Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-474

Appeal P-9200463

Ontario Hydro

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ORDER

BACKGROUND:

A request was made to Ontario Hydro (Hydro) under the Freedom of Information and Protection of Privacy Act (the Act) for access to documents relating to 23 projects originally considered by Hydro staff for inclusion in the rehabilitation of the Bruce-A Nuclear Generating Station, and which were subsequently excluded from that project.

Hydro issued an interim decision in which it proposed to grant partial access to the records at issue. Hydro also provided the requester with a fee estimate of $11,340 for search time and for the preparation of the relevant records. The requester subsequently sought a fee waiver from Hydro on the basis that dissemination of the records would benefit public health or safety pursuant to section 57(4)(c) [previously section 57(3)(c)] of the Act. Hydro decided not to waive the fee, and the requester appealed both the amount of the fee estimate, and the decision not to waive the fee.

Through mediation, the request was narrowed significantly to focus upon eight projects identified by the appellant. Hydro revised its fee estimate to $4,240 and then to $1,335 following final confirmation from the appellant that the number of records sought had been reduced.

Further mediation was not possible, and notice that an inquiry was being conducted to review Hydro's decision was sent to the appellant and to Hydro. Written representations were received from both parties.

PRELIMINARY MATTER

Hydro's representations raise an issue respecting the standard of review under the Act which should apply in appeals involving an institution's decision to deny a fee waiver. Hydro specifically states that:

> Section 57(3) [now 57(4)] of the Freedom of Information and Protection of Privacy Act states that all or part of a fee may be waived where "in the head's opinion, it is fair and equitable to do so" after considering certain circumstances. It is respectfully submitted that discretion with respect to the application of fee waivers is consigned to the head of an institution. It is further submitted that denial of an application for waiver should be reversed only on a finding of arbitrary or capricious abuse of discretion. In this instance, denial of the fee waiver is based upon information received from the Manager of the Bruce NGS A Rehabilitation Section, who has knowledge of both the records and the decision-making process. [Emphasis added].

Hydro submits that the scope of review for the Commissioner's Office in these matters is limited to ascertaining whether the head's discretion to not grant a fee waiver, is "arbitrary or capricious". In support of its position, Hydro cites two American cases decided under the provisions of the United States Freedom of Information and Protection of Privacy Act, 5 U.S.C.

552 (the U.S. FOI Act). These are Burke v. Department of Justice, 432 F. Supp. 251 (1976) aff'd 559 F.2d 1182 (10th Circ 1977) and Ely v. United States Postal Service 753 F.2d 163 (1985).

Having reviewed these cases, it appears that the nature of the test being advanced derived not from the court's reasoning that decisions of this nature should be accorded a high level of deference but simply because a broader standard of review was not available under the U.S. FOI Act.

Under the U.S. FOI Act, where an individual disagrees with a fee waiver decision, that individual is entitled to file an appeal with the appropriate U.S. District Court. Prior to 1986, this court did not have the express statutory jurisdiction to review fee waiver decisions issued by government institutions. These rulings could only be overturned on the narrower grounds of judicial review at common law. One of these grounds was whether the agency which issued the decision had exercised its discretion in an arbitrary or capricious manner.

Since the two cases cited by Hydro were decided prior to 1986 and were based on a standard of review which derived from a specific statutory context, I do not consider them to be applicable to the present appeal.

In Ontario, an appellant, by virtue of section 57(5) of the Act, has the right to ask the Commissioner to review an institution's decision not to waive a fee. The Commissioner may then either confirm of overturn this decision based on a consideration of the criteria set out in section 57(4) of the Act.

In my view, the standard of review which should apply to the review by the Commissioner or his delegate to decisions issued under section 57(4) of the Act is one of correctness. I have reached this conclusion based on a consideration of the scheme of the Act as a whole and, more particularly, on a review of the following provisions:

1. Section 1(a)(iii) of the Act which states that decisions on the disclosure of government information are to be made independently of government.

2. Section 50 (1) of the Act which provides the Commissioner with the authority to review **any** decision of the head of an institution.

3. Sections 51 and 52(1), (4) and (8) of the Act which provide the Commissioner with broad investigative powers and which contemplate the receipt and consideration of fresh evidence.

4. Section 54(1) of the Act which prescribes that, after all the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised in the appeal.

In addressing the appropriate standard of review, I have also considered the significance of the phrase "in the head's opinion" which is found in the introductory part of section 57(4) of the Act. The leading case on the meaning of this type of wording is the Supreme Court of Canada's

decision of Gana v. The Minister of Manpower and Immigration (1971) 13 D.L.R. (3d) 699. There, the court considered an Immigration Appeal Board decision made under the Regulations of the Immigration Act. More particularly, the court was required to determine whether a conclusion reached "in the opinion of an immigration officer" was subject to review.

In addressing this issue, Spence, J. offered the following analysis:

> It is said, on behalf of the Minister, that the review is prohibited by the opening words of the Regulation, s. 34(3)(f), "in the opinion of an immigration officer". I am not of the opinion that those words in the Regulation preclude a review of that opinion by virtue of a statutory duty put on the Special Inquiry Officer by various sections of the Immigration Act. In my opinion, the words simply mean that an Immigration Officer is to carry out an assessing duty, not that his opinion becomes final and conclusive, protected from any review.

The court then held that the Immigration Appeal Board's statutory mandate implied a right to review "in an appellate manner" the decision of immigration officers.

Applying the rationale of the Gana decision to the present appeal, it is my view that the phrase "in the head's opinion" means only that the head of an institution has a duty to determine whether it is fair and equitable in a particular case to waive a fee. The wording does not affect the Commissioner's statutory authority to review the correctness of that decision.

ISSUES:

A. Whether Hydro's decision not to waive fees was proper in the circumstances of this appeal.

B. If the answer to Issue A is yes, whether the fee estimate is reasonable.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether Hydro's decision not to waive fees is proper in the circumstances of this appeal

In order to address this issue, it will be necessary to review the fee waiver provisions of the statute which are contained in section 57(4)(c) of the Act and the factual context in which the appeal arose. Section 57(4)(c) states, in part:

> A head shall waive the payment of all or any part of an amount required to be paid under this Act where, in the head's opinion, it is fair and equitable to do so after considering, whether dissemination of the record will benefit public health or safety;

The factual context of this appeal may be summarized as follows. Ontario Hydro has, for some time, been considering the future of its Bruce-A Nuclear Generating Station. One of the

alternatives discussed involves the undertaking of extensive repairs to rehabilitate the station at an estimated cost of three billion dollars. Hydro officials identified a number of rehabilitation projects which should be recommended to its Board of Directors for further consideration and a number which should not, one of which involved the "retubing" of the station. The information which the appellant has requested relates to the second group of projects.

On March 9, 1993, Hydro announced that it had not yet made a decision on whether to rehabilitate the Bruce-A nuclear reactors. Following this announcement, the appellant confirmed that he was still interested in seeking access to these records. As of the date of the issuance of this Order, it is my understanding that a decision on the future of the generating station has still not been made.

The appellant represents a non-profit, public-interest foundation which conducts research in the field of nuclear energy. The appellant's views about the disposition of his request have been put forward at two stages in the access process. First, the appellant made submissions to Hydro during the request stage. Second, he elaborated upon these representations in response to the Notice of Inquiry. This staging of submissions has allowed Hydro to respond directly to a number of points which the appellant originally raised.

The appellant submits that, if a fee waiver is granted, his organization will make the records in question available to the public. He further states that dissemination of these records will benefit public health or safety.

The appellant goes on to say that the dissemination of the records would subject certain decisions relating to the rehabilitation of the Bruce-A Nuclear Generating Station to public scrutiny, thereby avoiding "inappropriate decisions or inappropriate compromises in decision-making, both in these specific decisions and in future decisions".

Hydro submits that the benefit described by the appellant is unfounded as decisions respecting nuclear power plants "are made following appropriate analysis with the involvement of the Atomic Energy Control Board". Hydro also states that the:

> appropriate decisions were made to implement projects that would positively impact on the public health and safety and to defer or cancel those projects that were not a priority at that time.

Hydro maintains that the public dissemination of these records would not alter the ultimate decision-making process.

The appellant also submits, from a somewhat different perspective, that dissemination of these records will:

> ... help uncover and publicize inherent and insoluble safety problems ... For example, it is easily conceivable that some of the projects Hydro staff rejected in the rehabilitation of the Bruce-A Nuclear Generating Station were rejected for reasons of intractability -- difficulty or cost or hazard Hydro staff considered excessive, not because the existing system is considered ideal, optimal, or even

> appropriate ... If so, the public at risk has a right to be informed of the reasons for the problems remaining unsolved.

In response to this assertion, Hydro states that:

> ... no such safety problems exist, as evidenced by the AECB involvement and sanction of our adherence to operating licence condition requirements.

According to the appellant, dissemination of the records will also ensure that the specific details of these matters are brought to the attention of public officials, as well as to the Atomic Energy Control Board (AECB). In response, Hydro submits that the AECB is already fully aware of the status of these projects, and that documentation is readily available to interested parties. Hydro then goes on to state that access to these records is available to members of its Board of Directors as well as to elected or appointed officials who require access to the records in accordance with their legislated duties.

Hydro also submits that the appellant has "failed to establish a causal relationship between release of the project documentation and any substantive 'benefit' to public health or safety". Hydro concludes that it would be difficult to identify any health or safety related information in the documents that is not already known to the public.

In interpreting the scope of section 57(4)(c) of the Act, upon whose wording this appeal will turn, the comments contained in the report prepared by The Williams Commission entitled Public Government for Private People are instructive. It should be noted that this report formed the foundation of Ontario's Freedom of Information and Protection of Privacy Act. With respect to fee waivers, the Report comments at page 270 that:

> ... we have concluded that the statute should explicitly provide for waiver or reduction of fees when provision of the information can be considered as primarily benefiting the general public. Criteria for the exercise of this discretion should include the size of the public to be benefited, the significance of the benefit, the private interest of the requester which the disclosure may further, the usefulness of the material to be released, and the likelihood that a tangible public good will be realized.

Section 57(4)(c) of the Act was also considered by former Commissioner Sidney B. Linden in Order 2. There, he stated that:

> In this case, the relevant criterion for waiver of fees contained in subsection 57(3)(c) [now 57(4)(c)] is whether or not dissemination of the record will "benefit public health or safety". While there is no definition of that term, in my view, it does not mean that fees will be waived where a record simply contains some information relating to health or safety matters ... The institution submits that the appellant must show some "causal connection" between the dissemination of the record and any substantive benefit to "public health or safety". In most cases this would be difficult for an appellant to do, even where, as in this case, the appellant has viewed the record.

> The United States Department of Justice has issued guidelines to federal agencies in the United States on how to process fee waiver requests. These guidelines suggest that a waiver is appropriate among other considerations, "if the information released **meaningfully contributes to public development or understanding of the subject**".
>
> If the information is only of marginal value in informing the public, then the public benefit is diminished accordingly." (Common Cause v. IRS, 1 GDSP 79188 (D.D.C. 1979); Shaw v. CIA 3 GDSP. 183, 009 (D.D.C. 1982). (Emphasis added).

I adopt the comments of Commissioner Linden for the purposes of this appeal.

Drawing both from the Williams Commission report and Order 2, I believe that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c) of the Act:

1. Whether the subject matter of the record is a matter of public rather than private interest;

2. Whether the subject matter of the record relates directly to a public health or safety issue;

3. Whether the dissemination of the record would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue;

4. The probability that the requester will disseminate the contents of the record.

It would now be useful to apply this list of factors to the records at issue in this appeal. As I have indicated previously, the appellant is seeking access to records which were considered for inclusion in the rehabilitation plans for the Bruce-A Nuclear generating Station, but which were subsequently rejected. In my view, the safety of Ontario's nuclear generating facilities is a matter of considerable importance to the general public. In addition, following my review of the records in question, it is clear that they relate directly to a public health and safety issue. That is, whether the Bruce-A Nuclear generating Station can continue to be operated in a safe manner.

It is also clear that the debate respecting the safety of this facility is complex and that both Hydro and the various interest groups have taken divergent positions on this subject which are often difficult for the public to reconcile. For these reasons, I believe that the records which are the subject of this appeal, if disseminated, would contribute meaningfully to the development of understanding on the subject of the maintenance of aging nuclear reactors - which is, admittedly, a public health and safety issue.

Finally, based on the representations received from the appellant, I am satisfied that these records, if they are ultimately subject to release, will likely be disseminated to the public.

Therefore, I find that the dissemination of the records will benefit public health or safety in a manner contemplated by section 57(4)(c) of the Act and I do not uphold the decision of the head to deny a waiver of fees.
In coming to this determination, I have also considered the fact that the appellant has worked constructively with Hydro to narrow the scope of his request with the result that the original fee estimate was reduced by approximately 90 per cent. My examination of the file also indicates that some of the records identified by Hydro may be duplicates of one another with the result that $1,335 figure may be reduced even further.

Because of the manner in which I have disposed of Issue A , there is no need for me to consider Issue B.

ORDER:

1. I order Ontario Hydro to waive the fee in this appeal, and to render a final decision on access to the records within 30 days of the issuance of this Order.

2. I order Ontario Hydro to provide me with a copy of the final access decision within 35 days of the issuance of this order.

Original signed by: June 10, 1993
Irwin Glasberg
Assistant Commissioner