

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## **ORDER PO-3541**

Appeal PA13-310

Independent Electricity System Operator

October 21, 2015

**Summary:** The appellant sought access to documents about two specific wind turbine projects. The IESO claims that the documents contain proprietary information that qualifies for exemption under section 18(1)(a)(economic and other interests). The appellant raised the possible application of the public interest override in section 23. The portions of the records which contain information which reveals the formula and methodology the IESO developed with a consultant to price Feed-in Tariff (FIT) contracts is found exempt under section 18(1)(a), but the remaining withheld information is ordered disclosed. The public interest override is found not to apply to the exempt information and the IESO's decision is upheld, in part.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 18(1)(a) and 23.

**Orders and Investigation Reports Considered:** Order PO-3031.

### **OVERVIEW:**

[1] The appellant submitted a request to the Independent Electricity System Operator (IESO) under the *Freedom of Information and Protection Privacy Act (Act)* for records relating to the adjustment or cancellation of a specific power purchase agreement relating to a wind farm. The IESO located responsive records and issued an interim fee and access decision letter to the appellant, granting partial access.

[2] The requester (now the appellant) appealed the IESO's decision to this office and

a mediator was assigned to the appeal to explore settlement with the parties. During mediation, the appellant narrowed his request as follows:

Please provide any analysis conducted by or for the Director, Contract Management of the Ontario Power Authority [IESO] related to the cancellation of the power purchase agreements for output from the two [named] Wind Farm contracts completed from October 1, 2012 to February 7, 2013. Provide any records of communication associated with this analysis once it was completed. Please provide a complete list of those to whom this analysis was sent.

[3] The IESO issued a revised decision dated June 19, 2014, along with an index of records. The parties participated in further discussions with the mediator, but a settlement was not reached. At the end of mediation, the mediator issued a report indicating that the portions of the records IESO identified as non-responsive in its June 19, 2014 decision letter are not at issue in this appeal. The mediator's report also confirms that the appellant takes the position that the public interest override at section 23 applies in the circumstances of this appeal.

[4] As no further mediation was possible, the issues remaining in dispute were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry, the non-confidential portions of the parties' representations were shared with each other pursuant to *Practice Direction Number 7*.

[5] In this order, I find that the exemption at section 18(1)(a) only applies to the portions of the records which reveal the formula and methodology the IESO developed with its consultant to price FIT contracts. I find that the total sum figure appearing at the end of each of the spreadsheets does not qualify for exemption under section 18(1)(a). I also find that the IESO properly exercised its discretion in applying section 18(1)(a) to portions of record 1 found exempt. Finally, I find that the public interest override at section 23 does not apply in the circumstances of this appeal.

[6] Before I discuss my findings regarding the applicability of section 18(1)(a), I will first address two preliminary issues.

## **RECORDS:**

[7] The records at issue are the withheld portions of the records described in the chart below:

<b>Record</b>	<b>Description of records</b>
1	Email to Director of Contract Management from staff with spreadsheet and analysis attached, dated November 9, 2012

2	Email to Director of Contract Management from staff with spreadsheet attached, November 7, 2012
3	Spreadsheet, undated
4	Spreadsheet, undated
5	Spreadsheet, undated

## **PRELIMINARY ISSUES:**

### **1. Did the IESO properly respond to the appellant's request?**

[8] Throughout his representations, the appellant raised concerns about the IESO's response to his original and narrowed request. The appellant takes the position that the IESO delayed matters without an explanation and inexplicably reversed its decision to rely on the mandatory third party information exemption only to rely on an exemption it previously advised no longer applied. The appellant also argues that the IESO further complicated matters by directing him to file a new request in the midst of this appeal and failed to respond to the portion of his request which seeks "... any records of communication associated with [the IESO's FIT analysis] once it was completed".

[9] The appellant submits that the IESO's "... behaviour throughout has been to stonewall, to rely on inaccurate statements, to muddy the waters, and to ignore elements of his request entirely". The appellant goes on to state:

I am seeking an Order that makes a finding on the conduct of the IESO in this matter, directs further disclosure, directs the IESO to explain its behaviour in this case, and comments on opportunities to enhance future mediation processes.

[10] The appellant also asked that I comment about what types of actions mediators from this office can take when "... it becomes clear, as in this case, that the [institution] is abusing the process by behaving irresponsibly".

[11] I note that the Mediator's Report indicates that the IESO issued a fee estimate and interim decision letter, dated April 30, 2013 in response to the appellant's original request. In its interim decision, the IESO advised that its preliminary search located 150 records which may be responsive. The IESO went on to advise that it anticipated that some of these records would qualify for exemption under sections 17(1)(third party information) and 19 (solicitor-client privilege) and requested a deposit to continue processing the request.

[12] The IESO subsequently issued a revised decision, dated June 1, 2013 granting the appellant partial access to the 91 records it determined were responsive to the request. The IESO withheld 29 of these records, claiming that they contained third party information and qualified for exemption under section 17(1). The IESO took the position that these records also qualify for exemption under sections 19 (solicitor-client privilege) and 18(1)(economic and other interests). The IESO claimed that the remaining 62 records may affect the interests of a third party and advised that it intended to issue a final access decision by July 1, 2013 regarding access to the 62 records. The appellant subsequently appealed the IESO's June 1, 2013 decision. In his appeal letter, the appellant advises that he filed the appeal as he was concerned that the time for him to appeal the IESO's decision would expiry as the IESO had not yet issued a final access decision.

[13] The IESO issued its access decision on July 15, 2013 advising that 12 of the potentially 62 responsive records were in fact responsive. The IESO granted the appellant full access to 7 records, but claimed that the remaining 5 qualify for exemption under section 17(1)(third party information). The IESO claimed that one of these records also qualifies for exemption under section 18(1)(economic interest). The IESO also claimed that the remaining 50 records were not responsive to the request. Finally, the IESO advised that it decided to waive any further fee "...because of the delay in issuing this decision".

[14] The appeal was transferred to mediation and the appellant forwarded a revised request to the mediator which narrowed the scope of the appeal to records which addressed the cancellation of power purchase agreements. The mediator forwarded the narrowed request to the IESO, which subsequently issued a revised decision letter dated April 14, 2014 to the appellant. In that letter, the IESO advised that it conducted a search for records responsive to the narrowed request and located one record. The IESO denied the appellant access to this record, claiming that it contains third party information and qualifies for exemption under section 17(1). The IESO also indicated that it located 9 other records, but took the position that these records were not responsive as they did not "contain any analysis related to the cancellation of the power purchase agreements".

[15] The parties subsequently participated in a telephone meeting to explore resolution with the mediator. At this meeting, the appellant discussed his concerns about the length of time this matter was taking. The appellant also confirmed that he was not interested in records capturing information about contract changes. The appellant was also given assurances by the IESO's Freedom of Information Co-ordinator (Co-ordinator) that, to date, no records relating to the cancellation of the purchase agreement had been located.

[16] However shortly after the mediation meeting, the Co-ordinator advised the mediator that the records the IESO had identified as non-responsive in its April 14, 2014 decision were in fact responsive. The IESO issued a revised decision letter dated

June 19, 2014 to the appellant which stated:

Following our phone conversation... I spoke directly with the Director of Contract Management. During this meeting, the purpose behind the creation of a spreadsheet was clarified and it is now our understanding that the spreadsheet is responsive to your request.

...

The [IESO] is providing the responsive portions of these spreadsheets to you, with redactions to remove unresponsive material and a final figure of the calculation that is exempt under Section 18 of the [Act]. A related document that outlines the assumptions used in the preparation of the spreadsheets is also exempt under Section 18 of the [Act] and will not be released.

[17] I have carefully reviewed the appeal file along with the appellant's representations and note his frustration with the length of time it took for the IESO to arrive at a final decision about which records were responsive to the narrowed request and its access decision regarding such records. Unfortunately, the IESO's response to the appellant's original and narrowed request generated a total of five decision letters. As well, the IESO required additional time to notify third parties and review the records.

[18] However, having regard to the circumstances in this appeal, I am satisfied that the IESO adequately responded to the appellant's request and discharged its duties under sections 26 (Notice by head), 27(Extension of time and Notice of Extension), and 28 (Notice to affected person), and 29 (Contents of notice of refusal).

[19] One of the concerns raised by the appellant is the IESO's decision to abandon its claim that section 18(1) (economic and other interest) apply to the records only to revive the claim in its revised decision letter, dated June 19, 2014. Though I appreciate that the IESO's revised decision may have caused some confusion, I am satisfied that the IESO's revised decision merely reflects its better understanding of the nature of the records at issue. Similarly, there is insufficient evidence before me to suggest that the IESO used the mediation process to deliberately thwart or delay access. Rather, it appears that an oversight occurred as a result of the Director of Contract Management (the Director) not being consulted until late in the mediation process. In its reply representations, the IESO explains:

Subsequent to [the mediation meeting] with the appellant, [the Coordinator] met with [the Director of Contract Management]. During this meeting, it was determined that the spreadsheets at issue in this appeal were potentially responsive.

The [Project Manager] consulted by [the Co-ordinator during the request stage] was [also] in attendance at the meeting ... The [Project Manager]

indicated that this was the first time that he had heard about these spreadsheets having being prepared. [The Director] confirmed that only he and the Contract Management team members who prepared the spreadsheets were aware that this analysis had been undertaken.

[The Co-ordinator] had not previously spoken directly with [the Director] during the course of her initial search because she believed that someone from the Contract Management team had spoken with [the Director] in February 2013 when she first made the team aware of the request.

[20] Furthermore, given that the IESO's reliance on section 18(1) merely revives its original position, I am satisfied that its June 19, 2014 decision does not give rise to the concerns which arise when an institution raises a discretion exemption for the first time.<sup>1</sup> In any event, even if I found that the IESO's June 19, 2014 letter amounted to raising a new discretionary exemption claim, there is insufficient evidence to suggest that the appellant was prejudiced in any way or the integrity of the appeals process was compromised having regard that the IESO previously relied on the same exemption early in the request and appeals process.<sup>2</sup>

[21] For the reasons stated above, I am satisfied that the IESO adequately responded to the appellant's request.

## **2. Should reasonable search be added as an issue to this appeal?**

[22] Throughout this appeal the appellant takes the position that the IESO failed to address the portion of his revised request that seeks access to "... any records of communication associated with the [profitability analysis of the contracts] once it was completed". Including a "...complete list of those to whom this analysis was sent".

[23] The appellant takes the position that the IESO failed to conduct a reasonable search for records responsive to the part of his revised request that seeks a list of the individuals who were provided a copy of the requested records. In support of this position, the appellant states:

I seek disclosure of the profit estimate that the IESO undertook in the report it now acknowledges to have undertaken. I also seek records of communication of the results of the report, including a list of those to whom the results were sent.

---

<sup>1</sup> Section 11.01 of the IPC's *Code of Procedure* provides: In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

<sup>2</sup> See Order PO-2113.

[24] The appellant also states that:

... the list of to whom this analysis was sent is critical to my investigation. The information would have been sent to whom ever had ordered it in the first place. Once the profit component of the projects was estimated, who received that information? Was the minister involved?

[25] In response, the IESO states:

The appellant has provided no basis for his continued assertion that a report exists containing analysis of the cancellation of the FIT projects, such a report does not exist.

The appellant has not provided, nor could he provide, any basis for his assertion that records exist indicating that this report was communicated to others. Because there is no report, there is no record containing a list of persons whom that report was communicated.

All communications regarding the results of the Wind Model Analysis have already been produced by the IESO. The IESO has produced two emails with attached spreadsheets containing the results of the Wind Model Analysis as part of the responsive records. These emails are the only records of communication of the result of the Wind Model Analysis. There were no communications with a report as the appellant suggests.

[26] It appears that when the appellant filed his appeal he believed that a report describing the IESO's Wind Model Analysis should exist. The IESO advises that no such report exists, but located spreadsheets which contain its analysis for the two wind turbine projects identified in the appellant's request. The IESO advises that the spreadsheets were exchanged among IESO's staff via email and located two emails in which the spreadsheets was sent to the Director of Contract Management by staff in the IESO's Contract Management/ Electricity Resources department.

[27] Having regard to the representations of the parties, I find that the appellant has failed to adduce sufficient evidence to conclude that there is a reasonable basis to believe that there exists a record which comprehensively lists the individuals the IESO communicated its analysis with. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>3</sup>

[28] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

---

<sup>3</sup> Order MO-2246.

Furthermore, previous orders from this office have confirmed that there is no obligation on an institution to create a record in responsive to the request.

[29] Having regard to the evidence before me, I am satisfied that the IESO conducted a reasonable search for records responsive to the portion of the appellant's request for a report along with information about who received information about its Wind Model Analysis for the two projects in question. No such report was located, but the IESO located spreadsheets which contained the type of analysis referred to in the appellant's revised request. In doing so, the IESO also located two emails which capture information about who sent and received the spreadsheets in the address lines of the emails. While I recognize that the IESO may have meeting agendas, electronic appointment requests, interoffice mail logs or other records which may identify other individuals who received copies of the spreadsheets, there is no obligation on part of the IESO to create a record where one does not already exist.

[30] Having regard to the above, I find that the appellant has failed to provide sufficient evidence that there is a reasonable basis to believe that there exists a record which comprehensively lists the individuals' who exchanged the report within the IESO.

[31] Accordingly, the issue of whether or not the IESO conducted a reasonable search will not be added to this appeal.

## **ISSUES:**

- A. Does the discretionary exemption at section 18(1)(a) apply to the records?
- B. Did the institution exercise its discretion under section 18(1)(a)? If so, should this office uphold the exercise of discretion?
- C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1)(a) exemption?

## **DISCUSSION:**

### **ECONOMIC AND OTHER INTERESTS**

#### **Issue A: Does the discretionary exemption at section 18(1)(a) apply to the records?**

[32] Section 18(1)(a) states:

A head may refuse to disclose a record that contains trade secrets or financial, commercial, scientific or technical information that belongs to



the Government of Ontario or an institution and has monetary value or potential monetary value;

[33] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.<sup>4</sup>

**Section 18(1)(a): information that belongs to government**

[34] For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,
2. belongs to the Government of Ontario or an institution, and
3. has monetary value or potential monetary value.

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

[35] The IESO submits that the records contain financial and commercial information which describe the "total free cash flow for equity sum". The IESO advises that this information "reflects the amount of profit that a FIT supplier may lose if its FIT supply contracts were cancelled". The IESO also submits that this information relates to its current and future revenues and that previous decisions from this office have found that such information constitutes financial or commercial information.<sup>5</sup>

[36] The information the IESO describes above is the total sum figure appearing at the end of each spreadsheet contained in records 1 to 5. The sum describes the IESO's free cash flow to equity for a number of wind turbine projects, including the two projects identified in the request.

[37] The IESO also submits that record 1 also contains information regarding the "assumptions underlying the Wind Model Analysis". In support of its position, the IESO states:

The assumptions contain specific data relating to the use of money by the IESO ... They comprise of the cost accounting method utilized by the IESO to price individual FIT construction projects. Key assumptions involving debt, anticipated capital expenditures and expected revenue constitute financial analysis and are part of the IESO's commercially sensitive business plan regarding the construction of FIT projects.

---

<sup>4</sup> Toronto: Queen's Printer, 1980.

<sup>5</sup> Orders PO-3031 and PO-3042.

[38] The IESO takes the position that “modelling assumptions, valuations and other similar formulate” have been found to constitute financial or commercial information by this office.<sup>6</sup>

[39] This information at issue is contained on pages 8 to 11 of record 1 and consist of a 3 page report entitled “Assumptions in Wind Model Analysis” and a 1 page excerpt from the consultant’s report.

[40] The appellant’s representations do not appear to dispute that the records contain financial or commercial information.

[41] Financial and commercial information have been defined in prior orders as follows:

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>7</sup>

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

[42] Having regard to the IESO’s submissions, along with the records themselves, I am satisfied that the withheld information represents information relating to money that pertains directly to contractual or commercial matters.

[43] Accordingly, I find that this information contains “financial information” and/or “commercial information” within the meaning of those terms defined by this office and am satisfied that the first part of the three-part test in section 18(1)(a) has been met.

## ***Part 2: belongs to***

[44] For information to “belong to” an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

---

<sup>6</sup> Order PO-2019.

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

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

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

[45] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,<sup>10</sup> customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.<sup>11</sup>

[46] The IESO submits that it has a proprietary interest in both the assumptions underlying the Wind Model Analysis contained in record 1 and the total sum figure contained in records 1 to 5. In support of this position, the IESO states:

The IESO retained and paid an external consulting firm, [named firm], to assemble the assumptions underlying the Wind Analysis Model. The IESO itself invested extensive resources into collecting information from operators and other industry groups to assemble the pricing information contained in the assumptions. It is through the work of [the consulting firm], combined with IESO's own policy analysis, that the Wind Model Analysis formula was created. A significant expenditure of money and the application of skill and effort therefore went into the development of this model. This demonstrates both the IESO's proprietary interest in the information in question and its inherent monetary value to the IESO.

The assumptions underlying the Wind Model Analysis should be recognized as having the "quality of confidence" required by law. This model is not known outside of the IESO. The IESO has ever published any information regarding the methodology it uses to price FIT contracts. In fact, the circulation of this information is limited even within the IESO itself, with only senior management being aware of the contents of this model.

[47] With respect to the "total free cash flow for equity sum", the IESO goes on to state:

The application of the Wind Analysis Model was used in the calculation of the total free cash flow for equity sum in [the] spreadsheets contained in Records 1 through 5. That sum is therefore also a product of the significant expenditures of money and the application of skill of both [the consulting firm] and the IESO.

---

<sup>10</sup> Order P-636.

<sup>11</sup> Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

[Order PO-3042 supports] the argument that financial projection information that has been prepared by external consulting firms has value to an institution as confidential information and therefore "belong" to that institution.

Like the assumptions underlying the Wind Model Analysis, the total free cash flow for equity sum has the "quality of confidence" required by law. These sums have never been published and are only known by select executives within the IESO. This information belongs to the IESO and must be protected from misappropriation by another party.

[48] The appellant states:

... the IESO is still wasting everyone's time with a concocted red herring about why their model and its inputs ought to remain secret, to repeat a point that I have repeated often ...I am not – emphasize NOT – seeking the details of their model, just the output of the model...

In my September 16, 2014 letter, I explained that the information I am seeking is, "a historical matter of general interest to electricity consumers and of direct interest to residents of [specified geographic location] but of no direct interest to me." The "fear" the IESO speaks of is that consumers and wind turbine neighbours might become better educated about what is driving the trends they are experiencing.

Ontario's electricity consumers are captive. We must pay for the output of the two wind power contracts in question. The public has no access to public utility regulation that might help explain what we are paying for from these 20 year wind power FIT contracts.

[49] In its reply representations, the IESO advises that the information at issue contains "...estimations that may or may not come to fruition depending on a number of factors". The IESO also submits that the "... contract price for FIT contracts is already public, and that [it is this] price that factors into the determination of rates paid by ratepayers".

[50] The confidential portion of the IESO's reply representations provided details of the type of information the estimates contain and how that information could be used by others.

[51] Based on the IESO's representations, I am satisfied that the information at issue "belongs to" the IESO as a result of its expenditure of money and application of skill and effort to develop the information. In making this decision, I also accept the IESO's submission that the information at issue is not known outside the institution and relates to information it developed partly through the retention of the consulting firm. Accordingly, I find that the second part of the three-part test in section 18(1)(a) has

been met.

***Part 3: monetary value***

[52] To have “monetary value”, the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.<sup>12</sup>

[53] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.<sup>13</sup> Nor does the fact, on its own, that the information has been kept confidential.<sup>14</sup>

[54] The IESO submits that the information at issue has an inherent monetary value. In support of this argument, the IESO states:

Both the assumptions underlying the [Wind Model Analysis] and the total free cash flow for equity sum have inherent monetary value for the IESO for planning and investing purposes. Their value goes beyond the mere cost to the IESO of having the model and projections developed by [the consulting firm]. Indeed, this information derives its value from being kept confidential.

The IESO retained [the consulting firm] to create the Wind Model Analysis so that it could carefully plan investment in alternative energy projects in Ontario. Among other things, the Wind Model Analysis allowed the IESO to consider financial risk, and this information therefore has inherent monetary value to the IESO. They did so as a competitive market actor.

...

The IESO benefits from the maintenance of a competitive market of providers of various capacities willing to enter into FIT contracts. The modelling assumptions allowed the IESO to consider profitability. The IESO should be free to develop such assumptions without fear that they will be later mischaracterized or applied for an unrelated purpose.

The total free cash flow for equity sum also has monetary value. The appellant has already received the free cash flow for equity numbers in relation to the projects referred to in his access request. In those

---

<sup>12</sup> Orders M-654 and PO-2226.

<sup>13</sup> Orders P-1281 and PO-2166.

<sup>14</sup> Order PO-2724.

instances, the IESO used its discretion and released information for projects that had already reached commercial operation.

[55] The IESO also provided confidential submissions in support of its position that disclosure of the information at issue would result in direct losses to the IESO.

[56] Finally, the IESO states that:

... [p]art of the IESO's mandate is to procure new supplies of renewable energy through contracts in order to achieve the targets set by the government for conservation and renewable energy generation in Ontario. The FIT program encourages and promotes the greater use of renewable energy sources. The fundamental objective of the FIT program is to facilitate the increased development of renewable generating facilities in Ontario. Permitting the release of financial estimate information about the consequences of projects moving forward would be contrary to this objective.

Planning information and profit projections have been held to have inherent monetary value [in Order PO-3031]. The ability to do financial planning and act as an efficient market actor is fundamental to the IESO's function.

[57] In response, the appellant submits the facts in this appeal are distinguishable from those in Order PO-3031. He argues that in Order PO-3031, the information at issue related to profit projections for a project not yet commenced. Whereas in this appeal, the information at issue relates to projects the IESO has already commenced. In support of this position, the appellant states that the "[e]xemptions available to business development financial information ought not to protect historical information where contracts are already locked in".

[58] The IESO provided the following response to the appellant's argument in its reply representations:

The total free cash flow for equity sums are not calculations of profitability and are not historical information...They are estimations that may or may not come to fruition depending on a number of factors.

The monetary value of the total free cash flow for equity sum is not impacted by whether or not a FIT project is already operating. The monetary value lies in how that sum can be used to inform the IESO's business decisions. Disclosure of such information could only be detrimental to the IESO's relationships with its FIT suppliers...

[59] The IESO also provided confidential submissions in support of its position that the information at issue is "essential" to its "planning and investment decisions".

*Decision and Analysis*

[60] The main crux of the appellant's submission is that the information at issue relates to wind turbine projects that have already commenced and are subject to a contractual arrangement with the IESO. The appellant takes the position that section 18(1)(a) should not be used to "protect historical information where contracts are already locked in". The appellant also submits that the findings in Order PO-3031 should not be applied to the circumstances in this appeal because in that order, the records at issue related to an incomplete project.

[61] In Order PO-3031, Adjudicator Daphne Loukidelis found that records containing financial projection information had an inherent monetary value for "planning and investment purposes" and thus qualified for exemption under section 18(1)(a). In making her decision, Adjudicator Loukidelis noted that the records inherent monetary value went beyond the mere cost to the institution of having the projections developed and produced by its consultants.

[62] It is helpful to organize the type of information at issue in this appeal in two broad categories. There is the total sum figure for the free cash flow for equity sum which appears on the bottom of the spreadsheets contained in records 1 to 5. The spreadsheets contain information about the equity profit, equity spent and free cash flow for equity sum for each project. The IESO disclosed the free cash flow for equity sum relating to the two wind turbine projects identified in the appellant's request to him. However, the IESO withheld the gross total of the free cash flow for equity sum for the combined projects reported on the spreadsheet.<sup>15</sup>

[63] The remaining information at issue is a 3 page report entitled "Assumptions in Wind Model Analysis" and a 1 page excerpt from the consultant's final report contained in the bundle of records identified as record 1. The information at issue describes various calculations which take into consideration capital expenditures, operational and maintenance budgets and debt/equity parameters, some of which appear to have been based on the assumptions identified by the IESO's consultant.

[64] I have carefully reviewed the information at issue along with the representations of the parties and find that only the information relating to the assumptions identified by the consultant has intrinsic monetary value. In my view, if this information is disclosed it would deprive the IESO of the monetary value of the information. This information consists of financial projections based on the advice, methodology and formulas identified by the consultants retained by the IESO. I find that, this information has an inherent monetary value for the IESO for its planning and investment purposes. Accordingly, I conclude that this information qualifies for exemption under section

---

<sup>15</sup> The portions of the spreadsheets which contain information about other projects was identified by the IESO as not responsive to the appellant's request. However, the gross total of the free cash flow to equity sum was identified as responsive to the request.

18(1)(a) as the third requirement of the three-part test has been met.

[65] However, I am not satisfied that IESO submissions and the records themselves provide sufficient evidence to demonstrate that disclosure of the gross total for the free cash flow to equity sum located on the bottom of the spreadsheets would deprive the IESO of the monetary value of this information. The IESO submits that the release of this information would result in a direct loss as disclosure of the information would reveal how it prices FIT contracts.

[66] Though I accept the IESO's submission that some of the calculations involved in arriving at the gross total calculation are based on the assumptions and methodology identified by the consultant, I am not satisfied that the withheld total figure has an intrinsic value. In my view, the mere fact that the IESO incurred a cost to develop a formula or methodology to price FIT contracts does not mean that any and all calculations relating to its estimates of current or future revenues automatically also have an intrinsic monetary value.

[67] In addition, even if the appellant was able to obtain the free cash flow to equity sums for each individual project and combine that information with what has already been disclosed to him, there are too many factors involved in the arriving at the gross total sum withheld from the spreadsheets to give rise to the harm identified by the IESO. The free cash flow to equity sum estimates the total amount of money that may be able for profit after all expenses, debts and reinvestments are paid for the wind farms identified on the spreadsheet. Some of the calculations factored into the gross total are based on the assumptions identified by the consultant, but other calculations are based on actual expenditures, contractual terms or other items which, in my view, would be eventually identified in other documents such as invoices, contracts or financial reports.

[68] For the reasons stated above, I find that the total sum figure withheld in the spreadsheets does not meet the third requirement for the three-part test in section 18(1)(a). Accordingly, I find that this information does not qualify for exemption under section 18(1)(a) and order the IESO to disclose this information to the requester.

[69] Turning back to the information I found exemption under section 18(1)(a), I will now determine whether the IESO properly exercised its discretion in applying the exemption to this information.

**Issue B: Did the institution exercise its discretion under section 18(1)(a)? If so, should this office uphold the exercise of discretion?**

[70] The section 18(1)(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.



[71] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[72] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>16</sup> This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[73] In my view, the IESO's submissions in support of the application of the section 18(1)(a) exemption reflects the manner in which discretion was exercised. The manner in which the IESO severed the records and provided full access to other records demonstrate that the IESO took into consideration the purpose of the *Act*, namely that information should be available to the public and exemptions from the right of access should be limited and specific. Throughout his representations, the appellant submits that the information at issue should be available to the public. However, I am satisfied that the IESO's submissions regarding the possible application of the public interest override demonstrates that the IESO took into consideration whether disclosure of the information remaining at issue would increase public confidence in how it performs its work.

[74] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.<sup>17</sup> Having regard to the purpose of the section 18 exemption, the nature of the information and the extent to which it is significant and/or sensitive to the IESO, I am satisfied that the IESO properly exercised its discretion, particular when I also consider the information that will be and has already been disclosed to the appellant.

[75] Having regard to the above, I find that the IESO properly exercised its discretion to withhold the information I found exempt under section 18(1)(a). I will now discuss whether the public interest override at section 23 applies to this information.

**Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1)(a) exemption?**

[76] Section 23 states:

---

<sup>16</sup> Order MO-1573.

<sup>17</sup> Toronto: Queen's Printer, 1980.

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

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

[78] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>18</sup>

[79] The IESO submits that there is no compelling public interest in the disclosure of the information at issue. In its representations, the IESO states:

The records at issue in this appeal relate to the planning, negotiation and procurement of commercial FIT contracts in Ontario. They do not pertain to public safety, health, democracy or any other subject matter rising to the level of being a compelling public interest.

[80] The IESO also submits that in the circumstances of this appeal, there is a public interest in non-disclosure of the information at issue. In particular, the IESO argues that disclosure of the information at issue could compromise its fulfillment of its mandate to support and develop green energy in Ontario.

[81] The appellant submits that there is nothing in the *Act* which suggests that the provincial government's green energy activities are exempt from disclosure. Furthermore, the appellant argues that the IESO has a duty to protect the interest of electricity consumers with respect to prices and the adequacy, reliability and quality of electricity services.<sup>19</sup> The appellant submits that:

- disclosure would bring to light information he believes is critical to understanding the underlying dynamics of the provinces' "electricity policy situation and power rates";

---

<sup>18</sup> Order P-244.

<sup>19</sup> Section 1(f) of the *Electricity Act* provides to one of the purposes of the legislation is to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

- disclosure would also inform ratepayers and citizens living in close proximity of wind turbines about “details of how information that might interest them is treated by public officials holding positions of great influence over their welfare”; and
- disclosure of the total free cash flow for equity estimate would “assist electricity consumers in understanding better what is happening behind their power bills” and “help explain the sudden appearance of thousands of wind turbines in rural Ontario”.

[82] In response, the IESO submits that the public interests identified by the appellant have no connection to the actual information at issue in this appeal. The IESO states:

[n]one of the records at issue or any of the information over which the IESO has claimed an exemption could provide the citizenry with information about how electricity is priced...

The contract price for FIT contracts is already public, and that is the price that factors into the determination of rates paid by ratepayers.

[83] In addition, the IESO submits that disclosure of the redacted assumptions and sums would not explain the “sudden appearance of thousands of wind turbines in rural Ontario”. The IESO advises that the provinces increased use of green energy is supported by a number of policy documents available to the public.

### *Decision and analysis*

[84] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.<sup>20</sup> Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>21</sup>

[85] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.<sup>22</sup> Any public interest in *non*-disclosure that may exist also must be considered.<sup>23</sup> A public interest in the non-disclosure of the record may bring the

---

<sup>20</sup> Orders P-984 and PO-2607.

<sup>21</sup> Orders P-984 and PO-2556.

<sup>22</sup> Order P-984.

<sup>23</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

public interest in disclosure below the threshold of “compelling”.<sup>24</sup>

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

[87] In this order, I found that the exemption at section 18(1)(a) applied to the portion of the records which contained the IESO’s proprietary information. The appellant argues that disclosure of this information would inform or enlighten the public about electricity prices. However, I agree with the IESO that the information remaining at issue in this appeal does not respond to the public interest considerations raised by the appellant.

[88] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.<sup>25</sup>

[89] Even if I was persuaded that there was a compelling public interest in the circumstances of this appeal, I would not be satisfied that this interest clearly outweighs the purpose of the section 18(1)(a) exemption. In my view, the interest raised by the appellant does not clearly outweigh the proprietary interests raised by the IESO. Accordingly, I find that the public interest override at section 23 does not apply in the information I found exempt under section 18(1)(a).

**ORDER:**

1. I uphold the IESO’s decision to withhold the information I found exempt under section 18(1)(a) in pages 9 to 11 of record 1. For the sake of clarity, in the copy of record 1 enclosed with the IESO’s order, I have highlighted the portions of the records which **should not** be disclosed to the appellant.
2. I order the IESO to disclose the balance of the withheld records to the appellant by **November 12, 2015**.
3. In order to verify compliance with order provision 1, I reserve the right to require a copy of the record disclosed by the IESO to be provided to me.

Original Signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

October 21, 2015 \_\_\_\_\_

<sup>24</sup> Orders PO-2072-F, PO-2098-R and PO-3197.

<sup>25</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

