

Comments of the Independent Electricity System Operator

**Amendments to the OEB Regulatory
Instruments (RRRs, Codes and Rules) and
Specifying a Mandatory Record Retention
Period For Regulated Entities**

Submitted to the Ontario Energy Board
(EB-2015-0247)

January 15, 2016

1.0 BACKGROUND

The Ontario Energy Board ("Board" or "OEB") issued a Notice of Proposal ("Notice") on November 11, 2015 (revised December 10, 2015) to amend the OEB Regulatory Instruments to specify a mandatory record retention period for Regulated Entities (Board File No. EB-2015-0247). To perform its mandate, under the *Ontario Energy Board Act, 1998* ("Act") the OEB has the authority to require the production and retention of records from Regulated Entities for regulatory purposes. The Board's Notice indicates that the purpose of the proposed amendments is to implement a mandatory record retention period of current calendar year plus 9 years ("Mandatory Record Retention Period") to "ensure that the OEB has access to the documents required for regulatory purposes and to discharge its statutory duties". The Notice specifies that the proposed amendments will be applicable to all OEB Regulated Entities, which includes electricity distributors, transmitters, generators and retailers, unit sub-metering providers, the IESO, as well as gas distributors and marketers (collectively the "Regulated Entities").

2.0 IESO COMMENTS

The Independent Electricity System Operator ("IESO") provides comments in the areas outlined in the Board's Notice and additional comments for Board consideration below. The IESO appreciates that the Board granted its request for an extension to the deadline for submitting comments.

The format of records that must be retained, i.e. electronic v. paper formats;

The IESO submits that the format of records be left to the discretion of Regulated Entities with the caveat that they must maintain capability to retrieve and review a record throughout the Mandatory Record Retention Period. The format(s) used by a Regulated Entity should optimally serve the related business functions and be compatible with a Regulated Entity's tools and processes. Allowing Regulated Entities to have this flexibility will also help ensure efficient implementation of the Board's proposal. Finally, not limiting format(s) will avoid administrative burden and cost should Regulated Entities need to convert existing records formats to comply with a Board's prescribed format, if any.

The types of records to which the record retention requirements are applicable, i.e. records required to be retained for regulatory purposes vs. corporate/business/ operational records that are not required to be retained for regulatory purposes;

The Notice indicates that the Board's proposed amendments do not include "records that are not required for regulatory purposes, e.g. records that a Regulated Entity retains solely for corporate or operational purposes, but which are not required for regulatory purposes". The IESO agrees with the Board's proposed approach to limit the applicability of the Mandatory Record Retention Period to records required for regulatory purposes. Regulated Entities should retain the flexibility to implement records management policies and processes for non-regulatory business records that meet their unique business requirements.

The types of records to be retained to demonstrate compliance with Regulatory Instruments, i.e. provisions in regulatory instruments that do not contain specific retention requirements;

The Notice indicates that "[t]he Mandatory Record Retention Period is applicable to documents required explicitly or by reasonable inference, by statutes and regulations, as well as the OEB regulatory instruments". Further to the above, the IESO submits that clarification is needed on the types of records the Board may require "explicitly or by reasonable inference". This could be done through direct Board consultation with each Regulated Entity or groups of similar Regulated Entities to establish the types of

1 records that are eligible to demonstrate compliance and based on the regulatory instruments that apply
2 to each Regulated Entity. This could also be achieved through additional formal consultations with
3 Regulated Entities (see section 3.0 Additional Comments). Having this added clarity will help ensure
4 efficient implementation of the Board's proposed policy and improve regulatory and compliance
5 certainty.

6 ***The temporal application of the Mandatory Record Retention Period, i.e. whether it should be applied***
7 ***only prospectively or retrospectively in some cases as well;***

8 The IESO submits that there is a practical limitation with the Board applying the proposed Mandatory
9 Record Retention Period retrospectively and therefore it should only be applied prospectively.

10 One of the purposes of the Board's proposed policy is to improve consistency and clarity for regulatory
11 records retention. The Board acknowledges that current Regulatory Instruments that require retention
12 of records for regulatory purposes vary, are inconsistent, or do not define a retention period at all.
13 Existing records management processes of Regulated Entities have been designed and implemented
14 with consideration of current regulatory requirements and business needs which may not be compatible
15 with the Board's proposal. For example, Regulated Entities may have already destroyed documents
16 where existing retention periods are shorter than the proposed Mandatory Record Retention Period;
17 therefore, demonstrating compliance to a new Mandatory Record Retention Period applied
18 retrospectively may be impossible. In other words, to demonstrate compliance, Regulated Entities
19 would have had to have known in advance which records and supporting materials should be
20 maintained.

21 Applying the Mandatory Record Retention Period prospectively will avoid the practical limitation of
22 having to apply new standards to existing records or to a potentially incomplete set of records. This will
23 minimize risk of non-compliance, while also ensuring the Board will meet its objectives for access to
24 documents needed to discharge its statutory duties. This point is emphasized by the fact that the
25 Board's Notice indicates that the Board "will treat the Mandatory Record Retention Period for records
26 that are required for regulatory purposes as an enforceable provision", and that "a Regulated Entity's
27 failure to comply with the requirements is a breach subject to compliance action under Part VII.1 of the
28 Act".

29 ***The exceptions to the record retention requirements, for example other statutory requirements that***
30 ***may mandate a shorter record retention period;***

31 The IESO submits that any exceptions should be part of the Board's justification for applying a
32 Mandatory Record Retention Period for a required regulatory document and that this could include an
33 explanation where other legislative requirements may prevail. The IESO recommends that if other
34 statutory retention requirements already exist and are shorter than the Board's proposed Retention
35 Period, that the Mandatory Record Retention Period be consistent with statutory requirements and
36 strive to avoid uncertainty on applicability. This would also apply to all records that "explicitly or by
37 reasonable inference" are also required to be retained for regulatory purposes. If a Mandatory Record
38 Retention Period is synchronized with statutory requirements, it would reduce the administrative
39 burden of having to change existing records retention processes that already align statutory
40 requirements. Lastly, the IESO submits that deferring to a shorter Mandatory Record Retention Period
41 may increase the probability that staff resources with direct knowledge of the related regulatory activity
42 will be available to help facilitate an efficient Board compliance review.

1 ***Implementation (in force) date for the Mandatory Record Retention Period and the duration of the***
2 ***transition period, i.e. the date that amendments are in force and the recommended transition period.***

3 The IESO submits that, based on the number of OEB Regulated Entities, their varying requirements
4 and/or states of implementation readiness, a minimum of 2 years is required to provide Regulated
5 Entities with the means to achieve a state of compliance readiness. The IESO encourages further
6 discussion on this topic to ensure industry best practices can be incorporated and that the principles of
7 consistency and fairness are adequately addressed. The length of time before any policy is in force
8 should consider the time that may be needed to review, validate or upgrade tools and processes, and/or
9 to obtain additional resources (which could include through a competitive procurement for consulting
10 services, or in some cases working with vendors to modify existing records management tools and
11 processes).

12 **3.0 ADDITIONAL COMMENTS**

13 ***Rationale for proposed Mandatory Record Retention Period***

14 While the IESO is cognizant of the Board's regulatory obligations under the Act, the IESO respectfully
15 seeks added clarity on the rationale for the proposed Mandatory Record Retention Period (i.e. current
16 calendar year plus 9 years), relative to other durations that will meet the Board's objectives to ensure
17 access to documents needed to discharge its statutory duties. The IESO submits that there may be
18 benefits and less risk to Regulated Entities by minimizing the retention period so that records are kept
19 for only as long as they are required to adequately meet OEB objectives. Furthermore:

- 20 • Because the Board's requirement for records retention may also extend to other records (see
21 above regarding need for clarification on "or by reasonable inference"), a longer than necessary
22 retention period will increase the volume of records that need to be maintained over time, and
23 therefore increase potential costs.
- 24 • A retention period that is beyond what is needed to meet these objectives could expose
25 Regulated Entities to potential commercial, legal, or other risks it would not otherwise be
26 exposed to.

27 The IESO proposes that there is a general need for additional consultation and under this heading, and
28 specifically proposes that further discussion include:

- 29 • Whether the Board's proposed Retention Period is optimal or whether it should be altered
30 based on consideration of regulatory risks and benefits? In other words, should the Board
31 consider shorter or varied retention periods, such as, nature of records, cost, or regulatory risk,
32 rather than proposing a single Mandatory Record Retention Period broadly across all required
33 regulatory records?

34 ***Need for additional consultation***

35 In considering these comments, the IESO requests that the Board convene a formal consultation process
36 that includes open discussion with Regulated Entities to fully explore the comments of participants, the
37 implications of the proposed amendments including implementation, potential risks and costs relative
38 to regulatory benefit, and to identify and share best practices.

39 ***Conclusion***

40 The IESO appreciates and the opportunity to participate and provide its comments on this initiative.