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BY EMAIL AND WEB POSTING

August 9, 2021

**To: All Regulated Entities
All Other Interested Stakeholders**

**Re: Proposed Amendments to the *Practice Direction on Confidential Filings*
File No.: EB-2021-0227**

The Ontario Energy Board (OEB) is evaluating the efficiency and effectiveness of its regulatory proceedings. As part of this initiative, the OEB is proposing amendments to its *Practice Direction on Confidential Filings* (Practice Direction). The proposed amendments are intended principally to streamline the process for addressing requests for confidential treatment and to revise the OEB's approach to redactions of personal information. A summary of the key proposed changes to the Practice Direction is set out below. A copy of the proposed revised Practice Direction is attached as Schedule A to this letter.

Stakeholders are invited to comment on the proposed amendments to the Practice Direction. Under the OEB's new governance structure, any changes to the Practice Direction are approved by the Chief Commissioner.

Background

The OEB's general policy is that materials related to an adjudicative proceeding should be placed on the public record, so that all interested parties can have equal access to those materials. This reflects the OEB's view that its adjudicative proceedings should be open, transparent and accessible. However, the OEB recognizes that some information may be of a confidential nature and should be protected as such. The purpose of the Practice Direction is to establish uniform procedures for the filing of confidential materials in relation to adjudicative proceedings that come before the OEB and for dealing with requests for confidential treatment.

In a letter to stakeholders dated March 9, 2021, the OEB indicated that the treatment of confidential filings is one of the areas where it would look to make improvements.

Summary of Proposed Amendments

As noted above, the principal objective of the proposed amendments is to streamline the process for addressing confidentiality requests and to revise how redactions of personal information will be addressed. The OEB is also taking this opportunity to make additional changes to the Practice Direction for greater clarity and to harmonize with recent changes to the *Rules of Practice and Procedure*.

A summary of the more significant proposed amendments to the Practice Direction is set out below.

1. “Presumptively Confidential” Information

The OEB is proposing to change how requests for confidentiality for certain types of information will be handled, with a view to eliminating the need for formal rulings on confidentiality in appropriate cases.

Appendix B of the current Practice Direction includes a list of categories of information that have previously been found to be confidential and for which parties can anticipate that the OEB will grant confidentiality. However, the OEB nevertheless rules on requests for confidentiality relating to these kinds of information in the same way that it does for other confidentiality claims.

Under the proposed amendments set out in Part 4, specific categories of information would be deemed to be “presumptively confidential”. The proposed categories are in a new Appendix B. The OEB is proposing to eliminate the current sections 4.1 and 4.2 of the Practice Direction because information identified as confidential in Filing Guidelines and the Record-keeping and Reporting Requirements would be deemed “presumptively confidential”.

There would still be an opportunity for parties to object to confidential treatment for such information within set timelines. However, absent an objection, information fitting within one of the “presumptively confidential” categories would be accorded confidential treatment. In such a case, the OEB would simply confirm the confidential treatment by way of a letter or in a Procedural Order.

2. Process for Raising Objections

The process for raising objections to confidentiality requests is set out in Part 5 of the Practice Direction. With the current practice, the OEB will typically establish a schedule for parties to file objections on confidentiality requests.

Under the proposed amendments to Part 5, the timelines for objections would be standardized with parties having 5 business days to file an objection to a confidentiality request and the party requesting confidentiality also having 5 business days to reply to any objection. The proposed amendments to the Practice Direction would permit the OEB to extend or compress the time as needed in individual cases.

3. Acceptance of Declaration and Undertaking

The current Practice Direction contemplates that the person filing a request for confidentiality will have an opportunity to object to the OEB's acceptance of a Declaration and Undertaking (D&U) after the D&U is filed with the OEB. The party who filed the D&U then has a right of reply to any such objection. Objections and replies are to be filed "within the time specified by the OEB".

To streamline this process, the OEB is proposing that a party making a confidentiality request must identify where they object to the disclosure of some or all of the confidential information to a given representative of another party. Where the confidentiality request relates to materials included in the original application evidence, this would be done within three business days of the OEB's decision on intervention requests. In all other cases, this would be done at the time of filing the confidentiality request. This approach would eliminate the need to establish timelines for objections to the acceptance of a D&U, and further procedural steps will only be needed where an objection to a D&U is raised.

4. Treatment of Personal Information

The current process for considering redactions for personal information largely mirrors the process for confidentiality requests, except that intervenors who sign the OEB's D&U do not have access to the personal information. This means that parties generally have an opportunity to make submissions on redactions for personal information and the OEB issues a decision on the requested redactions.

The proposed amendments to the Practice Direction include, in a new Part 10, a revised process for addressing the redaction of personal information that is separate from the process for addressing confidentiality requests. The revised approach is consistent with the *Freedom of Information and Protection of Privacy Act* (FIPPA), which governs the OEB's obligations regarding the protection of personal information. Specifically, it is proposed that OEB staff will review the redactions to make sure that they are personal information within the meaning of FIPPA. If, upon review, there is a need for further explanation or justification for the personal information redactions, OEB staff will contact the party who made the filing and that party will be asked to make an additional filing explaining why the redacted information is considered to be personal information within the meaning of FIPPA. Further steps, if any, would then be determined by the OEB.

5. Other Changes

The OEB is proposing to make a number of other amendments to the Practice Direction. Some of these are for greater clarity, and others are to align with recent changes to the *Rules of Practice and Procedure* relating to definitions and interpretation. In addition, the OEB is proposing to provide further direction in Part 5 of the Practice Direction on the information that is to be provided in support of confidentiality requests, as well as on how requests for confidential treatment will be considered.

Some of the proposed changes would trigger the need for minor consequential changes to the *Rules of Practice and Procedure*, *Rules of Practice and Procedure for Enforcement Proceedings*, and the form of D&U. These changes will be determined based on the final revisions to the Practice Direction.

Invitation to Comment and Cost Awards

Interested parties are invited to file any comments they have on the proposed amendments to the Practice Direction by **August 23, 2021**. The OEB intends to review comments at the OEB's Adjudication Modernization Committee before issuing final amendments to the Practice Direction.

Cost awards will be available to eligible persons under section 30 of the *Ontario Energy Board Act, 1998*. The OEB intends to allow up to **two** hours per eligible participant for comments regarding the proposed amendments to the Practice Direction.

The OEB will assess the cost eligibility of participants at the time of the submission of cost claims. Costs awards will be recovered from all rate regulated electricity distributors, rate regulated electricity transmitters, rate regulated natural gas distributors, and Ontario Power Generation Inc. The costs are to be apportioned amongst all rate regulated electricity distributors, rate regulated electricity transmitters, rate regulated natural gas distributors, and Ontario Power Generation Inc. in the same manner as under the OEB's Cost Assessment Model.

The OEB will apply the principles set out in section 5 of its *Practice Direction on Cost Awards* when awarding costs. The maximum hourly rates set out in the OEB's Cost Awards Tariff will be applied. The OEB expects that groups representing the same interests of class of persons will make every effort to communicate and coordinate their participation in this process. The OEB will use the process set out in section 12 of its *Practice Direction on Cost Awards* to implement the payment of the cost awards. Therefore, the OEB will act as a clearing house for all payments of cost awards in this process. For more information on this process, please see the OEB's *Practice Direction on Cost Awards*.

Filing Instructions

Stakeholders are responsible for ensuring that any documents they file with the OEB **do not include personal information** (as that phrase is defined in FIPPA), unless filed in accordance with Rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file number, **EB-2021-0227** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at the [Filing Systems Page](#) on the OEB's website.
- Parties are encouraged to use RESS. Those who have not yet [set up an account](#), or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.

All communications should be directed to the attention of the Registrar at the address below and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this consultation, interested parties must include the Case Manager, Jerry Wang at Jerry.Wang@oeb.ca and OEB Counsel, Lawren Murray at lawren.murray@oeb.ca.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

Yours truly,

Original signed by

Christine E. Long
Registrar

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SCHEDULE A

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1. Introduction and Purpose

The purpose of this Practice Direction on Confidential Filings is to establish uniform procedures for the filing of confidential materials in relation to all proceedings that come before the Ontario Energy Board. This Practice Direction is also intended to assist participants in the OEB's proceedings in understanding how the OEB will deal with such filings.

The OEB's general policy is that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the OEB's view that its proceedings should be open, transparent, and accessible. The OEB therefore generally places materials it receives in the course of the exercise of its authority under the *Ontario Energy Board Act, 1998* and other legislation on the public record so that all interested parties can have equal access to those materials. That being said, the OEB relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed, and recognizes that some of that information may be of a confidential nature and should be protected as such.

This Practice Direction seeks to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential. The approach that underlies this Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the OEB that confidential treatment is warranted in any given case.

The OEB is required to devote additional resources to the administration, management and adjudication of confidentiality requests and confidential filings. In this context, it is particularly important that all parties remain mindful that only materials that are clearly relevant to the proceeding should be filed, whether the party is filing materials at its own instance, is requesting information by way of interrogatory or is responding to an interrogatory. Parties are reminded that, under the OEB's *Rules of Practice and Procedure*, a party that is in receipt of an interrogatory that it believes is not relevant to the proceeding may file and serve a response to the interrogatory that sets out the reasons for the party's belief that the requested information is not relevant. This process applies to all interrogatories, and is of particular significance in relation to confidential filings given the administrative issues associated with the management of those filings. For example, superseded drafts of earlier materials would generally not be relevant to proceedings before the OEB.

The OEB's *Rules of Practice and Procedure* and *Rules of Practice and Procedure for Enforcement Proceedings* govern the conduct of all proceedings before the OEB. Those *Rules* require compliance with this Practice Direction.

The *Freedom of Information and Protection of Privacy Act* restricts the OEB's disclosure of personal information. Personal information is a category separate and apart from

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confidential information. In this Practice Direction, the process for addressing redactions for personal information, set out in Part 10, is different from the process for addressing confidentiality claims.

2. Application

Except for information provided in application forms for licensing applications, the procedures set out in this Practice Direction are to be followed by all participants in a proceeding before the OEB, unless otherwise directed by the OEB. This includes proceedings to be determined under delegated authority (see **section 3.3**) and proceedings commenced on the OEB's own motion.

For application forms for licensing applications, the OEB has identified predefined categories of information that the OEB will treat as confidential. It is not necessary to request confidentiality for information in these categories under Part 5.

This Practice Direction is subordinate to existing law and regulations, including the *Freedom of Information and Protection of Privacy Act*, the *Ontario Energy Board Act, 1998*, the *Statutory Powers Procedure Act*, OEB instruments (i.e., licences, codes, rules and OEB orders), the OEB's *Rules of Practice and Procedure* and the OEB's *Rules of Practice and Procedure for Enforcement Proceedings*.

This Practice Direction does not address the manner in which Commissioners and OEB staff will administer confidential information, which is an issue of the OEB's internal processes. The OEB has implemented internal procedures that are designed to ensure that confidential information is segregated from other information and is made available within the OEB to those who need the information in the course of performing their roles.

3. Definitions and Interpretation

3.1 Definitions

3.1.1 In this Practice Direction,

“applicant” means a person who makes an application;

“application” when used in connection with a proceeding commenced by an application to the OEB, or transferred from an employee acting under delegated authority to the OEB by the Chief Commissioner under section 6(7) of the *OEB Act*, means the commencement by a party of a proceeding including an appeal;

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“**business day**” means any day other than any Saturday, Sunday or other day that the OEB’s offices are closed;

“**document**” or “**record**” includes written documentation, films, photographs, charts, maps, graphs, plans, surveys, books of account, transcripts, videotapes, audio tapes, and any information stored by means of an electronic storage and retrieval system;

“**FIPPA**” means the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F31, as amended from time to time;

“**hearing**” means a hearing in any proceeding before the OEB, and includes an electronic hearing, an oral hearing, and a written hearing;

“**OEB**” means the Ontario Energy Board;

“**OEB Act**” means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, as amended from time to time;

“**OEB Rules**” means the *Rules of Practice and Procedure* and the *Rules of Practice and Procedure for Enforcement Proceedings*;

“**party**” includes an applicant, an appellant, an employee acting under delegated authority in an appeal under section 7 of the *OEB Act*, any person granted intervenor status by the OEB and any person ordered to produce information in a proceeding before the OEB;

“**proceeding**” means a process to decide a matter brought before the OEB, including a matter commenced by application, notice of appeal, transfer by the Chief Commissioner under section 6(7) of the *OEB Act*, reference, request or directive of the Minister, or on the OEB’s own motion; and

“**Registrar**” means the Registrar of the OEB appointed under section 5 of the *OEB Act*.

- 3.1.2 Except as otherwise defined in **section 3.1.1**, words and expressions used in this Practice Direction shall have the meaning ascribed to them in the *OEB Act* and the OEB’s *Rules of Practice and Procedure*.

3.2 Matters Decided Under Delegated Authority

- 3.2.1 Under the authority of section 6 of the *OEB Act*, certain powers or duties of the OEB have been delegated to an employee of the OEB. In such cases, the

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delegate is responsible for making determinations in relation to confidential filings. The provisions of this Practice Direction otherwise apply, with such modifications as the context may require.

4. Presumptive Confidential Treatment

With a view towards improving regulatory efficiency, this Practice Direction sets out categories of information which will presumptively be treated as confidential. Where no objection to the confidentiality request is received for information fitting within one of these categories, the OEB will confirm the confidential treatment by way of a letter or as part of a procedural order.

- 4.1 Appendix B contains specific categories of information that will presumptively be considered confidential. Parties or OEB staff can challenge the presumptive confidential treatment of such information by filing an objection within the timelines contemplated in **section 5.1.6**. If an objection is filed, the timelines set out in **sections 5.1.6** and **5.1.8** and **sections 5.1.9 to 5.1.15** apply with such modifications as the context may require. Absent an objection, information identified by the party requesting confidentiality as fitting within one of the categories set out in Appendix B will be accorded confidential treatment, unless the OEB determines that the information does not fit within a category in Appendix B. In such case, the OEB will confirm the treatment in writing.
- 4.2 Representatives for parties can generally have access to a document fitting within one of the categories in Appendix B, including for the purpose of determining whether to file an objection under **section 4.1.1**, in accordance with Part 6.

5. General Process for Confidentiality in Matters Before the OEB

The processes set out in this Part and in Part 6 are intended to allow for the protection of information that has been properly designated as confidential. The onus is on the person requesting confidential treatment to demonstrate to the satisfaction of the OEB that confidential treatment is warranted in any given case. The presence of a third-party confidentiality agreement is not in and of itself a sufficient reason for an applicant to refuse to file information that is relevant to a proceeding. Similarly, a confidentiality agreement between an applicant and a third party does not automatically result in confidential treatment for the information covered by the agreement.

It is also the expectation of the OEB that parties will make every effort to limit the scope of their requests for confidentiality to an extent commensurate with the commercial sensitivity of the information at issue or with any legislative obligations of confidentiality or non-disclosure. Parties must prepare meaningful redacted documents or summaries

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so as to maximize the information that is available on the public record. This will provide parties with a fair opportunity to present their cases and permit the OEB to provide well-documented reasons for its decisions. Before a party requests confidential treatment for specific information, that party is expected to review information already in the public domain and should not claim confidentiality over information that is publicly available. The OEB further expects that parties will not claim confidentiality where the same type of information has been put on the public record in previous proceedings, absent a compelling reason why confidential treatment is warranted in the current proceeding.

The processes in this Part and in Part 6 set out the OEB's role in the exchange of confidential filings and related materials (such as the Declaration and Undertaking).

5.1 Process for Confidentiality Requests

- 5.1.1 All filings must be made in accordance with the *OEB Rules*, which deal with confidential documents before the OEB.
- 5.1.2 In accordance with the *OEB Rules*, a party may request that all or part of a document be held confidential.
- 5.1.3 A request for confidentiality must be addressed to the Registrar.
- 5.1.4 A request for confidentiality must include the following items:
 - 5.1.4.1 a cover letter indicating that a request for confidential treatment is being made for certain information;
 - 5.1.4.2 a table which sets out for each piece of information for which confidential treatment is requested: (i) the specific page(s) that are redacted; (ii) whether the redacted information fits within a presumptively confidential category included in Appendix B, if applicable; and (iii) where (ii) does not apply, the basis for the confidentiality claim, including references to Appendix A, if applicable, and the reasons why public disclosure of that information would be detrimental;
 - 5.1.4.3 a confidential, un-redacted version of the document containing all of the information for which confidentiality is requested. This version of the document is to be marked "confidential" and must identify all portions of the document for which confidentiality is claimed by using shading, square brackets, highlighting or other appropriate markings; and
 - 5.1.4.4 either:
 - 5.1.4.4.1 a non-confidential, redacted version of the document from which the information that is the subject of the

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- confidentiality request has been deleted or stricken; or
- 5.1.4.4.2 where the request for confidentiality relates to the entire document, a non-confidential description or summary of the document which can be included in the cover letter set out in (a).
- 5.1.5 A copy of the cover letter requesting confidentiality, together with the non-confidential version or non-confidential description of the document (as applicable) and the table setting out the basis for the confidentiality request must be served on all parties to the proceeding, and will be placed on the public record. The confidential, un-redacted version of the document will be kept confidential until the OEB has made a determination on the confidentiality request. Access to documents by representatives for parties is governed by Part 6.
- 5.1.6 Where a request for confidentiality is made prior to the OEB's determination of requests for intervention, a party or OEB staff may object to the request for confidentiality by filing an objection with the Registrar, and sending a copy to the party requesting confidentiality, within five business days of the OEB's determination of any requests for intervention, unless otherwise directed by the OEB. For other requests for confidentiality, a party or OEB staff may object to the request for confidentiality by filing an objection with the Registrar within five business days of the OEB's receipt of the information set out in **section 5.1.5**, unless otherwise directed by the OEB. If an objection is not received within the applicable timeframe set out above, the OEB will make its determination on confidentiality without further procedural steps.
- 5.1.7 An objection to a request for confidentiality must address the reason why the party believes that the information that is the subject of the request for confidentiality is not confidential, in whole or in part, by reference to the grounds for confidentiality expressed by the party making the request for confidentiality.
- 5.1.8 The party requesting confidentiality will have an opportunity to reply to the objection. The replying party must file its reply with the Registrar and serve it on all parties to the proceeding within five business days of the receipt of the objection set out in **section 5.1.6**. Where multiple objections are received on different days, the reply submission must be filed within five business days of receipt of the last objection.
- 5.1.9 The OEB will then assess whether the request for confidentiality should be granted and may determine that a request for confidentiality is not warranted regardless of whether any party has objected to the request. Some of the factors that the OEB may consider in making this assessment are listed in Appendix A.

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- 5.1.10 In considering the request for confidentiality, the OEB may, as a preliminary matter, determine whether the information is relevant to the proceeding. Where the OEB determines that the information is not relevant to the proceeding, it may issue a decision accepting the redactions without assessing the grounds for confidentiality. Despite the expectation set out in section 1 to file only relevant information, if a party requesting confidentiality has filed information it considers not relevant to the proceeding, it should address the reason why it believes this information is not relevant in its reply to the objection.
- 5.1.11 In determining the request for confidentiality, the OEB may:
- 5.1.11.1 order the document placed on the public record, in whole or in part;
 - 5.1.11.2 order the document be kept confidential, in whole or in part;
 - 5.1.11.3 order that the non-confidential redacted version of the document or the non-confidential description or summary of the document (as applicable) be revised;
 - 5.1.11.4 order that the confidential version of the document be disclosed under suitable arrangements as to confidentiality (see Part 6); or
 - 5.1.11.5 make any other order that the OEB finds to be in the public interest.
- 5.1.12 The OEB will notify all parties of its decision under **section 5.1.11** in relation to a request for confidentiality.
- 5.1.13 Where the OEB has ordered that information that is the subject of a confidentiality request be placed on the public record or disclosed to another party, in whole or in part, the person who filed the information will, subject to **section 5.1.14**, have a period of three business days in which it may request that the information be withdrawn. Such request shall be made in writing to the Registrar. The OEB may deny the request where the information is relevant to a matter in issue and its probative value would outweigh any unfair prejudice, having regard to the record of the proceeding at the time of the request.
- 5.1.14 The ability to request the withdrawal of information under **section 5.1.13** does not apply to information that was required to be produced by an order of the OEB.
- 5.1.15 If the party that made the request for confidentiality indicates, within three business days of the date of receipt of the OEB's order requiring the information be placed on the public record, that it intends to appeal or seek review of the decision, the OEB will not place the document on the public record until the appeal or review has been concluded or the time for filing an appeal or review has expired without an appeal or review having been commenced. In the absence of such an indication, the OEB will deal with the information in the

manner set out in its order.

5.2 Confidentiality Requests Made Orally During an Oral Hearing

5.2.2 The provisions of **section 5.1** also apply to requests for confidentiality made in the context of an oral hearing, with such modifications as the context may require. However, the Panel presiding over the oral hearing may take such action as it considers appropriate to expedite the process when there is an immediate need for information that the Panel needs to hear.

5.3 Interrogatories or Undertakings

5.3.2 A party may request that all or part of a response to an interrogatory or all or part of information filed further to an undertaking given in a Technical Conference or an oral hearing be held confidential. The provisions of **sections 5.1** and **5.2** apply to requests for confidentiality made in relation to a response to an interrogatory or in relation to information filed further to an undertaking, with such modifications as the context may require.

6. Arrangements as to Confidentiality

Where the OEB has agreed to a request for confidentiality, the confidential information will not be placed on the public record including where the OEB accepts presumptively confidential information under Part 4. Representatives of parties to the proceeding will generally be given access to the confidential information provided that suitable arrangements as to confidentiality are made. This Part sets out the principal arrangements that the OEB will use in allowing limited and conditional access to confidential information by representatives of parties.

The OEB considers violations of a Declaration and Undertaking given to the OEB under this Part to be a matter of very serious concern. Such violations can be, and will continue to be, subject to sanctions imposed by the OEB. In appropriate cases, the OEB may also refuse to accept further Declaration and Undertakings from persons whose future compliance with a Declaration and Undertaking is in question.

6.1 Declaration and Undertaking

6.1.1 The OEB generally expects that confidential information should be disclosed to persons fitting within one of categories set out in **section 6.1.2** that have signed the form of Declaration and Undertaking found on the OEB's website at: <https://www.oeb.ca/industry/rules-codes-and-requirements/practice-direction-confidential-filings>. The Declaration and Undertaking is a binding commitment by the person:

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- 6.1.1.1 not to disclose the confidential information except as permitted by the OEB;
- 6.1.1.2 to treat the confidential information in confidence;
- 6.1.1.3 to destroy the confidential information following completion of the proceeding; and
- 6.1.1.4 in the case of confidential information in electronic media, to expunge the confidential information from all electronic apparatus and data storage media under the person's direction or control, and to continue to abide by the terms of the Declaration and Undertaking in relation to such confidential information to the extent that it subsists in an electronic form and cannot reasonably be expunged in a manner that ensures that it cannot be retrieved.

A signed Declaration and Undertaking must be filed with the OEB and will be placed on the public record.

- 6.1.2 Subject to **section 6.1.4**, the OEB will, except where there are compelling reasons for not doing so, accept a Declaration and Undertaking from the following:
 - (a) counsel for a party; and
 - (b) an expert or consultant for a party.

As a general rule, such counsel, expert or consultant cannot be a director, officer, or employee of a party.

- 6.1.3 Subject to **section 6.1.4**, the OEB may accept a Declaration and Undertaking from other persons in appropriate cases. In such a case, a modified version of the form of Declaration and Undertaking will be made available to such person.
- 6.1.4 Where the party requesting confidentiality objects to any person fitting within **section 6.1.2** from being provided with access to confidential information, the party should, when making the confidentiality request in accordance with **section 5.1.4**, indicate to which person the objection applies and the reasons why access should not be granted to that person if they agree to abide by the terms of the Declaration and Undertaking. A copy of the objection must also be sent to the person to whom the objection relates on the same day the objection is sent to the OEB, and that person shall have an opportunity to respond to the objection within five business days of the OEB's receipt of the objection. Where an objection under this section is raised, the timeline in **section 5.1.6** is suspended until the OEB has resolved the issue of whether it will allow the

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person to have access to the confidential information under a Declaration and Undertaking and whether any conditions are required in relation to such access.

- 6.1.5 **Section 6.1.4** does not apply where the confidentiality request is filed prior to the OEB's determination of requests for intervention. In such situations, the party requesting confidentiality shall file with the Registrar any objection to a person fitting within **section 6.1.2** from being provided with access to confidential information within three business days of the OEB's determination of any requests for intervention. A copy of the objection must also be sent to the person to whom the objection relates on the same day the objection is sent to the OEB, and that person shall have an opportunity to respond to the objection within five business days of the OEB's receipt of the objection.
- 6.1.6 The OEB may deny access to confidential information by representatives of certain parties where the OEB determines that those parties have a commercial interest or other circumstances that would provide them some advantage unrelated to the proceeding. The OEB may also, as a condition of acceptance of the Declaration and Undertaking, impose such further conditions in relation to access to the confidential information as the OEB considers appropriate, including requiring an affidavit confirming that the representative will not be involved in any other matters where the confidential information could be relevant.
- 6.1.7 Where the OEB determines that confidential information should be disclosed to one or more persons that have signed a Declaration and Undertaking, the party requesting confidential treatment of information shall serve the confidential information on such persons.
- 6.1.8 In accordance with the terms of the Declaration and Undertaking, confidential information must either be destroyed or expunged (as applicable) and a Certificate of Destruction in the form available on the OEB's website (<https://www.oeb.ca/industry/rules-codes-and-requirements/practice-direction-confidential-filings>) filed with the Registrar within the time specified in the Declaration and Undertaking.

6.2 Hearings in the Absence of the Public (*In Camera* Hearings)

- 6.2.1 Under section 9 of the *Statutory Powers Procedure Act*, oral hearings are required to be open to the public except where the OEB is of the opinion that "intimate financial 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" or "matters involving public security may be disclosed", in

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which case the OEB may hold the hearing in the absence of the public. It is therefore the OEB's normal practice to hold oral hearings open to the public to comply with this obligation and to facilitate transparency, openness, and accessibility of the OEB's processes.

6.2.2 The OEB recognizes that there may be some instances where the proceedings may need to be closed to the public. This situation could arise when there is a possibility that information that the OEB has agreed is confidential will be disclosed during an oral hearing. When this occurs, the OEB will exclude from the hearing room all persons other than the following:

- (a) representatives of the OEB (i.e., OEB staff, OEB consultants, etc.);
- (b) representatives of the party that filed the confidential information; and
- (c) persons allowed access to the confidential information at issue under a Declaration and Undertaking.

The hearing will then proceed *in camera* for such time as the confidential information is the subject of the hearing or is being referred to.

6.2.3 When part of a hearing is conducted *in camera*, transcripts of the *in camera* portion of the hearing will be dealt with in the same manner as the confidential information at issue. Subject to **section 6.2.5**, copies of the transcript of the *in camera* portion of the hearing will only be provided to the party that provided the confidential information and to persons allowed access to the confidential information at issue under a Declaration and Undertaking.

6.2.4 The party that filed the confidential information that is the subject of an *in camera* portion of a hearing shall, within five business days of the *in camera* hearing or such other time as the OEB may direct, review the transcript of that portion of the hearing and shall file with the OEB:

- (a) a redacted version of the transcript that identifies all portions of the transcript for which confidentiality is claimed, using shading, square brackets or other appropriate markings; or
- (b) where the party believes that the entire transcript should be treated as confidential, a letter identifying why the party believes that to be the case and a summary of the transcript for the public record.

6.2.5 The OEB will assess the filing made under **section 6.2.4** and may, among such other action as the OEB may take, do one or more of the following:

- (a) provide a redacted version of a transcript prepared under **section 6.2.4(a)** or this section to all persons allowed access to the confidential information

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- at issue under a Declaration and Undertaking, or direct that it be so provided;
- (b) direct that the party that filed a redacted version of a transcript under **section 6.2.4(a)** or this section prepare and file a revised redacted version of the transcript;
 - (c) provide a summary of a transcript prepared under **section 6.2.4(b)** or this section to all parties to the proceeding, or direct that it be so provided;
 - (d) direct that the party that filed a summary of a transcript under **section 6.2.4(b)** prepare and file a revised summary or a redacted version of the transcript;
 - (e) direct that any non-confidential testimony that is given *in camera* be placed on the public record and provided to all parties to the proceeding;
or
 - (f) direct that a redacted version of the transcript suitable for being placed on the public record be prepared and provided to all parties to the proceeding.

6.3 Other

- 6.3.1 Where the OEB has made arrangements for the disclosure of confidential information, the OEB may give further directions to the parties from time to time to protect the confidential information from disclosure to persons that are not entitled to such disclosure. These directions may include the process for the filing and exchange of interrogatories that contain the confidential information and the manner in which confidential information may be addressed as part of closing arguments or final submissions.
- 6.3.2 Parties should make every effort to prepare their written argument such that the entirety of the document can be placed on the public record. Where it is necessary to make specific reference to confidential information in a written argument, the party filing the argument should either:
- (a) file a public version of the written argument together with a confidential appendix that contains the confidential information; or
 - (b) file both an un-redacted confidential version of the written argument and a public, redacted version of the written argument from which all confidential information has been deleted.
- 6.3.3 Where the OEB considers that a confidential appendix to, or a redacted version of, a written argument contains information that has not been determined by the OEB to be confidential, the OEB may order the party filing the written argument to file a revised appendix or redacted version.

7. Settlement Conferences

7.1.1 Confidentiality in the context of settlement conferences shall be governed by the OEB's *Rules of Practice and Procedure*, and the Practice Direction on Settlement Conferences. However, parties who have received access in a proceeding to confidential information, after the OEB has accepted their Declaration and Undertaking, can only disclose that information, during a settlement conference, to (i) the party who filed the confidential information, (ii) other representatives of parties allowed access to the confidential information at issue under a Declaration and Undertaking, (iii) the OEB appointed facilitator for the settlement conference, and (iv) OEB staff.

8. Inspections and Investigations

8.1.1 If any document, record, or other information obtained under an inspection (under Part VII of the OEB Act) or an investigation (Part VII.0.1 of the OEB Act) is to be introduced into evidence in a proceeding, it must be done in accordance with the OEB Act. The OEB will then determine whether the document, record, or information should be made public or provided on a confidential or redacted basis. The OEB will determine the matter in accordance with Parts 5 and 6.

8.1.2 A party that files an OEB report that describes the outcome of an inspection or investigation where that party was the subject of the inspection or investigation may seek confidential treatment over that report. The OEB will determine whether the report should be made public or provided on a confidential or redacted basis in accordance with Parts 5 and 6.

9. Electronic Information

Parties and the OEB shall not electronically transmit materials containing confidential information, including transcripts of in camera proceedings, without password protection.

10. Personal Information under the Freedom of Information and Protection of Privacy Act

The OEB is subject to FIPPA. Subject to limited exceptions, the OEB is prohibited from disclosing personal information, and the *OEB Rules* state that personal information will neither be placed on the public record nor provided to any party, including a person from whom the OEB has accepted a Declaration and Undertaking under **section 6.1**. Accordingly, the OEB's process for addressing redactions for personal information is

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different from the process for addressing confidentiality claims.

Personal information includes recorded information about an identifiable individual that is of a personal nature. Examples of information fitting within the definition of personal information are set out in section 2(1) of FIPPA. Section 2(3) of FIPPA states that the name, title, and contact information of a person acting in a business, professional, or official capacity is not personal information.

- 10.1 When a person files a document or record that contains the personal information of another person who is not a party to the proceeding, the person filing the document or record must:
- (a) file two versions of the document or record in accordance with the *OEB Rules*, and include in the confidential, un-redacted version of the document or record shading, square brackets, highlighting or other appropriate markings to identify the personal information; and
 - (b) provide a table which sets out for each piece of redacted personal information: (i) the specific page(s) that contain the personal information; and (ii) the basis for the personal information claim with specific reference to how the redacted information fits within the definition of personal information set out in section 2 of FIPPA. This table will be placed on the public record and should be filed with the public redacted version of the document.
- 10.2 Parts 5, 6, and 7 do not apply to requests regarding personal information. OEB staff will review the redactions for personal information to ensure the information qualifies as personal information under FIPPA. Where necessary, the party that redacted the information will be contacted by OEB staff and asked to file, on the public record, additional explanation of how or why the redacted information fits within the definition of personal information in FIPPA. Further steps, if any, will be determined by the OEB.

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Appendix A

Considerations in Determining Requests for Confidentiality

The final determination of whether or not information will be kept confidential rests with the OEB. The OEB will strive to find a balance between the general public interest in transparency and openness and the need to protect confidential information. Some factors that the OEB may consider in addressing confidentiality of filings made with the OEB are:

- (a) the potential harm that could result from the disclosure of the information, including:
 - i. prejudice to any person's competitive position;
 - ii. whether the information could impede or diminish the capacity of a party to fulfill existing contractual obligations;
 - iii. whether the information could interfere significantly with negotiations being carried out by a party; and
 - iv. whether the disclosure would be likely to produce a significant loss or gain to any person;
- (b) whether the information consists of a trade secret or financial, commercial, scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the OEB;
- (c) whether the information pertains to public security or cybersecurity;
- (d) whether the Information and Privacy Commissioner or a court of law has previously determined that a record should be publicly disclosed or kept confidential;
- (e) whether the type of information in question was previously held confidential by the OEB; and
- (f) whether the information is required by legislation to be kept confidential.

Information that is in the public domain will not be considered confidential.

Appendix B

Categories of Information that Will Presumptively Be Considered Confidential

This Appendix contains a list of specific categories of information that will presumptively be considered confidential, subject to any objections from parties as to why confidential treatment should not be accorded to such information in a particular proceeding.

1. Unit pricing of a third party
2. Billing rates of a third party
3. Load profiles, energy usage and billing information of a specific customer that is not personal information
4. Copy of an unsuccessful bid received as part of a competitive procurement process
5. Non-public financial statement of an unregulated affiliate engaged in competitive business activity
6. Information covered by solicitor-client privilege, settlement privilege or litigation privilege
7. Underlying dataset and/or model of a consultant retained by a party
8. Information related to current or future collective bargaining negotiations
9. Non-public forward-looking financial information where such disclosure could give rise to liability under Ontario securities law
10. Information that has not been generally disclosed and such disclosure is prohibited by Ontario securities law
11. Information identified in the OEB's Reporting and Record Keeping Requirements as being confidential
12. Information identified as being considered confidential in OEB filing requirements and filing guidelines.