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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.

THE ISSUES ON APPEAL

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

2. The IESO requests that some of its representations regarding Issues A and B not be shared with the other parties.
3. A version of these representations with redactions indicating the information which the IESO requests not be shared with the other party to this appeal is enclosed.¹
4. *Practice Direction Number 7* dictates the confidentiality criteria required for the sharing of the IESO's representations with the other party to this appeal. You may withhold information contained in the IESO's representations where:
 - (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded;
 - (b) the information would be exempt if it was contained in a record subject to the *FIPPA* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
 - (c) the information should not be disclosed to the other party for another reason.²
5. The IESO asks that certain of its representations be withheld on the basis of criteria (b) and (c).
6. The IESO has referred to the monetary value of its information. In doing so, it has discussed concerns about particular market actors that and unresponsive information contained in the records at issue. Release of this information would be exempt from disclosure as harmful to the OPA and should not be disclosed to the appellant.
7. If the IESO were forced to make its representations without referring to this information, the IESO would be unable to make the full representations required for complete and correct adjudication of concerning the records at issue.

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

8. The discretionary exemption in section 18(1)(a) applies to each of the records at issue in the appeal.
9. Section 18(1) states that:

¹ See Tab 2.

² *Practice Direction Number 7*.

A head may refuse to disclose a record that contains,

(a) [...] financial [or] commercial [...] information that belongs to the Government of Ontario or an institution that has monetary value or potential monetary value.

10. The IESO may refuse to disclose, in part or in full, each of the records at issue in this appeal as they:
- (a) contain financial or commercial information;
 - (b) belong to the IESO; and
 - (c) have monetary value or potential monetary value.

Types of Information

11. *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
12. *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
13. The forms of section 18(1)(a) information in the records at issue are as follows:

Record	Type of Information
1	Financial and commercial information: assumptions underlying the Wind Analysis Model and total free cash flow for equity sum
2	Financial and commercial information: total free cash flow for equity sum
3	Financial and commercial information: total free cash flow for equity sum
4	Financial and commercial information: total free cash flow for equity sum
5	Financial and commercial information: total free cash flow for equity sum

i) The Assumptions Underlying the Wind Model Analysis

14. The assumptions underlying the Wind Model Analysis, contained in Record 1, constitute both financial and commercial information.

³ *Ibid.*

⁴ Order PO-2010, Tab 3.

15. These assumptions contain specific data relating to the use of money by the IESO and therefore should be characterized as financial information. They comprise the cost accounting method utilized by the IESO to price individual FIT construction projects. Key assumptions involving debt, anticipated capital expenditures and expected revenue constitute financial analysis and are part of the IESO's commercially sensitive business plan regarding the construction of FIT projects.
16. Previous orders have held that modelling assumptions, valuations and other similar formulae constitute financial and commercial information. For example, in Order PO-2019, the "internal valuations, key financial modelling assumptions and model results" contained in a letter setting out various scenarios for the sale or lease of a nuclear plant were found to be financial information.⁵ The same Order found that "modelling and assumptions" used to formulate various scenarios for the decontrol of the nuclear facility constituted both financial and commercial information.⁶
 - ii) The Total Free Cash flow for Equity Sum
17. The "total free cash flow for equity" sum contained in each of Records 1 through 5 also constitutes financial and commercial information.
18. The "total free cash flow for equity" reflects the amount of profit that a FIT supplier may lose if its FIT supply contracts were cancelled. These numbers were preliminary estimates, arising in part from the Wind Model Analysis. These numbers constitute the kind of "specific figure [...] related to current and future potential revenues" that has been held to be financial information in past orders.⁷ Profit and revenue estimates have specifically been found to constitute both financial and commercial information.⁸

Information "Belonging To" the IESO

19. In order for the section 18(1)(a) exemption to apply, the IESO must demonstrate that the financial and commercial information "belongs to" the IESO.
20. The term "belongs to" refers to "ownership" by an institution. For information to "belong to" an institution, that institution must have some proprietary interest in it either in a traditional intellectual property sense, or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.
21. Where information has an inherent monetary value to an organization resulting from the expenditure of money or the application of skill and effort to develop the information, and that information is consistently treated in a confidential manner by the institution, the

⁵ Order PO-2019, para. 44.

⁶ Order PO-2019, para. 47.

⁷ Order PO-3031, para. 32.

⁸ Order PO-3042, para. 28.

courts will recognize a valid interest in protecting the confidential business information from misappropriation by others because it has the “quality of confidence”.⁹

22. The IESO has a proprietary interest both in the assumptions underlying the Wind Model Analysis and the total free cash flow for equity sums. This information has the “quality of confidence” required by law.

i) The Assumptions Underlying the Wind Model Analysis

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

24. The assumptions underlying the Wind Model Analysis should be recognized as having the “quality of confidence” required by law. This model is not known outside of the IESO. The IESO has never published any information regarding the methodology it uses to price FIT contracts. In fact, the circulation of this information is limited even within the IESO itself, with only senior management being aware of the contents of this model. This is precisely the sort of confidential information that merits protection from misappropriation by another party.


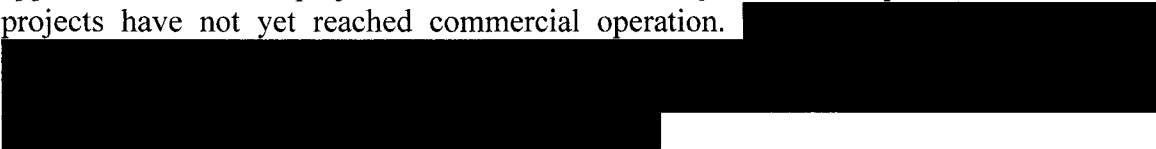
ii) The Total Free Cash Flow for Equity Sum

25. The application of the Wind Analysis Model was used in the calculation of the total free cash flow for equity sum in spreadsheets contained in Records 1 through 5. That sum is therefore also a product of the significant expenditure of money and the application of skill of both HATCH and the IESO.
26. Previous orders support the argument that financial projection information that has been prepared by external consulting firms has value to an institution as confidential information and therefore “belong to” that institution.¹⁰
27. Like the assumptions underlying the Wind Model Analysis, the total free cash flow for equity sum has the “quality of confidence” required by law. These sums have never been published and are only known by select executives within the IESO. This information belongs to the IESO and must also be protected from misappropriation by another party.



⁹ Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v Ontario (Information and Privacy Commissioner)*, [2001] OJ No 2552 (Div Ct).

¹⁰ Order PO-3042.

Information Having "Monetary Value" to the IESO

28. The purpose of section 18(1)(a) is to permit an institution such as the IESO to refuse to disclose a record where this disclosure would deprive the institution of the monetary value of the information.¹¹ This is adjudged in the context of the IESO being afforded the same protections offered to competitive private parties for commercially valuable information.
29. Both the assumptions underlying the Wind Analysis Model and the total free cash flow for equity sum have inherent monetary value for the IESO for planning and investment purposes. Their value goes beyond the mere cost to the IESO of having the model and projections developed by HATCH. Indeed, this information derives its value from being kept confidential.
30. The IESO retained HATCH to create the Wind Model Analysis so that it could carefully plan investment in alternative energy projects in Ontario. Among other things, the Wind Model Analysis allowed the IESO to consider financial risk, and this information therefore has inherent monetary value to the IESO. They did so as a competitive market actor.
31. 
32. The IESO benefits from the maintenance of a competitive market of providers of various capacities willing to enter into FIT contracts. The modelling assumptions allowed the IESO to consider profitability. The IESO should be free to develop such assumptions without fear that they will later be mischaracterized or applied for an unrelated purpose.
33. The total free cash flow for equity sum also has monetary value. The appellant has already received the free cash flow for equity numbers in relation to the projects referred to in his access request. In those instances, the IESO used its discretion and released information for projects that had already reached commercial operation. Notwithstanding, it was and remains proper for the IESO to consider the application of section 18(1)(a) to both those numbers and the remaining non-responsive total free cash flow for equity numbers.
34. Some of the non-responsive information – redacted in the records provided to the appellant – relates to projects which are not the subject of his request. Some of these projects have not yet reached commercial operation. 

¹¹ Orders M-654 and PO-2226.

35. 
 This would be to the detriment of the IESO and ratepayers as a whole.
36. No private market actor would be forced to disclose such considerations about a contractual counterparty and it is not appropriate for the IESO to have to do so in this instance.
37. Part of the IESO's mandate is to procure new supplies of renewable energy through contracts in order to achieve the targets set by the government for conservation and renewable energy generation in Ontario. The FIT program encourages and promotes the greater use of renewable energy sources. The fundamental objective of the FIT program is to facilitate the increased development of renewable generating facilities in Ontario. Permitting the release of financial estimate information about the consequences of projects moving forward would be contrary to this objective.
38. Planning information and profit projections have been held to have inherent monetary value.¹² The ability to do financial planning and act as an efficient market actor is fundamental to the IESO's function.
39. The foregoing representations on the monetary value of the information which the IESO seeks to withhold are supported by the purpose of the section 18 exemption from disclosure, described under "Issue C", below.

The Section 18(2) Exception Does Not Apply

40. *FIPPA* 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 the institution and for a fee; or
 - (b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.
41. This exception to the exemption under section 18(1)(a) does not apply in these circumstances, as the information in question is not the result of product or environmental testing. The information is contained in a report prepared by a consulting firm to analyze the pricing of individual FIT projects, as well as the costs and benefits of continuing or cancelling each project.

¹² Order PO-3031.

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?

42. The IESO is making its best efforts to present a position with respect to the public interest exception without knowing what grounds the requester is relying on to support any potential claiming of the exception. With respect, if the requester raises new issues not addressed herein, the IESO would appreciate an opportunity to reply.

43. Section 23 reads:

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.

44. The IESO respectfully submits that in order to apply the public interest override contained in section 23, you must find the following:

- (i) that there is a compelling public interest;
- (ii) that public interest has to be in the particular information at issue; and
- (iii) that the public interest clearly outweighs the purpose of the exemption.

45. None of the three requirements contained in section 23 are met in this appeal.

46. The word “compelling” has been defined as rousing strong interest or attention. For example, previous orders which have found a compelling public interest have considered elections and public safety issues.

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

48. Any compelling public interest in disclosure, which is not admitted but expressly denied, does not outweigh the purpose of the exemptions claimed by the IESO.

49. The purposes of section 18(1) of *FIPPA* are described in the Williams Commission Report:

There are a number of governmental institutions (in particular, Crown corporations) engaged in the supply of goods and services on a competitive basis. In our view, the commercially valuable information of institutions should be exempt from the general rule of public access to the same extent that similar information of nongovernmental organizations is protected under the statute.

50. As noted above, the public has an interest in non-disclosure due to the nature of the records at issue and their importance to the fulfillment of the IESO's mandate to support and develop green energy in Ontario. The requester's interest in disclosure must be weighed against this public interest. It is necessary to take into account the public interest in protecting the confidentiality of this important commercial information.
51. Disclosure of the information which is being withheld would be harmful to both the IESO and to other parties in Ontario's electricity system. The disclosure of information related to financial planning and pricing determinations cannot relate to a compelling public interest outweighing these harms that would be suffered.

Issue D: Are some of the records non-responsive and therefore not necessary to produce?

52. The IESO has redacted non-responsive information from the records at issue in this appeal.
53. Although not articulated as an issue on appeal, the IESO submits that an adjudicator has the ability to make decisions respecting the relevance of parts of requested records.¹³
54. The test for relevance is "responsiveness", meaning anything reasonably related to the request.
55. A commonly applied test for relevancy is set out in Order P-880:

Relevancy means responsiveness. That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.¹⁴

56. Notwithstanding the "liberal interpretation" of responsiveness, where an appellant's request is "very clear and specific" and identifies "the particular type of information sought", any information outside that request is non-responsive and therefore will be excluded.¹⁵
57. The legislation recognizes that only portions of a document may be responsive to requests for general information. Information that is disclosed must be meaningful. The fact that some irrelevant information is located next to some relevant information does not make irrelevant information relevant.¹⁶

¹³ *Ontario (A.G.) v. Ontario*, 19 O.R. (3d) 197 at para. 15 (Ont. Ct. J. (Gen. Div.), Div. Ct.).

¹⁴ Order P-880.

¹⁵ Order PO-2084.

¹⁶ Order P-880.

58. On several occasions, portions of a record have been severed and not disclosed on the basis of relevance and responsiveness.¹⁷ In Order PO-2075-R, Assistant Commissioner Mitchinson, as he then was, held that non-responsive information which was not commingled with responsive information (despite being contained in the same record) could be severed and withheld.
59. In this appeal, the spreadsheets contained in Records 1 through 5 have been partially redacted to sever information pertaining to FIT projects other than those specified in the request. As the requester has clearly sought information pertaining to only two specifically named FIT projects, any calculations and figures related to other projects are non-responsive to the request. The redacted information about other FIT projects is clearly irrelevant to the request and therefore is properly excluded.
60. In PO-2034, the adjudicator held that section 10 of *FIPPA* contemplates that any portion of a record may be severed from that record, either because it is not responsive or because it is exempt under *FIPPA* as long as to do so does not result in “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information. This was applied to withhold portions of a chart not related to a request.¹⁸ The IESO submits that the same approach is appropriate here to sever parts of the spreadsheets in question that are not relevant to the request.
61. These redactions have led to an orderly appeal process. Had the IESO not redacted the information pertaining to the other FIT projects, it would have been required to give notice to each of the other providers and wait for each provider’s response pursuant to sections 27 and section 17. This would have resulted in unnecessary procedures which would not have assisted the requestor.
62. In the case of the assumptions underlying the Wind Model Analysis (contained in Record 1), the IESO has withheld the entirety of the document, as partial redaction would not have produced meaningful disclosure. After redacting from the assumptions all of the information over which the section 18(1)(a) exemption is claimed, any remaining content would have been meaningless and therefore non-responsive to the request.

¹⁷ Orders PO-2175 (notebook entries), PO-2867 (e-mails from an e-mail chain), PO-2084 (chart) and PO-2789 (a grant application).

¹⁸ Order PO-2034, Tab 11.