



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

ORDER P-531

Appeal P-9200590

Ontario Hydro



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ORDER

Ontario Hydro (Hydro) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the amount of electricity purchased by Hydro from a named company (the affected party) at a landfill site from the start up date to the time the request was received. The requester also sought information regarding the price Hydro was paying per megawatt for all electricity generated by both landfill gas and pipeline gas at this site.

The affected party operates what is known as a non-utility generator (NUG). Hydro determined that the requested information was available in electronic form on the NUG database.

In response to a prior "informal" request from the requester for the same information, Hydro had sought the affected party's consent to disclose the information. The affected party advised Hydro that it objected to the disclosure of the requested information based on its position that this would be a disclosure of commercial information that, if released, would disadvantage its competitive position.

Hydro then denied the requester access to the requested information pursuant to sections 17(1)(a) and (c) and 18(1)(c) of the Act. The requester appealed the decision.

During mediation, the requester decided not to pursue the issue of the price per megawatt paid by Hydro to the affected party for the electricity generated at the site. As Hydro had denied access to this information pursuant to section 18(1)(c) of the Act, the application of this exemption is no longer an issue in this appeal.

Further mediation was not possible, and notice that an inquiry was being conducted to review Hydro's decision was sent to Hydro, the appellant, and the affected party. Representations were received from Hydro and the affected party. The appellant indicated that the correspondence previously sent on the file was to be considered as its representations.

The sole remaining issue in this appeal is whether the mandatory exemptions provided by sections 17(a) and (c) of the Act apply to the record at issue. These sections read as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For a record to qualify for exemption under sections 17(1)(a) or (c), Hydro and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a) or (c) of subsection 17(1) will occur.

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Hydro and/or the affected party must submit evidence that the expectation of harm is not fanciful, imaginary or contrived, but based on reason. Furthermore, the evidence to support such an expectation must be "detailed and convincing" (Order 36).

In addition, several previous orders have determined that information contained in a record would reveal information **supplied** by an affected party, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218, P-219, P-228 and P-241).

Part One

Hydro submits that disclosure of the information at issue "represents the complete picture of sales by [the affected party]". Having reviewed the record and the representations of the parties, I am satisfied that disclosure of the amount of electricity purchased by Hydro from the affected party would reveal the affected party's sales figures.

Both Hydro and the affected party submit that this information constitutes "commercial information". I agree. In my view, this information relates to the "... buying, selling or exchange of merchandise or services" (Order P-493). Therefore, the first part of the test has been met.

Part Two

With respect to part two of the test, Hydro and/or the affected party must meet two requirements. They must prove that the information was **supplied** to Hydro and that it was supplied **in confidence**, either explicitly or implicitly.

In order to determine if the information at issue was "supplied" to Hydro by the affected party, it is useful to examine the technical process whereby Hydro is apprised of the amount of electricity generated at the site.

The amount of electricity generated at the site is measured by meters located at the site. The affected party states that these meters are not accessible to the public. Hydro can obtain a reading of the amount of power produced at any given time by using a computer modem which telephones the measuring device and, using confidential codes, electronically transmits a reading.

In my view, technological developments which may result in the networking of computer and electronic data systems between government institutions and private industry should not preclude a business organization from arguing that it "supplied" the information to the government.

Such developments are, I believe, recognized to some extent in the definition of "records" in section 2 of the Act. "Record" is defined in the Act as follows:

... any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
- (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

As I have indicated, Hydro retrieved the record containing the information responsive to the request from its NUG database.

Given that the definition of a "record" includes information recorded by electronic means in other than hard copy format, I do not believe that the manner in which the information contained in the "record" flows from the private to the public sector, e.g. by electronic transmission as opposed to paper documents, should be determinative of whether information is "supplied" for the purpose of section 17(1) of the Act. Rather, the issue is whether the information was communicated to the government institution by a third party as opposed to being generated or created by the government institution itself.

In the circumstances of this appeal, I am satisfied that the information at issue was "supplied" to Hydro by the affected party.

Regarding the issue of confidentiality, Hydro states:

The Senior Contract co-ordinator, Non-Utility Generation Division, advises that all matters pertaining to individual NUG projects are confidential. During the

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negotiating phase, Ontario Hydro does not acknowledge the existence of the project. It is only when the contract is signed, that Ontario Hydro will discuss it in limited detail. There is a strict internal rule of confidentiality pertaining to NUG's. Ontario Hydro does not give out information to anyone unless they have a legal right to it, i.e. the federal government. If the NUG project consents or asks us to provide the information, then we will do so; otherwise, it is maintained in the strictest confidence. This is the way Ontario Hydro has done and continues to do business with NUG's and they rely upon this confidentiality.

In my view, I believe this description of the manner in which Hydro does business with NUG's gives rise to a reasonable expectation on the part of the affected party that the information it provided to Hydro was communicated implicitly in confidence. Accordingly, the second part of the section 17(1) test has been satisfied.

Part Three

The appellant contends that the amount of electricity purchased by Hydro has been stated publicly at a landfill gas seminar and in the press. Moreover, the appellant maintains that, as the affected party has exclusive rights to the production of this type of power, it cannot be said that it would suffer harm should the information requested be disclosed.

As far as the first point is concerned, Hydro has indicated that the figure mentioned at the seminar and in the press does not represent the information responsive to the request. As far as the second point is concerned, the affected party notes that the requester is a direct competitor who has competed against it on previous landfill gas projects.

In their submissions, both Hydro and the affected party outline three scenarios which relate to expectations of harm to the affected party should the requested information be disclosed to the requester.

Should the amount of electricity produced by the affected party over a given period of time be disclosed:

1. Competitors such as the requester could formulate an "evaluation" of the reliability of the power plant.
2. The "actual production capability" of the power plant would be known.
3. The requested information "represents the complete picture of all sales" by the affected party which, together with information on purchase rates already in the public domain, makes it possible to derive a total revenue picture.

Having carefully reviewed the record and the representations of the parties, I am satisfied that in the circumstances of this appeal, there is sufficient evidence to indicate that disclosure of the information at issue could reasonably be expected to prejudice significantly the competitive position of the affected person and/or result in undue loss to this person. Accordingly, I find that part three of the test for exemption under section 17(1) of the Act has been satisfied. Because all three parts of the test have been met, I find that the mandatory exemption provided by sections 17(1)(a) and/or (c) applies to the information at issue in this appeal.

ORDER:

I uphold Hydro's decision.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ September 3, 1993