

Ontario Energy Board

Guidelines for the Treatment of Confidential Filings

PHASE I

2000

INDEX AND OVERVIEW OF CONTENTS

	Page
1. Introduction	3
2. Applications to the Director of Licensing	6
3. Proceedings before a Panel of the Board	8
Appendix 1. Confidential Record Types	13
Appendix 2. Considerations in Assessing Confidentiality	14
Appendix 3. Definitions	15
Appendix 4. Rules of Practice and Procedure: Rules 12 and 13	18
Appendix 5. Freedom of Information and Privacy Protection Act Overview	20

Draft For Comments

1. INTRODUCTION.

1.1. Note that the following terms are used throughout these Guidelines with the specific meaning stated in Appendix 3 and have been capitalized in the text: Record; Information Item; Proceeding; Panel; Confidential Record; and Public Record.

1.2. BACKGROUND.

1.2.1. The Ontario Energy Board Act, 1998, encompasses a greater number of regulated parties, appeals to a broader group of stakeholders, and involves a number of new and/or augmented processes which has resulted in changes in both the type and amount of information required by the Ontario Energy Board (the “Board”). The need for clear and explicit treatment of Confidential filings in Proceedings before the Board or applications to the Director of Licensing has consequently acquired a greater degree of significance in the new and more competitive energy environment in Ontario.

1.2.2. The Board generally places information it receives in the course of Proceedings on the Public Record so all interested parties have equal access to this information; however, a Filer may consider some of the information sensitive and may request that a particular Information Item be treated as confidential. The Board recognizes that disclosing confidential information might harm the Filer or others under certain conditions, and that maintaining confidentiality may be necessary.

1.2.3. Applications to the Director of Licensing, on the other hand, are generally of a confidential nature. The Director’s application review process is not governed by the rules of the Statutory Powers Procedure Act (Ontario Energy Board Act, Part IV, Section 50(4); Part V, Section 6).

1.2.4. The “default” or standard treatment of Records filed with the Board is generally to make them public, while Records filed in relation to applications to the Director of Licensing are generally confidential. Separate processes are provided in the Guidelines for Proceedings before the Board and for applications to the Director of Licensing.

1.3. SOURCE LEGISLATION .

1.3.1. The Guidelines are both consistent with and subordinate to existing relevant law and regulations, including the Freedom of Information and Privacy Protection Act (“FIPPA”), the Ontario Energy Board Act (“OEB Act”), Board instruments (Codes, Licences, Board

Draft For Comments

Orders, etc.), the Board's Rules of Practice and Procedure (particularly Rule 13), and the Statutory Powers Procedure Act ("SPPA"). The criteria used in FIPPA have provided guidance for the criteria used in the Guidelines. Appendix 5 provides an overview of FIPPA.

1.4. SCOPE OF THE GUIDELINES.

- 1.4.1. Phase I of the Guidelines addresses Records submitted in relation to a Proceeding in front of a Panel or Records submitted to the Director of Licensing relating to a licence application.
- 1.4.2. The issue of internal confidentiality (e.g., access to information by individuals or departments within the Board) and retention responsibilities and procedures for accessing Confidential Records will be addressed in Phase II of the Guidelines. Phase II of the Guidelines will also address Acquired Records and Internal Records, as defined in Appendix 3. Acquired Records are defined as Records filed with the Board or otherwise acquired by the Board as a result of a Board request (e.g. monitoring and reporting requirements), while Internal Records are Records created by the Board itself reflecting its internal analysis of evidence and other matters (e.g. working papers).

1.5. OBJECTIVE OF THE GUIDELINES.

- 1.5.1. The objective of Phase I of the Guidelines is to establish an efficient and practical procedure to address confidentiality issues, consistent with the Board's interpretation of relevant existing laws, rules and practice. The Guidelines therefore clarify the treatment of Confidential Records, document the procedure that the Board and the Director will use to assess Records as confidential or as public, and outline the general criteria/considerations the Board and the Director may apply to their assessment.

1.6. HIGHLIGHTS OF THE GUIDELINES .

- 1.6.1. The Guidelines reflect different processes for Proceedings before a Panel of the Board, and for applications to the Director of Licensing. In Proceedings before a Panel of the Board when there is an issue pertaining confidentiality, there is an initial review by the case manager, or by an appointed Reviewer (the "Reviewer"). The Reviewer will consider the concerns of regulated parties, parties to the Proceeding and members of the Board Panel. The Reviewer has an opportunity to offer alternatives which may be

Draft For Comments

acceptable to the Filer and still address the concerns and needs of all parties to the Proceeding.

- 1.6.2. For Proceedings before a Panel, the Guidelines recognize that certain types of Information Items may have been previously assessed as confidential, and there are situations where it may be efficient from a regulatory process perspective to treat the Record as confidential based on past assessment experience. Appendix 1 provides a listing of the types of Records previously assessed or treated as confidential, and which may be treated as confidential in future Proceedings. Generally, this assessment has been made in a prior Board decision. In other instances, entries in Appendix 1 recognize previous Board practice to treat the information on a confidential basis. In either case, the Guidelines allow for parties to the Proceeding to object to the treatment of a type of Record listed in Appendix 1 as confidential, and for a determination as to whether the Record or circumstances are sufficiently different so as to require disclosure.
- 1.6.3. Records for which confidential treatment is requested by the Filer and which do not match a type or Record listed in Appendix 1 will typically undergo the procedure outlined in these Guidelines to determine confidentiality. However, a Panel may chose not to make a determination of the confidentiality of the Record if there is no objection to its status as confidential from parties to the Proceeding.

Draft For Comments

2. APPLICATIONS TO THE DIRECTOR OF LICENSING .

2.1. THE APPLICATION.

- 2.1.1. Applications and related materials for the Director of Licensing should be sent to the Board Secretary, marked confidential.
- 2.1.2. The Board Secretary will deliver such materials to the Director of Licensing .
- 2.1.3. The Director of Licensing has predefined the information he/she generally requires in order to assess an application for various types of licences. The Director of Licensing has developed certain templates to assist applicants in preparing their applications. The templates generally indicate whether the various Information Items requested will be considered confidential, and which Information Items are considered public. In the absence of a request for confidentiality (see 2.2. below), all Information Items indicated to be public in the application template will be forwarded to the Board Secretary and added to the Public Record.
- 2.1.4. The Director of Licensing may request additional information in order to process an application. Information received in response to a request from the Director of Licensing will generally be treated as confidential, unless the Director of Licensing indicates the response is intended for placement on the Public Record (e.g. request for clarification of an Information Item contained in the initial application that has been placed on the Public Record).

2.2. REQUESTS FOR ADDITIONAL CONFIDENTIALITY.

- 2.2.1. The Filer may object to public disclosure of information that is normally added to the Public Record. The Filer must include with the Application and related materials written reasons supporting the Filer's confidentiality request for each individual Information Item for which confidentiality is being sought. The request and written reasons will be filed on the Public Record; but Filers may request confidential treatment for those written reasons where the written reasons themselves contain confidential information, and the Director of Licensing will make a determination.
- 2.2.2. Where a request for additional confidentiality has been made, the Director of Licensing will decide whether to grant additional confidentiality, and advise the Filer accordingly. The

Draft For Comments

decision of the Director of Licensing will be placed on the Public Record, along with the information, if any, the Director of Licensing has decided will be publicly filed.

2.3. REQUESTS FOR DISCLOSURE OF CONFIDENTIAL INFORMATION.

- 2.3.1. Interested parties or intervenors may request that certain information filed with the Director of Licensing and kept confidential be added to the Public Record. The request should contain a description of the requestor's interest in the application or material, and the reasons why an Information Item should be added to the Public Record. The request and the reasons will be filed on the Public Record.
- 2.3.2. The Director of Licensing will inform the Filer of the request, and the Filer will have 5 business days to provide a written response objecting to disclosure (or proposing partial disclosure, e.g., a summary, "blacked out" version, etc.). The response will be placed on the Public Record. Where the response itself contains confidential information, such information will be deleted before the response is placed on the Public Record.
- 2.3.3. The Director of Licensing will file the decision and brief written reasons on the Public Record, along with any information that is to be disclosed.
- 2.3.4. Where the Director of Licensing has determined that information should be added to the Public Record under paragraph 2.3.3. above, the Director of Licensing will notify the requestor, the Filer and any intervenors or interested parties in writing that additional information relating to the application has been added to the Public Record. Parties will have 5 business days to provide comment on the application in light of the additional information on the Public Record.

2.4. APPEALS.

- 2.4.1. The decision of the Director of Licensing to keep a Record confidential or make it public can not be appealed to the Board.
- 2.4.2. Interested parties may appeal the Director of Licensing's decision on the application itself (grant, deny, revoke) to the Board. Should the Board decide to hear the appeal, it would constitute a new Proceeding in front of the Board, and as such will be subject to the provisions of the SPPA. The procedural steps and requirements are discussed in section 3, under the heading "Proceedings Before a Panel of the Board".

Draft For Comments

3. PROCEEDINGS BEFORE A PANEL OF THE BOARD.

3.1. INTRODUCTION.

3.1.1. All filings must be filed in accordance with the Rules of Practice and Procedure, and any amendments and rules in force at the time of the filing. Rules 12 and 13 should be referred to by Filers seeking confidentiality or persons objecting to a request for confidentiality. Rules 12 and 13 are transcribed in Appendix 4.

3.2. INITIAL FILING REQUIREMENTS.

3.2.1. In accordance with Rule 13, a party may, upon filing of a document, request that all or any part of the document be held in confidence by the Board. The request must be filed with the Board Secretary and served on all parties, and contain:

- a) The full Confidential Record including appropriate identification of the individual Information Items for which confidentiality is being sought. The Information Items should be clearly identified as “CONFIDENTIAL”. A separate envelope may be used to segregate written material for which confidentiality is requested. Electronic filings enable Filers to indicate the intended status of each Information Item/Record filed.
- b) A cover letter to the Board Secretary indicating the reasons for the request for confidentiality. For Records that correspond to a type of Record listed in Appendix 1, the Filer may choose to refer to the item number in Appendix 1 to which the Information Item or Record corresponds. For Records whose type does not correspond to any of the types of Records listed in Appendix 1, the cover letter should provide a full explanation of the need for confidentiality.
- c) An abridged version of the Confidential Record. The abridged version should be a fair and accurate representation of the full version, maintaining the integrity and purpose of the filing to the largest possible degree, without disclosing those aspects of the filing that the Filer wishes to maintain as confidential. The process of establishing and reviewing the abridged version is discussed below under the heading “Abridged Versions of Filings”.
- d) A listing of differences between the abridged and full version. This will include the pages, lines, etc. where the abridged version differs from the full version, including in each case the reasons why public disclosure might harm the Filer or be contrary to the public interest. For each page, line, etc. where confidentiality is requested, the Filer must specifically illustrate the direct links between the disclosure of the Information Item and

Draft For Comments

the occurrence of the stated harm, unless the risk or harm is self evident.

3.3. ABRIDGED VERSIONS OF FILINGS.

- 3.3.1 An abridged version is prepared for the purpose of maximizing public access to information. The abridged version should include a reference to the pages, lines etc. for which confidentiality is being requested, and the rationale supporting the request (e.g. lines 12 to 16 on page 30 reveal the company's equity position, the disclosure of which may impact future negotiations of asset acquisitions by revealing the company's ability to pay).
- 3.3.2 An abridged version may employ alternate disclosure methods to provide public information on the items suppressed. The purpose is to provide the public with sufficient information and avoid the potentially negative consequences to a Filer of a confidentiality assessment. The suppressed information may be presented in an abridged version using several techniques such as aggregation of data, summaries, data ranges, removing contractor names, using statistical measures, referencing benchmarks, or in any other manner appropriate (e.g. continuing the above example, the equity position itself may not be as important to public stakeholders as the Filer's ability to meet its financial commitments after acquiring the asset; therefore financial ratios such as interest coverage may be useful additional disclosure).
- 3.3.3 If it is not possible to create an abridged version (e.g. the entire text is confidential), the cover letter should indicate this situation. If the disclosure of the existence of a Record is in itself confidential, the cover letter should indicate this fact and the cover letter should also be marked as confidential.
- 3.3.4 If desired by the Filer, a Reviewer may be assigned who, with assistance from the Filer if needed, will assess whether the abridged version reflects the full version accurately and to the largest degree possible. The Reviewer may request modifications and enhancements to improve the disclosure contained in the abridged version. The purpose of this review is to improve public disclosure. Any revisions to the abridged version adopted by the Filer will be provided to parties to the Proceeding.

3.4. PREVIOUSLY ASSESSED RECORDS (APPENDIX 1).

Draft For Comments

- 3.4.1. Types of Records listed in Appendix 1 have been previously assessed confidential, and will continue to be considered confidential without the requirement for an initial justification of the need for confidentiality required from the Filer. The Board may decide at any time to include a type of Record in Appendix 1 and therefore treat it as confidential, with or without a specific Proceeding or filing in progress, with or without oral hearings, and with or without stating reasons for the decision.
- 3.4.2. However, this initial assessment of confidentiality will be re-assessed if a party to a Proceeding challenges the confidential treatment of the Record and can demonstrate that sufficient special circumstances exist. The Board may update Appendix 1 from time to time.
- 3.4.3. If a Filer claims confidentiality on the basis that an item is of the same type as a type of Record listed in Appendix 1, the Reviewer will assess the complete filing to verify that this type of Record corresponds with the type claimed in Appendix 1.
- 3.4.4. If the Reviewer determines that the filing doesn't conform to a type of Record in Appendix 1 (e.g. the circumstances or context for this filing differ from those associated with the related Record in Appendix 1) the Reviewer will notify the Filer within 10 business days from the receipt of the filing by the Board Secretary. The notification will be placed on the Public Record. The Filer must then provide a full explanation of the need for confidentiality as outlined under the heading "Initial Filing Requirements".

3.5. ASSESSMENT PROCESS/PROCEDURES.

- 3.5.1. The cover letter, abridged version and listing of differences (which does not disclose confidential information) will be added to the Public Record by the Board Secretary, but the full confidential record will be maintained in confidence by the Board until a determination is made regarding confidentiality.
- 3.5.2. Parties will be served notice that they will have an opportunity to object to the confidentiality of the initial filing based on the reading of the abridged version (including any revisions) or on any other knowledge of the situation they might have. Any such objection must be properly filed with the Board Secretary within 5 business days of service of the notice, and it must include reasons why public disclosure would be in the public interest, and the deficiencies of the available abridged version in addressing the information requirements. In situations where the filing has been determined to be consistent with Records in Appendix 1 (previously assessed filings), the objection must also explain the special circumstances that warrant disclosure of this Record. The Filer

Draft For Comments

may reply to objections to confidentiality within 10 business days of the receipt of the objection.

- 3.5.3. Once the objections are known, the Reviewer may suggest revisions (or further revisions if revisions were made to the initial abridged version) to the abridged version in a focussed attempt to resolve the specific disclosure objections submitted by parties to the Proceeding. In this case, objecting parties will have 5 business days to withdraw their objections.
- 3.5.4. If an objection is not withdrawn, the Board will commence a formal determination of confidentiality. In the absence of any objections, the Panel is not bound to make a formal determination of confidentiality. In such an instance, the Board Secretary will maintain the record in confidence. However, the Panel may conduct a formal determination of confidentiality if it is of the view that such a review is in the public interest (e.g. the type of Record may be prevalent in the future, and adding or not adding the Record to the listing of pre-assessed Records in Appendix 1 may have value from a regulatory process efficiency perspective).
- 3.5.5. A Panel may chose to engage a separate Panel of Board Members to make a determination on the issue of confidentiality. If either Panel conducts a hearing on the confidentiality of a Record, Rule 47 of the Board's Rules of Practice and Procedure apply. The Panel may choose to include or exclude the general public or other parties, require parties to sign a Declaration and Undertaking of Confidentiality as a condition of attendance at the hearing, or to hold "in camera" hearings with or without restrictions on attendance.

3.6. WITHDRAWAL OF EVIDENCE.

- 3.6.1. The Panel may determine that certain information (withdrawn or not filed) is necessary for the Filer to discharge their burden of proof in the Proceeding. The Panel may require that the Filer submit the evidence, in which case the aforementioned procedure for determining confidentiality applies.
- 3.6.2. Where a filing has not been ordered by the Board, Filers might decide to withdraw it at any time during the determination of confidentiality process. In this case, the Record does not constitute evidence and will not be used for decision making by the Panel hearing the application.

3.7. POST-ASSESSMENT PROCEDURES.

Draft For Comments

- 3.7.1. If the Panel determines that the Information Item should be made public, the Board Secretary will notify all parties immediately after the decision with reasons of the Panel, and will allow a period of 5 business days following this notice before adding the Information Item to the Public Record. If any party to the Proceeding indicates in writing during this period that it intends to appeal, the Board Secretary will maintain the Record in confidence until the appeal process has concluded or further direction is received from the Panel. If the process included a positive determination by the Reviewer that the Record was consistent with a type of Record listed in Appendix 1, the Panel must determine whether or not to amend Appendix 1.
- 3.7.2. If the Panel determines that the Information Item should remain confidential, the Board Secretary will notify all parties immediately after the written decision with reasons of the Panel, and maintain the Record in confidence.

3.8. EXPEDITED PROCESS.

- 3.8.1. The Panel may amend the procedure to expedite an ongoing Proceeding, when there is an immediate need for information that the Panel needs to hear.
- 3.8.2. A Panel conducting an oral hearing where an issue of confidentiality arises, may take whatever action it considers appropriate, including but not restricted to:
- a) Deciding that the Panel will analyze the Record and decide if it will be maintained in confidence, with or without a hearing, or put in the Public Record;
 - b) Requesting that the case manager or a Reviewer conduct a review without delay and issue a recommendation to the Panel on the issue of confidentiality, followed by a Panel decision;
 - c) Including or not any parties, with or without a non-disclosure requirement (“Declaration of Undertaking, as specified in Rule 47 and Form 3 of the Rules of Practice and Procedure), in the confidentiality decision making process;
 - d) Conducting written or oral Proceedings, or conducting “in camera” Proceedings to determine confidentiality, with attendance by all or some of the parties or others, at the discretion of the Panel;
 - e) Waiving the need for an abridged version and a list of differences between the full and abridged versions.

Draft For Comments

APPENDIX 1. CONFIDENTIAL RECORD TYPES.

The Appendix lists types of Records previously assessed or maintained as confidential. These items are subject to amendment from time to time.

It should be noted that whether any particular Record filed as part of an application or in a Proceeding before the Board will be kept confidential is the decision of the Panel hearing the application.

Item Number	Title	Explanation
1	Individual Personal Records.	Personal Records of employees or other members of entities seeking licences, filed with the Board, or otherwise obtained, including police, tax, CPIC, and other personal Records.
2	Credit Checks.	Utility or personal credit checks, filed with or obtained by the Board directly. These are credit checks ordered from a variety of commercial sources, including Dunn & Bradstreet, Standard & Poor, etc.
3	Components of Contracts.	certain components of contracts between parties are generally treated as confidential unless otherwise designated by the Board (e.g. Business Plans and Strategies; Competitive Pricing; Details of certain litigation or other legal information)

Draft For Comments

APPENDIX 2. CONSIDERATIONS IN ASSESSING CONFIDENTIALITY.

The process of determining confidentiality ultimately culminates in the classification of the filing as being either a Public Record or a Confidential Record. The basic principle underlying the assessment process is to achieve an appropriate balance between the public interest in disclosure and the potential harm resulting from the disclosure of the information.

The determination of confidentiality may include the criteria in Rule 47.01 and the following considerations:

1. Whether disclosure of the Record could unduly: prejudice the competitive position of any party significantly; impede or diminish the capacity of a party to fulfill existing contractual obligations; or interfere significantly with negotiations being carried out by a party.
2. Whether disclosure of the Record could unduly reveal information supplied to, or in the report of a conciliation officer, mediator, labor relations officer, or other person appointed to resolve a labor relations dispute or a commercial dispute, or other type of arbitration or mediation.
3. Whether disclosure of the Record is likely to produce undue personal harm or financial harm to any person, group, agency, or committee, to an affiliate of the Filer, a business associate of the Filer, or any other entity conducting or that has conducted business with the Filer. Definitions of personal harm and financial harm are included in Appendix 3.
4. Whether the Board is able to discharge its responsibilities under the OEB Act without public disclosure of the Record.
5. Whether a Record is public or generally available elsewhere (e.g. other levels or departments of government) either before or after the confidentiality of the Record is challenged.
6. Whether a Record has been declared exempt under FIPPA by the Freedom of Information Commissioner or by a court of law (i.e. assessed in a process outside the ambit of the Board) and such prior declaration is made known to the Board. Note: the Board is not bound by decisions of other tribunals.
7. Whether an assessment of the confidentiality of the Record under FIPPA has commenced.

Draft For Comments

APPENDIX 3. DEFINITIONS.

These Guidelines adopt all definitions contained in the Ontario Energy Board Act, RSO 1998, (the OEB Act), the Statutory Powers Procedure Act, RSO 1990, (SPPA), and the Freedom of Information and Protection of Privacy Act, RSO 1990, F.31, (FIPPA).

In addition, these Guidelines use, expand or define the following terms:

Applicant:

A party applying to the Board or to the Director of Licensing.

Confidential Record:

A Record with restricted circulation that is not available to the general public or parties.

Days:

Business days; days when the offices of the Board are open for business.

Filer:

Any person or entity, or a representative of a person or entity, filing with the Board.

Financial harm:

Includes but is not limited to the undue loss or gain of money or money equivalent; undue loss or gain of other assets, including goodwill, credit ratings, opportunity to conduct business, opportunity to close a sale; loss or gain of control over a company, situation, or share offering; undue loss or gain of opportunity or realization of a maximum price due to having to alter the Filer's timetable; undue loss or gain of clients; undue loss or gain of suppliers; undue increase or decrease in the cost of supplies, including insurance premiums, interest rates paid, and service fees; undue loss or gain due to a lawsuit, threatened law suit, or potential law suit; undue loss or gain due to the need to incur costs for products and services which otherwise would not have been necessary at any time; prejudice or gain to the competitive position; material interference with ongoing labor or contractual or other negotiations in progress. However, if the financial harm will not accrue for a sufficiently long period of time after the Record is disclosed, it may not constitute financial harm for the purposes of confidentiality.

Information Item:

A part or a subset or component of a record.

Draft For Comments

Board Regulatory Staff:

The staff employed by the Board that performs the technical analysis and related technical advice associated with applications (and appeals) to the Board, applications to the Director of Licensing, development of policy and performance of audits, investigations and reviews. It includes all staff of the Board's Regulatory Affairs and Licensing and Applications groups.

Panel:

The group of Members of the Board deciding on the confidentiality of a filing. The Panel generally consists of two, or more Members, but it can consist of only one Member if authorized by the Chair or any one Vice-Chair of the Board. The Panel deciding on confidentiality issues will generally be the same Panel hearing the main application. However, the application Panel may request a separate Panel to decide on confidentiality.

Personal harm:

Relates to harm to one or several individuals. It includes and is related to (but is not limited to): financial harm; undue loss or gain of personal position or reputation; disclosure of acts of a criminal nature for which a person has been convicted or of which a person is accused; personal financial information; or any other personal information which is not generally available publicly.

Proceeding:

A matter brought before a Panel, whether commenced by application, reference, Order in Council or on the Board's own initiative.

Public Information:

A Public Record or a subset, part of component of a Public Record.

Public Record:

A Record accessible to the general public.

Record:

The definition of "Record" in FIPPA is:

"RECORD" MEANS ANY RECORD OF INFORMATION HOWEVER RECORDED, WHETHER IN PRINTED FORM, ON FILM, BY ELECTRONIC MEANS OR OTHERWISE, AND INCLUDES:

(A) CORRESPONDENCE, A MEMORANDUM, A BOOK, A PLAN, A MAP, A DRAWING, A DIAGRAM, A PICTORIAL OR GRAPHIC WORK, A PHOTOGRAPH, A FILM, A MICROFILM, A SOUND RECORDING, A VIDEOTAPE, A MACHINE READABLE RECORD, ANY OTHER DOCUMENTARY MATERIAL, REGARDLESS OF PHYSICAL FORM OR CHARACTERISTICS, AND ANY COPY THEREOF, AND (B) SUBJECT TO THE REGULATIONS, ANY RECORD

Guidelines for the Treatment of Confidential Filings- Phase I

Draft For Comments

THAT IS CAPABLE OF BEING PRODUCED FROM A MACHINE READABLE RECORD UNDER THE CONTROL OF AN INSTITUTION BY MEANS OF COMPUTER HARDWARE AND SOFTWARE OR ANY OTHER INFORMATION STORAGE EQUIPMENT AND TECHNICAL EXPERTISE NORMALLY USED BY THE INSTITUTION; ("DOCUMENT").

Records in the possession or control of the Board are classified in three classes for the purposes of this Guideline:

a) Acquired Record:

- a Record filed with the Board, including the Director of Licensing as part of an application, or required or seized by the Board, including the Director of Licensing, pursuant to Sections (106), (107), (108), or (122) of the OEB Act.
- a Record filed with the Board, including the Director of Licensing, outside of a Proceeding or application with the Director of Licensing, or after a Proceeding or application are finalized as evidenced by a Board Decision or Director of Licensing Decision, pursuant to a Board Order or another monitoring and compliance instrument (for example, any monitoring and compliance Record filed by a utility to meet an order of the Board) or to conditions imposed by the Director of Licensing in granting an application.

b) Filing:

A Record filed by a Filer in reference to a Proceeding in front of a Panel, or associated with a Proceeding in front of a Panel, or a Record filed by a Filer with the Director of Licensing relating to a licence application. For instance, an application for rates, an application for a licence, or a MAAD filing. Also included are Records requested by the Panel during the course of a Proceeding, Records requested by Board Staff to analyze pre-filed evidence, or supplementary Records requested by the Director of Licensing in the course of a licence application, etc.

c) Internal Record:

- A Record created by the Board itself, or a Record of another institution shared with the Board. All Records created by Board Members, staff, employees, associates, consultants, etc, including those which directly relate to a filing.
- All Records related to matters not directly associated with any Proceeding, applicant, or filing.

Reviewer:

A Board Regulatory Staff member appointed to conduct a review of Records filed as confidential.

Draft For Comments

APPENDIX 4. RULES OF PRACTICE AND PROCEDURE: RULES 12 AND 13.

Rules of Practice and Procedure.

These Rules are available at the Board's web site: <http://www.oeb.gov.on.ca>

The Rules are useful to determine a variety of administrative procedures.

Specifically:

Rule 12. Public Record

12.01. Subject to Rule 13, all documents filed in respect of a proceeding shall be placed on the public record.

Rule 13. Confidential Documents

13.01. A party may, upon the filing of a document, request that all or any part of the document be held in confidence by the Board.

13.02. Any request for confidentiality shall:

(a) include a summary of the nature of the information in the document;

(b) address:

(i) the reasons for the request, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed; and

(ii) any objection to placing an abridged version of the document on the public record, and the reasons for such an objection; and

(c) be filed with the Board and served on the parties.

13.03. A request under Rule 13.02 shall be placed on the public record.

13.04. Where a party has made a request under this Rule, the document, if filed with the Board, shall be held in confidence unless the Board decides, with or without a hearing, that

Draft For Comments

the document should be placed on the public record.

13.05. Where the Board holds a hearing under Rule 13.04, the Board may direct that the hearing be held in the absence of the public in accordance with Rule 47.

13.06. A person may object to a request for confidentiality by filing an objection and serving the objection on the parties.

13.07. An objection shall address the reasons:

- (a) why the party requires public disclosure of the document; and
- (b) why public disclosure would be in the public interest.

13.08. After giving the party claiming confidentiality an opportunity to reply to an objection, if any, the Board may:

- (a) order that the document be placed on the public record;
- (b) order that the document be held in confidence by the Board;
- (c) order that the document need not be disclosed to the Board;
- (d) order that an abridged version of the document be placed on the public record;
- (e) make any other order the Board may deem to be in the public interest.

13.09. In considering a request under this Rule, the Board shall apply the criteria in Rule 47.01 and the burden of satisfying the Board that a document should be held in confidence is on the person claiming confidentiality.

The criteria in Rule 47.01 establish that the Board may hold an oral hearing or part of an oral hearing in the absence of the public only where the Board is of the opinion that a) matters involving public security may be disclosed; or b) intimate financial, commercial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

Draft For Comments

APPENDIX 5. FREEDOM OF INFORMATION AND PRIVACY PROTECTION ACT
OVERVIEW.

The Freedom of Information and Protection of Privacy Act (FIPPA) is Ontario legislation with two main purposes:

1. To allow access to information held by public institutions.
2. To keep confidential the personal information held by public institutions.

The Act requires a government institution to release information, unless it falls within one of the exceptions listed, and prohibits the institution from releasing personal information. There are exceptions to the prohibition against disclosure of personal information (e.g. consent, public safety) but we cannot generally release personal information whether requested under FIPPA or otherwise.

The part of FIPPA that will be most relevant to the Board is that which deals with the requirement to disclose information. We regularly receive and keep information that is commercially sensitive, often on the understanding that it will be held in strict confidence. We could not carry out our statutory mandate if we could not receive information in confidence. However, FIPPA prevails over our own rules about confidentiality, including material held by the E.R.O. All information (other than personal), whether collected in confidence or not, could be disclosed through a successful FIPPA request.

The general rule is that any person has a right of access to information held by government institutions (except personal information). A person wanting access to our records could make the request to the Board or to the Ministry. The head of the institution decides whether the information should be released. The decision is appealable to the Information and Privacy Commissioner. The Minister is the head of the institution, and he has delegated decision making authority to the Deputy Minister and the Assistant Deputy Minister for Business Planning and Corporate Services, but not to the Board.

There are various exceptions to the rule that government institutions must give access to information. Records do not have to be disclosed if disclosure would:

- reveal advice to the government from a public servant or a consultant (s.13)
- interfere with law enforcement (s.14)
- reveal confidential information received from other government (s.15)
- compromise national defence (s.16)
- compromise the economic or other interests of Ontario (s.18)
- breach solicitor - client privilege (s.19)
- cause danger to health or safety (s.20)
- reveal tax information (s.17(2))
- reveal trade secrets, or sensitive scientific, technical, commercial or financial information (s.17(1))

Draft For Comments

The exemption in section 17(1) may be applicable to most of the information the Board collects in confidence. However, to avoid disclosure, the information must not only fall into one of the categories listed in section 17, but it must have been supplied in confidence and its disclosure must be reasonably expected to cause harm. The section reads as follows:

17. Third party information

17.(1). A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

17.(2). Tax information

17.(2). A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

17.(3). Consent to disclosure

17.(3). A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure. R.S.O. 1990, c. F.31, s. 17.

As suggested in the attached protocol, if the Board or the Ministry receives a FIPPA request relating to information held by the Board, a memo will be prepared describing the information and providing advice as to whether it may fit within one of the exceptions to disclosure. FIPPA states that the decision must be made within thirty days, and the protocol attempts to take account

Draft For Comments

of this tight time frame.

The existence of FIPPA does not mean that the Board should respond to requests for information only through the mechanism of that statute. We have always been helpful in responding to reasonable requests for access to non-confidential information, and this practice should continue.