Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3840-I

Appeal PA16-232

Independent Electricity System Operator

May 16, 2018

Summary: The Independent Electricity System Operator (IESO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to each of its solar micro Feed-in Tariff (microFIT) contracts where the contract holder is a business. The requester sought information such as the microFIT contract version, the owner of the microFIT project, address and nameplate capacity. The IESO generated a spreadsheet and granted partial access to it. The IESO withheld twelve of sixteen columns of information, citing the mandatory exemption for third party information at section 17(1). The requester appealed both the application of section 17(1) and the IESO's interpretation of the scope of her request. During the course of the appeal, the IESO raised the potential applicability of the discretionary exemption at section 18(1) (economic and other interests of Ontario).

In this interim order, the adjudicator upholds the IESO's interpretation of the scope of the request. She allows the IESO to raise section 18(1) despite the lateness of the exemption claim, but finds that section 18(1) does not apply to the information at issue. She defers her findings on section 17(1) pending notification of affected parties.

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

BACKGROUND:

[1] The Independent Electricity System Operator (IESO) is a corporation without share capital continued under the *Electricity Act*.[1] Its purposes are set out in section 6(1) and include the following:

- directing the operation and maintaining the reliability of the IESO-controlled grid
- establishing and enforcing criteria and standards relating to the reliability of the integrated power system
- engaging in activities related to contracting for the procurement of electricity supply
- engaging in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario
- engaging in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources
- engaging in activities that promote electricity conservation and the efficient use of electricity

[2] In its representations, the IESO explains its function and the micro Feed-in Tariff (microFIT) program as follows:

> The [IESO] is responsible for the day-to-day operation of Ontario's electricity system. One of the objectives of the IESO is to facilitate the diversification of the energy supply mix by promoting the use of renewable energy sources. The IESO partly achieves this objective through providing homeowners and other eligible participants with the opportunity to develop a small renewable electricity generation project of 10 kW or less ("microFIT Projects"). Both individuals and businesses are eligible to become owners of microFIT Projects.

[3] The appellant made a request to the IESO under the *Freedom of Information and Protection of Privacy* Act (the *Act*) for itemized information related to "all Solar PV microFIT contract holders that have been identified as Businesses according to the above details."

[4] The "above details" referred to by the appellant included the following statement:

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[1] 1998, SO 1998, c 15, Sch A.

If a microFIT owner uses a Company name as Owner and/or if the owner indicated to IESO that it was HST (or GST) registered, it is clear that those Owners are operating as businesses.

[5] The appellant also stated in her request that

> [t]hese Owners are clearly acting as businesses and the information requested below is not considered personal information and hence should be available under the FIPPA rules without approval of the applicant.

[6] The itemized information sought by the appellant is the following:

1. microFIT reference number
2. microFIT contract version
3. Tariff rate
4. Project/Customer Name
5. Project Information
    a. Owner/Business Information
        i. Company/ Person
        ii. Contact
        iii. Mailing Address
        iv. Telephone
        v. E-mail
    b. Address
    c. City/Town/Township
    d. Lot Number(s)
    e. Concession Number(s)
    f. GPS Coordinates
        i. Latitude
        ii. Longitude

6. Total Nameplate Capacity (kW)
7. Fuel Type (if available):
8. Solar/Photovoltaic Cells (Rooftop) or
    a. Solar / Photovoltaic Cells (Ground Mount)
    b. Status of MicroFIT Project

[7] The IESO issued a decision to the appellant granting partial access to what it identified as the responsive spreadsheet. In its decision, the IESO disagreed with the appellant's assertion that owners who are HST/GST registered are necessarily operating as a business. The IESO stated that, that being said, there are some microFIT owners that the IESO recognizes as businesses rather than individuals, and that the responsive spreadsheet contains information about these suppliers.

[8] The IESO denied access to portions of the spreadsheet, citing the mandatory exemption for third party information at sections 17(1)(b) and 17(1)(c) (third party information) of the *Act*. Its decision letter advised the appellant that a spreadsheet disclosing four of the requested items of information had been scanned onto a CD-ROM and would be sent to her upon the payment of a $10 fee, representing the cost of the CD-ROM, in accordance with section 6 of Regulation 460 under the *Act*.

[9] The appellant appealed the IESO's decision to this office, objecting to its decision to withhold information under section 17(1). During mediation, she also told the mediator that she disagreed with the IESO's position that HST (or GST) registration does not, in and of itself, define a microFIT supplier as a business. She advised that she requested information related to all Solar PV microFIT contract holders that have indicated to the IESO that they are HST (or GST) registered. The appellant argued that the IESO has interpreted the scope of the request too narrowly to capture all of the information she seeks. The IESO, on the other hand, took the position that the appellant's request was limited to information related to microFIT suppliers who were classified as businesses.

[10] Also during mediation, the appellant advised that she did not want piecemeal access to the requested information and would wait for the outcome of her appeal before receiving any information.

[11] As the appeal was not resolved during mediation, it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by seeking and receiving representations from the IESO. In its representations, the IESO raised, for the first time, the application of the discretionary exemption for economic and other interests of an institution at section 18(1) of the *Act*. As the IESO raised this exemption more than 35 days after it was notified of this appeal, contrary to section 11 of the *Code of Procedure*, I added both

section 18(1) and the late raising of section 18(1) as issues in this appeal.

[12] I then sought and received representations from the appellant, reply and supplementary reply representations from the IESO, surreply representations from the appellant, and sur-surreply representations from the IESO on the section 18(1) issue. The parties' representations were shared with one another, with some portions of the representations withheld pursuant to the confidentiality criteria set out in section 5 of *Practice Direction 7*.

[13] In this interim order, I uphold the IESO's interpretation of the scope of the appellant's request. I find that the exemption at section 18(1) for economic and other interests of the IESO does not apply to the information at issue, and I defer consideration of the application of section 17(1) to the information at issue pending notification of affected parties.

RECORDS:

[14] The record at issue is a spreadsheet containing 16 columns of information pertaining to each microFIT contract holder that the IESO has identified as a business. The IESO decided to disclose the columns indicating the type of technology, the price, the contract version, and the contract status. Twelve columns were withheld and are at issue. The withheld information includes the microFIT reference number, project address, and name of the contract holder.

ISSUES:

A. What is the scope of the request? What information is responsive to the request?

B. Late raising of the discretionary exemption at section 18(1)

C. Does the discretionary exemption at section 18(1) apply to the information at issue?

DISCUSSION:

A. What is the scope of the request? What information is responsive to the request?

[15] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
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> (a) make a request in writing to the institution that the person believes has custody or control of the record;
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> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
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> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[16] To be considered responsive to the request, records must "reasonably relate" to the request.[2] The appellant takes the position that her request includes information pertaining to microFIT contract holders with HST/GST[3] numbers, while the IESO takes the position that the request was for information pertaining to contract holders who are businesses, and that it has located that information and provided partial access to it. The IESO's position is that contract holders with HST/GST numbers are not necessarily businesses.

[17] It is well established in previous orders of this office that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[4]

Representations

IESO's representations

[18] The IESO disagrees that a microFIT contract party having an HST number is, on its own, enough to determine that they are operating as a business. For that reason, the IESO has not included in the scope of the request information about microFIT projects where the contract party is HST-registered if the party is an individual. It submits that there are approximately 8,875 HST-registered microFIT contract parties, and that it cannot assess whether an HST-registered microFIT contract party is operating in a business capacity or a personal capacity without contacting each owner, particularly since the individual may be registered for HST for reasons unrelated to the microFIT contract.

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[2] Orders P-880 and PO-2661.
[3] I will refer to HST numbers throughout this Order. Where applicable, reference to HST includes GST.
[4] Orders P-134 and P-880.

[19] The IESO explains that the records it found to be responsive to the request are those where the contract party's name suggests that it is not an individual, for example, if the name includes "Inc" or "Ltd".

[20] The IESO points out that the appellant stated in her request that she sought information where third party approval is not required. In the IESO's submission, this means that the IESO could not disclose information related to microFIT contract parties where personal information is at issue, including HST-registered microFIT contract parties who used their names and not a presumed name of a company.

Appellant's representations

[21] The appellant submits that a microFIT contract holder is engaged in a commercial activity. She refers to a Canada Revenue Agency (CRA) Information Sheet entitled "The GST/HST Implications of the Acquisition of Solar Panels Under the micro Feed-in Tariff Program in Ontario" which states that, "Given the terms of the microFIT Program whereby all sales of electricity are taxable supplies made in the course of a commercial activity…". She also refers to the CRA's application form for an HST number, which states that in order to obtain an HST number, one must have a business number. She also refers to a GST Bulletin stipulating that input tax credits are only available where a capital property is used primarily for commercial activities.

[22] The appellant submits that regardless of whether or not microFIT contract holders want to operate as a business, by using an HST number they are operating as a business.

[23] The appellant also submits that instead of limiting its search to names containing "Inc" or "Ltd", the IESO should have also at least included information where it is clear that the contract holder is other than a homeowner or individual.

IESO's reply and supplementary reply representations

[24] The IESO submits that it undertook a comprehensive review of microFIT contract party names in order to isolate all businesses. It did not just review for "Corp" or "Inc", although those are examples of microFIT contract parties whom the IESO included as responsive to the request. The IESO explains that it identified individual parties by reviewing a spreadsheet containing the information pertaining to all microFIT contracts at the time of the request, namely 24,562 contracts. It performed a line-by-line review of the name of each contract holder to determine if the contract holder was an individual or one of the other types of applicants. The names of the non-individuals (farms, school boards, municipalities, churches and any suppliers who were not identified by individual names) were compiled in a spreadsheet as responsive to this request.

[25] The IESO submits that it is not practical for it to rely upon the applicant type listed on the microFIT application forms, because this information is self-identified and

unverified; furthermore, microFIT contracts may be assigned to a different microFIT contract party, making the original information on the application form no longer relevant. Therefore, a microFIT contract party's legal name is more likely to accurately reflect the capacity in which a microFIT contract party entered into the contract than the applicant type listed on an initial application.

[26] The IESO also reiterates that not all HST-registered microFIT contract parties are participating in the microFIT program in a business capacity. It submits that the definition of commercial activity used by the IPC and the CRA serve different functions, and that CRA commentary regarding whether a transaction constitutes commercial activity is concerned only with tax issues and is not binding on the IPC for the purposes of interpreting the *Act.*

[27] The IESO submits that in any event, the GST/HST Information Sheet submitted by the appellant demonstrates that not all persons participating in the microFIT program are required to register for HST, and that the CRA uses a CRA standard (small supplier threshold) to determine when HST registration is required. The IESO submits that this standard has nothing to do with the IESO or a microFIT contract party's intentions. It reiterates that an individual may have an HST registration for purposes unrelated to their participation in the microFIT program and that in fact, a person's HST status is likely their personal information. The IESO submits that neither its limited collection of HST numbers from applicants nor the CRA's determination of when microFIT contract parties are required to register for HST is determinative of the capacity in which individuals are participating in the microFIT program.

[28] The IESO explains that verifying each contract party's name against the party's self-identified "applicant type" on their original application form would not confirm the accuracy of the IESO's determination of that party's legal status because the "application type" is unverified information from applicants; there are instances where an individual identified themselves as a commercial entity and where a commercial entity has identified itself as an individual. The IESO provides an example where a business identified itself as a homeowner in its application but was identified in the IESO's line-by-line review as a business.

Appellant's sur-reply representations

[29] The appellant points out that the assignment process includes a requirement for the assignee to confirm its applicant type. She questions why the IESO asks applicants for their applicant type if the IESO does not take responsibility for the applicant type being accurate.

[30] The appellant submits that all microFIT contract parties, not just those registered for HST, are engaging in commercial activity. She submits that "understanding that all sale of electricity is a commercial activity but knowing that other microFIT contract owners perhaps did not have the intent of operating as a business and thus did not file

for HST or were not already acting as a business when they applied, I have restricted my request to HST registrants or others obviously acting as a business out of respect".

[31] The appellant also submits that HST registration is only available to those operating as businesses, so HST status is not personal information.

Analysis and findings

[32] For the following reasons, I find that the IESO properly interpreted the scope of the appellant's access request.

[33] The appellant is an individual who is experienced in the energy sector and is familiar with the *Act.* As noted above, the appellant stated the following in her access request:

> If a microFIT owner uses a Company name as Owner and/or if the owner indicated to IESO that it was HST (or GST) registered, it is clear that those Owners are operating as businesses.
>
> …
>
> [t]hese Owners are clearly acting as businesses and the information requested below is not considered personal information and hence should be available under the FIPPA rules without approval of the applicant.

[34] "Business" is not a defined term in the *Act.* The term "business", however, is mentioned in section 2(3) of the *Act* addressing the definition of "personal information":

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[35] The term "business" also appears in prior orders of this office addressing the definition of personal information. These orders have found that to qualify as personal information, the information must be about the individual in a personal capacity, and that generally, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[5]

[36] In my view, it is not clear that information about individuals engaging in a sales transaction is never considered their "personal information". The reference to "business,

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[5] See Orders P-1409, R-980015, PO-2225 and MO-2344.

professional or official capacity" in section 2(2) could be interpreted as meaning not merely any profitable activity but, rather, an individual's regular business. As noted by Adjudicator Cropley in Order MO-2343, if the mere exchange of money were the criterion for a determination of what constitutes a business activity, an individual homeowner who decides to sell a personal item at a garage sale or other venue would also be considered to be engaged in a business activity.

[37] Moreover, and as noted above, information relating to an individual in a business capacity may still be personal information if it reveals something of a personal nature about the individual.

[38] In my view, however, in order to determine the scope of the request, it is not necessary for me to resolve this question or more specifically, the issue of whether an HST-registered individual microFIT contract holder is necessarily a "business".

[39] On one possible interpretation of the appellant's request, she sought information relating to all contract holders who a) use a company name, or b) indicated to the IESO that they are HST-registered -- regardless of the whether the IESO sees all of these entities as "businesses".

[40] However, in my view, to adopt this interpretation would be to ignore the appellant's statement that she seeks information where it is "clear" that the contract holder is operating as a business and the information is not personal information. As I have noted above, it is my view that it is not, in fact, clear that information about individuals who engage in sales transactions and have an HST number is never considered to be their "personal information".

[41] Although ambiguity in a request is generally resolved in favour of the requester, I find that in this case, the appellant's request is best interpreted as being for the information of contract holders who are clearly not acting in an individual capacity, or in the appellant's words "clearly acting as businesses" and whose information would clearly not be considered to be personal information under the *Act.* In my view, it was open to the IESO to take its own view regarding what entities are "clearly acting as a business", and to not accept the appellant's definition. This is particularly the case since the appellant could have simply asked for the details of all contract holders who are HST-registered, rather than present what are in effect legal arguments in her access request. In my view, the IESO fairly interpreted the request when it examined the spreadsheet of information relating to all microFIT contract holders and excluded individual names from the scope of the request.

[42] Further, in my view, the IESO adopted a liberal interpretation of the appellant's request when it defined "business" as any entity other than an individual. The IESO did not take the position, for example, that a church is not a "company" and is therefore not within the scope of the appellant's request.

[43] For the above reasons, I uphold the IESO's interpretation of the scope of the appellant's request.

B. Late raising of the discretionary exemption at section 18(1)

[44] In its representations during the adjudication stage of the appeal, the IESO raised the potential application of the exemption at section 18(1) of the *Act.* The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim 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.

[45] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. The policy has been upheld by the Divisional Court, which found that where an institution had notice of the 35-day rule, there was no denial of natural justice in refusing to consider a discretionary exemption claimed outside the 35-day period.[6]

[46] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the institution and to the appellant.[7] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after this period.[8]

Representations

[47] The IESO submits that its late claiming of the section 18(1) exemption should be permitted because it would not prejudice the appellant. It submits that since it claimed section 17(1) for the portions of the records for which section 18(1) is now claimed, the section 18(1) claim has had no impact on the outcome of the mediation, does not require the notification of any new parties, and does not otherwise affect the availability

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[6] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.); see also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[7] Order PO-1832.
[8] Orders PO-2113 and PO-2331.

of information to the appellant.

[48] The IESO submits that no delay results from its late claiming of section 18(1), since it was the first party to make representations and the appellant had the opportunity to make full representations on the section 18(1) claim at the first opportunity should the IPC decide that to be necessary.

[49] The IESO also points out that the basis for its claim of section 18(1) is similar in nature to that underlying its section 17(1) claim. Finally, the IESO submits that the circumstances of this case and the sensitivity of the information at issue warrant the IESO being able to make comprehensive representations.

[50] The appellant's representations do not specifically address whether the IESO should be permitted to raise the section 18(1) exemption after the 35-day period provided for in the *Code of Procedure*.

Analysis and findings

[51] This office has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter. As noted above, the adoption and application of this policy has been upheld by the Divisional Court. Nevertheless, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

[52] I am required to weigh and compare the overall prejudice to the parties. In doing so, I must weigh any delay or unfairness that could harm the interests of the appellant, as against harm to the IESO's interests that may be caused if the exemption claim is not allowed to proceed. In order to assess possible prejudice, the importance of an exemption claim and the interests the exemption seeks to protect in the circumstances of the particular appeal can be important factors.

[53] For the following reasons, I allow the IESO to raise the applicability of the section 18(1) exemption to the information at issue.

[54] First, as noted by the IESO, the appellant had notice before the expiration of the 35-day period that the IESO wished to exempt the information for which it now claims the section 18(1) exemption. The appellant knew from the outset that this information was in issue.

[55] As well, and again as noted by the IESO, it raised the new exemption claim before the appellant made her representations. Therefore, the inclusion of the newly claimed exemption for the information at issue has not resulted in any delays to the adjudication process. The appellant has been provided with a full opportunity to respond to the IESO's representations and to make her own representations as to whether the information qualifies for exemption under section 18(1).

[56] I have also considered the potential prejudice to the IESO if I do not allow the section 18(1) exemption to be claimed with respect to the information. There is little prejudice to the IESO in this case beyond the obvious prejudice of being faced with the possibility of being required to disclose records that qualify for the section 18(1) exemption.

[57] However, I am satisfied that the appellant will not be prejudiced and the integrity of the adjudication process will not be compromised if I allow the IESO to raise the application of the section 18(1) exemption beyond the 35-day time period. Therefore, I have decided to allow the IESO to raise the section 18(1) exemption, and will now consider whether it applies to the information at issue.

Issue C: Does the discretionary exemption at section 18(1) apply to the information at issue?

[58] The IESO has raised sections 18(1) (c) and (d) of the *Act,* which state as follows:

> A head may refuse to disclose a record that contains,
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> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[59] The purpose of section 18(1) 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*.[9]

[60] For sections 18(1) (c) or (d) to apply, the institution 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.[10]

[61] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under

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[9] Toronto: Queen's Printer, 1980.

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

section 18(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[11].

IESO's representations

[62] The IESO submits that its economic interests and its ability to manage the economy of Ontario could reasonably be expected to be prejudiced by disclosure of the information at issue. It submits that it is likely that if the information is disclosed, a third party will interfere in the proper performance of microFIT contracts. The IESO states that the microFIT agreements, as amended, preclude microFIT contract parties from entering into agreements that involve an assignment of contract rights without the IESO's consent. Should contract holders be induced to enter into inadvisable arrangements, their microFIT contract may be terminated. The IESO submits that while this is a harm to third parties, it is also prejudicial to the economic interests of the IESO, which has an interest in the proper performance of agreements.

[63] The IESO also submits that there are negative consequence to it if microFIT contract parties provide inaccurate information. First, it will be injurious to the IESO's ability to manage the microFIT program. The IESO explains that it is important for it to have accurate information, not only to contact microFIT contract parties but also for the sake of other steps such as forecasting electricity supply.

[64] The IESO submits that it is entitled to manage the microFIT program in a manner that ensures both its success and integrity, and that disclosure of the information at issue does not ensure the integrity of the microFIT program, but rather undermines it.

Appellant's representations

[65] The appellant submits that the IESO's section 18(1) exemption claim is hard to understand since the IESO provides similar information under the FIT program without claiming this exemption. She submits that equivalent information should be disclosed for businesses that are microFIT contract holders.

IESO's reply representations

[66] In reply, the IESO submits that the microFIT and FIT programs are tailored to different types of energy generation projects that have different confidentiality expectations and needs.

[67] The IESO explains that it is true that it has released certain information about the FIT program to the appellant. It explains that it has express rights under the FIT contract to publish certain information and that in order to ensure the transparency of

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[11] Order MO-2363.

this process, FIT suppliers consent to the IESO publishing a substantial amount of information about them on its website.

[68] The IESO submits that in contrast to FIT suppliers, microFIT contract parties do not consent to the disclosure of information on the IESO's website. It submits that given the unsophisticated nature of certain small microFIT contract parties, these parties are more vulnerable than larger FIT parties to interference by private service providers that offer non-essential services. The IESO submits that in order to preserve the integrity of the microFIT program, the IESO is protecting the microFIT contract parties by securing confidential information from the public, including private sector service providers.

Appellant's sur-reply

[69] The appellant submits that the IESO has not provided sufficient evidence of harm. She takes issue with the IESO's submission that microFit contract holders are less sophisticated than FIT contract holders, and she submits that the size of a contract holder has no bearing on its understanding of a contract.

[70] The appellant also submits that the IESO has not provided any evidence that a microFIT contract holder is vulnerable to interference by private service providers.

IESO's sur-surreply

[71] Following receipt of the appellant's representations, I invited the IESO to respond to the appellant's sur-reply representations as they relate to the section 18(1) issue. I also asked the IESO to comment on the fact that according to its website, it is no longer accepting applications for the microFIT program. I invited the IESO to make representations on the impact of this development on its section 18(1) claim and in particular, its argument that if microFIT contract parties believe that their information will be publicly disclosed, they may provide inaccurate information to the IESO when entering into a microFIT contract.

[72] In response, the IESO points to the evidence of harm that it provided in affidavit form with its initial representations. The IESO submits that microFIT parties have and may enter into third-party contracts which harm the integrity of the microFIT program and which may put the microFIT contract party in non-compliance with the microFIT contract. One possible scenario if this occurs is termination of the microFIT contract. Another possible scenario is a third party issuing an improper payment direction, directing the contract payments away from the microFIT contract holder to the third party. The IESO submits that these challenges are not hypothetical and points out that in 2016 it suspended the acceptance of new applications, in part because irregular and non-compliant applications were discovered that attempted to evade the program requirements and that were a result of third party actors' involvement behind the scenes in the program. The IESO became aware of attempts to interfere with the

integrity of the microFIT program and had to take steps to protect it. The IESO submits that the harms articulated in the affidavit are based on the past experience of the IESO and are not speculative in any way. The IESO again stresses that there are no legitimate uses that the appellant could have for the information about microFIT contract holders.

[73] The IESO also submits that microFIT owners may be more vulnerable than FIT owners to unnecessary service offerings because the microFIT program is intended to be accessible to a much broader group of participants, including individual homeowners, than would a FIT contract. Consequently, many participants in the microFIT program have less experience engaging with the IESO or other actors on energy projects. This inexperience, in the IESO's submission, can affect the participant's ability to discern between necessary and unnecessary (and legitimate and illegitimate) third-party service providers.

[74] The IESO reiterates that disclosure of the information at issue to the appellant is likely to have materially adverse impacts on the microFIT contracts of the owners as a result of third parties soliciting business from them, causing harm to both the participant and the IESO. The IESO submits that it has noted an increased frequency of private service providers soliciting business from microFIT owners for potentially unnecessary services.

[75] In response to my question about the IESO no longer accepting microFIT applications, the IESO acknowledges that it is not presently accepting new applications for the microFIT program, but submits that this does not signal a permanent cessation of offering programs similar in nature to the microFIT program that are directed at this class of consumer.

[76] The IESO also submits that although it is no longer accepting new applications, it continues to process applications that were submitted prior to its announcement and to enter into new agreements with approved applicants. Thousands of applications remain under consideration, and approved applicants continue to supply information to the IESO that the IESO needs to rely on to be accurate.

[77] Further, the IESO points out that microFIT contracts are for a 20-year term and can be assigned to different counterparties during this term. To date, there have been thousands of assignments of microFIT contracts. As such, new participants may become involved in the microFIT program even without the IESO accepting new applications. The IESO submits that those participants should be encouraged to provide accurate information to the IESO and not be faced with the prospect of having their information circulated to the public if they do. The IESO submits, therefore, that the fact that it is not presently accepting new applications for microFIT contracts does not diminish its concern that it will receive inaccurate information if individuals believe that their information will be publicly available.

Analysis and findings

[78] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[12]

[79] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[13] For example, previous orders of this office have found that detailed information about an institution's clients such as comprehensive client lists, unit pricing information and contract dates are exempt as disclosure could reasonably be prejudicial to the institution's competitive position by providing the contact list to competing entities, or revealing dates that would enable competitors to target clients at relevant times. It has also been found that financial details such as the amount of the contract and unit costs may give competitors valuable information to effectively bid business away by tailoring their offers to undercut or outbid the institution and to target those contracts that are the most lucrative.

[80] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[14]

[81] As noted above, for sections 18(1) (c) or (d) to apply, the institution 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.

[82] This is not a case where the institution argues that disclosure could reasonably be expected to result in it losing business to competitors. Rather, the IESO argues that disclosure can reasonably be expected to undermine the integrity of the microFIT program as a result of, for example, contract holders being induced to enter into inadvisable arrangements and the resulting termination of their microFIT contracts, or unsophisticated contract holders being induced to have payment due to them assigned

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[12] Orders P-1190 and MO-2233.
[13] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[14] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

to a third party. The IESO also argues that publicizing the contract details could reasonably be expected to result in parties providing inaccurate information to the IESO, undermining the integrity of the microFIT (or future similar) program.

[83] In my view, the evidence provided by IESO falls short of establishing that disclosure can reasonably be expected to result in either of the harms set out in sections 18(1) (c) or (d).

[84] I accept that the IESO has had difficulties with the microFIT program in the past, relating to third party interference in parties' obligations under the microFIT contracts. The IESO argues that microFIT parties are less sophisticated than the parties to the FIT contracts and are more susceptible to being induced into entering into inadvisable arrangements.

[85] However, I do not accept that a significant portion of the contract holders listed in the record (for example, farms, school boards, municipalities, and churches) are unsophisticated enough to allow a third party to induce them into entering into arrangements that could result in the termination of their microFIT contracts. The IESO has provided little basis for this assertion and I find that it is speculative.

[86] Even if I were to accept that disclosure of the information at issue could reasonably be expected to result in some microFIT contracts being terminated, or in payments being directed to third parties rather than the contract holder, I am not satisfied that these contract terminations could reasonably be expected to result in prejudice to the IESO's economic interests or its competitive position, nor am I satisfied that they could reasonably be expected to be injurious to the financial interests of the IESO or its ability to manage the economy of Ontario. Under the microFIT program, it is the contract holders who benefit financially by selling electricity to Ontario. The IESO has not provided me with sufficient information to conclude that these contract terminations or payment redirections could reasonably be expected to result in prejudice to IESO's economic interests or the other harms mentioned in sections 18(1) (c) or (d).[15] Similarly, the other examples of harm referenced in the IESO's representations do not, in my view, represent the types of harms contemplated by section 18(1) (c) or (d). In my view, the IESO's references to the "integrity of the microFIT program" are too vague to establish a reasonable expectation of the harms set out in sections 18(1) (c) or (d).

[87] In any event, I note that the IESO states that in 2016 when it became aware of attempts to interfere with the integrity of the microFIT program, it took steps to protect it. I would expect that it would take similar action and protect the integrity of the microFIT program (or other future similar program) should the integrity of the program be threatened by disclosure of the records.

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[15] The IESO has not, for example, provided evidence about how much of the province's energy supply is derived from microFIT projects.

[88] Moreover, I find the IESO's concern that disclosure could lead to contract parties providing inaccurate information to the IESO to be speculative. A party under a microFIT contract needs to provide the information at issue to the IESO in order to be paid for the energy it supplies to the grid. The IESO submits that it is important for it to have accurate information, not only to contact microFIT contract parties but also for the sake of other steps such as forecasting electricity supply. While I accept that these are important reasons for needing accurate information, the IESO has provided me with little beyond its own speculation to suggest that disclosure could reasonably be expected to result in parties providing misinformation.

[89] Further, even if there is a reasonable expectation of parties providing inaccurate information as a result of disclosure of the information at issue, the IESO has not satisfied me that this amounts to a reasonable expectation of prejudice to its economic interests or competitive position, or of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario. The IESO mentions that it must be able to forecast energy supply. Assuming without deciding that this equates to managing the economy of Ontario within the meaning of section 18(1)(c), I am not satisfied that to the extent that parties may provide misinformation, this could reasonably be expected to have any meaningful impact on the IESO's ability to forecast energy supply. The IESO has not, for example, provided evidence about how much of the province's energy supply is derived from microFIT projects. I note again that the IESO refers to the integrity of the microFIT program, without clearly explaining what this means or how it translates into the harms contemplated by sections 18(1) (c) or (d).

[90] I conclude, therefore, that section 18(1) does not apply to the information at issue.

[91] The issue of whether the information at issue is exempt pursuant to section 17(1) is deferred pending notification of affected parties.

ORDER:

1. I uphold the IESO's interpretation of the scope of the appellant's request.

2. I do not uphold the IESO's application of section 18(1) to the information at issue.

3. Consideration of the section 17(1) issue is deferred pending notification of affected parties.

Original Signed by: May 16, 2018

Gillian Shaw
Adjudicator