

Information and Privacy Commissioner,
Ontario, Canada



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

NOTICE OF INQUIRY

under the
Freedom of Information and Protection of Privacy Act
(*FIPPA* or the *Act*)

Appeal Number:	PA13-310
From Decision of:	Independent Electricity System Operator (formerly Ontario Power Authority)
Institution File Number:	2013-013
Date of This Notice:	January 28, 2015
Representations Due:	February 19, 2015

BACKGROUND:

A requester submitted a request to the Ontario Power Authority (OPA) under the *Freedom of Information and Protection Privacy Act (Act)* for records relating to the cancellation of the power purchase agreements. The OPA located responsive records and issued a decision letter to the requester granting partial access.

The requester (now the appellant) appealed the OPA's decision to this office and a mediator was assigned to the appeal to explore settlement with the parties. During mediation, the appellant narrowed his request as follows:

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

The OPA issued a revised decision, dated June 19, 2014 along with an index of records. The parties participated in further discussions with the mediator and at the end of mediation, the appellant confirmed that the only records he continues to seek access are those referred to in the OPA's June 19, 2014 decision letter. The appellant also raised the possible application of the public interest override at section 23 of the Act.

As no further mediation was possible, the issues remaining in dispute were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I decided to commence my inquiry by seeking the representations of the OPA, initially. Attached to this notice are the non-confidential portions of the OPA's representations.

I am now inviting the representations of the appellant. The appellant is invited to respond to all of the issues and questions set out in this notice. The appellant is also invited to respond to any issues arising from the OPA's representations.

RECORDS:

The records at issue are two emails and three spreadsheets described in the Index of Records attached to the OPA's June 19, 2014 decision letter.

BURDEN OF PROOF:

Please note that under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

ISSUES:

SHARING OF REPRESENTATIONS

Issue A: Do your representations contain confidential information that you do not want me to share with other parties to this appeal?

The sharing of representations is addressed in *Practice Direction Number 7*, issued by this office.

Your representations may be shared with other parties to the appeal unless they meet the confidentiality criteria identified in *Practice Direction Number 7*, which are reproduced on page 3 of the enclosed "Inquiry Procedure at the Adjudication Stage".

Please state your position concerning the sharing of your representations.

If you believe that portions of your representations should remain confidential, please identify these portions and explain why the confidentiality criteria apply to the portions you seek to withhold.

If there is more than one other party, please indicate to which party your confidentiality request applies.

If you make no submissions on this issue, I may decide to share some or all of your representations without further notice to you.

ECONOMIC AND OTHER INTERESTS

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

General principles

Section 18(1) states:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to

the same extent that similar information of non-governmental organizations is protected under the *Act*.¹

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

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

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

Part 1: type of information

The types of information listed in section 18(1)(a) have been discussed in prior orders:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.²

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.³

¹ Toronto: Queen's Printer, 1980.

² Order PO-2010.

³ Order PO-2010.

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.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.⁶

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.⁷

Does the record contain a trade secret, or financial, commercial, scientific or technical information? Please explain.

Part 2: belongs to

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

Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,⁸ customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value

⁴ Order PO-2010.

⁵ Order P-1621.

⁶ Order PO-2010.

⁷ Order PO-2010.

⁸ Order P-636.

to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.⁹

Does the information "belong to" the Government of Ontario or an institution as that term has been defined by this office? Please explain.

Part 3: monetary value

To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.¹⁰

The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.¹¹ Nor does the fact, on its own, that the information has been kept confidential.¹²

Does the information have monetary value or potential monetary value? Please explain.

Section 18(2): exception to the exemption

Section 18(2) states:

A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

- (a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or
- (b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.

The "results of product or environmental testing" includes raw data that may need to be further reviewed, analyzed, interpreted and reported.¹³

⁹ Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

¹⁰ Orders M-654 and PO-2226.

¹¹ Orders P-1281 and PO-2166.

¹² Order PO-2724.

¹³ Order P-1562.

Does the record contain the results of product or environmental testing carried out by or for an institution? Please explain.

Was the testing done as a service to a person, group of persons or organization other than for an institution and for a fee? Please explain.

Was the testing conducted as preliminary or experimental tests for the purpose of developing methods of testing? Please explain.

PUBLIC INTEREST OVERRIDE

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

General principles

Section 23 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.

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

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.¹⁴

Compelling public interest

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.¹⁵ Previous orders have stated that in order to find a compelling public interest in disclosure, the

¹⁴ Order P-244.

¹⁵ Orders P-984 and PO-2607.

information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.¹⁶

A public interest does not exist where the interests being advanced are essentially private in nature.¹⁷ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.¹⁸

A public interest is not automatically established where the requester is a member of the media.¹⁹

The word "compelling" has been defined in previous orders as "rousing strong interest or attention".²⁰

Any public interest in *non*-disclosure that may exist also must be considered.²¹ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".²²

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation²³
- the integrity of the criminal justice system has been called into question²⁴
- public safety issues relating to the operation of nuclear facilities have been raised²⁵
- disclosure would shed light on the safe operation of petrochemical facilities²⁶ or the province's ability to prepare for a nuclear emergency²⁷

¹⁶ Orders P-984 and PO-2556.

¹⁷ Orders P-12, P-347 and P-1439.

¹⁸ Order MO-1564.

¹⁹ Orders M-773 and M-1074.

²⁰ Order P-984.

²¹ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

²² Orders PO-2072-F, PO-2098-R and PO-3197.

²³ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

²⁴ Order PO-1779.

²⁵ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

²⁶ Order P-1175.

²⁷ Order P-901.

- the records contain information about contributions to municipal election campaigns²⁸

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 considerations²⁹
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations³⁰
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding³¹
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter³²
- the records do not respond to the applicable public interest raised by appellant³³

Is there a public interest in disclosure of the record? If so, is this interest compelling? Please explain.

Is there a public interest in non-disclosure? Please explain.

Purpose of the exemption

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.

An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.³⁴

²⁸ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

²⁹ Orders P-123/124, P-391 and M-539.

³⁰ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

³¹ Orders M-249 and M-317.

³² Order P-613.

³³ Orders MO-1994 and PO-2607.

³⁴ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

What is the purpose of the exemption? To what extent is the purpose being served in this case?

Does the compelling public interest in disclosure of the records clearly outweigh the purpose of the exemption in this case? Please explain.

SEVERANCES:

Section 10(2) of the *Act* obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The institution is asked to consider whether there is any undisclosed information which should be disclosed pursuant to section 10(2) and to make representations on that subject.

Please note that pursuant to sections 10(2), 54(1) and 54(3) of the *Act*, the decision maker may order the disclosure of any portions of records which are not found to be subject to an exemption.

DOCUMENTATION IN SUPPORT OF REPRESENTATIONS:

In order to assist the decision maker in this appeal, the parties are requested to submit with their representations any **background materials, documentation, policies, statutory provisions, by-laws, or case authorities**, which support their representations.

TESTS:

The tests mentioned in the Notice of Inquiry are intended to assist the parties to make their representations. Please note that where the IPC has not yet articulated a test, no test is included.

REFERENCES TO PAST ORDERS:

References to past orders in this notice of inquiry do not reflect any decision by the adjudicator of any active issue in this appeal, including the interpretation of sections of the *Act* that may be at issue. Order references are provided to assist you in making representations on the issues in this appeal. These past orders reflect determinations based on the facts that were before the adjudicator.

not signed

Confidential

DELIVERED

January 16, 2014

Jennifer James
Adjudicator
Information and Privacy Commissioner of Ontario
Tribunal Services Department
2 Bloor Street East, Suite 1400
Toronto, Ontario
M4W 1A8

Dear Adjudicator James,

Please accept the contents of this letter and enclosed materials as the Independent Electricity System Operator's ("IESO") representations in Appeal PA13-310 regarding disclosure of certain records in response to a request made pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*"). These representations are made by the IESO as a consequence of the merger of the Ontario Power Authority and IESO effective January 1, 2015.

BACKGROUND

Appeal PA13-310 concerns the disclosure of records internally generated by the IESO to analyze the profitability of various Feed-In Tariff Program ("**FIT**") contracts in Ontario. The records at issue include spreadsheets listing a variety of calculations pertaining to the profitability of individual FIT projects (the "**Wind Model Analysis**"), as well as the assumptions and methodology established by an external consulting firm to generate those calculations. The Wind Model Analysis is used by the IESO in making various determinations regarding the pricing of FIT contracts and whether those contracts are commenced, continued or terminated. All of the five records at issue contain financial and commercial information that can be withheld pursuant to section 18(1)(a) of the *FIPPA*. Some of the records also contain non-responsive information which is validly redacted.

The Records at Issue

1. The records at issue in this Appeal are:

Record	Description of Contents
1	An internal email exchange attaching the Wind Model Analysis for Ontario FIT Projects and the assumptions underlying that analysis.
2	An internal email exchange attaching the Wind Model Analysis for Ontario FIT Projects.
3	A spreadsheet containing the Wind Model Analysis for Ontario FIT Projects.
4	A spreadsheet containing the Wind Model Analysis for Ontario FIT Projects.
5	A spreadsheet containing the Wind Model Analysis for Ontario FIT Projects.