

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4216

Appeals PA18-00741 and PA19-00038

Independent Electricity System Operator

November 30, 2021

Summary: This order resolves two appeals of an access decision of the Independent Electricity System Operator (the IESO) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for all correspondence between the IESO and a third party, relating to a specified wind energy project. The IESO decided to fully disclose some records, and withhold portions of the remaining records under the mandatory exemption at section 17(1)(third party information) of the *Act*. The third party appealed the IESO's decision to disclose any responsive records under section 17(1); the third party also objected to the disclosure of some information on the basis of the mandatory exemption at section 21(1)(personal privacy) of the *Act*. The requester appealed the IESO's decision to withhold portions of the responsive records. In this order, the adjudicator finds that some responsive information is exempt under section 21(1), and only certain pages of the remaining records at issue are exempt under section 17(1). As a result, she orders the IESO to disclose the remaining information at issue to the requester, and dismisses the appeals.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1(a)(ii), 2(1) (definition of "personal information"), 10(2), 17(1), and 21(1).

Order Considered: Order PO-4101

OVERVIEW:

[1] The Independent Electricity System Operator (the IESO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to

all correspondence between the IESO and a third party relating to a specified wind energy project.

[2] Following third party notification, the IESO issued an access decision granting the requester partial access to the responsive records, and withholding portions of the records under the mandatory exemption at section 17(1) (third party information) of the *Act*.

[3] A third party, now the appellant in PA18-00741, appealed the IESO's decision to disclose portions of the responsive records. The original requester, now the appellant in PA19-00038, appealed the IESO's decision to withhold information in the responsive records; the third party is an affected party in PA19-00038. For ease of reference, I will refer to these parties as "the third party" and "the requester," below.

[4] A mediator was assigned to explore the possibility of resolution of the appeals. The mediator communicated with the third party, the requester, and the IESO in order to discuss the issues of the appeal. During mediation, the IESO produced an index of records at issue and shared it with the third party and the requester. The third party confirmed that it was appealing the IESO's decision to disclose the records at issue on the basis that they should be withheld in full under the mandatory exemptions at sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. However, the third party consented to the disclosure of information in the responsive records that is publicly available, and the IESO then disclosed this information, consisting of portions of records 1 and 4, to the requester. As a result, this information is no longer at issue in this appeal. The requester confirmed that she continued to pursue access to the records at issue. The IESO advised the mediator that it maintains its decision to grant partial access to the records at issue in this appeal. As the parties could not reach a further mediated resolution, the appeals moved to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

[5] Since Appeals PA18-00741 and PA19-00038 involve the same records, as the adjudicator assigned to these appeals, I decided to conduct a joint inquiry. I began this inquiry by sending a joint Notice of Inquiry, setting out the facts and issues on appeal, to the IESO and the third party. I sought and received written representations from the IESO on the possible application of section 17(1), and from the third party on its claims that sections 17(1) and 21(1) apply. The scope of the appeals was narrowed through the third party's consent to the disclosure the business contact details of its employees; however, the third party continued to object to the disclosure of the rest of the information that it considered exempt under section 21(1). In addition, the third party objected to the full sharing of its representations with the appellant, but this issue was not resolved at the time because of an intervening government decision about the project that is the subject matter of the appeal in December 2019, and ensuing litigation.

[6] Due to the litigation, the IPC placed the appeals on hold in January 2020.

[7] After a court decision was issued in May 2020, I sought confirmation from the requester and the third party that they had continued interest in pursuing the appeals in June 2020. They did, and I reactivated the appeals in July 2020. I then communicated with the third party about the sharing of its representations in September and October 2020. Following that, I asked the requester for written representations on the issues set out in the Notice of Inquiry, and in response to the representations of the IESO (which were fully shared) and the third party (which were partially withheld, due to confidentiality concerns).¹ In response, the requester advised that she wanted the information she had requested, but did not provide representations on the issues in the appeals. I then provided the IESO and the third party with copies of each other's representations, and an opportunity to provide reply representations. Upon my consideration of these representations, I closed the inquiry.

[8] During my review of the file, I noted that at mediation, the requester indicated to the mediator that she was not interested in pursuing financial information in the correspondence at issue, if that financial information did not relate to the dates of the contract and key milestones. I asked the requester to clarify this in writing, and she confirmed that that was indeed the case. As a result, several pages of the records at issue containing financial information that do not specifically relate to the dates of the contract or key milestones (such as the third party's financial model) are no longer at issue in these appeals. I will identify these pages in the Records section, below.

[9] For the reasons set out below, I uphold the IESO's access decision, in part. I find that portions of the records contain *personal information*, as that term is defined under section 2(1) of the *Act*, and are exempt under the mandatory personal privacy exemption at section 21(1) of the *Act*. I also find that there is insufficient evidence to conclude that most of the remaining records at issue are exempt under the mandatory exemption at section 17(1). The exception to this is portions of record 8, which I find to be exempt under section 17(1). As a result, I will order the IESO to disclose the non-exempt information that remains within the scope of the appeals to the requester.

RECORDS:

[10] There are 25 records at issue, consisting of over 500 pages in total.

[11] The IESO's position is that records 2-5, 7, 9, 10, and 13-17 should be disclosed in full, and that the unredacted portions of records 1, 6, 8, 11, 12, 18, 19, 20, 21, 22, 23, 24 and 25 should also be disclosed as well.

[12] The third party objects to disclosure of the 25 records in full, except for pages

¹ In accordance with the IPC's practice on sharing (*Practice Direction 7* of the IPC's *Code of Procedure*).

35-78 and 113-159 of record 1 and pages 308-360 of record 4.²

[13] Given the requester's confirmation that she does not seek certain financial information, the redactions on several pages of the records that the IESO had withheld under section 17(1) are no longer at issue,³ and I will not be discussing them in this order; this information should not be disclosed to the appellant. The IESO's redactions that remain at issue are set out in the table below.

	Remaining at issue
Third party's appeal	<ul style="list-style-type: none">• records 1-25⁴
Requester's appeal	Redactions on the following pages of these seven records: <ul style="list-style-type: none">• record 1 [pages 20-24, 28-34, 162, 176, 178-180, 183, 199 (second two redactions), 202, and 204-225]• record 6 (page 366)• record 8 (pages 391-395, and 397)• record 11 (page 407)• record 12 (pages 438 - 440, 443, and 451-456)• record 22 (pages 517-522)• record 25 (pages 551-554)

² These pages have been disclosed to the requester.

³ These pages are as follows: Pages 10-15, 17-19, 162 (only the fifth redaction), 184, 199 (the first redaction) and 277-287 of record 1; pages 367 and 368 of record 6; page 377 of record 8; pages 408-409 of record 11; pages 429 (from #3 onwards on page 429)-434, 448-456, and 458-463 of record 12; page 485 of record 18; pages 489-490 of record 19; pages 494-495 of record 20; pages 500-502 of record 21; pages 506-508, 514-516, and pages 524-529 of record 22; pages 530-532 of record 23; and pages 538-539 of record 24.

⁴ Except the pages that the third party has consented to disclosing in records 1 and 4, and the name, contact information and/or signature blocks of the third party's employees

ISSUES:

- A. Do records 1, 12, and 22 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) apply to the information at issue?
- C. Does the mandatory exemption at section 17(1) apply to the records?

DISCUSSION:

Background information

[14] The IESO and the third party provided background information about the records at issue, which I will summarize in order to better understand the reasons for my decision that are set out in this order.

[15] The IESO describes its mandate as delivering key services across the electricity sector to Ontario, including planning for the province's future energy needs and designing a more efficient electricity marketplace to support the evolution of the electricity sector. The IESO states that, in practice, this means securing a wide range of electricity resources and services to address those needs, using various generation technologies and capacities. The IESO further explains that one competitive process for procuring large renewable energy projects was the Large Renewable Procurement (LRP) wind projects, and that a company owned by the third party (which I am referring to collectively as "the third party" in this order) applied to supply energy through the LRP program and obtained an LRP contract.

[16] The records at issue in this appeal relate to the submission of documentation in support of the key development milestones (KDM) under the third party's contract. The third party explains that its contract required that it submit, as part of the KDM submission package, "detailed financial, technical and commercial information about the Project, including sensitive information about its financial model, material contracts with other third parties, facilities and connections, project timeline, and cost estimates." Furthermore, this information included an independent audit report relating to the third party's financial model for the project.

[17] The request is for all correspondence between the IESO and the third party during a specified period, relating to one of its LRP wind projects; as mentioned, the requester clarified that she is not seeking financial information that does not relate to the dates of the contract and KDM, so that information is no longer at issue.

[18] The records remaining at issue include "the lists of material contracts and agreements" on pages 20-24 of record 1, pages 451-456 of record 12, and pages 517-

522 of record 22. The IESO withheld these pages under section 17(1), but defers to the IPC's determination regarding whether these lists contain *personal information* that is exempt under the mandatory personal privacy exemption at section 21(1) of the *Act*, as the third party argues.⁵

Issue A: Do records 1, 12, and 22 contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[19] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the *personal information* relates. The third party submits that portions of records 1 and 12 (pages 20-24 and pages 451-455, respectively) contain *personal information*. For the following reasons, I agree with the third party, and on my review, I also find that pages 517-522 (in record 22) also contain *personal information* as that term is defined in section 2(1) of the *Act*, and that none of the *personal information* in these records relates to the requester.

What is "personal information"?

[20] Section 2(1) of the *Act* defines *personal information* as "recorded information about an identifiable individual."

Recorded information

[21] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.⁶

About

[22] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.⁷ See also sections 2(3) and 2(4), which state:

(3) 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.

⁵ The third party's representations omit reference to pages 517-522. However, these lists are of the same nature as those at pages 20-24 and 451-455 mentioned in its representations.

⁶ See the definition of "record" in section 2(1).

⁷ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

(4) For greater certainty, subsection (3) 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.

[23] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be “personal information” if it reveals something of a personal nature about the individual.⁸

Identifiable individual

[24] Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.⁹

What are some examples of “personal information”?

[25] Section 2(1) of the *Act* gives a list of examples of personal information:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (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,

⁸ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

...

(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.

[26] The list of examples of *personal information* under section 2(1) is not a complete list. This means that other kinds of information could also be *personal information*.¹⁰

Statutory exclusions from the definition of "personal information"

[27] Sections 2(3) and (4) of the *Act* exclude some information from the definition of *personal information*. Sections 2(3) and (4) are described above.

Whose personal information is in the record?

[28] It is important to know whose *personal information* is in the record. If the record contains the *requester's own personal information*, their access rights are greater than if it does not.¹¹ Also, if the record contains the *personal information* of other individuals, one of the personal privacy exemptions might apply.¹²

[29] As mentioned, the third party now consents to the disclosure of the business contact details of its employees. As a result, this information will be disclosed to the requester.

[30] However, the third party argues that pages 20-24 and 451-455 contain the personal information of identifiable individuals.

[31] The third party submits that pages 20-24 (of record 1) and 451-455 (of record 12) contain lists of individuals who are named as counterparties to contracts, including leases and easement agreements involving local landowners. The third party argues that disclosure of the identities of the persons on the lists, including company names that clearly bear the names of private individuals, would reveal the personal opinions or views of these individuals. That is, it would reveal their support for the development of the project, and unfairly breach the expectation that the fact of their contractual relationship with the third party is private or confidential. The third party highlights the inherently sensitive nature of the contracts (whose parties are listed in the pages at issue), and argues that this is in stark contrast to the type professional or business

¹⁰ Order 11.

¹¹ Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

¹² See sections 21(1) and 49(b) of the *Act*.

information that does not qualify as *personal information* in other IPC orders (such as names of vendors contracting with a public health authority).¹³ The third party explains that the contracts in the circumstances here involve community members supporting a renewable energy project that is opposed by others in the community, and which has created tension amongst community members. The third party submits that disclosure of the information on these pages would disclose the personal views of the individuals involved on a contentious local issue when those individuals had no reasonable expectation that this information would be released.

[32] While the IESO submits that these lists contain information that is exempt under section 17(1), it defers to the IPC's determination on this.

[33] The third party and the IESO did not address pages 28-24 of record 1.

[34] From my review of the records, pages 28-34 of record 1 and pages 517-522 of record 22 engage similar issues to pages 20-24 and 451-455,¹⁴ which I will discuss below.

Analysis/findings

[35] Based on my review of pages 20-24, 451-455, and 517-522 of records 1, 12, and 22, respectively, I find that these pages of the records contain information that qualifies as personal information under the *Act*. While pages 28-34 do not contain lists of the same types of information, I find that because they include address and/or property identifier information, this information can also be traced back to identifiable individuals and is *personal information* under the *Act*, in the circumstances of these appeals.

[36] In Order PO-4101, the adjudicator considered claims that I find to be similar to the ones made here about whether disclosure of information that would reveal support or opposition to a controversial project constitutes personal information. In Order PO-4101, the adjudicator reasoned that such information would qualify as "personal information" under the Act:

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

¹³ For example, in Order PO-3938.

¹⁴ The IESO's representations also mention pages 517-522 along with pages 20-24 and 451-455.

support or opposition to the Project is personal information as it consists of recorded information about an individual.

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.

[37] I agree with this reasoning and find it relevant to the appeals before me, and therefore, I adopt it here to the information withheld on pages 20-24 and 28-34 of record 1, pages 451-455 of record 12, and pages 517-522 of record 22. I find that this information would reveal which individuals support or oppose the wind energy project that is the subject of the request. This is the *personal information* of these individuals, under the introductory wording of the definition of *personal information* (recorded information about an individual), and under paragraphs (a) - (e), and (h) of section 2(1) of the *Act*, in cases where an individual's name or family name is used. While some of the information at issue may be considered professional or business information, I find that it takes on a personal nature because disclosure of any portion of it would risk, by process of elimination, disclosure of which individuals approved or did not approve of the project.

[38] There has been no claim that the records contain the personal information of the requester, and I accept that they do not.

[39] Since the information withheld in on pages 20-24, 28-34, 451-455, and 517-522 records 1, 12, and 22 contain *personal information* belonging to individuals other than the requester, any right of access that the requester may have to that *personal information* must be considered under the mandatory personal privacy exemption at section 21(1) of the *Act*.

Issue B: Does the mandatory exemption at section 21(1) apply to the information at issue?

[40] As I will explain below, I find that the *personal information* at issue in records 1, 12, and 22 is exempt under the mandatory personal privacy exemption at section 21(1) of the *Act*.

[41] One of the purposes of the *Act* is to protect the privacy of individuals with respect to *personal information* about themselves held by institutions.

[42] Section 21(1) of the *Act* creates a general rule that an institution cannot disclose *personal information* about another individual to a requester. This general rule is subject to a number of exceptions.

[43] The section 21(1)(a) to (e) exceptions are relatively straightforward. If any of

the five exceptions covered in sections 21(1)(a) to (e) exist, the institution must disclose the information.

[44] The section 21(1)(f) exception is more complicated. It allows the institution to disclose another individual's *personal information* to a requester only if this would not be an "unjustified invasion of personal privacy." Other parts of section 21 must be looked at to decide whether disclosure of the other individual's *personal information* would be an unjustified invasion of personal privacy.

Do any of the exceptions in sections 21(1)(a) to (e) apply?

[45] The parties have not argued that any of these exceptions apply in the circumstances, and I find that there is no basis for finding that these exceptions are relevant here.

Section 21(1)(f) exception: disclosure is not an unjustified invasion of personal privacy

[46] Under section 21(1)(f), if disclosure of the *personal information* would not be an unjustified invasion of personal privacy, the *personal information* is not exempt from disclosure.

[47] Sections 21(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

[48] Sections 21(3)(a) to (h) should generally be considered first.¹⁵ These sections outline several situations in which disclosing *personal information* is presumed to be an unjustified invasion of personal privacy.

[49] If one of these presumptions applies, the *personal information* cannot be disclosed **unless**:

- there is a reason under section 21(4) that disclosure of the information would **not** be an "unjustified invasion of personal privacy," or
- there is a "compelling public interest" under section 23 that means the information should nonetheless be disclosed (the "public interest override").¹⁶

[50] If the *personal information* being requested does not fit within any presumptions under section 21(3), one must next consider the factors set out in section 21(2) to

¹⁵ If any of the section 21(3) presumptions are found to apply, they cannot be rebutted by the factors in section 21(2) for the purposes of deciding whether the section 21(1) exemption has been established.

¹⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

determine whether or not disclosure would be an unjustified invasion of personal privacy. However, if any of the situations in section 21(4) is present, then section 21(2) need not be considered.

[51] In these appeals, the third party did not claim that any of the presumptions at section 21(3) apply, and based on my review of the *personal information* at issue in records 1, 12, and 22, I am satisfied that none apply. In addition, the appellant has not argued that any situation in section 21(4) is present, and based on my review of the records, I find no basis for accepting that any of them are. Therefore, I will now consider the factors set out in section 21(2).

Section 21(2): Do any factors in section 21(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?

[52] Section 21(2) lists several factors that may be relevant to determining whether disclosure of *personal information* would be an unjustified invasion of personal privacy.¹⁷ Some of the factors weigh in favour of disclosure, while others weigh against disclosure. If no factors favouring disclosure are present, the section 21(1) exemption — the general rule that *personal information* should not be disclosed — applies because the exception in section 21(1)(f) has not been proven.¹⁸

[53] The factors outlined in section 21(2) cannot be used to rebut (disprove) a presumed unjustified invasion of personal privacy under section 21(3).¹⁹ In other words, if disclosure of the *personal information* is presumed to be an unjustified invasion of personal privacy under section 21(3), section 21(2) cannot change this presumption.

[54] The list of factors under section 21(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 21(2).²⁰

[55] Each of the first four factors, found in sections 21(2)(a) to (d), if established, would tend to support disclosure of the *personal information* in question, while the remaining five factors found in sections 21(2) (e) to (i), if established, would tend to support non-disclosure of that information.

The parties' positions

[56] The third party argues that the factors weighing against disclosure at sections 21(2)(e) (pecuniary or other harm) and 21(2)(f) (highly sensitive) apply to the *personal*

¹⁷ Order P-239.

¹⁸ Orders PO-2267 and PO-2733.

¹⁹ *John Doe*, cited above.

²⁰ Order P-99.

information at issue.

[57] The appellant did not identify any factors at section 21(2) favouring disclosure, as she did not provide representations in the inquiry, beyond stating that she sought the information she requested. However, I have considered whether the third party's claim that she opposes the project and the fact of her request is an indication the factor favouring disclosure at section 21(2)(a) (public scrutiny) is relevant.

21(2)(a): disclosure is desirable for public scrutiny

[58] This section supports disclosure of *personal information* when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.²¹ It promotes transparency of government actions.

[59] The issues addressed in the information that is being sought do not have to have been the subject of public debate in order for this section to apply, but the existence of public debate on the issues might support disclosure under section 21(2)(a).²²

[60] Institutions should consider the broader interests of public accountability when considering whether disclosure of the personal information is "desirable" or appropriate to allow for public scrutiny of its activities.²³

[61] Here, I accept that there has been public debate about the project in question.

[62] However, I am not satisfied that disclosing the *personal information* of those who are counterparties to contracts, including leases and easement agreements involving local landowners, and/or the identities of individuals that could be revealed, would subject the activities of the government to public scrutiny. Rather, it would reveal, at a minimum, the personal views or opinions of these individuals about a contentious local issue – not the actions or decisions of government that can be scrutinized on the substantive issue of the wind projects and delivery of electricity to Ontarians more generally. Therefore, I find that section 21(2)(a) does not apply to the *personal information at issue* on pages 20-24, 28-34, 451-455, and 517-522 records 1, 12, and 22. I am also unable to conclude that there are other factors favouring disclosure, based on the evidence before me.

[63] Since there are no factors at section 21(2) favouring disclosure that apply to the information at issue, the exception in section 21(1)(f) is not established and it is not necessary to discuss the third party's position that factors not favouring disclosure at

²¹ Order P-1134.

²² Order PO-2905.

²³ Order P-256.

section 21(2) apply. Accordingly, the mandatory section 21(1) exemption applies to the *personal information* at issue on pages 20-24, 28-34, 451-455, and 517-522 records 1, 12, and 22, and I will order the IESO to withhold it from disclosure.

Issue C: Does the mandatory exemption at section 17(1) for third party information apply to the remaining records (or parts of records)?

[64] The third party and the IESO disagree about the extent to which section 17(1) applies to the remaining records, or parts of records, at issue. The third party objects to the disclosure of all twenty-five records at issue, with the exception to a few pages from two records. The IESO objects to portions of several records being disclosed, relying on section 17(1) of the *Act* (and some of these redactions are no longer at issue). For the following reasons, I uphold the IESO's decision, in part: I uphold the IESO's access decision to fully disclose certain records and partially disclose others, but I do not find sufficient evidence to uphold some redactions made by the IESO, as set out in further detail below.

[65] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,²⁴ where specific harms can reasonably be expected to result from its disclosure.²⁵

[66] Section 17(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if 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

²⁴ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

²⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[67] For section 17(1) to apply, the party arguing against disclosure 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 institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Records 2- 5, 7, 9, 10, and 13-17

[68] The IESO submits that these twelve records at issue do not fall under any of the exemptions in the *Act*.

[69] As for “confidential third party information,” which I take to be a reference to section 17(1) more specifically, the IESO submits that records 2-5, 7, 9, 10, and 13-17 do not reveal any confidential third party information. The IESO submits that that is because the information in these records is primarily email correspondence between the IESO and the third party, or is otherwise available in the public domain.

[70] The third party opposes the disclosure of all twenty-five records,²⁶ but did not directly address the IESO’s submission about the disclosure of these twelve records specifically.

[71] The third party’s position is that disclosure of (all) the records at issue “would reveal technical and/or commercial information that was supplied to the IESO in confidence, the disclosure of which could reasonably be expected to cause certain enumerated harms.” It identified those harms as being prejudicing its competitive position (which refers to section 17(1)(a)) and/or resulting in undue loss to the third party or undue gain to other parties (which refers to section 17(1)(c)).

[72] Based on my review of records 2-5, 7, 9, 10, and 13-17, as well as the representations of the IESO and the third party, I find that there is insufficient evidence

²⁶ With the exception of portions of record portions of records 1 and 8 that the third party consented to the disclosure of.

before me to conclude that these twelve records meet the three-part test for section 17(1).

[73] In opposing the disclosure of these records, the third party had the onus of proving that each record meets the each part of the three-part test for section 17(1) of the *Act*.

[74] Here, even if I accept that records 2-5, 7, 9, 10, and 13-17 contain commercial and/or financial information (satisfying part one of the test), and were supplied in confidence to the IESO (satisfying part two), I do not accept that there is sufficient evidence that the harms-related third part of the test is satisfied.

[75] Parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.²⁷

[76] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.²⁸ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.²⁹

[77] However, here, I found the third party's representations to be vague and non-specific to the twelve records that the IESO states should be fully disclosed. Although the third party asserts that it would suffer the harms contemplated by sections 17(1)(a) and/or 17(1)(c) if *any* the twenty-five records at issue were disclosed, the third party did not sufficiently establish this claim with respect to records 2-5, 7, 9, 10, and 13-17.

[78] Having reviewed these records, I agree with the IESO that they can be described as correspondence between IESO staff and the third party. If there is third party information in the type of correspondence found in these twelve records, it was incumbent on the third party to identify what that proprietary information was, but I find that it did not do so.

[79] In addition, the third party did not provide evidence directly challenging the

²⁷ Orders MO-2363 and PO-2435.

²⁸ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

²⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

IESO's position that these records contain no third party information or information that is already in the public domain.

[80] In the circumstances, I find that the emails between IESO staff and the third party that make up records 2-5, 7, 9, 10, and 13-17 do not meet part three of the three-part test, and specifically the third part of that test, relating to harms. Based on my review of records 2-5, 7, 9, 10, and 13-17 and the third party's representations, I find that there is insufficient evidence to conclude that disclosure of any of these records could reasonably be expected to result prejudice to the third party's competitive position under section 17(1)(a), and/or undue loss to it or undue gain to another party under section 17(1)(c).

[81] Since all three parts of the test for section 17(1) must be met in order for records to be found exempt, and records 2-5, 7, 9, 10, and 13-17 do not meet part three of the test, these records are not exempt from disclosure under section 17(1) of the *Act*, and I uphold the IESO's decision to disclose them.

Records 1, 6, 8, 11, 12, 18-25

[82] In addition to deciding that records 2-5, 7, 9, 10, and 13-17 should be fully disclosed, the IESO also decided that many *portions* of records 1, 6, 8, 11, 12, and 18-25 should also be disclosed in *full*. The IESO states that these portions of these 13 records do not reveal any confidential third party information, and include prescribed forms and other template agreements between the IESO and the third party that do not qualify as having been "supplied" for the purposes of section 17(1). In addition, the IESO submits that these portions of records 1, 6, 8, 11, 12, and 18-25 are not otherwise exempt from disclosure under that section of the *Act*.

[83] As mentioned, some information is now removed from the scope of the appeals, due to the appellant's confirmation that she does not seek certain financial information. After that information, and the information that I have found to be exempt under section 21(1) is considered, what remains at issue under section 17(1) is the following:

- in the third party's appeal, both the redacted and unredacted portions of records 1, 6, 8, 11, 12, and 12-25;
- in the requester's appeal, the redactions on the pages of these six records:
 - record 1 [pages 162, 176, 178-180, 183, 199 (second two redactions), 202, and 204-225]
 - record 6 (page 366)
 - record 8 (pages 391-395, and 397)
 - record 11 (page 407)

- record 12 (pages 438 - 440, and 443)
- record 25 (pages 551-554)

[84] The third party's representations did not directly and address records 1, 6, 8, 11, 12, and 18-25 (in contrast to its specific mention of certain pages of records in its representations about why section 21(1) applies).

[85] Rather, the third party "generally concurs" with the IESO's position that portions of records 1, 6, 8, 11, 12, and 18-25 should be withheld under section 17(1), but goes farther than that and states its belief that these records should all be withheld in full.

[86] The third party also submits that all of the records at issue³⁰ "should be withheld to avoid the enumerated harms that would arise from disclosure." I take this to mean that the third party objects to the portions of records 1, 6, 8, 12, 18-25 that the IESO does not believe are exempt under section 17(1), as well as the portions of these records that the IESO believes to be exempt.³¹ The third party initially provided submissions about the harms referenced in section 17(1)(a) and 17(1)(c), but later added its agreement with the IESO's representations, which appear to reference section 17(1)(b) (similar information will no longer be provided).

[87] Turning from the parties' general positions on the disclosure of records 1, 6, 8, 12, 18-25, I will now examine whether the evidence establishes that these thirteen records meet the three-part test for section 17(1) of the *Act*.

Part 1 of the section 17(1) test: type of information

[88] As between the third party and the IESO, there are claims that the records contain up to three of the types of information listed at section 17(1): technical, commercial, and/or financial information. The IPC has described these types of information protected under section 17(1), as follows:

Technical information is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the

³⁰ Again, other than the portions of records 1 and 8 that it has agreed to disclose.

³¹ It also means that the third party objects to disclosure of records 2, 3, 4, 5, 7, 9, 10, 13, 14, 15, 16 and 17, but I will not be discussing these records further in this order, given my findings that they do not meet the three-part test.

field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.³²

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.³³ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.³⁴

Financial information is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.³⁵

[89] The third party submits that the records primarily relate to its submission of the project's key development milestone (KDM) documentation. This documentation was required to show that the third party has met certain requirements. The third party states that "the KDM documentation follows a competitive bid process for a 'Large Renewable Procurement I' contract'" (LRP contract). The LRP contract required the third party to submit "detailed financial, technical and commercial information about the project, including sensitive information about its financial model, material contracts with other third parties, facilities and connections, project timeline, and cost estimates." This information was also to include an independent audit report pertaining to the third party's financial model for the project.

[90] Therefore, the third party argues that the records contain highly confidential *financial, technical* and *commercial information* relevant to a key stage of the project.

[91] I note that these representations were made before the appellant confirmed that she is not seeking certain financial information, thus removing records like the independent audit report and the financial model from the scope of the appeals.

[92] For its part, the IESO submits that the records at issue in these appeals all relate, either directly or indirectly, to the LRP contract between the IESO and the third party for the buying and selling of wind power. Therefore, the IESO submits that the information it redacted from portions of records 1, 6, 8, 11, 12, and 18-25 is *commercial information*, arising only because of the IESO's commercial relationship with the third party.

³² Order PO-2010.

³³ Order PO-2010.

³⁴ Order P-1621.

³⁵ Order PO-2010.

[93] In addition, the IESO submits that the redacted portions of records 1 and 8 contain *technical information*, submitted to the IESO by the third party in connection with the KDM requirements of the project contract so that the IESO could determine whether certain development milestones were achieved. The IESO describes the *technical information* contained in these records as single line diagrams depicting locational and connection information. It states that this information was prepared by engineering professionals retained by the third party to prepare these diagrams and compile the information contained therein.

[94] Based on my review of the records and the agreed position between the IESO and the third party on type of information in the records, I find that records 1, 6, 8, 11, 12, and 18-25 flow from the commercial relationship between these parties, and therefore, contain *commercial information*. As a result, records 1, 6, 8, 11, 12, and 18-25 meet part one of the test for section 17(1).

[95] I also accept the IESO's statement that some of the redactions it made in records 1 and 8 include *technical information* (specifically on 176, 178-180 in record 1 and pages 391-395 and page 397 in record 8), including single line diagrams depicting locational and connection information, which was prepared by professional engineers for the third party.

Part 2: supplied in confidence

Supplied

[96] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.³⁶

[97] 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.³⁷

[98] The contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it

³⁶ Order MO-1706.

³⁷ Orders PO-2020 and PO-2043.

reflects information that originated from one of the parties.³⁸

[99] There are two exceptions to this general rule:

1. **the “inferred disclosure” exception.** This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.³⁹
2. **the “immutability” exception.** This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.⁴⁰

In confidence

[100] The party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an **objective** basis.⁴¹

[101] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.⁴²

³⁸ This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

³⁹ Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.

⁴⁰ *Miller Transit*, cited above at para. 34.

⁴¹ Order PO-2020.

⁴² Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

Portions of records 1, 6, 8, 11, 12, and 18-25 that the IESO decided were not exempt

[102] The IESO maintains its position that the portions of records 1, 6, 8, 11, 12, and 18-25 are not exempt under the *Act*.

[103] The IESO submits that the portions of records 1, 6, 8, 11, 12, and 18-25 do not reveal any confidential third party information and include prescribed forms and other template agreements between the IESO and the third party that do not qualify as having been *supplied* for the purposes of section 17(1).

[104] The third party asserts that the records at issue were *supplied* to the IESO.

[105] When given the opportunity to do so, the third party did not address the IESO's submissions that the unredacted portions of records 1, 6, 8, 11, 12, and 18-25 include prescribed forms and other template agreements between the IESO and the third party that do not qualify as having been *supplied* for the purposes of section 17(1).

[106] In the circumstances, based on my review of unredacted portions of records 1, 6, 8, 11, 12, and 18-25 and the parties' representations, I find that the third party did not establish that the portions of these records were *supplied in confidence* to the IESO. As noted, when given the opportunity to reply to the IESO's statement that the unredacted portions of these records include prescribed forms and other template agreements between the IESO and the third party, the third party did not address this. From my review of the unredacted portions of records 1, 6, 8, 11, 12, and 18-25, I find that even if most or all portions of these records could be said to be supplied to the IESO on the basis that they are in the IESO's record holdings, there is insufficient basis from a review of these portions of the records themselves and the IESO's representations on them, that they were *supplied in confidence* to the IESO.

[107] Given my finding that there is insufficient evidence that these portions of records 1, 6, 8, 11, 12, and 18-25 were *supplied in confidence* to the IESO, it is not necessary to assess part three of the test for these portions of the records. As a result, I uphold the IESO's decision to disclose those portions of these records that remain at issue.

Remaining IESO redactions at issue in records 1, 6, 8, 11, 12, and 18-25

[108] The representations of the IESO and the third party were general in nature, and did not specify any particular records at issue.

[109] Referring to the information that it redacted from the responsive records under section 17(1), the IESO states that that information was either directly supplied to the IESO by the third party as part of the KDM requirements under the contract or its disclosure would reveal information supplied by the third party to the IESO. The IESO, therefore, submits that the redacted information in the withheld records qualifies as having been *supplied* under the *Act*. Further details about the various types of

information withheld on these pages was not provided, though I note that it varied in nature.

[110] The IESO states that, in its correspondence providing the IESO with the records that the IESO partially redacted, the third party did not specifically provide notice to the IESO that the records were confidential.

[111] However, the IESO submits that it is clear that the information provided to the IESO arises in connection with a proposed commercial activity between the third party and the IESO, namely the provision of information to the IESO in connection with the KDM requirements under the contract. Therefore, the IESO submits that it is reasonable to consider that there was an implicit expectation of confidentiality at the time that the information was communicated to the IESO. The IESO also states that the information has not otherwise been disclosed publicly, and was prepared for a purpose that would not entail disclosure.

[112] For its part, the third party indicates that it agrees with the IESO's position regarding the information that the IESO redacted under section 17(1). I take this to mean that the third party submits that the portions of records 1, 6, 8, 11, 12, and 18-25 that the IESO redacted were *supplied in confidence* to the IESO. Details about any of the pages remaining at issue under section 17(1) were not provided, though such details were provided in the third party's representations about section 21(1).

[113] As mentioned, the third party asserts that all of the records at issue were *supplied* to the IESO.

[114] The third party submits that the information at issue was provided to the IESO *in confidence* both explicitly (e.g. marked confidential or limited exclusively to use by IESO and no other party) and implicitly (e.g. where such documentation could not be altered or adjusted in submission to the IESO but the circumstances demonstrated the expectation of confidentiality).

[115] Furthermore, the third party argues that the "inherent sensitivity of [the records] makes it clear that they were only supplied to the IESO with the expectation that they would remain confidential." The third party notes that the records contain technical and/or commercial details about the project. It submits that, "[t]ogether, these details reveal critical commercial elements of the Third Party's bid to the IESO in a competitive procurement process." As a result, the third party states that it clearly expected the IESO would keep the records in strict confidence.

[116] In addition, the third party states that it has consistently treated the records in a confidential manner. It explains that the records are not widely disclosed within the third party's organization itself, and are only available to employees with a need to know and who are bound by duties of confidentiality.

[117] The third party also states that the records have not been disclosed publicly

"given the enumerated harms that would be expected to occur if they were," which it discusses in its representations under part three of the test.

[118] Based on my review of the remaining redacted portions of records 1, 6, 8, 11, 12, and 25 that are at issue, I partially uphold the IESO's decision.

[119] As discussed, the IESO submits, and the third party does not dispute, that the information that the IESO withheld under section 17(1) was either directly *supplied* to the IESO by the third party as part of the KDM requirements under the contract or its disclosure would reveal information *supplied* by the third party to the IESO.

[120] Since neither party resisting disclosure of the remaining redactions in records 1, 6, 8, 11, 12, and 25 at issue provided detailed evidence about whether the information was *supplied* to the IESO, I have examined the records themselves in order to assess this from the records and/or the circumstances.

[121] The remaining portions of records 1, 6, 8, 11, 12, and 18-25 that the IESO decided to redact are as follows:

- record 1 [pages 162, 176, 178-180, 183, 199 (second two redactions), 202, 204-225]
- record 6 (page 366)
- record 8 (pages 391-395, and 397)
- record 11 (page 407)
- record 12 (pages 438 - 440, and 443)
- record 25 (pages 551-554).

Redacted information not supplied in confidence

[122] Page 366 of record 6 and page 407 of record 11 are attachments to a letter from the IESO to the third party. Based on my review of these pages (which appear to be copies of one another), I am not satisfied that the information at issue qualifies as having been *supplied* to the IESO. Neither the IESO nor the third party specifically explained what information on these pages was supplied by the third party and is proprietary to it. In general terms, the contents of this page can be described as revealing documents that the third party was required to submit and had submitted, or would still need to submit. In the circumstances, I find that there is insufficient evidence to accept that page 366 of record 6 and page 407 of record 11 were *supplied* to the IESO. As a result, these pages do not meet part two of the test, and I will order them disclosed to the requester.

[123] In record 12, the IESO redacted pages 438, 439, and 443 in full, and a small portion of page 440. Based on my review of these redactions, I am unable to conclude that the information withheld (invoice, receipt, and fee information) can be considered *supplied* to the IESO. Neither the IESO nor the third party have sufficiently explained how the information redacted on these pages can be considered *supplied* by the third party to the IESO. As a result, the information withheld on these pages does not meet part two of the test, and I will order it disclosed to the requester.

Redacted information supplied in confidence

[124] Based on my review of the redactions on pages 162, 183, 199 (the second two redactions), 202, 204-225 at issue in record 1, I find that they are in signed contracts between the third party and Hydro One,⁴³ that are attached to the third party's submission for the project. The redactions appear to reflect the scope and agreed upon terms between those contracting parties. Since the IESO was not one of these contracting parties, I accept that the third party *supplied* the information redacted on these pages to the IESO, and that this was done *in confidence*.

[125] The redactions on pages 176, 178-180 in record 1 and pages 391-395 and page 397 in record 8 consist of *technical information* prepared by a professional engineer for the third party as part of its required documentation. As a result, I accept that this information was *supplied* to the IESO by the third party.

[126] The IESO describes record 25 in its index of records as an "[e]mail to Contract Management from [the third party] with quarterly report attached." The remaining redactions at issue in record 25 are parts of that quarterly report. The index of records states that "[c]onfidential commercial information belonging to [the third party] has been redacted." As it was for the other redactions made by the IESO, neither the IESO nor the third party discussed the redactions on pages 551-554 directly. However, based on my review of the information redacted in the quarterly report, I find it reasonable to accept that the third party *supplied* it to the IESO as part of its quarterly reporting to the IESO.

[127] Based on my review of the records and the parties' representations, I accept that the *supply* of the information redacted on pages 176, 178-180 in record 1, pages 391-395 and 397 in record 8, and pages 551-554 in record 25, was made *in confidence* to the IESO. I accept that the technical information withheld in records 1 and 8, which was prepared by a professional engineer in relation to the third party's submission package, was supplied to the IESO with expectations of confidence on the part of both the IESO and the third party, given the nature of the process and the information itself. Similarly, I accept that in *supplying* the IESO with a quarterly progress report through record 25,

⁴³ Hydro One is identified in this order because it is an institution under the *Act*.

the third party did so *in confidence*.

[128] Since pages 162, 183, 199 (the second two redactions), 202, 204-225 at issue in record 1, pages 176, 178-180 in record 1, pages 391-395 and 397 in record 8, and pages 551-554 in record 25 meet both elements of part two of the test (they were *supplied* to the IESO, and that supply was made *in confidence*), I will now go on to consider whether they also meet part three of the test.

Part 3: harms

[129] As I will explain below, I find that the remaining information at issue on pages 176, 178-180 in record 1 and pages 391-395 and 397 in record 8 meets part three of the test. However, I find that the remaining information at issue in record 25 and on pages 162, 183, 199 (the second two redactions), 202, 204-225 at issue in record 1 do not.

Could reasonably be expected to

[130] Parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁴⁴

[131] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.⁴⁵ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁴⁶

The positions of the IESO and the third party

[132] The IESO states that it can speak to harms in general terms, but that the third party is better positioned to make representations on part three of the test. The IESO states that it will adopt the position and arguments of the third party regarding only the portions of the records that the IESO redacted and whether disclosure of that information could reasonably be expected to result in one or more of the harms in

⁴⁴ Orders MO-2363 and PO-2435.

⁴⁵ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁴⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

sections 17(1)(a), (b) and (c) of the *Act*.

[133] The third party asserts that “[v]ery significant harm would occur” if the records were disclosed, “thus satisfying the third branch of the test” for section 17(1), and makes claims using the language of sections 17(1)(a) and/or 17(1)(c). After having an opportunity to review the IESO’s representations, the third party added that it also agreed with the IESO’s position under section 17(1)(b).

[134] I will discuss the parties’ positions about sections 17(1)(a), (b), and (c) in more detail, below, noting that the parties did not specify any particular records or redactions within records in their arguments under part three of the test. I will begin with a discussion of section 17(1)(b).

Section 17(1)(b): similar information no longer supplied

The IESO’s representations

[135] The IESO submits that, by its nature, the LRP program requires a significant amount of coordination and information sharing between the IESO and its contract counterparties. It submits that it is essential to the successful operation of the LRP program and other procurement programs that are managed by the IESO, that the IESO be able to obtain detailed information from its contract counterparties. The IESO maintains that given the size and scope of the LRP projects, developers are required to provide detailed information to the IESO pursuant to the terms of the LRP contract, usually at great expense.

[136] The IESO also submits that an important balancing of interests is relevant in the circumstances, saying:

. . . the interests of public disclosure must be weighed against the interests of the administration of renewable energy programs that are created and administered pursuant to the statutory authority of the Minister of Energy. The IESO submits that if it cannot provide the confidentiality assurances that its contract counterparties expect - and routinely obtain from the private sector - then it becomes inherently more problematic for the private sector to deal with the IESO, thus hampering the IESO’s ability to fulfill its statutory mandate to help the province meet its electricity needs.

The third party’s position

[137] Although the third party did not initially claim harms under section 17(1)(b) in its representations, in reply to the IESO’s representations, it expressed agreement with the IESO’s position regarding the importance of ensuring confidentiality with contracting counterparties and the importance of the IESO’s ability to fulfill its mandate.

Analysis/findings

[138] Based on my review of the parties' representations and the contents of pages 176, 178-180 in record 1 and pages 391-395 and 397 in record 8, I accept disclosure of the information that the IESO redacted on these pages meets part three of the test. As mentioned, the information redacted on these pages is technical information relating to the project, including technical drawings relating to the site of the project. Given the nature of this information, I accept that it is in the public interest that similar information continue to be supplied in confidence to the IESO in order for the IESO to make important, informed decisions relating to the carrying out of its mandate. As a result, I find that the information that the IESO redacted on pages 176, 178-180 in record 1 and pages 391-395 and 397 in record 8 meets part three of the test. As this information meets all three parts of the test, I uphold the IESO's decision that it is exempt from disclosure under section 17(1).

[139] However, I am not similarly persuaded to accept that the information similar to that withheld on pages 162, 183, 199 (the second two redactions), 202, 204-225 at issue in record 1 and pages 551-554 in record 25 would not longer be supplied to the IESO, or that there is a public interest in its continued supply to the IESO in confidence. As discussed, the information withheld on the aforementioned pages of record 1 are portions of contracts between the third party and HydroOne, which relate to the project that is the subject of these appeals; the information withheld on pages 551-554 in record 25 is found in quarterly update reports from the third party to the IESO. In my view, it is reasonable to expect that a company doing business with the IESO would be required to provide evidence of contracts such as those at issue, as well as periodic updates about the progress of its project. Given the nature of this information, I find that it is unreasonable to expect that such basic requirements would dissuade a company from doing business with the IESO, but could reasonably be expected to hamper the IESO from fulfilling its mandate if the information was not provided. As a result, I find that the information at issue on pages 162, 183, 199 (the second two redactions), 202, 204-225 at issue in record 1 and pages 551-554 in record 25 is not exempt under section 17(1)(b) of the *Act*. I will now consider whether these pages are exempt under section(s) 17(1)(a) and/or 17(1)(c) of the *Act*.

Sections 17(1)(a) and (c): prejudice to competitive position / undue loss or gain

[140] Sections 17(1)(a) and (c) seek to protect information that could be exploited in the marketplace.⁴⁷

⁴⁷ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

The IESO's representations

[141] The IESO submits that the disclosure of the redacted portions of the records could reasonably be expected to significantly prejudice the third party's competitive position vis-à-vis competitors and other interested parties. The IESO states that these other parties could use the information to gain a better understanding of the third party's commercial position and strategies, and then use it to gain an unfair advantage over the third party.

The third party's representations

[142] The third party submits that disclosure of the records could reasonably be expected to cause harm by prejudicing its competitive position and/or result in undue loss to it or undue gain to other parties. The third party makes three points in relation to this submission:

- that "very significant harm would occur" if the records were disclosed to its competitors and to third parties because the confidential and technical information in the records could be used to unfairly gain insight into the third party's strategy, including its strategy about financing renewable energy projects, and to outbid the third party in other competitive bid processes;
- the records contain information that is subject to confidentiality obligations under contractual arrangements, including "detailed economic models and assumptions that are confidential to vendors," thus "severely erod[ing] and undermin[ing]" the third party's essential business relationships, and including information that is "key to contractual negotiations";
- disclosure of the records could result in an undue loss to it and an undue gain to other parties in litigation, a "real-life concern . . . heightened given the pending Renewable Energy Approval appeal in which [the third party] and the requestor [are] currently involved (details of which are described in the Confidential Records)." The third party submits that disclosure under the Act "would amount to an end-run around the normal, court supervised, documentary discovery process," which would result in undue loss to the third party and undue gain to other litigants.

Analysis/findings

[143] In my view, the representations of both the third party and the IESO under sections 17(1)(a) and 17(1)(c) are vague and sweeping, not sufficiently addressing the variety of information that the IESO had withheld in the records, and not establishing through detailed evidence that the harms contemplated by sections 17(1)(a) and/or 17(1)(c) could reasonably be expected. I found the representations regarding sections 17(1)(a) and/or 17(1)(c) to read as speculative assertions. To the extent that the third party's representations address concerns about financial information such as financial

models, those concerns are of no relevance now that those portions of the records are no longer within the scope of the appeal.

[144] What remains for me to decide is whether the remaining information at issue on pages 162, 183, 199 (the second two redactions), 202, 204-225 at issue in record 1 and pages 551-554 in record 25, that is, the redacted portions of contracts with HydroOne and the quarterly progress report, would meet part three of the test under section(s) 17(1)(a) and/or 17(1)(c). Based on the representations of the parties and my review of these pages of records 1 and 25, I am not persuaded that there is sufficient evidence to establish that disclosure of the information at issue would unfairly prejudice the third party's competitive position. Likewise, I find that there is insufficient evidence to establish that disclosure could reasonably result in undue loss to the third party or undue gain to other parties such as its competitors. The fact that the third party, who won a contract with the IESO, may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them, as contemplated by sections 17(1)(a) and 17(1)(c).⁴⁸ In my view, there is insufficient evidence to establish that disclosure of this information would reveal the third party's informational assets, or what those assets might be in the remaining redactions. I also find insufficient evidence to accept that disclosure of the information withheld on these pages would harm the third party's business relationships.

[145] In addition, I do not accept the third party's arguments with respect to harms in relation to litigation.

[146] Past IPC orders have considered similar arguments to the ones made by the third party in this appeal and have held that "the reference in section 17(1)(a) to competitive position was not intended to include a litigant's competitive position in civil litigation,"⁴⁹ and that the Legislature could have added a section of the *Act* denying access to information that might be obtained through the discovery process in litigation, but did not do so. In my view, the reasoning of these past decisions applies to the arguments of the third party regarding litigation, and I do not accept these arguments as a sufficient basis to conclude that the pages at issue in record 52 meet part three of the test under section(s) 17(1)(a) and/or 17(1)(c).

[147] In conclusion, I find that the remaining information at issue in record 8 is exempt under section 17(1)(b) of the *Act*, but the remaining information at issue in record 25 is not exempt under sections 17(1)(a), (b), or (c) of the *Act*. As a result, I will order the IESO to withhold the remaining information at issue on pages 176, 178-180 in record 1 and pages 391 -395 and 397 in record 8, and to disclose the remaining information at

⁴⁸ See Orders MO-2363 and PO-2758.

⁴⁹ Order PO-2490.

issue on pages 162, 183, 199 (the second two redactions), 202, 204-225 at issue in record 1, and on pages 551-554 in record 25.

Issue D: Can the exempt portions of records 1, 8, 12, and 22 be severed in such a way so as to disclose additional information without disclosing information that is exempt?

[148] As I will explain, I find that portions of the pages in records 1, 8, 12, and 22 that I have found to be exempt under section 21(1) or section 17(1), respectively, cannot reasonably be further severed.

[149] The question of whether records containing exempt material can reasonably be severed is highly dependent on the particular circumstances of a case.

[150] Section 1(a)(ii) of the *Act* indicates that the purpose of the *Act* is to provide a right of access to information under the control of an institution in accordance with the principle that necessary exemptions from that right should be limited and specific.

[151] Section 10(2) of the *Act* requires the IESO to disclose as much of a record as can reasonably be severed without disclosing the information that falls under one of the exemptions. Whether a record can be severed under section 10(2) in a way that discloses information that is not exempt depends on the content of the record in question and the circumstances surrounding the request.

[152] In considering the question of severance under section 10(2), I must decide whether information I have found to be exempt under the *Act* can reasonably be severed in order to disclose non-exempt information. This decision does not involve considering whether information that I have found *not* to be exempt should nevertheless be withheld, as the third party argues I should find in relation to the twenty-five responsive records.

[153] In these appeals, I have found that portions of records 1, 12, and 22 are exempt under the mandatory personal privacy exemption at section 21(1), and that portions of records 1 and 8 are exempt under the mandatory third party information exemption at section 17(1) of the *Act*.

[154] Based on my review of the information redacted on pages 20-24 and 28-34 of record 1, 451-455 of record 12, and 517-522 of record 22, I find that it cannot be further severed without revealing information (such as the number of landowners having contracts or easement agreements), which may itself reveal *personal information* by the process of elimination.

[155] Based on my review of the information withheld on pages 176, 178-180 in record 1 and pages 391-395 and 397 of record 8, I also find that it cannot reasonably be further severed without revealing information that is exempt under section 17(1)(b), as it constitutes technical information relating to the project, in its entirety.

[156] As a result of my findings on severability, I will not order the IESO to further sever the information withheld on pages 20-24 and 28-34 of record 1, 451-455 of record 12, 517-522 of record 22, pages 176, 178-180 in record 1, and pages 391-395 and 397 of record 8.

[157] For these reasons, I uphold the IESO's access decision in part, and dismiss the appeals.

ORDER:

1. I uphold the IESO's access decision, in part. I uphold the IESO's decision to fully disclose records 2-5, 7, 9, 10, and 13-17, as well as the portions of records 1, 6, 8, 11, 12, and 18-25 that remain within the scope of the appeals that I have found not to be exempt under sections 21(1) and/or 17(1) of the *Act*. I uphold the IESO's decision to withhold the information it redacted on pages 20-24 and 28-34 of record 1, 451-455 of record 12, and 517-522 of record 22, but on the basis of the mandatory personal privacy exemption at section 21(1) of the *Act*. The information that is outside the scope of the appeal should not be disclosed to the appellant.
2. I order the IESO to disclose the non-exempt records that remain within the scope of the appeals to the requester, in full, no later than **January 10, 2022**, but no earlier than **January 5, 2022**.
3. In order to verify compliance with this order, I reserve the right to require the IESO to provide me with a copy of the records disclosed pursuant to order provision 2.

Original Signed by: _____
Marian Sami
Adjudicator

November 30, 2021