded that disclosure of some of the information pertaining to the Project design and specifications could reasonably be expected to prejudice significantly the affected party's competitive position (section 17(1)(a)) or would result in undue gain by its competitors (section 17(1)(c)). I find that this information about the Project site was developed by the affected party and is sufficiently detailed that its disclosure could lead to undue gain by competitors.

[66] As a result of these findings I find that the following records are exempt: 1.5, 1.16, 1.4 (pages 16-18 only), 1.9 (part), 1.12 (pages 81-83 only), 1.17 (part), 1.45 (part), and 3 (part). I will indicate which parts of records 1.9, 1.17, 1.45 and 3 are exempt in the highlighted copy of the records sent to the IESO with this order.

[67] After review of the remaining records, I am unable to conclude based on the records themselves or in consideration of the representations made that any of the section 17(1) harms could reasonably be expected to occur if they are disclosed.

[68] As a result of these findings, I uphold the IESO's decision to withhold certain information and I find in favour of the affected party that the IESO should withhold some additional information. However, I will also order disclosure of the following records or parts of records as section 17(1) has not been established and there are no alternative exemption claims to consider: 1.4 (pages 5-15 only), 1.9 (part), 1.10, 1.11, 1.12 (pages 77-80 only), 1.13, 1.15, 1.17 (part), 1.36, 1.38, 1.39, 1.45 (part), 3 (part). For clarity, the IESO should not disclose the information in Record 1.10 that was withheld on the basis that it is non-responsive.

[69] I will next consider the IESO's claim that the personal privacy exemption in section 21(1) of the *Act* requires that parts of records 1.9, 2¹⁸, 1.43, 1.44 and 3¹⁹ be withheld.

B. Do records 1.9, 1.43, 1.44, 2, and 3 contain personal information within the meaning of section 2(1)?

[70] The IESO claims that the mandatory personal privacy exemption in section 21(1) applies to part of records 1.9, 1.43, 1.44 and 3. The information in Record 1.9 that the IESO has withheld on the basis of section 21(1) is reproduced in records 2 and 3. In my view, the fairest interpretation of the IESO's representations is to consider records 2 and 3 in conjunction with the IESO's section 21(1) claims.

[71] To determine whether section 21(1) applies, it is first necessary to decide whether these records contain "personal information."

[72] Relevant parts of the *Act's* definition are:

"personal information" means recorded information about an identifiable individual, including,

¹⁸ I will discuss the reasons why I will consider Record 2 below.

¹⁹ I will discuss the reasons why I will consider Record 3 below.

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

...

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

...

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[73] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.²⁰ Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[74] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²¹

[75] Even if information relates to an individual in a professional, official or business

²⁰ Order 11.

²¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.²² To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²³

Representations

[76] The IESO submits that records 1.9, 1.43 and 1.44 contain personal information. As noted above, records 2 and 3 include duplicate information that the IESO claims is personal information and so I will also consider these records.

[77] The IESO explains that records 1.43 and 1.44 consist of copies of a prescribed IESO form used to indicate landowner support for the Project. These documents include the names and addresses of landowners who own land on which, or next to where, the Project is to be located. It also argues that because the forms indicate that the landowner "supports the development, construction and operation of the LRP," they contain information that reveals a political belief which is a specified type of personal information disclosure of which is deemed to constitute an unjustified invasion of personal privacy (section 21(3)(h)).

[78] The IESO says that part of Record 1.9, and therefore its duplicate in records 2 and 3, contains the exact description, address and postal code for every property that abuts the Project. It submits that while "not directly personal information relating to an individual," disclosure could lead to exposure of personal information. Specifically, the IESO submits state that disclosure of the withheld information would mean that those who supported the Project would become known and this could unfairly damage their reputation as there is a coalition against the construction of wind turbines.

[79] The affected party submits that the names, municipal addresses, property identification numbers and personal view of private landowners is "personal information" under the *Act*.

[80] The appellant submits that "at least some of" the withheld information does not constitute personal information and refers to Order PO-3574 where the adjudicator held that legal descriptions of properties, without names or addresses of property owners did not constitute personal information about the owners.

Analysis and findings

[81] Based on my review, I agree that records 1.43 and 1.44 contain the "personal

²² Orders P-1409, R-980015, PO-2225 and MO-2344.

²³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

information” of several individuals. The information on these pages indicates the ownership of a subset of land owners abutting the Project who support the Project. In my view, individually and collectively, these forms contain or risk revealing the identity of both approving land owners and, by omission, those that do not. In my view, the landowner’s support or opposition to the Project is personal information as it consists of recorded information about an individual.

[82] Some of the forms contain information that arguably contains professional or official information. I nevertheless reach the same conclusion because disclosure of any subset of these forms would risk, by process of elimination, disclosure of which landowners approved or not and therefore risk disclosure of the personal information of identifiable individuals.

[83] However, I do not accept that the portions of records 1.9, 2 and 3 withheld on the basis of section 21(1) contain personal information. The information on these pages consists only of the legal description and address land on which the Project or the connection line is to be located.

[84] The adjudicator in Order PO-3574 dealt with a similar issue and wrote:

As for property legal descriptions, I note that previous orders have found that addresses or geographical locations, in and of themselves, do not necessarily constitute "personal information" under section 2(1) of the *Act*. ... In Order M-15, Commissioner Tom Wright pointed out that a municipal location or address itself could not automatically be equated with the address of its owner. Thus, a municipal address or legal description of a property alone would not necessarily reveal information about an identifiable individual.

...

[85] Unlike the information contained in records 1.43 and 1.44, the legal descriptions and addresses on records 1.9, 2 and 3 are not associated with any ownership information or any information about support (or not) for the Project. I agree with the analysis in Order PO-3574 and find that the legal descriptions do not, on their own, contain personal information.

[86] In summary, I find that records 1.43 and 1.44 contain personal information but that records 1.9, 2 and 3 do not. Without any alternative claims to assess, I will accordingly order that the portions withheld on the basis of section 21(1) in records 1.9, 2 and 3 be disclosed. I will now turn to whether disclosure of the personal information in records 1.43 and 1.44 would constitute an unjustified invasion of personal privacy.

C. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue in records 1.43 and 1.44?

[87] The IESO and the affected party claim that the mandatory personal privacy exemption at section 21(1) applies to the personal information at issue. Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The section 21(1)(a) to (e) exceptions are not at issue in this appeal.

[88] Section 21(1)(f) is at issue in this appeal and it provides that personal information is not exempt from disclosure if to do so would not be an unjustified invasion of personal privacy. Section 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Although not at issue in this appeal, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[89] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.²⁴

[90] The IESO argues that section 21(3)(h) applies in this case. It states:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs of associations.

[91] Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2).²⁵

[92] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.²⁶ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors or circumstances favouring disclosure in section 21(2) must be present. In the absence of

²⁴ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

²⁵ *John Doe v. Ontario (Information and Privacy Commissioner)*, cited above.

²⁶ Order P-239.

such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.²⁷

[93] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).²⁸ Relevant section 21(2) factors are:

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(e) the individual to whom the individual relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Representations

[94] The IESO's first argument is that disclosure of the personal information in records 1.43 and 1.44 would constitute a presumed unjustified invasion of personal privacy under section 21(1).

[95] The IESO explains that Record 1.43 consists of prescribed IESO forms that are required to be completed by landowners to demonstrate that the Project has no less than seventy-five percent support of the landowners abutting the lands on which the Project will be located. These forms include the names, signatures, property descriptions and addresses of supportive landowners. Record 1.44 is an aggregation of the forms in Record 1.43.

[96] The IESO argues that the landowners' support for the Project is an expression of a political belief regarding use of wind power in Ontario and that therefore disclosure of this information would constitute a presumed invasion of personal privacy within the meaning of section 21(3)(h). The IESO elaborates that there has been a "heated political debate" about the Project in particular. It argues that the IPC has and should take a broad interpretation of term "political belief," citing Order PO-2745.

²⁷ Orders PO-2267 and PO-2733.

²⁸ Order P-99.

[97] Alternatively, the IESO submits that if disclosure of the personal information is not a presumed unjustified invasion of personal privacy, when one considers the criteria in section 21(2) there are compelling reasons to withhold the information, pointing to sections 21(2)(e) (pecuniary or other harm) and (i) (unfair damage to reputation) in support of withholding the information.

[98] The IESO says that disclosure of the names and addresses of supportive landowners gives rise to a reasonable risk of harm that they may be targeted by those who oppose the Project. Further, it submits that disclosure may unfairly damage the supportive landowners' reputations in the community. The IESO argues that section 21(2) (i) is present if the harm would be unfair, not whether it is foreseeable, citing Orders PO- 2267 and PO-2733.

[99] The affected party supports the IESO's application of section 21(1) to the personal information and also argues that the information provided by the landowners was provided "on the expectation and understanding that it would be kept from public disclosure." Although not specifically stated by the affected party, these types of considerations are those normally associated with section 21(2)(h).

[100] The requester submits that a landowner's decision to support the Project is not a political belief or association and that the presumption in section 21(3)(d) does not apply. It says that support for a particular project, as is the case here, is distinct from one's attitude or opinion about wind power developments in Ontario. It argues that one's political belief or association is not inferable from their decision to support the Project. A landowner could be in favour of wind energy generally but opposed to the Project, or *vice versa*.

[101] The requester submits that the criteria in section 21(2) favour disclosure of the information because it would subject the government and its agencies to public scrutiny (section 21(2)(a)). It also submits that the information is not highly sensitive or personal so this factor (section 21(2)(f)) does not favour privacy protection. It also rejects any notion that landowners who supported the Project would be "targeted" or exposed to "harm" if their identities were revealed.

Analysis and findings

[102] For the reasons that follow, I find that disclosure of the personal information constitutes an unjustified invasion of personal privacy and it should not be disclosed. However, I also find that it may reasonably be severed from the records at issue and if it is removed, records 1.43 and 1.44 will no longer contain personal information.

Not a presumed unjustified invasion of personal privacy

[103] Although I agree with the adjudicator in Order PO-2745 that "political beliefs" ought not to be narrowly interpreted, I do not find that the personal information at issue constitutes any individual's political beliefs within the meaning of section 21(3)(d).

[104] I acknowledge that the topic of wind energy has become a political issue in Ontario. However, I am persuaded by the requester's argument that an individual landowner's expression of support in a prescribed form for a particular project is not on its own a manifestation of, nor could one infer from it, one's political beliefs about wind energy in Ontario. In the context of this appeal, it only indicates whether the landowner supports the Project.

Nevertheless an unjustified invasion of personal privacy.

[105] Having concluded that disclosure would not constitute a *presumed* unjustified invasion of personal privacy, I will now consider the factors in section 21(2) otherwise support such a finding.

[106] I find that sections 21(2)(f) (highly sensitive), 21(2)(e) (pecuniary and other harms), and 21(2)(i) (damage to reputation) have not been established by the evidence in this appeal. At best, the IESO and the affected party's representations summarize speculative concerns that are not sufficient to establish these criteria.

[107] To be considered highly sensitive (section 21(2)(f)), there must be a reasonable expectation of significant personal distress if the information is disclosed.²⁹ For section 21(2)(e) to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. The applicability of Section 21(2)(i) is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.³⁰

[108] However, I find that the section 21(2)(h) (provided in confidence) is a relevant consideration that weighs in favour of privacy protection. Based on the representations of the IESO and the affected party, I find that the landowners, the affected party and the IESO had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. This factor favours privacy protection.

[109] More significantly, I am unable to conclude that disclosure of the personal information is desirable for the purpose of subjecting the IESO (or the government) to public scrutiny (section 21(2)(a)). Arguably, the government policy at issue is the requirement that 75% of landowners support the Project. Information about how this requirement is met may assist with providing public scrutiny, but I find that knowing the identities of those landowners does not. I therefore find that the section 21(2)(a) factor is not established, which weighs in favour of withholding the information.

²⁹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

³⁰ Order P-256.

[110] In summary, I find that disclosure of the personal information contained in records 1.43 and 1.44 would constitute an unjustified invasion of personal privacy and it should therefore be severed from the records at issue. If the portions indicated on the copy of the records provided to the IESO with his order are withheld, there will no longer be any personal information contained in the records.

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 17(1) and 21(1) exemptions?

[111] The last issue that requires consideration is whether, as argued by the requester, there is a compelling public interest under section 23 of the *Act* sufficient to outweigh the purpose of the sections 17(1) and 21(1) exemptions in relation to the exempt information. The IESO and the affected party dispute that section 23 applies.

[112] Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 15.1, **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.

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

[114] The *Act* does not state who bears the burden to prove that section 23 applies. This office has established that the appellant does not fully bear the burden because they do not have the benefit of reviewing the records at issue. 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.³¹

[115] 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.³² Previous orders have stated that in order to find a compelling public interest in disclosure, the 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.³³

³¹ Order P-244.

³² Orders P-984 and PO-2607.

³³ Orders P-984 and PO-2556.

[116] A public interest does not exist where the interests being advanced are essentially private in nature.³⁴ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.³⁵

[117] The word “compelling” has been defined in previous orders as “rousing strong interest or attention.”³⁶

[118] Any public interest in *non*-disclosure that may exist also must be considered.³⁷ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling.”³⁸

[119] A compelling public interest has been found *not* to exist where, for example a significant amount of information has already been disclosed and this is adequate to address any public interest considerations³⁹ or where the records do not respond to the applicable public interest raised by appellant.⁴⁰

[120] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[121] 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.⁴¹

Representations

IESO

[122] The IESO submits that there is no compelling public interest in disclosure of the records and that even if there is, the interest does not outweigh the purpose of the relevant exemptions. It says that the information at issue is of insignificant value to the public and do not meet the threshold of compelling. It acknowledges that although the requester has an interest in the records, this does not extend to a broader public interest. It restates the interests protected by sections 17 and 21, which are canvassed extensively above.

³⁴ Orders P-12, P-347 and P-1439.

³⁵ Order MO-1564.

³⁶ Order P-984.

³⁷ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

³⁸ Orders PO-2072-F, PO-2098-R and PO-3197.

³⁹ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁴⁰ Orders MO-1994 and PO-2607.

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.).

[123] It also argues that if a public interest in disclosure is established, it does not outweigh the IESO's interest in the efficient and effective administration of its procurement programs.

Affected Party

[124] The affected party says that the public interest override does not apply. It argues that while there may be a public interest in renewable energy projects and related procurement programs, for section 23 to apply it must be shown that the interest is compelling and clearly outweighs the purpose of the exemption.

[125] The affected party argues that if there is a public interest it cannot be considered compelling because "considerable information about the matter at issue has already been made publicly available. It refers to information on its website, the IESO's website, and the municipality's website (incidentally, the requester).

[126] It says that a number of IPC decisions have found that compelling public interest did not exist where a significant amount of information has already been disclosed (P-532, P-568, PO-2626, PO-2472 and PO-2614) or where there has been widespread coverage (P-613). In sum, it says that disclosure of the information at issue goes beyond what is necessary to satisfy the interest of the general public.

[127] The affected party also argues that other public forums exist to discuss the matter without causing it harm. It points to community engagement processes undertaken in the LRP Process.

[128] The affected party submits that there is a public interest in withholding the information that qualifies for exemption under section 17(1). It says that it is critical that participants in procurement programs like the LRP Program can engage in communications openly and candidly with the IESO in a good faith effort to facilitate their potential bids. It argues that disclosure would hinder the program administered by the IESO.

Requester

[129] The requester submits that there is a compelling public interest in disclosing the records. It argues that the Project is "part of a controversial government program" and that this weighs in favour of disclosure.

[130] It submits that public scrutiny of the processes and procedures for decisions made regarding expenditure of government funds is necessary to ensure the proper functioning of those programs. It refers to IPC order P-2435 in support of the proposition that the right to access to information is "even more compelling when... the information sought relates directly to government expenditure of taxpayer money...".

[131] The requester acknowledges that there is some publicly-available general

information regarding the LRP Program. However, it says that the IESO's processes with respect to the Project have been "kept secret." It says that the details of the affected party's bid and its assessment by the IESO are relevant to the public's ability to scrutinize the Project and the LRP Program. It argues finally that the Project will have a profound impact on the government and residents of the municipality and that they should be permitted to know how those decisions were made.

[132] Finally, the requester argues that the impacts on the affected party and affected identifiable individuals would be "slight," and as I understand the argument, not enough to outweigh the compelling public interest in disclosure.

Analysis and findings

[133] Having considered the representations and the information remaining at issue, I find that there is not a compelling public interest sufficient to outweigh the interests protected by sections 17(1) and 21(1) in disclosing the remaining withheld information.

[134] I start by observing that the IESO's access decision was to withhold only part of the records. The affected party filed an appeal objecting to disclosure of any of the records and these appeal files were opened. Leaving aside any resolutions achieved in mediation, the requester has made the above representations regarding disclosure of the entirety of the records.

[135] I note this because as a result of my determinations above, many of the records at issue will be disclosed and I have taken this into account when assessing the parties' arguments regarding the public interest.⁴² After considering the records in their entirety and the arguments raised by the parties, it is my view that the level of disclosure that will be made to the requester as a result of this order addresses any public interest issues raised by the requester.

[136] The remaining information at issue consists of commercial and technical information disclosure of which I have found would cause harms to the affected party and personal information that if disclosed I have found would constitute an unjustified invasion of personal privacy. These are important protections and overriding them would not, as argued by the requester, cause only a slight impact.

[137] While there may be a public interest in disclosure of information regarding procurement and development of wind farms in Ontario, it is my view that based on my review of the information remaining at issue I am not able to conclude that this interest is sufficiently compelling. I am also not satisfied that additional disclosure that also compromises the protections provided in sections 17(1) and 21(1) is warranted. In my

⁴² See Orders PO-1885 and MO-2927.

view, the section 23 public interest override does not apply.

ORDER:

1. By February 24, 2021 but not before February 17, 2021, I order the IESO to disclose the following records to the requester: 1.2, 1.3, 1.4 (pages 5-15 only), 1.6, 1.7, 1.8, 1.9 (part), 1.10 (except those portions that the IESO withheld as not responsive), 1.11, 1.12 (pages 77-80 only), 1.13, 1.14, 1.15, 1.17 (part), 1.18, 1.19, 1.25, 1.31, 1.36, 1.37, and 1.42, 1.36, 1.38, 1.39, 1.45 (part), 2, 3 (part). (References to page numbers are to the page numbers assigned by IESO in the electronic copy of the records provided to the IPC.)
2. I order the IESO not to disclose the following information on the basis that section 17(1) applies: 1.4 (pages 16-18 only), 1.5, 1.9 (part), 1.12 (pages 81-83 only), 1.16, 1.17 (part), 1.45 (part) and 3 (part). I will indicate which parts of records 1.9, 1.17, 1.45 and 3 are exempt in the highlighted copy of the records sent to the IESO with this order.
3. By February 24, 2021 but not before February 17, 2021, I order the IESO to disclose records 1.43 and 1.44 except those portions that I have found are exempt under section 21(1). I will indicate which parts are exempt in the highlighted copy of the records sent to the IESO with this order.
4. In order to verify compliance with order provisions 1 and 3, I require the IESO to provide a copy of the access decision and the records sent to the requester.
5. The timelines in this order may be extended if the IESO is unable to comply in light of the current COVID-19 Pandemic. I remain seized of the appeal to address any timeline-related issues if the parties are unable to resolve them.

Original signed by: _____
Valerie Jepson
Adjudicator

_____ January 19, 2021