DELIVERED

March 16, 2015

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

Dear Ms. James,

Please accept the contents of this letter and enclosed materials as the Independent Electricity System Operator's ("**IESO**") reply representations in Appeal PA13-310 regarding points raised in the appellant's representations, as requested in your letter dated March 2, 2015.

Consistent with the IESO's ongoing desire to be as transparent as possible, these representations contain only a limited amount of confidential information. The IESO asks that this limited amount of information be withheld on the same grounds that the IESO articulated in its representations dated January 16, 2015. Those representations are not repeated herein.

OVERVIEW

1. These submissions are organized into four sections. The first section responds to the appellant's allegation that the IESO was negligent in its search for documents that are responsive to his request. The second section responds to the appellant's objection to the IESO's claim of a section 18 exemption over data pertaining to FIT projects that are currently operating. The third section contains the IESO's submissions on the application of the public interest override. The fourth section addresses the frivolous and vexatious nature of a number of the appellant's submissions.

ARGUMENT

Section I <u>The IESO Conducted A Reasonable Search For Responsive Records</u>

2. The appellant has complained about the nature of the IESO's search. As part of this complaint, the appellant seeks documents that don't exist.

3. The IESO has conducted a reasonable search for records. The IPC's conclusions on the reasonableness of the IESO's search should be made expressly in favour of the IESO.

4. Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable

search for records as required by section 24 of the *Freedom of Information and Protection of Privacy Act* ("***FIPPA***").[1]

The IESO's Reasonable Search Process

5. To demonstrate that a reasonable search has been conducted, the institution must provide "sufficient evidence to show that it has made a *reasonable* effort to identify and locate responsive records".[2]

6. A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[3]

7. The search for responsive records was conducted by Crystal Pritchard, the Freedom of Information Coordinator at the IESO. Ms. Pritchard has held this position since October 2012. Before that, she assisted the IESO in responding to requests made under *FIPPA*. Ms. Pritchard has conducted approximately 150 searches pursuant to *FIPPA* requests, over 50 of which have necessitated the broad and thorough type of search required by the appellant's request.

8. Ms. Pritchard expended a reasonable effort to locate records which were responsive to the appellant's request. She canvassed the appropriate staff and identified and searched all relevant files.[4]

9. As described below, Ms. Pritchard also consulted with other employees at the IESO with knowledge in the areas of the requester's request.

10. On February 15, 2013, the IESO received the appellant's initial request for information. The appellant requested that the IESO:

> *"[p]lease provide any analysis conducted by or for the Ontario Power Authority with respect to adjustments to or cancellation of the power purchase agreement for output from the McLean's Mountain Wind Farm completed [from October 1, 2012 to February 7, 2013]. Provide any records of communication that lead to this analysis being undertaken. Also provide any communications associated with this analysis once it was completed. Please provide a complete list of those to whom this analysis was sent."*[5]

(a) Prior to 2013, individual departments at the IESO conducted their own *FIPPA* searches. In 2013, these processes were consolidated and standardized so that all

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[1] Order PO-3070, para. 16.
[2] Order PO-3070, para. 17 *[emphasis added]*; Order PO-1920; Order PO-1744.
[3] Order PO-3070, para. 18; Order PO-1744.
[4] See e.g. Order PO-1920.
[5] Access or Correction Request dated February 7, 2013.

searches were to be conducted by Ms. Pritchard in the new Clearwell document system. It was standard procedure for Ms. Pritchard to consult with relevant departments to discuss the appropriate search terms, custodian and electronic file locations that she should use in her search, as well as to identify any other persons at the IESO with whom she should be consulting.

(b) After receipt of the appellant's initial request, Ms. Pritchard contact the Contract Management team, which was the group most likely to have responsive records. The Contract Management team provided advice to Ms. Pritchard regarding her initial search for responsive records.

(c) Ms. Pritchard performed the relevant searches in the Clearwell system. Potentially responsive records were identified. Ms. Pritchard flagged any documents related to the contracts as being potentially responsive so that the Contract Management team could later decide whether the documents were indeed related to "adjustments or cancellations" and therefore responsive.

(d) Once these documents had been flagged, Ms. Pritchard met with the Project Manager ("**PM**") responsible for the contracts noted in the request. At this meeting, Ms. Pritchard and the PM reviewed the records and determined which documents were responsive to the appellant's initial request.

(e) Third party notice was provided to an affected organization, and those records identified by Ms. Pritchard and the PM as responsive were sent to that organization for review and comment.

(f) The third party responded to Ms. Pritchard that some of the identified records were over-inclusive because they were routine documents not related to analysis of adjustments or cancellations of the contracts.

(g) Following receipt of the affected organization's comments, Ms. Pritchard and the Contract Management team again reviewed the potentially responsive records.

(h) Once the IESO identified the records, third party notice was again provided to the affected organization so that it could appeal the disclosure of those records.

(i) Once the 30-day appeal period for the affected organization elapsed, the relevant records were produced to the appellant.

11. The appellant appealed the IESO's decision in August 2013.

12. On January 21, 2014, the appellant contacted the IPC and revised his request.[6] The appellant requested that the IESO:

> *"[p]lease 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 McLean's Mountain 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."*

(a) In this email, the appellant also identified by name a group of six FIT contracts that he believed were the subject of a report. He believed that this report estimated the cost of terminating the contracts. This was the first time that the appellant made any mention of these six FIT projects and this report.

(b) Ms. Pritchard returned to the original set of potentially responsive records that had been identified by her first search of the Clearwell system. She conducted a specific search of those records for correspondence with Michael Killeavy, the Director of Contract Management, concerning the cancellation of the six FIT projects.

(c) This search identified one email to Mr. Killeavy. This email was from the affected third party organization and included two attachments. The section 17 exemption was claimed over this document.

(d) Ms. Pritchard also again reviewed the records that had originally been marked as unresponsive as a result of her initial search of the Clearwell system. She also searched these records for correspondence with Mr. Killeavy.

(e) This subsequent search identified 9 emails, each with an attached spreadsheet that referenced the six FIT projects.

(f) The IESO produced these emails to the IPC. The IESO indicated to the IPC at this time that they did not consider these records responsive, as they contained no analysis of the cancellation of the FIT projects. The IESO also informed the IPC that, in the event that the records were found to be responsive, they would be required to provide third party notice to the same affected third party prior to the disclosure of those records.

(g) Ms. Pritchard also again approached the PM and a Contract Analyst ("**CA**"), who was responsible for the contracts of the six FIT projects, to ask whether they knew of any report or analysis regarding the cancellation of those projects. They both

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[6] Email from T. Adams to mediator L. McIntyre, dated January 21, 2014.

confirmed to Ms. Pritchard that the IESO had not prepared a report to this effect and that they had never contemplated cancelling those FIT projects.

(h) On April 14, 2014, the IESO provided a revised decision letter to the appellant. The IESO indicated that the 9 emails had been provided to the IPC and that no report existed regarding the cancellation of the FIT projects.

13. On May 13, 2014, the appellant replied to the IESO's most recent decision letter and reiterated his request.

(a) Ms. Pritchard suggested a conference call with the appellant to clarify what information he was seeking.

(b) During this call, the appellant indicated that he would like an affidavit sworn by Mr. Killeavy stating that the IESO had never undertaken any kind of analysis with respect to cancelling the six FIT projects. Ms. Pritchard indicated to the appellant that she would need to speak to Mr. Killeavy and receive appropriate approval before promising that such an affidavit could be sworn.

(c) Subsequent to this call with the appellant, Ms. Pritchard met with Mr. Killeavy. During this meeting, it was determined that the spreadsheets at issue in this appeal were potentially responsive.

(d) The PM first consulted by Ms. Pritchard was in attendance at the meeting between Ms. Pritchard and Mr. Killeavy. The PM indicated that this was the first time that he had heard about these spreadsheets having been prepared. Mr. Killeavy confirmed that only he and the Contract Management team members who prepared the spreadsheets were aware that this analysis had been undertaken.

(e) Ms. Pritchard had not previously spoken directly with Mr. Killeavy during the course of her initial search because she believed that someone from the Contract Management team had spoken with Mr. Killeavy in February 2013 when she first made the team aware of the request.

(f) On June 19, 2014, the IESO provided redacted versions of the spreadsheets to the appellant. These spreadsheets form the records at issue in this appeal.

14. The appellant's allegations that the IESO "experienced a miraculous reversal of its position" or otherwise concealed information before having an "epiphany" are frivolous and unfounded.[7] The IESO simply continued to conduct diligent searches in an attempt to uncover responsive records that may have been missed in earlier, broader searches.

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[7] Appellant's Submissions, p. 6.

15. That the IESO conducted subsequent searches for responsive records is not evidence that its initial search was unreasonable. It is, instead, concrete evidence that the IESO takes its obligations under *FIPPA* seriously. An institution may locate records as part of a reasonable search undertaken after its initial search. For example, in Order PO-1744, the Ministry of Municipal Affairs and Housing conducted a second search during mediation for additional responsive records. The acting Adjudicator ultimately found that the Ministry's searches were reasonable.

16. In light of the comprehensive process undertaken by the IESO and amount of resources dedicated to the appellant's requests, the IESO seeks an order declaring that it conducted reasonable searches.

There Is No Basis For The Appellant's Claim Regarding Additional Documents

17. The appellant must go further than making bald allegations that the IESO has not conducted a reasonable search. While a requester may be unable to indicate precisely which responsive records the institution has not identified, he or she must still provide a reasonable basis for concluding that such records may exist.[8]

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

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

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

21. Where an institution provides detailed evidence and logical explanations as to why some types of requested records do not exist, and the appellant has not provided a reasonable basis for his assertions that additional records must exist, an institution's search should be held to be reasonable.[9]

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[8] Order PO-3070, para. 20; Order PO-1920; Order PO-1744.
[9] Order PO-1744.

Section II **The Section 18 Exemption Applies To Data Pertaining To Operating Projects**

22. The appellant has argued that the section 18 exemption "ought not protect historical information where contracts are already locked in".[10] He asserts that the section 18 exemption is not applicable to the "final figure of the calculation of profitability".[11]

23. The IESO believes that by "final figure for the calculation of profitability", the appellant is referring to the total free cash flow for equity sums over which the IESO has claimed a section 18 exemption.

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

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

26. The purpose of the section 18 exemption is to protect the economic interests of institutions in information that has monetary value "for planning and investment purposes".[12] Estimates of the costs have no less monetary value than estimates of the costs Both types of figures relate to prospective actions that the IESO may take. Both types of figures are essential to the planning and investment decisions of competitive market players such as the IESO. The section 18 exemption should therefore equally apply to protect this information.

Section III **The Public Interest Override In Section 23 Of *FIPPA* Is Not Applicable**

27. The public interest override in section 23 of *FIPPA* has no application to the records at issue in this appeal. The interests identified by the appellant are either not "compelling public interests" under *FIPPA* or do not relate to the records at issue in this appeal.

28. The appellant has asserted the following "compelling" public interests in the release of the records at issue in this appeal:

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[10] Appellant's Submissions, p. 8.
[11] *Ibid.*
[12] PO-3031.

(a) a "desire to promote the public interest by bringing to light information [he] believes critical to understanding the underlying dynamics of Ontario's electricity policy situation and power rates";[13]

(b) a "concern to inform electricity ratepayers and citizens living with wind turbines about details of how information that might interest them is treated by the public officials holding positions of great influence over their welfare";[14]

(c) a need to provide this information to Ontario's electricity consumers who are "captive" and "must pay for the output of the two wind power contracts in question";[15]

(d) a desire to provide the total free cash flow for equity estimate to the public "to assist electricity consumers in understanding better what is happening behind their power bills";[16] and

(e) a desire to provide the total free cash flow for equity estimate to the public to "help explain the sudden appearance of thousands of wind turbines in rural Ontario".[17]

The Records Do Not Relate To The Interests Identified by the Appellant

29. The interests identified in paragraph 28 above, are not compelling public interests in disclosure of the records at issue in this appeal.

30. In order for the records to be subject to the public interest override contained in section 23, there must be a compelling public interest "in the disclosure of the record".

31. Any compelling public interest upheld by the IPC must be connected to the content of the records at issue in an appeal. That is, it is not sufficient for an appellant to raise a public interest in the abstract, if it is unrelated to the contents of the records at issue, as a justification for release of the records.

32. In this appeal, the appellant has raised interests alleged to relate to the price of electricity in Ontario generally, but which are not connected to the contents of the records at issue.

33. For example, the particular interest described in paragraph 28(d) above, refers to the total free cash flow for equity sum being used by electricity consumers to better understand the rates that they pay for hydro.

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[13] Appellant's Submissions, p. 2.
[14] *Ibid.*
[15] Appellant's Submissions, p. 7.
[16] Appellant's Submissions, p. 8.
[17] *Ibid.*

34. None of the records at issue or any of the information over which the IESO has claimed an exemption could provide the citizenry with information about how electricity in Ontario is priced.

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

36. The particular interest described in paragraph 28(e) above, regarding a desire to "help explain the sudden appearance of thousands of wind turbines in rural Ontario", would also not be addressed by the disclosure of the redacted assumptions and sums. Ontario's increased use of green energy is supported by a number of policy documents made available to the public by both the IESO and the Ministry. The records would not provide any further details that could be useful to the public in understanding the presence of wind turbines in the Province.

There Is No "Compelling" Interest at Issue

37. To the extent that the appellant has described public interests in disclosure of the records, which is not admitted but denied, they are not "compelling".

38. As noted in the IESO's original representations, the word "compelling" has been defined in previous orders as "rousing strong interest or attention".[18]

39. Respectfully, any attention directed at the termination of the FIT contracts at issue has been generated by the appellant himself. The appellant has not provided any material demonstrating that the public interests he has described have roused the level of attention necessary for the issue to rise to one of public interest.

40. The appellant asserts that there is a compelling public interest in the disclosure of the records at issue because they relate to the use of ratepayers' money. The IPC has rejected similar broad allegations of "compelling public interests" in other cases. For example:

    (a) In Order PO-3111, the requester argued that funding decisions related to in vitro fertilization should be made public. The requester stated that the interest was "so compelling that it touches on the waste of hundreds of millions of public dollars and the loss of the lives of children in Ontario". The IPC held that there existed no "compelling public interest", despite finding that "funding policies relating to medical issues touch on all citizens of Ontario in the context of public accountability". A compelling public interest did not exist solely because the record at issue could relate to the use of public funds.

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[18] Order P-984.

(b) In Order PO-2864, the requester raised broad public accountability issues regarding access to contracts entered into by publically funded institutions. The adjudicator acknowledged that even though there was generally a significant public interest in obtaining access to agreements entered into by institutions, there was no "compelling public interest" in disclosure of the records in that appeal. In that appeal, the government institution argued that:

> *[A] public interest does not exist in the records simply because they relate to the expenditure of public funds. To find otherwise would mean that every record relating to the expenditure of public funds would be subject to disclosure under section 23, because neither sections 17 or 18 would apply to protect the confidentiality of the records.*

41. Vague claims of a "compelling public interest" existing simply because the records may touch on the use of public funding should fail, particularly where the records at issue do not even relate to the alleged interest claimed.

Section IV The Appellant Makes a Number of Frivolous and Vexatious Allegations

42. As part of his appeal submissions, the appellant has alleged that the IESO has "muddied the waters"[19], "stonewalled"[20], "behaved irresponsibly"[21], "wasted time"[22], and "deliberately sought to bleed [the appellant's] resources"[23]. He analogizes the IESO's conduct to "[l]ine ups for government-issue toilet paper in the former Soviet Union".[24]

43. Respectfully, these allegations are baseless, unsupported by any evidence apart from bald assertions in the appellant's own letters, and patently untrue. The IESO conducted a reasonable search in response to the appellant's initial request for information and has continued in good faith to attempt to resolve the appellant's outstanding requests.

44. The appellant has sought an order from the Adjudicator regarding the IESO's conduct in this matter, including a direction that the IESO "explain its behaviour".[25] The appellant has also sought comments from the Adjudicator regarding "opportunities to enhance future mediation processes".[26]

45. This relief is unwarranted on the facts of this appeal. Further, these requests are not properly made within the scope of this appeal. Respectfully, the issues properly before the Adjudicator relate to the nature of the IESO's search and issues related to the IESO's claim of the section 18 exemption over responsive information.

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[19] Appellant's Submissions, p. 3.
[20] Appellant's Submissions, p. 6.
[21] Appellant's Submissions, p. 2.
[22] Appellant's Submissions, p. 7.
[23] Appellant's Submissions, p. 10.
[24] Appellant's Submissions, p. 7.
[25] *Ibid.*
[26] *Ibid.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Adam D.H. Chisholm