

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4140-I

Appeal PA20-00377

Independent Electricity System Operator

April 23, 2021

Summary: The appellant submitted an access request to the Independent Electricity System Operator, under the *Freedom of Information and Protection of Privacy Act*, for the annual pricing information that Bruce Power is forecasted to charge Ontarians until 2064 for electricity from the Bruce Nuclear Generating Station. The appellant specifically sought pricing information generated from the final version of the Bruce Power Refurbishment Implementation Agreement. The IESO issued a decision letter indicating that no responsive records exist. In this interim order, the adjudicator orders the IESO to conduct another search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24.

Orders Considered: Orders PO-3800, PO-3955 and PO-4044-R.

OVERVIEW:

[1] In this appeal about future electricity pricing in the province, the appellant is a non-profit organization that produces research and educational materials on how Ontario can move to a 100% renewable electricity system. Its vision “is for a low-carbon, high efficiency energy system that protects our climate, our health and our environment.”

[2] In 2016, the appellant sought annual pricing information from the Independent Electricity System Operator (the IESO) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) regarding amounts Bruce Power is forecasted to charge Ontarians until 2064 so that it could prepare research comparing

this pricing information with the cost of alternative sources of energy.

[3] The appellant's 2016 access request (the original request) specifically sought:

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

[4] The IESO issued a decision, followed by a revised decision, in which it identified a number of responsive records. It granted full access to one record (the IESO - Bruce Power Refurbishment Implementation Agreement, Technical Briefing for Media, dated December 3, 2015).

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

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

[7] The appellant appealed the IESO's access decisions and Appeal file PA17-207 was opened.

[8] The IESO advised that Bruce Power should be added as an affected party in that appeal. I added it as a party and sought representations from the IESO, Bruce Power and the appellant. The parties' representations were exchanged between them in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[9] The following five records were at issue in Appeal file PA17-207:

Record 2 - Financial model included in the technical schedule to the ARBPRIA (fully withheld)

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

Record 3 - ARBPRIA Information for the Financial Accountability Office of Ontario (fully withheld)

Record 4 – Review of Bruce Refurbishment Price Estimate and Comparison to Cost of Alternatives (partially withheld)

Record 5 - Bruce Nuclear Refurbishment: Effectiveness of Off-Ramps² (partially withheld)

Record 6 - Impact of Bruce PPA (Power Purchase Agreement) “Step-Up” Price Scenarios on LTEP (Long Term Energy Plan) (2013) Customer Cost (partially withheld)

[10] The appellant confirmed that it was only interested in receiving access to the annual rates (i.e. price) in the records that Bruce NGS is forecast to charge Ontarians until 2064 based on the ARBPRIA.

[11] I adjudicated the appeal and issued Order PO-3955. In that order, I found that section 17(1)(a) of *FIPPA* applied to Records 2 and 3 by reason of the deeming provision in section 20(1) of the *EA*. These sections read:

[12] Section 20(1) of the *EA* reads:

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

[13] 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,

² Off-ramps are decisions that can be made by the IESO to terminate a plan to refurbish a particular nuclear generator.

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

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

[14] I then found that the public interest override in section 23 of *FIPPA* did not apply to this information. Section 23 reads:

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.

[15] I also found that neither sections 17(1) nor 18(1) apply to the annual pricing information at issue in Records 4 to 6 and ordered that information disclosed. This information is found on pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6.

[16] Bruce Power then filed a reconsideration request seeking to have withheld the information that I ordered disclosed on the basis that it had been designated by the IESO under section 20(1) of the *EA*. As such, Appeal PA19-00298 was opened to address Bruce Power's reconsideration request.

[17] After the exchange of representations, I issued Reconsideration Order PO-4044-R. In that order:

- I granted Bruce Power's request for reconsideration on the basis that there was a fundamental defect in the adjudication process leading to Order PO-3955.
- I found that the information at issue in pages 3 and 11 of Record 4, page 8 of Record 5, and pages 4, 5, and 12 of Record 6 had been designated by the IESO under section 20(1) of the *EA*. I found that this information is, therefore, exempt under section 17(1)(a) of *FIPPA*.
- I further found that the public interest override in section 23 applied, but only to page 8 of Record 5, the record titled Bruce Nuclear Refurbishment: Effectiveness of Off-Ramps. I ordered disclosure of this one page of the records.

[18] The appellant received disclosure of page 8 of Record 5. It wrote to the other parties and to me saying that the document disclosed pursuant to Reconsideration Order PO-4044-R did not appear to contain the requested information, namely, the forecasted annual electricity prices pursuant to the final agreement between Bruce Power and the IESO, the ARBPRIA.

[19] The appellant's position was that:

The public does not know what the electricity will cost from this project because the released figures [from page 8 of Record 5] appear to be

based on an earlier and obsolete draft of the agreement, not the final version that actually matters.

[20] The IESO responded and was in apparent agreement with the appellant that the records at issue in Orders PO-3955 and PO-4044-R did not contain the pricing information based on the final agreement.

[21] As a result, the appellant, on July 24, 2020, filed a new access request (the new request) with the IESO, attaching page 8 of Record 5. In the request, the appellant stated that this page includes:

... charts showing the annual price from the Bruce Power Generating Station at threshold and on budget based on different refurbishment scenarios.

However, it appears that the data indicated in the charts is not based on the final refurbishment agreement between the IESO and Bruce Power.

[22] The appellant then sought access to:

... the data illustrated in the attached document [page 8 of Record 5], but based on the final refurbishment agreement between the IESO and Bruce Power. The [appellant] also requests, if possible, that the data also be provided in nominal values (versus 2014 dollars). The [appellant] requests the specific underlying data points (e.g. the spreadsheet or spreadsheets).

For further clarity, the [appellant] is requesting the price of electricity from the Bruce Power Generating Station between 2015⁴ and 2064 based on the final version of the refurbishment agreement entered into between the IESO and Bruce Power.

[23] In response, the IESO advised the appellant that its request was:

... fundamentally the same as a request made in 2016 (our file number 2016-083), which was the subject matter in Appeal PA17-207 that is now complete. Freedom of Information request 2016-083 was for "any records that contain a forecast of the rates (\$ per kWh or other unit of energy) that will be paid to Bruce Power for the Bruce Nuclear Generating Station in each year from 2016 until 2064."

⁴ The new request sought pricing information from 2015 (when the final agreement was signed), whereas the original request sought pricing information from 2016.

Our search has indicated that there are no records that are responsive to Request 2020-013 [the new request] that were not responsive to Request 2016-083.

[24] The appellant then filed an appeal with the IPC of the IESO's decision regarding the new request. This appeal was streamed directly to adjudication and assigned to me.

[25] I sought the representations of the appellant, the IESO, and Bruce Power as to whether the IESO had conducted a reasonable search for records responsive to the appellant's new request, namely, for records containing:

...the price of electricity from the Bruce Power Generating Station between 2015 and 2064 based on the final version of the refurbishment agreement [the ARBPRIA] entered into between the IESO and Bruce Power.

[26] As stated, the appellant asked that this information be provided in nominal values (versus 2014 dollars) and also sought access to the specific underlying data points for this information (e.g. the spreadsheet or spreadsheets).

[27] In this interim order, I find that the IESO has not conducted a reasonable search, and I order it to conduct another search for records responsive to the appellant's new request.

DISCUSSION:

Did the IESO conduct a reasonable search for records responsive to the appellant's new request?

[28] 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 24.⁵ 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.

[29] 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.⁶ To

⁵ Orders P-85, P-221 and PO-1954-I.

⁶ Orders P-624 and PO-2559.

be responsive, a record must be "reasonably related" to the request.⁷

[30] 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 are reasonably related to the request.⁸

[31] 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.⁹

[32] 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.¹⁰

[33] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.¹¹

[34] The IESO was asked to provide a written summary of all steps taken in response to the new request. In particular, it was asked:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - a. choose to respond literally to the request?
 - b. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of

⁷ Order PO-2554.

⁸ Orders M-909, PO-2469 and PO-2592.

⁹ Order MO-2185.

¹⁰ Order MO-2246.

¹¹ Order MO-2213.

the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

Representations

[35] The IESO provided an affidavit from its Senior Manager, Energy Contracts and Initiatives (the manager). The manager states that, for the original request, he met with the IESO's Freedom of Information Administrator (the FOIC) and the IESO's Associate General Counsel and Corporate Secretary (the counsel), to determine how the IESO would comply with its obligations under the *Act*.

[36] The manager states that, as a result of the tight controls over documents relating to Bruce Power, the financial model and pricing information generated from it is tightly controlled within the IESO. As such, he states that he knew that the only place that the requested pricing information could be found was in the actual financial model, presentations to the IESO's Board, to the provincial government, and in a report to the Financial Accountability Office (the FAO). The manager, the FOIC and the counsel reviewed all presentations to the IESO's Board, the government or the FAO, and included in its response to the original request all documents that contained the requested information, redacting exempt information where appropriate.

[37] The manager states that when the IESO received the new request, he followed the same process and reviewed materials sent to the Ontario government and the Board to determine whether the requested pricing information in question had been captured anywhere else outside the financial model.

[38] In considering the IESO's production obligations, the manager did not differentiate in 2016 between "draft" or "final" price forecasts. Therefore, all price forecasts were in fact included in the original request, and only new forecasts would be responsive to the new request. He states that he reviewed all presentations to or communications with government or the IESO Board, which are the only bodies to whom the IESO would ever communicate such sensitive information. No additional responsive documents were located as a result of this search beyond those that were identified in 2016.

[39] The manager states that he reviewed the electronic drive that serves as the document repository for the Bruce Power ARBPRIA files. He states that he knows that the IESO has used the financial model to generate pricing, and he looked at all documents where there was a chance of finding such information, such as

presentations to government or the IESO Board. No additional responsive records were found beyond those that had been found in response to the original request.

[40] The manager states that he is not aware of any records that were created but would have been deleted because the IESO's practice is not to delete any records with respect to the ARBPRIA, and all records are retained unless they were draft works-in-progress that were superseded by final versions. Further, he states that the IESO is not aware of responsive records existing with any other party other than Bruce Power, which is not subject to the *Act*.

[41] Bruce Power states that it has updated its website to disclose additional pricing information related to the price of power under its contract with the IESO. It states that in 2015, Bruce Power estimated that the average price of power over the life of the contract would be \$77/MWh.¹² In 2017, the FAO estimated that from 2016 to 2064, the average price of power under Bruce Power's contract with the IESO would be \$80.7/MWh.

[42] Bruce Power points out that its website also includes current power pricing information and the price under the contract is re-set annually on April 1st. It states:

As of April 1, 2020, the current Bruce Power price of power is \$78.55/MWh. A grid showing the comparable prices of different sources of power as of April 1, 2020 is also included. A link is also provided to the IESO's website where historical data on electricity prices is set out.

[43] The appellant submits that it is impossible that no other documents exist. It states that the IESO did not provide the records used to make the presentations and figures underlying Records 3 and 5, which would include a spreadsheet containing the relevant data points. It submits that there is likely a Microsoft Excel file that contains the data tables and the charts, which were then imported or copied into the presentation.

[44] The appellant submits that this Excel file:

- may provide clues as to where other information might exist,
- would contain the specific data points, and
- would confirm whether the figures have been adjusted for inflation, which makes a major difference over forty years.

[45] The appellant submits that the IESO's search of electronic file storage areas is an

¹² A megawatt-hour (MWh) is a unit of measure of electric energy.

incomplete search, as it would not search emails or attachments to emails. Furthermore, the appellant states that users of these storage areas often do not save each and every file to the electronic repository, such as working files.

[46] The appellant states that various IESO and Bruce Power staff must have emailed each other various pricing information for the purposes of generating Records 3 to 6 and none of those were disclosed. It also states that there may be other areas that should have been searched, such as the computers of the individuals who generated Records 3 to 6.

[47] The appellant submits that, as Record 3 contains a price forecast created for the FAO based on the "final" agreement, it should have been included in the response to the new request. Furthermore, the appellant states that the IESO should have but did not include the underlying documentation (e.g. Excel files) which were used to generate Record 3.

[48] In reply, the IESO states that the presentations and figures underlying Records 3 and 5 have been produced. It states that when a chart or graph (such as in page 8 of Record 5) needs to be produced, the relevant data is contained in the chart or graph. The IESO states that it has already identified and noted as responsive to the appellant's original request all such records that have been generated.

[49] The IESO states that the electronic document repository is the only source of documents and that there is no separate repository of emails or working files containing relevant data.

[50] The IESO states that the records that utilized graphs of prices from the financial model were identified as responsive to the original request and the new request. It states:

A record derived from the financial model needs to be created first before it can be emailed, and once it is created it is saved on the shared drive. As such, IESO's search for responsive records was reasonable. There is no need to search emails over the last 5 years, as the requested records are all stored in the shared drive.

... Record 3 "consists of the results of the IESO's calculations based on the information in the financial model". The "underlying documentation (e.g. Excel files)" that [the appellant] asks for is simply the financial model, which is exempt from disclosure. There was therefore nothing more to disclose, and this record was properly withheld.

[51] Bruce Power did not provide reply representations.

[52] In sur-reply, the appellant submits that the IESO, in its reply, acknowledges that it has records that would be responsive to the new request. It points out that:

The IESO acknowledges that there is a Microsoft Excel file containing the financial model and that new tabs are created when a new chart or graph is created. It appears that new tabs are used for the purpose of generating price forecasts. However, the IESO did not provide a copy of those new tabs in response to the [appellant's] most recent request. It did not provide any records.

The IESO argued that it need not provide the IPC with these new tabs because the IESO alleges that they are part of an electronic file previously addressed by [Order] PO-3800. That is incorrect for a number of reasons:

1. First, when a new tab is created in a Microsoft Excel file a new record is created. It is not the same as the record considered previously.
2. Second, a chart or spreadsheet created from the financial model is very different from the financial model itself. The fact that the chart or spreadsheet is housed in a tab in the same file as the financial model is not relevant to whether it should be disclosed.
3. Third, even if a record was previously subject to a past order, that does not justify an institution from declining to include it in a future search for records and declining to provide a copy to the IPC upon appeal. This case is a good example of why that is important. Had the IESO collected the Microsoft Excel file in its search and provided a copy to the IPC in this appeal, there would have been much more clarity much sooner.

We request that the IESO be directed to

- (a) provide a copy of the Microsoft Excel file or files containing the various charts, graphs, and sheets produced from the financial model to the IPC, and
- (b) provide a description of each tab, including when it was created, what it contains, and the basis on which it is withheld.

I note that the IESO references new tabs for "charts and graphs" created from the financial model. However, I believe this would also include the underlying tables, which Microsoft Excel refers to as "sheets." In other words, the new tabs would include both the charts and the tables with the data points that are visually represented in the charts. These data points are more precise than the charts themselves. In both cases, they represent information generated from the financial model, rather than the financial model itself.

The IESO acknowledges that it has not searched emails. It states that it need not do so because “[a] record derived from the financial model needs to be created first before it can be emailed, and once it is created it is saved on the shared drive...”

...Record 3 contains a price forecast created for the Financial Accountability Office based on the “final” agreement. That document should have been included the response to [the new] request ... but was not. Furthermore, the IESO should have but did not include the underlying documentation (e.g. Excel files) which were used to generate Record 3.

The IESO argues that this record need not be provided because it was created based on information in the financial model and it therefore constitutes the financial model itself. We disagree. This is a price forecast created from the financial model. It should be collected in the IESO's search and provided to the IPC for adjudication.

[53] Bruce Power responded to the appellant's sur-reply representations, arguing that providing the financial model to the IPC is not relevant to the issue of whether the IESO conducted a proper search in response to the new request. Although the IESO was also provided with an opportunity to respond, and indicated it would do so by providing representations supplementary to those of Bruce Power, it did not provide supplementary representations.

Analysis/Findings

[54] The appellant is asking the IESO to provide to it the annual forecasted price of electricity from the Bruce NGS between 2015 and 2064 based on the final version of the refurbishment agreement (the ARBPRIA). This agreement was entered into between the IESO and Bruce Power and addressed the refurbishment of the Bruce NGS.

[55] The appellant received a copy of page 8 of Record 5 as a result of Reconsideration Order PO-4044-R. After reviewing that record, the appellant noticed that the price forecasting it contained was based on the previous draft versions of the ARBPRIA, not the final version, which is dated December 3, 2015. Based on my review of page 5 of Record 8, I agree it contains annual forecasted electricity prices that predate the ARBPRIA. Record 5 is dated October 9, 2015.

[56] Based on my review of the parties' representations, I find that the IESO has not conducted a reasonable search for price forecasts based on the final version of the ARBPRIA.

[57] The issue before me is whether responsive information, which would be dated on the same date (December 3, 2015), or on a date after, the signing of the ARBPRIA, could exist in IESO records.

[58] I agree with the appellant that the requested price forecasts may be located by searching in the following documents:

- The new tabs of the identified Microsoft Excel file that generate price forecasts from the financial model attached to the final version of the ARBPRIA (the financial model).
- Any charts, tables and spreadsheets created from the financial model.
- Emails. Although the IESO has searched emails from the shared drive for records derived from the financial model, it has not searched for emails containing the annual pricing forecasts not derived from the financial model.
- The Excel files that were used to generate Record 3, which contains price forecasts created for the FAO, based on the final ARBPRIA.
- The financial model. Even if the financial model or other information, such as Record 3 (ARBPRIA Information for the Financial Accountability Office of Ontario), has previously been found exempt, the IESO should issue a new access decision on any new information arising from these records that contains the annual pricing information requested by the appellant in the new request. It is possible that this information, although exempt, could be subject to the public interest override in section 23 of *FIPPA*.

[59] In this case, the appellant's new request specifically seeks annual electricity pricing information or forecasts created as a result of, and corresponding to, the final agreement. And yet, the information located by the IESO in its searches for responsive records in response to that was pricing information based on the draft versions of the ARBPRIA.

[60] Accordingly, I find that the IESO has not conducted a reasonable search for records responsive to the appellant's new request, namely, the annual price of electricity from the Bruce NGS between 2015 and 2064 based on the final version of the refurbishment agreement (the ARBPRIA), which was signed on December 3, 2015.

[61] Therefore, I will order the IESO to conduct another search for records responsive to the appellant's new request, taking into account the considerations outlined in this interim order.

ORDER:

1. I order the IESO to conduct another search for records responsive to the appellant's new request, taking into account the considerations outlined in this interim order.

2. I order the IESO to provide me with an affidavit sworn by the individual who conducts the search within 30 days of the date of this interim order. At a minimum, the affidavit should include information relating to the following:
 - a. information about the employee swearing the affidavit describing his or her qualifications and responsibilities;
 - b. a statement describing the employee's knowledge and understanding of the subject matter of the request;
 - c. the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - d. information about the type of files searched, the nature and locations of the search, the steps taken in conducting the search, and the results of the search; and
 - e. if as a result of the further search, it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
3. If responsive records are located as a result of the search referred to in order provision 2, I order the IESO to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request. This decision letter should also include the IESO's decision regarding access to the specific underlying data points.
4. The affidavit referred to in order provision 2 should be forwarded to my attention and may be shared with the appellant, unless there is an overriding confidentiality concern.
5. I remain seized of this appeal in order to deal with any matters arising from this interim order.
6. The timelines noted in order provisions 1 to 4 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: _____
Diane Smith
Adjudicator

_____ April 23, 2021