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# Ontario Energy Board

## Practice Direction on Confidential Filings

**Revised February 17, 2021**

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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 and parties to a proceeding are 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.

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

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The OEB will continue to monitor the effectiveness of its approach to confidential filings and will revise this Practice Direction on an as-needed basis.

## **2. APPLICATION**

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.

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*, and the *Statutory Powers Procedures Act*, OEB instruments (i.e., licences, codes, rules and OEB orders) and the OEB's *Rules of Practice and Procedure*.

This Practice Direction does not address the manner in which Commissioners and OEB staff will handle 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 on a limited basis.

## **3. DEFINITIONS AND INTERPRETATION**

### **3.1 Definitions**

3.1.1 In this Practice Direction:

“**Act**” means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B);

“**applicant**” means a person who makes an application to the OEB, and includes a person that is filing a notice under section 80 or 81 of the Act;

“**application**” when used in connection with a proceeding commenced by an application to the OEB, means the commencement by a party of a proceeding before the OEB, and includes a notice filed under section 80 or 81 of the Act;

“**business day**” means any day which is not a holiday;

“**document**” or “**record**” includes a written document, film, audio tape, videotape, file, photograph, chart, graph, map, plan, survey, book of account, transcript, and any information stored by means of an electronic storage and retrieval system;

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“**FIPPA**” means the *Freedom of Information and Protection of Privacy Act* (Ontario);

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

“**holiday**” means any Saturday, Sunday and any other day that the OEB’s offices are closed;

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

“**party**” includes an applicant, an appellant, 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 motion, notice of appeal, reference, request of the Minister, Order in Council or on the OEB’s own motion; and

“**Registrar**” means the Registrar of the OEB appointed under section 5 of the 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 Act and the OEB’s *Rules of Practice and Procedure*.

## **3.2 Interpretation**

3.1.1 In this Practice Direction:

- (a) words importing the singular include the plural and vice versa;
- (b) words importing a gender include any gender;
- (c) words importing a person include (i) an individual, (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public body corporate; and (iii) any government, government agency or body, regulatory agency or body or other body politic or collegiate;
- (d) where a word or phrase is defined in this Practice Direction, other parts of speech and grammatical forms of the word or phrase have a corresponding meaning;
- (e) a reference to a document (including a statutory instrument) or a provision

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of a document includes any amendment or supplement to, or any replacement of, that document or that provision; and

- (f) the expression “including” means including without limitation.

### **3.3 Matters Decided Under Delegated Authority**

- 3.3.1 Under the authority of section 6 of the Act, certain powers or duties of the OEB have been delegated to an employee of the OEB. In such cases, the delegate is responsible for making determinations in relation to confidential filings. The provisions of this Practice Direction otherwise apply in relation to confidential filings made in the context of a proceeding to be decided under delegated authority.

## **4 WHEN REQUEST FOR CONFIDENTIALITY IS NOT REQUIRED**

### **4.1 Information Identified as Confidential in OEB Templates and Filing Guidelines**

- 4.1.1 The OEB has developed certain templates and filing guidelines to assist applicants in preparing licensing and other applications. Certain of these templates and filing guidelines, including licence application forms for electricity licences and gas marketing licences, identify predefined categories of information that will be considered confidential in the normal course. Where an OEB template or filing guideline indicates that information will be treated in confidence, no formal request for confidentiality under Part 5 is required. However, to the extent practicable, any such information should be clearly marked “confidential”.
- 4.1.2 Where an OEB template or filing guideline indicates that information will be treated in confidence, the information will not be placed on the public record nor provided to any other party unless another party requests access to that information under section 4.1.4 and the OEB rules in favour of that request.
- 4.1.3 In the absence of a request for confidentiality, all information that is not indicated on a template or in a filing guideline as being confidential will be included on the public record. An applicant that wishes information that would normally be included on the public record to be held confidential must follow the procedure set out in Part 5, and the OEB will determine the request in accordance with Part 5.
- 4.1.4 Where an OEB template or filing guideline indicates that information will be treated in confidence, a party may request access to that information by filing a request with the Registrar and serving a copy of the request on the applicant and

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each party. The request must address the matters identified in paragraph (b) of section 5.1.7. The applicant will have an opportunity to object to the request for access to confidential information. The applicant must file its objection with the Registrar and serve it on all parties within the time specified by the OEB. The OEB will determine the request for access to confidential information in accordance with Part 5.

## **4.2 Information filed Under the OEB’s Reporting and Record Keeping Requirements (“RRR”)**

- 4.2.1 The OEB’s *Natural Gas Reporting & Record Keeping Requirements: Rule for Natural Gas Utilities, Natural Gas Reporting and Record Keeping Requirements: Gas Marketer Licence Requirements and Electricity Reporting and Record Keeping Requirements* require that licensees and natural gas utilities file certain information with the OEB on a regular basis. Each of these RRR identify information that the OEB intends to treat in confidence. No formal request for confidentiality is required in relation to such information when it is filed with the OEB as part of a regular RRR filing. However, to the extent practicable, any such information should be clearly marked “confidential”. Where such information is filed as part of a regular RRR filing and is subsequently filed in a proceeding, Parts 5 and 6 apply.

## **4.3 Personal Information under FIPPA**

- 4.3.1 Subject to limited exceptions, the OEB is prohibited from releasing personal information, as that phrase is defined in FIPPA. 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 file two versions of the document or record in accordance with Rule 9A.01 of the OEB’s *Rules of Practice and Procedure*. As indicated in Rule 9A.02, the confidential, un-redacted version of the document or record will be held in confidence and neither that version of the document or record nor the personal information contained in it will be placed on the public record or provided to any other party, including a person from whom the OEB has accepted a Declaration and

Undertaking under section 6.1, unless the OEB determines that the information is not personal information or that the disclosure of the personal information would be in accordance with the requirements of FIPPA.

## **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.

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, and to prepare meaningful redacted documents or summaries 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 meaningful and well-documented reasons for its decisions.

The processes set out in this Part and in Part 6 contemplate that the OEB will play a central role in directing and managing the exchange of confidential filings and related materials (such as the Declaration and Undertaking). A party that independently serves other parties with documents containing confidential information other than through or at the direction of the OEB does so at its own risk.

### **5.1 Process for Confidentiality Requests**

- 5.1.1 All filings must be made in accordance with the OEB's *Rules of Practice and Procedure*, specifically, Rule 10 of the *Rules of Practice and Procedure*, which deals with confidential documents before the OEB.
- 5.1.2 In accordance with Rule 10.01 of the OEB's *Rules of Practice and Procedure*, 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:
  - (a) a cover letter indicating the reasons for the confidentiality request, including the reasons why the information at issue is considered confidential and the reasons why public disclosure of that information would be detrimental;
  - (b) a confidential, un-redacted version of the document containing all of the information for which confidentiality is requested. This version of the document should be marked "confidential" and should identify all portions of document for which confidentiality is claimed by using shading, square brackets or other appropriate markings; and

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- (c) either:
- i) a non-confidential, redacted version of the document from which the information that is the subject of the confidentiality request has been deleted or stricken; or
  - ii) where the request for confidentiality relates to the entire document, a non-confidential description or summary of the document.
- 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) 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, subject to section 5.1.6, be kept confidential until the OEB has made a determination on the confidentiality request.
- 5.1.6 A party to the proceeding may object to the request for confidentiality by filing an objection with the Registrar within the time specified by the OEB. The objection must be served on all other parties to the proceeding, including the party that made the confidentiality request. Where the party requires access to the confidential version of the document in order to submit its objection, the party may request that the OEB allow access for that purpose under suitable arrangements as to confidentiality. Such request shall be made in writing to the Registrar or, where the request is made during an oral hearing, directly to the OEB. The party that made the confidentiality request may object to the request for access within the time and in the manner specified by the OEB.
- 5.1.7 An objection to a request for confidentiality must address the following:
- (a) 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; and
  - (b) the reason why the party requires disclosure of the information that is the subject of the request for confidentiality and why access to the non-confidential version or description of the document (as applicable) is insufficient to enable the party to present its case.
- 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 the time specified by the OEB.
- 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

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that the OEB may consider in making this assessment are listed in Appendix A, including whether the OEB has in the past assessed or maintained the same type of information as confidential. An illustrative list of the types of information that the OEB has previously assessed or maintained as confidential is set out in Appendix B, and parties may anticipate that the OEB will accord confidential treatment to these types of information in the normal course.

5.1.10 In determining the request for confidentiality, the OEB may:

- (a) order the document placed on the public record, in whole or in part;
- (b) order the document be kept confidential, in whole or in part;
- (c) order that the non-confidential redacted version of the document or the non-confidential description or summary of the document (as applicable) be revised;
- (d) order that the confidential version of the document be disclosed under suitable arrangements as to confidentiality (see Part 6); or
- (e) make any other order that the OEB finds to be in the public interest.

5.1.11 The OEB will notify all parties of its decision in relation to a request for confidentiality.

5.1.12 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 5.1.13, have a period of 5 business days in which it may request that the information be withdrawn. Such request shall be made in writing to the Registrar or, where the request is made during an oral hearing, directly to the OEB. 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.

5.1.13 The ability to request the withdrawal of information under section 5.1.12 does not apply to information that was required to be produced by an order of the OEB.

5.1.14 If the party that made the request for confidentiality indicates, within five business days of the date of receipt of the OEB's order, 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**

5.2.1 The provisions of section 5.1 generally apply to requests for confidentiality made in the context of an oral hearing. 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**

5.3.1 A party may request that all or part of a response to an interrogatory be held confidential. The provisions of section 5.1 apply to requests for confidentiality made in relation to a response to an interrogatory, 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. Representatives of parties to the proceeding will generally be given access to the confidential information provided that suitable arrangements as to confidentiality are made, although the OEB may limit access to confidential information to those parties that the OEB has determined require access to the confidential information in order to present their cases. 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 processes set out in this Part require that parties file a Declaration and Undertaking with the OEB. Parties to a proceeding will be notified when the OEB has accepted a Declaration and Undertaking from a person. Parties should not independently serve a Declaration and Undertaking on other 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 may determine that confidential information should, in whole or in part, be disclosed to one or more persons 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->

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[confidential-filings](#)). The Declaration and Undertaking is a binding commitment by the person: (i) not to disclose the confidential information except as permitted by the OEB; (ii) to treat the confidential information in confidence; (iii) to return or destroy the confidential information following completion of the proceeding; and (iv) 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 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 The OEB shall notify the party that filed the confidential information that would be the subject-matter of a Declaration and Undertaking of the persons from whom a Declaration and Undertaking will be accepted. The party shall have an opportunity to object to the acceptance of a Declaration and Undertaking from such person in the manner and within the time specified by the OEB. The person to whom the objection relates shall have an opportunity to reply to the objection in the manner and within the time specified by the OEB. The OEB will then decide whether it will accept a Declaration and Undertaking from such person and may, as a condition of acceptance of the Declaration and Undertaking, impose such further conditions in relation to that person's access to the confidential information as the OEB considers appropriate. Where the OEB accepts a Declaration and Undertaking from a person, the OEB will notify the other parties to the proceeding or direct that the other parties be notified accordingly. A person should not serve a Declaration and Undertaking on other parties unless directed by the OEB to do so. A party is not required to serve confidential information on a person until such time as the party has been notified that the OEB has accepted a Declaration and Undertaking from that person.

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- 6.1.5 Where the OEB determines that confidential information should be disclosed to one or more persons that have signed a Declaration and Undertaking, the OEB may act as the conduit for the service of confidential information on such persons. In such cases, the confidential information need only be filed with the Registrar, and the Registrar will attend to the distribution of the confidential information to persons that have signed a Declaration and Undertaking.
- 6.1.6 In accordance with the terms of the Declaration and Undertaking, confidential information must either be destroyed or expunged (as applicable) or returned to the Registrar for destruction promptly following the end of the proceeding for destruction. A person that chooses to destroy or expunge confidential information must file with the Registrar the form of Certification of Destruction available on the OEB's website at: <https://www.oeb.ca/industry/rules-codes-and-requirements/practice-direction-confidential-filings>).

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

- 6.2.1 Under section 9 of the *Statutory Powers Procedure Act* (Ontario), 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”, in 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 in 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 that have signed and returned to the OEB a Declaration and Undertaking, provided that the confidential information at issue is covered by the Declaration and Undertaking and that the OEB has determined that the persons require access to the confidential information in order to present their cases.

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.

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- 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 applicable persons that have signed and returned to the OEB 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 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 applicable persons that have signed and returned to the OEB 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 public 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

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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 This Practice Direction does not apply to settlement conferences.<sup>1</sup> Confidentiality in the context of settlement conferences shall be governed by the OEB's *Rules of Practice and Procedure*, Practice Direction on Settlement Conferences and any other applicable Practice Guidelines.

## **8 INSPECTIONS AND INVESTIGATIONS**

Sections 110, 111 and 111.1 of the Act contain provisions that address the confidentiality of documents, records and information obtained by an inspector under Part VII of the Act. Sections 112.0.5 and 112.0.6 of the Act are to the same effect in relation to information obtained by an investigator under Part VII.0.1 of the Act.

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<sup>1</sup> For clarity, a settlement conference does not include a technical conference. Any confidentiality issues arising in relation to a technical conference will be addressed in accordance with Parts 5 and 6 of this Practice Direction.

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- 8.1.1 All documents, records and information obtained by an inspector during the course of an inspection under section 107 or 108 of the Act or obtained by an investigator under Part VII.0.1 of the Act are confidential. Generally speaking, such documents, records and information will not be disclosed to anyone other than OEB staff or Commissioners. By way of exception, documents, records and information obtained during an inspection or investigation may be disclosed:
- (a) to counsel for the OEB;
  - (b) as may be required in connection with the administration of the Act or any other Act that gives powers or duties to the OEB;
  - (c) where permitted as part of a report under section 111.1 of the Act;
  - (d) in any proceeding under the Act or any other Act that gives powers or duties to the OEB;
  - (e) with the consent of the owner of the document or record or the person that provided the information; and
  - (f) where required by law.
- 8.1.2 No document, record or information obtained by an inspector under section 107 or 108 of the Act or obtained by an investigator under Part VII.0.1 of the Act will be introduced in evidence in an OEB proceeding unless the OEB has given notice to the owner of the document or record or the person who provided the information, and has given that person an opportunity to make representations with respect to the intended introduction of that evidence.
- 8.1.3 If any document, record, or other information obtained by an inspector or investigator is admitted into evidence in a proceeding before the OEB, the OEB may determine whether the document, record, or information should be kept confidential and, if so, whether and the extent to which the document, record or information should be disclosed under suitable arrangements as to confidentiality (see Part 6). The OEB will determine the matter in accordance with Parts 5 and 6.

**9 FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT**

Participants in the OEB's processes are reminded that the OEB is subject to FIPPA. FIPPA addresses circumstances in which the OEB may, upon request, be required to release information that is in its custody or under its control, and generally prohibits the OEB from releasing personal information. Accordingly, the OEB will have regard to its obligations under FIPPA when making determinations in relation to confidential filings

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(see section 4.3.1). A brief overview of the more relevant provisions of FIPPA is set out in Appendix C.

## **10 ELECTRONIC INFORMATION**

The OEB will not electronically transmit materials containing confidential information, including transcripts of in camera proceedings, without password protection.

## **11 ACCESS TO CONFIDENTIAL INFORMATION OUTSIDE OF PROCEEDING**

Interested persons may wish to see confidential information at times other than during the proceeding in which the confidential information was filed. In such a case, the interested person may request access to that information by filing a request with the Registrar. The person that filed the confidential information will have an opportunity to object to the request for access to that information. The objection must be filed with the Registrar and served on the person requesting access. The OEB will determine the request for access to confidential information in accordance with Part 5.

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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;
- (d) whether the information is personal information;
- (e) whether the Information and Privacy Commissioner or a court of law has previously determined that a record should be publicly disclosed or kept confidential;
- (f) if an access request has previously been made for the information under FIPPA, whether the information was disclosed as a result of that request;
- (g) any other matters relating to FIPPA and FIPPA exemptions;
- (h) whether the type of information in question was previously held confidential by the OEB; and
- (i) 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**

### **Types of Information that Have Previously Been Held Confidential**

This Appendix contains an illustrative list of the types of information previously assessed or maintained by the OEB as confidential, and parties may anticipate that the OEB will accord confidential treatment to these types of information in the normal course.

#### **1. Individual Personal Records**

Personal records of employees or other members of entities seeking licenses that are either filed with the OEB or otherwise obtained have previously been held confidential. Individual personal records include police, tax, CPIC, and other personal records.

#### **2. Credit Checks**

Personal credit checks. These are credit checks filed with the OEB, or obtained by the OEB, from a variety of commercial sources including Dunn & Bradstreet and Standard & Poor's.

#### **3. Information Covered by Solicitor-client Privilege or Litigation Privilege**

Advice with respect to litigation or other legal information protected by solicitor-client privilege or litigation privilege.

#### **4. Tax Related Information**

Information from a tax return or information gathered for the purpose of determining tax liability or collecting a tax.

#### **5. Third Party Information under FIPPA**

Third party information as described in section 17(1) of FIPPA, including vendor pricing information.

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**6. “Forward Looking” Financial Information**

“Forward looking” financial information that has not been publicly disclosed and that Ontario securities law therefore requires be treated as confidential.

**7. Information Identified as Confidential in OEB Templates and Filing Guidelines**

Information identified as being considered confidential in OEB templates and filing guidelines, including licence application forms for electricity licences and gas marketing licences.

**8. Information Filed Under the RRR**

Information identified in the OEB’s *Natural Gas Reporting & Record Keeping Requirements: Rule for Natural Gas Utilities, Natural Gas Reporting and Record Keeping Requirements: Gas Marketer Licence Requirements and Electricity Reporting and Record Keeping Requirements* as being treated as confidential.

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**Appendix C**

**Summary of Pertinent FIPPA Provisions**

FIPPA allows any person to request access to records or information in the custody or under the control of the OEB.

Subject to limited exceptions, the OEB is prohibited from releasing personal information.

Following receipt of a request, the OEB must release non-personal information that is in its custody or under its control unless the information falls within one of the exemptions listed in the legislation. Some of the exemptions are mandatory (in which case the information must be withheld) and others are discretionary (in which case the information may be withheld). For example, records do not need to be released if disclosure would:

- (a) reveal advice to the government from a public servant or a consultant;
- (b) interfere with law enforcement;
- (c) reveal confidential information received from another government; or
- (d) violate solicitor-client privilege.

The exemptions that are likely to be of most relevance in the context of confidential filings with the OEB are those contained in section 17 of FIPPA, which relates to commercially sensitive third party information.

Under section 17(1), the OEB must not, without the consent of the person to whom the information relates, disclose a record where:

- (a) the record reveals a trade secret or scientific, technical, commercial, financial or labour relations information;
- (b) the record was supplied in confidence implicitly or explicitly; and
- (c) disclosure of the record could reasonably be expected to have any of the following effects:
  - i. prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization;
  - ii. result in similar information no longer being supplied to the OEB where it is in the public interest that similar information continue to be so supplied;
  - iii. result in undue loss or gain to any person, group, committee or financial institution or agency; or

- iv. 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.

Before granting a FIPPA request for access to a record that the OEB has reason to believe might contain information referred to in section 17(1) of FIPPA, the OEB must give written notice to the person to whom the information relates. That person then has an opportunity to make written representations as to why the record (or a part of the record) should not be disclosed. Where the OEB subsequently decides to disclose the record (or a part of the record), the OEB must again give written notice to the person to whom the information relates.

That person then has an opportunity to appeal the decision to the Information and Privacy Commissioner.

Under section 17(2) of FIPPA, the OEB must not, without the consent of the person to whom the information relates, 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.