Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3574

Appeal PA11-546

Independent Electricity System Operator

January 29, 2016

Summary: The OPA (now IESO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a specific wind energy project. The IESO granted partial access to some records, but denied access to others under the mandatory exemption in sections 17(1) (third party information) and 21(1) (personal privacy). The requester appealed the access decision. During the mediation and adjudication stages of the appeal, its scope was narrowed due to the removal of certain information by the appellant and due to previous orders addressing the exact same records. In this order, the adjudicator partly upholds the IESO's access decision under section 17(1), concludes that the public interest override does not apply to the information exempt on that basis, and orders the IESO to disclose the non-exempt records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 17(1) and 23.

Orders Considered: Orders P-246, PO-2478, PO-2965, PO-3530 and PO-3545.

OVERVIEW:

[1] Under the mandate of the *Green Energy Act*, Ontario is seeking to diversify the sources of its electricity supply and promote the use of cleaner, renewable energy sources and technologies, such as wind energy. To carry out this mandate, the

Independent Electricity System Operator (IESO)[1] administers the Feed-In Tariff (FIT) Program on the province's behalf, under which energy is procured from renewable energy projects under contract with suppliers. These arrangements are called FIT contracts. This order deals with records related to the FIT contract for a certain wind energy project.

[2] A community association submitted a request under the *Act* to the IESO, seeking access to information related to this wind energy project:

- the application and supporting documentation, submitted for a FIT Contract, along with any correspondence,
- the applicable FIT contract (excluding the publicly available schedules),[2]
- any amendments or revisions to the FIT contract,
- any correspondence or communication between the [IESO] and the proponent in respect of the contract and/or application process from September 1, 2009 and thereafter.[3]

[3] Prior to making its decision on access to the records identified as responsive to this request, the IESO notified the company named in the request (the third party), in accordance with section 28(1)(a) of the *Act*, to seek its views regarding disclosure of the records. The third party responded to the notification, providing consent to disclose the records, in part, and offering submissions as to why the remaining information should be withheld. The IESO subsequently issued an access decision to the requester, partially disclosing the records, but relying on the mandatory exemptions in section 17(1) (third party information) and 21(1) (personal privacy) to withhold certain information.

[4] The requester appealed the IESO's decision to this office and a mediator was appointed to explore resolution. During the mediation stage of the appeal, the appellant removed some information from the scope of the appeal and the third party agreed to disclose additional information to the appellant. However, a fully mediated resolution of the appeal was not possible because the appellant wished to pursue access to the remaining information that had been withheld.

[5] The appeal was transferred to the adjudication stage of the appeal process,

---

[1] Formerly known as the Ontario Power Authority, or OPA, the institution will be referred to by its current name in this order, even though the initial access request was submitted to the OPA. The Ministry of the Environment and Climate Change is also referred to by its current name in this order.

[2] FIT contracts are standard form documents and the schedules to them are publicly available on the IESO's website.

[3] In this context, "thereafter" means the date of the request, which was July 20, 2011.

where an adjudicator conducts an inquiry under the *Act*. The adjudicator who was formerly responsible for this appeal sent a Notice of Inquiry setting out the facts and issues on appeal to the IESO and the third party, initially. Both of these parties submitted representations. Subsequently, the adjudicator sent a Notice of Inquiry to the appellant along with a complete copy of the IESO's representations and the non-confidential portions of the third party's representations. The appellant submitted representations on the issues and also confirmed that it would remove additional information from the scope of the appeal. The IESO and the third party were given an opportunity to reply to the appellant's representations. The adjudicator asked them to respond, in particular, to the appellant's submissions on the second and third requirements of the section 17(1) exemption and the possible application of the public interest override in section 23 of the *Act*. Both parties did so.

[6] The appeal was subsequently transferred to me for disposition. Upon review of the file, I concluded that additional clarification as to its scope was required from the appellant. My reason for doing so was that there were other appeals relating to the same wind energy project that involved the same parties, but which were more recent in origin. I sought clarification and confirmation from the appellant, which I received and considered prior to preparing this order.

[7] In this order, I partly uphold IESO's section 17(1) claim, but order the rest of the withheld information disclosed.

RECORDS:

[8] The only index of records previously prepared in this appeal was created by the third party at the request stage. This index contained five tabbed portions representing categories of responsive records identified by the third party as: (1) FIT application and contract; (2) & (3) contract amendment submissions; (4) quarterly reports; (5) miscellaneous records, including correspondence and emails related to Tabs 1-4.[4] For ease of reference in this order, I maintained the third party's numbering system, using the relevant tab and figure numbers given to the records in the index.[5]

[9] For reasons discussed in the preliminary issue below, there are only

---

[4] The index did not consecutively number the records or describe them (general nature, length or date); nor did it account for disclosures made subsequent to the initial decision, including the additional disclosures agreed to by the third party in March 2013. Its format also did not permit identification of the information removed from the scope of the appeal by the appellant during mediation. For the purpose of adjudicating this appeal, I prepared a working index of records that reflected the successive access decisions and the removal of information from the scope of the appeal.

[5] For example, the record listed under Tab 1, Figure 4 in the third party index is identified as record 1.4 in this order.

approximately 124 pages of records, or portions of records, remaining at issue.

ISSUES:

Preliminary Issue: What is the proper scope of the records at issue in this order?

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

B. Do the legal descriptions of the turbine host sites qualify as "personal information?"

C. Is there a compelling public interest in disclosure of the records sufficient to outweigh the purpose of section 17(1)?

DISCUSSION:

PRELIMINARY ISSUE: What is the proper scope of the records at issue in this order?

[10] To be considered responsive to the request, records must "reasonably relate" to the request.[6] Upon review of the records identified as responsive in preparation for the disposition of this appeal, I noted that records, or portions of them, contained information that is not reasonably related to the appellant's request. Consequently, I will address the removal of this information as a preliminary matter. I will also address other scope-related matters as they affect the records at issue in this order.

Non-responsive – date range

[11] First, I noted that the binder of records (and index prepared by the third party) contained documents at Tab 5 that are dated after July 20, 2011, which is the date of this request. Since records 5.24-5.27 fall outside the date range of the request and are not responsive to it, I will not address them further in this order.

Non-responsive – other projects

[12] Second, several records that consist of strings of email correspondence contain information relating to the third party's other wind projects. As those other wind energy projects are not "reasonably related" to the request here, I will remove that non-responsive information from the scope of this appeal. Specifically, based on the subject line of the email identified as record 2.6, I conclude that it is non-responsive and I will

[6] Orders P-880 and PO-2661.

not be reviewing its possible exemption. In addition, the email strings at records 5.2, 5.4 and 5.6 each contain information about other wind energy projects of the third party. I will still consider the possible application of section 17(1) to the portions of these emails that are responsive to the request, but I will not review the non-responsive portions relating to other projects.

Information removed from scope by appellant

[13] During the inquiry into this appeal, the appellant confirmed (in representations provided in March 2014) that access was not being sought to the following information withheld by the IESO under section 21(1) or section 17(1): phone numbers, addresses and email addresses of individuals, including those parties entering into lease agreements with the third party; banking information;[7] and the major financial terms of the contract. Based on the particular type of information removed from the appeal's scope at that time, I have also removed two other types of information from the scope of this appeal: first, I conclude that the appellant already knows and, hence, does not seek access to the names of the individuals who leased land to the third party for this project; and, second, I also conclude that the appellant does not seek access to the third party's GST number.

Previously adjudicated records

[14] Finally, there have been other appeals with this office involving the same parties, the same wind project and related subject matter in which orders had already been issued. In some of these appeals, the requests bore sufficient similarity that it appeared likely that there would be overlap in terms of the responsive records and issues. I decided to contact the appellant to clarify and confirm their intentions, given the passage of time since they had submitted representations and my view that avoiding duplication to the extent possible was desirable.

[15] I wrote to the appellant to convey my preliminary view that some of the records at issue in this appeal were duplicates of records addressed by Adjudicator Diane Smith in Order PO-3530. In particular, I noted that Adjudicator Smith found that license, site lease, option to lease and amending agreements between the third party and identified individuals were exempt in Order PO-3530 because they fit within the mandatory exemption in section 17(1).[8] Accordingly, I advised the appellant that I intended not to proceed with determining the application of section 17(1) to records that I could conclude are identical to those before me in this appeal, such as the leasing agreements. I also asked for confirmation as to whether or not the information specifically identified in the appellant's March 2014 representations remained of

---

[7] Record 1.25; these types of information, particularly email addresses, appear throughout the records.
[8] See paragraph 85 at pages 16-17 of Order PO-3530, which was issued on September 3, 2015.

interest, given the passage of time and the possible availability of that information from other (public) sources. In the March 2014 representations, the appellant had confirmed that it specifically sought face pages and schedules to the FIT contracts, generating capacity of the turbines, term of the contract, and applicable "in force" milestone dates.

[16] In response, the appellant agreed that they did not wish to pursue access to information that has already been the subject of adjudication in past orders.[9] The appellant also advised that they no longer sought access to the generating capacity of the turbines or the term of the FIT contract. Therefore, before preparing this order, I reviewed the records once again to identify and remove the information that has recently been confirmed to be no longer at issue.[10]

Issue A: Does the mandatory exemption for confidential third party information in section 17(1) apply to the records?

[17] The IESO and the third party submit that the undisclosed portions of the wind energy project records are exempt from disclosure under the mandatory third party information exemption in section 17(1)(a) and (c) of the *Act,* which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[18] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[11]

---

[9] The three conditions of issue estoppel may also be met: (1) the same question has been decided, (2) the (judicial) decision which is said to create the estoppel was final; and, (3) the parties to the decision were the same persons as the parties to the proceedings in which the estoppel is raised. See *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, and Orders PO-2858–I, PO-3065 and PO-3543.

[10] Removed from the scope of this appeal (PA11-546) as previously adjudicated by Adjudicator Smith in Appeal PA14-5/Order PO-3530 are those identified as records 1.8, 1.10, 1.11 [1.20], 1.12 [1.18, 1.19], 1.17, 1.21, 1.22 [1.23], 1.24, 5.11, 5.14, 5.16, 5.18 and 5.21. Many of these records are themselves duplicates of one another [identified in brackets]. Additionally, although record 5.8 may be the duplicate of record 106 in Order PO-3530, I discuss it below.

[11] *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.).

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[12]

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

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.

[20] During the inquiry into this appeal, the IESO did not offer representations in support of the application of section 17(1), choosing instead to adopt the position and arguments of the third party. Further, the submissions provided by the parties are outlined below in a condensed form that also reflects the removal of certain information and records from the scope of the appeal, as discussed above.

Part 1: type of information

[21] The third party submits that the records contain commercial and technical information[13] consisting of: contractual agreements and amendments, including those with private landowners; coordinates and property identifiers relating to connection points, project locations and feeder lines; certain FIT contract notice provisions;[14] non-public correspondence, comments, opinions and proposed public statements; and detailed technical work plans and construction schedules.

[22] As stated, the IESO did not provide separate submissions on section 17(1). The appellant's representations do not address the first part of the test under section 17(1).

[23] Based on my review of the records that remain at issue in this appeal, I am satisfied that they contain commercial information for the purpose of part one of the test for exemption under section 17(1) of the *Act*.

[24] This type of information has been defined by past orders of this office, as

---

[12] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[13] The third party also submitted that the records contain financial information, but that information has been removed from the scope of the appeal.
[14] The title of those notice provisions was withheld from the third party's representations.

follows:

> *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.[15] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[16]

[25] The records reflect terms, obligations and conditions of the buying, selling or exchange of services by the IESO with respect to the third party and the wind energy project, which fits within the scope of the definition of commercial information for the purpose of part one of section 17(1). On the other hand, I do not accept that the information remaining at issue fits within the definition of technical information because the level of detail or description in the records is not sufficient for this category. The numeric or alphanumeric values associated with the site coordinates or connection points, for example, do not describe the construction, operation or maintenance of a structure, process, equipment or thing. As data points, they form a necessary part of the commercial agreement between the IESO and the third party, but do not comprise discrete technical information under section 17(1). Nonetheless, the agreement contains commercial information, and I find that the requirements of part one of the section 17(1) test are met.

Part 2: supplied in confidence

[26] In order for me to find that the second part of the test for exemption under section 17(1) has been met, I must be satisfied that the third party "supplied" the information at issue to the IESO in confidence, either implicitly or explicitly.

[27] Requiring evidence that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the confidential informational assets of third parties.[17] 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.[18]

[28] The contents of a contract involving an institution and a third party will not usually qualify as having been "supplied" for the purpose of section 17(1) because the terms of it are viewed as mutually generated, rather than "supplied" by the third party. This is the case even where the contract is preceded by little or no negotiation, or

---

[15] Order PO-2010.
[16] Order P-1621.
[17] Order MO-1706.
[18] Orders PO-2020 and PO-2043.

where the final agreement reflects information that originated from a single party. Another way of expressing this is that, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not, therefore, considered to be "supplied."[19] This approach has been approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above, and many other decisions.[20] Most recently, the approach was upheld in *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*.[21]

[29] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[22]

[30] In order to satisfy the "in confidence" component of part two, the third party and the IESO, who are resisting disclosure, must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[23]

[31] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and

---

[19] Orders MO-1706, PO-2371, PO-2384.
[20] See Orders PO-2018, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 (Div. Ct.) and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct) (*CMPA*). See also *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (Can LII) and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[21] 2015 ONSC 1392 (CanLII) (*Aecon Construction*), upholding PO-3311.
[22] Orders MO-1706, PO-2384, PO-2435 and PO-2497, upheld in *CMPA*, cited above.
[23] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[24]

Representations

[32] According to the third party, the records were supplied to the IESO to facilitate the development of the wind project. Even where the responsive record was created by the IESO, such as "standard form of FIT contract," the third party maintains that it was generated from the information supplied by it; therefore, the disclosure would reveal information that was originally supplied.

[33] The third party states that given the opposition to the development, it has consistently acted with caution to protect the information from disclosure, adding that even though the records were not marked "private and confidential," they "were supplied to the [IESO] pursuant to a business relationship in which correspondence and shared information were expected to remain confidential." The third party argues that there was a reasonable expectation of confidence that they would not be disclosed, including with respect to any access request under the *Act* and notwithstanding "the acknowledgement [in the FIT contract] that all information supplied to the OPA is subject to … requests under the Act…"

[34] The appellant acknowledges that it is opposed to this wind energy project and explains that the opposition is based on

> … the Project and the related REA[25] application [not being] in compliance with the *Green Energy Act* and related regulations. [The third party] has consistently used all possible avenues to prevent us from properly assessing the Project including withholding as much information as possible, even though we are entitled to this information under FIPPA.

[35] The appellant submits that because it is common knowledge that wind developments are controversial, the third party "was well aware that affected parties would be interested in all information relating to the FIT contract." The appellant refers to section 7.5 of the FIT contract that states it is subject to FIPPA; this provision acknowledges that the *Act* may require disclosure of "Confidential Information," defined therein as "subject to limited exceptions 'all information that is identified as confidential which is furnished … in relation to the FIT Contract'." According to the appellant, the third party cannot have had a reasonable expectation of confidentiality due to this clause.

---

[24] Orders PO-2043, PO-2371, and PO-2497, upheld in *CMPA*, cited above.

[25] REA stands for Renewable Energy Approval. In Ontario, an REA application is submitted to the Ministry of the Environment and Climate Change to obtain approval for certain types of renewable energy projects (solar, wind or bio-energy). The MOECC issues REAs pursuant to Ontario Regulation 359/09, made under part V.0.1 of the *Environmental Protection Act*, R.S.O. 1990, c. E 19.

[36] The third party argues that mere interest in the "redacted portions of the records does not automatically entitle the appellant to have access under FIPPA." According to the third party, the FIPPA acknowledgement should not be construed to undermine its (the third party's) understanding that the records "would only be publicly disclosed if required by law or court order." In reply to the appellant's comments about the FIT contract's FIPPA provision, the third party sets the provision out in its entirety[26] and submits that while the provision serves to recognize that the records are subject to the *Act*, it is not determinative of whether the appellant is entitled to access the withheld portions. The third party characterizes the FIPPA provision as giving it assurance that any access request would be subject to the applicable exemptions from disclosure, including section 17(1).

Analysis and findings

Supplied

[37] As noted above, section 17(1) protects sensitive business information in a contract only where it is demonstrably the same confidential "informational asset" originally supplied by a third party, and not where the evidence points to that same information representing the negotiated intention of the parties.[27]

[38] Ontario, like all Canadian jurisdictions, recognizes that the terms or content of a contract may be exempt where they reveal, or could be used to infer, proprietary information.[28] In my view, this helps illustrate the distinction between what meets the supplied test in this appeal and what does not, where the records are related to a contract, but are not (for the most part) the actual contract. The records remaining at issue in this appeal consist of certain withheld portions of the FIT contract between the IESO and the third party, amendments to elements of the agreement, submissions made by the third party under the contract, and miscellaneous communications, correspondence and schedules. The third party, with IESO's support, opposes the disclosure of the withheld portions of these records.

[39] Based on my review of the records, I conclude that some of the withheld information was not "supplied" by the third party for the purpose of section 17(1) of the *Act* because it reflects mutually agreed-upon terms or other aspects of the wind energy project between the IESO and the third party or originated from the IESO. However, some other portions of the records do satisfy the "supplied" requirement. Specifically, I

---

[26] Article 7.5 of Schedule 1, General Terms and Conditions. The third party provided a complete copy of the FIT contract as an attachment to its reply representations, stating that version 1.3.0 was executed March 9, 2010. The appellant refers to version 1.3.1. Whether it was version 1.3.0 or version 1.3.1 of the contract that was executed is not material for my findings in this order.
[27] See Order PO-3450.
[28] Orders PO-3176 (paragraph 109) and PO-3311, upheld in *Aecon Construction*, cited above.

find that the following types of information were either supplied directly by the third party to the IESO or that disclosure would reveal information supplied by it to the IESO:

- information in the FIT program application relating to access rights (record 1.6);
- conditions contained in the FIT application relating to commercial operation dates (record 1.7);
- legal property descriptions and GPS coordinates for turbines in various documents (records 1.7, 1.16, 5.8,[29] 5.10);
- land registry documents (record 1.13);[30]
- third party consultant's views (record 2.4);
- project timelines/schedules (records 2.10, 3.2);
- information provided by the third party in correspondence to the Ministry of the Environment and Climate Change (records 2.11, 2.17, 2.18, 2.20);
- notice documents submitted to the IESO (records 2.12, 2.25, 3.2, 3.4);
- project status or progress reports (records 4.1, 4.3, 4.5, 4.7);
- emails to the IESO from the third party (records 5.2, 5.6, 5.10, 5.13, 5.15, 5.17, 5.19, 5.20); and
- amendment forms submitted to IESO by the third party (records 5.12, 5.17, 5.19).[31]

[40] I note here that the IESO decided, and the third party consented, to disclose large portions of all of these records. Many of the records listed above contain more than one severance and my finding that a record contains information that meets the "supplied" test does not necessarily apply to all of the severances in those records. Some portions of certain records were removed as non-responsive and other portions were not "supplied," as discussed below.

---

[29] Record 5.8 is a duplicate or near-duplicate of the document identified as record 106 in Order PO-3530. Adjudicator Smith upheld the severance of the legal descriptions for turbines 7-10. I reach a different conclusion under part 3, below. Additionally, Adjudicator Smith ordered legal descriptions/coordinates for turbines disclosed in Order PO-3530 where they appeared in record 131, which matches record 5.11 in this appeal (removed from scope of the appeal, above.)

[30] Information about the lease agreements that were removed from the scope of this appeal appears on page 3 of record 1.13 and is not at issue.

[31] This list should not be taken to be exhaustive since snippets of these types of information may also appear in other records that are not listed.

[41] However, there are other types of withheld information that I find not to have been "supplied" by the third party, and these include:

- Handwritten notes on some FIT program documents (record 1.4);
- References to submitting a certain type of notice document (records 2.1, 2.2);
- Milestone commercial operation dates (records 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8);
- Hydro connection information (record 5.1);
- Email subject lines (records 5.2, 5.4, 5.6); and
- Emails between the IESO and the third party (records 5.9, 5.17, 5.20)

[42] In my findings on "supplied," above, I refer to a certain type of "notice document." The title of that notice provision was severed from the third party's representations and was withheld during the inquiry stage of this appeal at the request of the third party. However, the IESO named the provision in its representations, which were shared with the appellant and the third party admits in its non-confidential representations that the IESO uses a standard form of FIT contract. Current versions of these contracts and the forms used by third party suppliers to make submissions under that notice provision are publicly available on the IESO's website. Therefore, insofar as the inclusion of this type of notice provision is both acknowledged by the third party in its own representations and is publicly available, I find that disclosure of the name of the provision would not reveal "supplied" information. However, I find that the content of the third party's submissions under the notice provision was "supplied," and I will consider whether harm could reasonably be expected to result from disclosure, below.

[43] Record 1.4 is titled "FIT Program Application Package Review Form." This is an IESO-generated document, completed by IESO staff upon review of the application submitted by the third party. The withheld notes on page 4 of this record were also written by IESO staff. I find that these notes were not "supplied."

[44] Regarding record 2.2, I note that the withheld information consists of the IESO's terms for accepting the third party's first claim under the notice provision. The withheld terms and conditions under which the IESO approved the third party's claim were not supplied by the third party, notwithstanding the fact that they may have been based on information originally provided by the third party.

[45] Regarding the milestone commercial operation dates (MCODs) in records 4.2, 4.3, 4.4, 4.5 - 4.8, I find that these dates were not supplied by the third party. Rather, the dates were set by the IESO in response to the third party's event notice

submissions.[32]

[46] The hydro connection point information may have been provided as a requirement of the third party's FIT program application, but it is not information that belongs to the third party. It is obtained by agreement with Hydro One; it is susceptible to change and its disclosure would not reveal underlying, non-negotiated confidential information. Therefore, I find that it is not supplied.

[47] With respect to the email subject lines (that are responsive) and certain email content identified in the list above, I find that this information is not "supplied." In so finding, I also considered whether any of that information, including the terms of the event notice approvals and the MCODs, fits within either of the two exceptions to the "supplied" rule. I am satisfied that disclosing the withheld information would not permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the IESO. I am also satisfied that the withheld information is not immutable; that is, it is not characterized by a lack of susceptibility to change. Therefore, I find that the "inferred disclosure" and "immutability" exceptions do not apply.

[48] I will now review whether the "supplied" information was also provided to the IESO "in confidence," as that term is understood under section 17(1) of the *Act.*

In confidence

[49] As stated, to meet the "in confidence" requirement of part two, the party resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[33]

[50] As the parties acknowledge, the FIT Contract contains a clause that specifically contemplates the possibility of disclosure under the *Act.*[34] This FIPPA provision expressly states that the *Act* "applies to and governs all Confidential Information" in the IESO's custody or control and that the *Act* may require disclosure of it. Therefore, although the third party may have entered into the contract with the desire to protect the confidentiality of information it considered to be commercially sensitive, it was put on notice that the IESO, as an institution under the *Act*, could be required to disclose it

---

[32] MCODs are distinct from milestone schedules submitted by the contracting party as a means of conveying a commitment to a schedule of dates by which various stages of a project will be completed. In Order PO-2478, the adjudicator found that a milestone schedule was "supplied" because it formed part of a proposal to develop a wind power generating facility, not the final agreement. Regardless, the milestone schedule failed to meet part 3 of section 17(1) and was ordered disclosed.

[33] Orders PO-2497 (upheld in *CMPA*) and PO-3545.

[34] Article 7.5, also referred to in this order as the FIPPA provision.

pursuant to the *Act*. In this context, any understanding the third party claims to have had that its confidential information was protected from disclosure, "including with respect to any request under any freedom of information legislation" cannot be said to be reasonable.

[51] The third party acknowledges in its reply representations that the FIPPA provision contemplates disclosure under the *Act*, subject to the established application of the exemptions, including section 17(1). The clause speaks to compliance with the *Act,* while acknowledging that the records supplied by the third party to the IESO are subject to scrutiny as to whether exemptions properly apply.[35] Past orders have also held that the inclusion of a notice provision that identifies the *Act* applying to the information is important evidence in determining the "in confidence" component of part 2 of the test.[36] A third party's expectation of confidence may still be found to be reasonable despite such a clause, particularly where that party provides evidence about the confidentiality of specific information. Here, the third party's evidence about its expectation of confidentiality regarding the information it supplied to the IESO is sufficient to satisfy me that this expectation was objectively reasonable *at the time*.[37]

[52] In view of my finding that some of the withheld information does not qualify as "supplied," that information is not exempt under section 17(1) because all three parts of the test for exemption must be met.[38] I will order the records that failed to meet the requirements of part two of the section 17(1) test disclosed, subject to the severance of information that was removed from the scope of the appeal, as discussed earlier in this order.

Part 3: harms

[53] I will now review whether the information that satisfied both parts 1 and 2, above, also meets the requirements of the third part of the test under section 17(1).

[54] To meet this part of the test, the parties opposing disclosure are required to provide sufficient evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[39] The failure of a party resisting disclosure to provide the requisite evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of

---

[35] Orders PO-3525, PO-3545 and others.
[36] Orders PO-2371 and PO-2453.
[37] I reach this conclusion here, but acknowledge Assistant Commissioner Liang's comments on the third party's expectation of confidentiality in relation to similar information in Order PO-3545 at paragraph 147.
[38] *Miller Transit, supra*, paragraphs 9 and 27.
[39] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

anything other than the records at issue and the evidence provided by a party in discharging its onus.[40]

Representations

[55] According to the third party, the harms that can reasonably be expected to result from disclosure of the information are "apparent" and "not merely speculative." The third party explains that it has (at the time of the submissions) six wind projects in development in Ontario and has been facing "vocal resistance from anti-wind coalitions," who have "gone out of their way to slow down or thwart wind energy projects." These arguments allude to litigation commenced by the "anti-wind coalition" or supporters respecting this wind energy project. Portions of the third party's representations in this appeal were withheld as confidential during the inquiry, but I have considered them.

[56] The third party lists the five categories of information over which it claims section 17(1) and provides the following submissions on the harms it submits could reasonably be expected to result with their disclosure:[41]

1. *FIT application and contract*: disclosure of the GPS coordinates and property identifiers relating to the project locations would significantly interfere with the third party's ongoing negotiations with [Hydro One and] the IESO, particularly in the context of the anti-wind litigation against these parties. Applies to records 1.7, 1.10 and 1.13.

2. *Events 1 and 2*: the third party's submissions on the harms allegedly resulting from disclosure of information relating to this particular notice provision were withheld as confidential, but relate generally to impacts on its project scheduling, its economic position and negotiations.[42] The third party also argues that disclosure of comments, opinions and proposed responses provided by identified consultants or private correspondence between third party staff, the Ministry of the Environment and Climate Change or leasing landowners would result in harm to those relations. Construction schedules are designed with assumptions and knowledge gained from operating within the wind energy field and disclosure would put the third party at a competitive disadvantage and cause it undue loss. Undue loss would also result from disclosure because "it would allow anti-wind activists to use this information to halt the advancement of the project." Applies to records 2.4, 2.10, 2.11, 2.12, 2.17, 2.18, 2.20, 3.2 and 3.4.

---

[40] Order PO-2020.

[41] Only the arguments relating to *responsive* information that met the first two parts of the test under section 17(1) are set out.

[42] References to this type of harm were withheld in this appeal during the inquiry, but are expressly included in other recent orders with the same parties, including Order PO-3530.

3. *Quarterly reports*: disclosure of information in these records could reasonably be expected to detrimentally affect the third party's economic position and negotiations. Applies to records 4.1, 4.3, 4.5 and 4.7.

4. *Miscellaneous records*: disclosure of information relating to connection points and property identifiers would significantly interfere with ongoing negotiations with the IESO and other parties; disclosure of information related to event claims and resulting amendments would affect the third party's economic position and negotiations. Applies to records 5.2, 5.6, 5.8, 5.10, 5.12, 5.13, 5.15, 5.17 and 5.19.

[57] The third party asserts that disclosure of the described information will also result in prejudice to its position in similar approvals and development processes in jurisdictions outside Ontario, with "far-reaching adverse consequences."

[58] The appellant's response to the third party's submissions is to maintain that the third party has failed to provide "any evidence of reasonable expectation of harm,"[43] let alone "detailed and convincing evidence" of harm. The appellant argues that the third party has only tendered very broad and general evidence that does not rise above speculation. According to the appellant, since the third party was granted this FIT contract and has no competitor in relation to this particular wind project, disclosure of the withheld information could not possibly result in any harm to its competitive position. The appellant's argument is founded on the premise that any potential impact on other projects of the third party is irrelevant to deciding disclosure here.

[59] Regarding the portions of the FIT contract that indicate the exact locations of the wind turbines and lands covered by the project, the appellant states that this information is in the public domain generally through documents issued by the third party and in other public filings.

[60] Acknowledging their opposition to the development of this project, the appellant addresses the third party's arguments about the withheld information (outlined above[44]) by stating that the appellant considers access to the withheld information to be "essential to determine whether [the third party] has complied with applicable legal requirements." Further, the appellant submits that the location and connection information is also essential to permit proper comment on the REA application. These arguments are also outlined under the public interest override discussion, below.

[61] In reply, the third party strongly disputes the appellant's refutation of harm,

---

[43] Emphasis in original.

[44] Again, I set out only those submissions that are relevant to the responsive information that remains at issue in this part of my analysis. For example, this excludes the arguments related to the leasing documents.

stating that due to its lengthy experience in the wind energy business in many countries, it is "keenly aware of how the disclosure of the redacted portions … could harm its competitive position in Ontario and other jurisdictions." The third party argues that the appellant's claim that disclosure of the information relating to this specific wind energy project has no relevance in determining harm to third party interests elsewhere is not supported by the wording of the *Act*: specifically, "FIPPA does not stipulate that any harm must be associated with the precise matter (i.e., [this project]) subject to the FOI request. Section 17(1)(c) simply states that there must be undue loss to any person, which includes a corporate entity…"

[62] The third party notes that the coordinates and property identifiers relating to connection points, project locations and transformer stations are subject to change because they are still being negotiated with Hydro One and the IESO. The third party relies on Order PO-2965 in arguing that the disclosure of this particular information could reasonably be expected to harm its competitive position. Further, the third party states that it has other active wind energy projects in the province and intends to develop additional ones and these could all be "unduly harmed by the release of the information." The third party adds that:

> The disclosure of the redacted portions of the Records would be particularly harmful to [the third party's] competitive position given the nature of the wind energy industry and the controversy which surrounds it. It has been held that the disclosure of information that identifies specific lands whose owners have entered into agreements to host wind turbines and related infrastructure would reasonably be expected to interfere with negotiations involving the landowners (Order PO-2478 at page 17). In his decision, Adjudicator Frank DeVries expressed concern for landowners who had entered into such agreements given the reality that anti-wind coalitions would use the information to "allow" the landowners to "re-think" their position regarding these agreements (Order PO-2478 at page 17).

[63] The third party reiterates the concern about litigation and other actions by anti-wind coalition activists and argues that the undisclosed event notice information could be used by them to frustrate other wind energy projects, thereby causing undue harm. According to the third party, release of the confidential and private communications at issue here would hinder the open and frank discussion about FIT contracts that is necessary to facilitate future REA applications and associated wind energy projects.

[64] Regarding the construction schedules, the third party elaborates on the harms it says could reasonably be expected to result from release: specifically, it would reveal "trade secrets gained from the many years of operation within the industry and [would] give competitors an advantage when designing their own construction schedules." This, in turn, would result in loss to the third party in the form of the time and money

invested in developing those schedules, thereby also damaging its competitive position. The third party relies on Order P-246 where "the IPC found that disclosure of research and development information might reasonably be expected to significantly prejudice the competition position of an affected party as it could lose the benefit of its investment into the development of the production processes."

[65] The third party also submits that the undisclosed information in this appeal must be protected to encourage developers and landowners to work together to establish projects in Ontario to support the government's clean energy mandate by attracting wind power investment. According to the third party, disclosure of the information at issue "would deter developers from applying for FIT contracts as they would have to provide financial, commercial and technical information without any protection or guarantee of confidentiality."

Analysis and findings

[66] Many past orders have addressed the disclosure of information under the *Act* in the context of government procurement and contracting. These orders caution that careful consideration must be given to disclosure by applying the tests developed over time by this office while appreciating the commercial realties of the specific context and the nature of the industry in which it occurs.[45] As the type of contractual arrangement between the IESO and the third party in this appeal also raises issues of transparency and government accountability, these principles are equally applicable here.

[67] As previously noted, the party opposing disclosure of the information under section 17(1) bears the burden of proof. The party resisting disclosure must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[46]

[68] To begin my reasons here, I reject the third party's submission that disclosure of the information at issue in this appeal would deter developers from applying for FIT contracts because "they would have to provide financial, commercial and technical information without any protection or guarantee of confidentiality." It is true that there can be no outright guarantee of confidentiality when third parties contract with institutions. However, the *Act* mandates protection for confidential third party business information, if the evidence tendered establishes that the information meets the requirements of the section 17(1) exemption. I touch on this point in the discussion of the public interest override in section 23, below.

---

[45] See Orders MO-1888, MO-2496-I, PO-2987 and PO-3479.

[46] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[69] Based on my review of the information remaining at issue and the third party's representations, I am satisfied that the following information meets the third part of the test for exemption under section 17(1):

- information relating to access rights and leasing arrangements with individual landowners (record 1.6);
- third party consultant's views (record 2.4);
- information provided by the third party in correspondence to the Ministry of the Environment and Climate Change (records 2.11, 2.17, 2.18, 2.20);
- notice documents submitted to the IESO (records 2.25 and 3.2, in part);
- emails to the IESO from the third party (records 5.17 and 5.19, in part); and
- amendment forms submitted to IESO by the third party (record 5.12, in part).

[70] Much of the information relating to leasing arrangements with affected parties was removed from the scope of this appeal because the release of identical records had been adjudicated in other recent orders. I note that information in record 1.6 is similar, but not identical, to records found exempt in Order PO-3530. On my review of this content, I agree with Adjudicator Smith that disclosure of this type of information could reasonably be expected to significantly interfere with the third party's contractual or other negotiations for the purpose of section 17(1)(a). The harm to be avoided is to the viability of the leasing arrangements necessary to the third party in its carrying out of wind energy projects under FIT contracts. In reaching this conclusion, I accept the third party's point that the reasonable expectation of harm need not relate only to the specific project at issue in this appeal. Section 17(1) is flexible enough to contemplate and accommodate harm prevention in related contexts, given the right circumstances and persuasive evidence.

[71] Next, I am also persuaded that disclosure of information that has been referred to generally as "correspondence and shared information," which is contained in the other record-types listed above, could reasonably be expected to result in harm. Specifically, I find that disclosure of some portions of the notice provision submissions and comments, opinions and proposed responses relating to those submissions that were provided by the third party or its consultants or contained in private correspondence between third party staff and the MOECC could harm relations between these parties. This conclusion rests on my acceptance of the argument that disclosure of these private communications could reasonably be expected to hinder the open and frank discussion about FIT contracts required to facilitate future REA applications and

wind energy projects.[47] I find that disclosure of this particular information could reasonably be expected to significantly interfere with the third party's ability to negotiate under section 17(1)(a) and result in undue loss under section 17(1)(c).

[72] Therefore, for all of the information described above, I find that section 17(1) applies and that the information highlighted in the copies of the records sent to the IESO with this order is exempt.

[73] On the other hand, I am not persuaded by the parties' representations or the content of the following withheld portions of the records that disclosure could reasonably be expected to result in either of the harms contemplated by section 17(1)(a) or (c):

- conditions relating to commercial operation dates (record 1.7);
- legal property descriptions and GPS coordinates for turbines (records 1.7, 1.13, 1.16, 5.8, 5.10);
- project timelines/schedules (records 2.10, 3.2);
- other information provided by the third party in correspondence to the Ministry of the Environment and Climate Change (record 2.11);
- notice documents submitted to the IESO (records 2.12, 2.25, 3.2, 3.4);
- project status or progress reports (records 4.1, 4.3, 4.5, 4.7);
- emails to the IESO from the third party (records 5.2, 5.6, 5.10, 5.13, 5.15, 5.17 (in part) 5.19 (in part)); and
- amendment forms submitted to IESO by the third party (record 5.12, in part).

[74] I note that access was not denied to any of these records, in their entirety. In part, my finding results from the evidence failing to establish the requisite link between the information actually remaining at issue and the alleged harms upon its disclosure. Another factor is the passage of time: these records are dated between 2009 and 2011.

In this context, I am not persuaded that disclosure of the withheld information could reasonably be expected to interfere with the third party's negotiations with Hydro One and the IESO or lead to compromise or undue harm to the third party's position in other approval and development processes. Similarly, I reject the third party's submission that this particular information, if disclosed, could be used by "anti-wind coalitions" to

[47] See Orders PO-3545 and PO-3530.

compromise or halt this project, or others. Recently, in Order PO-3545, Assistant Commissioner Sherry Liang considered – and dismissed – a similar assertion of harm, stating (at paragraph 157):

> The third party's assertion that, in light of previous litigation, access to information requests and ERT appeals, the information at issue "could be exploited by anti-wind activists", does not establish a reasonable expectation of harm. The fact that stakeholders and members of the public have expressed concern over the third party's wind farm projects does not in and of itself establish a reasonable expectation of harm. I fail to see how the specific information in these records could reasonably be expected to be used in a manner leading to the harms described in section 17(1). The public availability of substantially similar information leads me to doubt the assertion of harm, in relation to the disclosure of these records.

[75] Again, a reasonable expectation of harm cannot be established in the absence of a plausible link between the information and the harm. As in Order PO-3545, I find that the mere existence of previous litigation or opposition to the project does not establish a reasonable expectation of harm with disclosure of the undisclosed information in this appeal.

[76] Previously in this order, I concluded that the title of a particular notice provision had not been supplied, while submissions to the IESO (in categories 2 and 3 of the records) did contain some content that was supplied in confidence. I also found that portions of these submissions satisfy part 3 of the test for exemption under section 17(1). However, with specific reference to the remaining portions of those event notice submissions, I am not persuaded that harm to the third party could reasonably be expected to result from its disclosure, thereby amounting to an undue loss to it.

[77] The third party's opposition to disclosure of the construction schedule (or timeline) is premised on concern with it allegedly revealing proprietary design and knowledge accumulated over years of wind energy industry experience, which it claims would result in competitive disadvantage and undue loss to it, as well as undue gain for others. The third party also asserts that there would be undue loss from disclosure because "it would allow anti-wind activists to use this information to halt the advancement of the project." However, I find that there is no reasonable connection between a construction schedule for the years 2010-2013 and these alleged harms. The timeline is now obsolete. Furthermore, I conclude that it does not reveal knowledge or strategy belonging to the third party of the requisite degree of detail that such harm could reasonably be expected to result, if it were to be disclosed.[48] Order P-246, cited

---

[48] See *HKSC Developments, supra,* paragraph 34, and Order MO-2233.

by the third party, is distinguishable because the information at issue was qualitatively different, specific as it was to the research and development of a new product by the third party in that appeal.[49]

[78] I also reject the third party's argument that section 17(1) harms could reasonably be expected with disclosure of the coordinates and property identifiers relating to connection points, transformer stations and turbine locations. As the third party admits, these are subject to change through negotiation. Indeed, with the passage of time, it appears there have been changes. As the appellant points out, such information is publicly available on the third party's website.[50] Additionally, I observe that some of this information is also publicly available through other means, such as the Land Registry Office.[51] It is difficult to see how the harms alleged by the third party could reasonably be expected to occur in this context.

[79] The third party also relies on Order PO-2478 as supporting the exemption of the coordinates and property identifiers because the adjudicator concluded that disclosure of this type of information could result in anti-wind activists interfering with negotiations between the third party and the landowners who would effectively be identified by this release. However, I reject the proposed equivalency of the projected harm that was established in Order PO-2478 with disclosure of information that identifies specific lands whose owners have entered into agreements to host wind turbines and related infrastructure here. In Order PO-2478, there was some evidence that negotiations with the landowners there were ongoing. There is no evidence before me that the negotiations between the third party and the landowners are incomplete or ongoing.

[80] All three parts of the test under section 17(1) must be satisfied for the exemption to apply. I have not been provided with sufficient evidence to support a finding that disclosure of the information listed above could reasonably be expected to significantly prejudice the third party's competitive position or significantly interfere with contractual or other negotiations under section 17(1)(a). I am also not satisfied by the representations that disclosure of the disputed portions could reasonably be expected to result in undue loss to the third party or undue gain to the appellant or others under section 17(1)(c). Having concluded that the third party has failed to provide sufficient

---

[49] Commissioner Tom Wright wrote: "… Du Pont has spent over twelve years in research for HCFC-123. The records provide considerable detail as to the steps taken in researching and developing the product. In addition Du Pont has invested millions of dollars in research and development in the product area. In my view, not only could Du Pont lose the benefit of the money it invested should competitors obtain the information in question and replicate the processes developed by Du Pont, but its competitive position could be damaged regarding the marketability of its product."

[50] By regulation, the third party is required to include legal descriptions of the participating properties in the Project Description Report. The same applies to GPS coordinates of the turbines.

[51] For example, record 1.13 consists of two land registry notices. At land registry offices in Ontario, such registered instruments are open to the public and may be accessed through computer terminals which permit inspection of them for a fee. See the discussion in Order PO-2860.

evidence to persuade me that the harms contemplated by section 17(1)(a) and (c) could reasonably be expected to result with disclosure of the portions of the records at issue, I find that section 17(1) does not apply to the withheld information in my second list, above, and I will order it disclosed.

[81] Since the IESO also claims that section 21(1) (personal privacy) applies to the legal descriptions of the properties where turbines are to be situated, I must review whether or not this information qualifies as the personal information of the individuals who are leasing the land to the third party. The mandatory exemption in section 21(1) can only apply to *personal* information.

Issue B: Do the legal descriptions of the turbine host sites qualify as "personal information?"

[82] The IESO also provided representations on the undisclosed information that it withheld on the basis of the mandatory personal privacy exemption in section 21(1). Of all the identified information, only the legal descriptions of the land where the turbines were (at that point in time) to be situated appear still to be at issue.

[83] "Personal information" is defined in section 2(1) of the *Act.* To fit within the definition, the information must be "recorded information about an identifiable individual," and it must be reasonable to expect that an individual may be identified if the information is disclosed.[52] An exception to the definition is found in section 2(3), which states that "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." Section 2(4) also provides that "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."

[84] The IESO submits that the records contain addresses and legal descriptions of the land owned by the FIT lessors, which qualifies as "personal information" under paragraph (d) of the definition in section 2(1) of the *Act*.[53] According to the IESO, this information consists of "addresses and legal descriptions of land of the lessors doing business with the [third] party. It is both the contact address of the lessor and legal and other descriptions of the lessor's land." The IESO submits that even though a lessor may be a small closely held company, the address or legal description of the property they are leasing out is about them in a personal capacity and so does not fit within the exception in section 2(3). According to the IESO, the lease arrangement reveals something of a personal nature about the individual insofar as the individual may be

---

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

[53] Paragraph (d) of the definition refers to "the address, telephone number, fingerprints or blood type of the individual."

seen to have facilitated the implementation of the FIT contract.[54] The IESO relies on Order P-364 in support of the argument that any information relating to that lessor relates directly to the identifiable individuals who own or manage the company.

Analysis and findings

[85] It should be noted that the IESO's submissions on this issue refer to the "address and legal description" of the turbine locations together. Previously in this order, I confirmed that the lessors' addresses were removed from the scope of this appeal by the appellant.

[86] The IESO relies on Orders PO-2967 and PO-3186. In my view, neither order supports the IESO's position that the legal property descriptions are *about* the lessors in a personal capacity. These orders do not address the issue of whether legal descriptions of property constitute "personal information." Order PO-2967 considered whether certain information about university employees constituted personal or professional information. In Order PO-3186, I reviewed "curriculum vitae" information about the employees of a proponent in the context of a request for a bid submission to determine whether it qualified as "personal information." As for property legal descriptions, I note that previous orders have found that addresses or geographical locations, in and of themselves, do not necessarily constitute "personal information" under section 2(1) of the *Act*.[55] In Order M-15, Commissioner Tom Wright pointed out that a municipal location or address itself could not automatically be equated with the address of its owner. Thus, a municipal address or legal description of a property alone would not necessarily reveal information about an identifiable individual.

[87] I appreciate that the information that has been removed from the scope of the appeal by the appellant – names and addresses of the lessors – may already be within the appellant's knowledge. In this sense, it may seem artificial to divorce the legal property descriptions from that presumably-known information for the purpose of determining whether the descriptions qualify as personal information. At the same time, however, the IESO's own position on access to this information in this appeal is inconsistent. The IESO has only withheld certain turbine coordinates/parcel legal descriptions (i.e. Turbines 7-10) from several of the records. Further, the third party consented to the disclosure of the legal descriptions for Turbines 1 to 6 in these records. Additionally, and as I noted under the section 17(1) discussion above, legal descriptions of the (current) participating properties are publicly available on the third party's own website.[56]

---

[54] The IESO cites Orders PO-2967, PO-2979 and PO-3186.
[55] Orders 23, M-15, M-176, M-179 and M-181.
[56] Not only the legal descriptions of the parcels of land that will be used for eight (no longer 10) turbines, but also the GPS coordinates, appear in the Project Description Report on the third party's website.

[88] Based on all of the circumstances surrounding the legal property descriptions, I adopt the reasoning in Order M-15, and I find that the legal descriptions of the lands where the turbines are to be hosted are about the property and not about an identifiable individual. Therefore, I find that they do not constitute personal information for the purpose of the *Act*. Since section 21(1) can only apply to personal information, I find that the legal property descriptions are not exempt on this basis. Even if I had concluded that the legal descriptions of the turbine sites were "personal information," I am satisfied that in the particular circumstances described above, including the public availability of the information, their disclosure would not result in an unjustified invasion of personal privacy. Consequently, I confirm that I will be ordering the disclosure of this information.

Issue C: Is there a compelling public interest in disclosure of the records sufficient to outweigh the purpose of section 17(1)?

[89] The appellant takes the position that the public interest override in section 23 of the *Act* applies to all of the information withheld by the IESO. However, since I concluded that sections 17(1)(a) and (c) apply only to some withheld portions of the records relating to the wind energy project,[57] my consideration of section 23 relates only to that information.

[90] Section 23 of the *Act* states:

> 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.

[91] Section 23 could be applied to override the third party information exemption in section 17(1) if two requirements are satisfied. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the particular exemption.

[92] 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.[58] 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 the citizenry about the activities of their government, 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

---

[57] Section 17(1) applies to portions of records 1.6, 2.4, 2.11, 2.17, 2.18, 2.20, 2.25, 3.2, 5.12, 5.17 and 5.19.
[58] Order P-984.

choices.[59] Any public interest in *non*-disclosure that may exist also must be considered.[60]

[93] 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 of the appeal.

[94] 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.[61]

Representations

[95] The third party submits that there is a public interest in non-disclosure of the information since protecting the records at issue would advance the provincial government's goal of promoting clean and renewable energy initiatives under the *Green Energy Act.* According to the third party, supporting this mandate requires that "any information related to commercial agreements between the [IESO] and wind developers must also be protected." The third party argues that there is a public interest in non-disclosure because disclosure would deter developers from applying for FIT contracts because there would be no protection or guarantee of confidentiality for any information they provide.

[96] The third party also challenges the appellant's claim that the disclosure of construction schedules and private, non-public, third party correspondence, comments and public statements is required to determine compliance with "applicable legal requirements." The third party explains that it is the REA application materials submitted to the Ministry of the Environment and Climate Change as part of a public process that would permit that particular determination, not the FIT contract signed with the IESO or private communications with the MOECC.

[97] The appellant responds by submitting that many of the third party's arguments are "incorrect or unsupportable by evidence or contradicted by recent changes in government policy." The appellant states that in contracting with government, the third party accepted the conditions of that arrangement, including the risk of disclosure. Further, the appellant submits that:

---

[59] Orders P-984, PO-2569 and PO-2789.
[60] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[61] Order P-244.

> … all of the reasons set out by [the third party] are intended to protect the interest of a developer. However, it is clear public policy of the Ontario Government that all wind power developments have to comply with the requirements set out in the Green Energy Regulation and associated government policies and guidelines. As affected parties, we are entitled to information required to ensure that such compliance has taken place … [and] to properly assess what has taken place.

[98] The IESO submits that the conditions of section 23 are not met in this appeal, either by the appellant's submissions or by the facts. The IESO submits that the appellant's strong interest in this particular wind project does not establish a relevant, broader "public interest" in the information. Further, the IESO maintains that even if there were a compelling public interest, such an interest has not been made out with respect to the responsive information. In other words, the existence of a broad policy or regulatory concern does not provide a sufficient basis to apply section 23 to override the section 17(1) exemption.[62] As for the appellant's stated purpose of access being to ensure compliance with the applicable laws, the IESO argues that this interest is not only overly broad, but could be argued in relation to most, if not all, of the IESO's records, which "would effectively negate the requirement for a 'compelling public interest'."

Analysis and findings

[99] In order for me to find that section 23 of the *Act* applies to override the exemption of the records that I have found qualify under sections 17(1)(a) and (c), I must be satisfied that there is a *compelling* public interest in the *disclosure of the particular records that have been found to qualify for exemption* that clearly *outweighs the purpose* of the exemption.

[100] The IESO contends that the appellant's interest is more private than public, which the appellant counters by maintaining that because its interests are affected by the wind energy project, it is entitled to review all information to ensure that the applicable legal requirements have been satisfied. Based on the information before me and the overall circumstances, I accept that there is a public interest in matters related to the compliance of wind energy projects with the rules, regulations and oversight established by the government for this purpose. As Assistant Commissioner Sherry Liang articulated it in a recent related order, there "exists a public interest in information about legislated regulatory requirements for wind farm projects, and in discussions about the proper interpretation of those requirements."[63] I agree.

---

[62] The IESO relies on Orders PO-3111, PO-2734 and PO-2864.
[63] Order PO-3545, at paragraph 197.

[101] The next question to be asked is whether that particular public interest is compelling. A compelling public interest has been found not to exist where, for example, another public process or forum has been established to address public interest considerations[64] or where a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[65] The appellant argues that it is entitled to access the information so as to ensure legislative compliance. However, I agree with the third party that the REA process – which is administered by the MOECC and involves public consultation, including posting on the Environmental Registry (online) for public comment – already provides the structure for the approval of this type of project. In Order PO-3545, Assistant Commissioner Liang considered the exempt record and concluded that it did "not add to the information the public requires to make effective use of the REA public consultation process (which has already occurred), or any potential future proceeding at the [Environmental Review Tribunal]." In this appeal, I considered whether the disclosure of the information for which I have upheld the third party information exemption in section 17(1) would shed light on the IESO's role in the relevant regulatory context, insofar as the IESO is involved in oversight or compliance, that is. Having reviewed the exempt information once again for this purpose, I am not persuaded that there is a sufficiently compelling public interest in its disclosure.

[102] Since both components of the first part of the test for the application of the public interest override are not met for this information, it is unnecessary for me to review the second part of the test: that is, whether the purpose of the section 17(1) exemption is clearly outweighed by a compelling interest in disclosure of the particular information. I find that section 23 does not apply to the exempt information in the circumstances of this appeal.

ORDER:

1. I uphold the IESO's decision to withhold the information in records 1.6, 2.4, 2.11 (in part), 2.17, 2.18, 2.20, 2.25 (in part), 3.2 (in part), 5.12 (in part), 5.17 (in part) and 5.19 (in part) that is exempt under section 17(1). The exempt information is highlighted in orange on the copies of the records sent to the IESO with this order.

2. I order the IESO to disclose the following records or portions of records which do not qualify for exemption under section 17(1), excepting the severances agreed to by the appellant and other information removed from the scope of the appeal in this order:

---

[64] Orders P-123/124, P-391 and M-539.
[65] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

1.4, 1.7, 1.13, 1.16, 2.1, 2.2, 2.10, 2.11 (in part), 2.12, 2.25 (in part), 3.1, 3.2 (in part), 3.4, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 5.1, 5.2, 5.4, 5.6, 5.8, 5.9, 5.10, 5.12 (in part), 5.13, 5.15, 5.17 (in part), 5.19 (in part) and 5.20.

The IESO must disclose the non-exempt information by **March 7, 2016**, but not before **March 2, 2016**.

In records where it would be helpful to distinguish between exempt and non-responsive information, I have highlighted non-responsive information in yellow.

3. I remain seized of this matter in order to verify compliance with provisions 1 and 2.

Original Signed by: January 29, 2016

Daphne Loukidelis
Adjudicator