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June 17, 2019

**Via Email**

Ms. Diane Smith, Adjudicator  
Information and Privacy Commissioner of Ontario  
Tribunal Services Department  
Suite 1400  
2 Bloor Street East  
Toronto ON M4W 1A8

Dear Adjudicator Smith:

**Re: Request for Reconsideration and Stay Pending Reconsideration  
Order PO-3955  
Appeal PA17-207**

We represent Bruce Power in respect of Appeal PA17-207 (the “**Appeal**”) and related Order PO-3955 dated May 16, 2019 (the “**Order**”).

We write to request two things:

- 1) A stay of the Order; and
- 2) A reconsideration of certain aspects of the Order

**Request for Stay**

Section 17 of the Code of Procedure expressly confers the power upon an Adjudicator to grant a stay on the request of a party, and section 18.06 states that a party can request a stay along with its reconsideration request.<sup>1</sup> The Information and Privacy Commissioner (“**IPC**”) has granted a stay pending reconsideration numerous times in the past and ought to do so here.<sup>2</sup>

In PO-3955 Adjudicator Smith made the following order:

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<sup>1</sup> Code of Procedure for appeals under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* (October 2004) (“**Code of Procedure**”).

<sup>2</sup> See e.g. Order PO-3066-R at para 3; Reconsideration Order PO-2958-R at “Background”; Order PO-3522-R at para 7.

- “1. I order the IESO to disclose to the appellant by **June 24, 2019** but not before **June 18, 2019**, pages 3 and 11 of Record 4, page 8 of Record 5 and page 4, 5 and 12 of Record 6.
2. I uphold the IESO’s decision to withhold access to the remaining information at issue in the records.”

Bruce Power seeks a stay of only paragraph 1 of the Order. Bruce Power seeks a reconsideration of paragraph 1 of the Order as it applies to Records 4, 5 and 6. Bruce Power also intends to file a judicial review application seeking review of paragraph 1 of the Order to preserve its rights.

Bruce Power takes no issue with the portion of the order which upholds the decision to withhold access and does not seek a stay with respect to that portion of the Order.

A stay of proceedings should be granted where three conditions exist: (i) there is an arguable issue to be tried; (ii) there is a likelihood of irreparable harm to the applicant if the stay is not granted; and (iii) the balance of convenience favours the stay. Bruce Power submits that all three conditions are met here and that the stay order should be granted.<sup>3</sup>

First, Bruce Power has an arguable case for reconsideration and an arguable case for judicial review. It is not a frivolous or vexatious position, but is rooted in the fact specific errors that led to an incorrect decision being issued and a breach of natural justice. Bruce Power submitted at paragraph 2 of its submissions that it did not have access to a copy of Records 4, 5 and 6. It asked for procedural relief on that issue. Its request appears to have been overlooked and was not ruled on. This error can be remedied by reconsideration by the adjudicator or by judicial review. A stay is required to permit that remedy to be sought. The threshold to be met at this stage of the test is low and Bruce Power has a meritorious position that easily satisfies this criteria.<sup>4</sup>

Second, if a stay is *not* granted, the reconsideration will be moot. IESO will be required to disclose to the appellant portions of Records 4, 5 and 6 which contain Bruce Power’s confidential information before the Order can be reconsidered or judicially reviewed. Once disclosure has occurred, it cannot be reversed. Disclosure to one person under access to information is disclosure to the world at large.<sup>5</sup> What has been seen cannot be unseen. “[O]nce access to information is granted, it cannot be undone if the order for access is subsequently reversed on appeal.”<sup>6</sup> The likelihood of irreparable harm criterion is met here.

Third, the balance of convenience favours Bruce Power. Once the documents are disclosed they cannot be recalled and Bruce Power will be irreparably harmed by the disclosure. Conversely, there is nothing to suggest there would be any prejudice to the appellant if a stay is granted. PO-3598 was under reserve for over a year. As far as Bruce Power is aware, no time

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<sup>3</sup> *Ontario (Ministry Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (March 5, 1996) Toronto Doc. 120/96; *O’Connor v. Nova Scotia*, 2001 NSCA 47 (CanLII).

<sup>4</sup> *RJR MacDonald. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 at para 54.

<sup>5</sup> Orders MO-2304 and PO-3507 at para 16.

<sup>6</sup> Interim Order PO-3703-I, citing *Nova Scotia v. O’Connor*, 2001 NSCA 47 at para 16.

sensitive reason was identified by the requester for seeking access to the information or indicated by the requester when it inquired about the status of reasons.

### **Request for Reconsideration**

Bruce Power is of the view that the most appropriate means of addressing its concerns is through the reconsideration process. In Bruce Power's submission, its inability to see Records 4, 5 and 6 was overlooked in the adjudication process and as a result there was a fundamental defect in the adjudication process. As a result, Bruce Power was not heard on whether its own confidential information ought to be disclosed. The Adjudicator did not have an opportunity to make an appropriate decision with the benefit of fully informed submissions from Bruce Power. Bruce Power respectfully requests a reconsideration and will follow up this week additional submissions with respect to its reconsideration request.

### **Judicial Review**

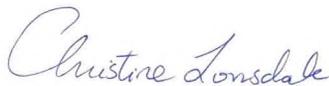
Recognizing that the Adjudicator has a discretion with respect to whether to permit a reconsideration, out of an abundance of caution, Bruce Power also intends to file a judicial review application. Bruce Power intends to ask for the judicial review application to be held in abeyance pending a decision with respect to its request for reconsideration. Bruce Power must act promptly in view of the order made. However, it does not intend to proceed with two overlapping proceedings at the same time.

### **Conclusion**

In the event you disagree with our request, we kindly ask that you please ensure that you give notice to Bruce Power of your position so that it can take the necessary next steps prior to any disclosure of the IESO Records, to prevent any harm that Bruce Power would experience as a result of disclosure.

If you have any questions about any of the above, please do not hesitate to contact myself or David Lever. We look forward to your response.

Yours truly,



Christine Lonsdale  
CL/sd

c: Lynn Mahoney  
David Lever