



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

ORDER P-555

Appeal P-9300122

Ontario Hydro



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ORDER

BACKGROUND:

Ontario Hydro (Hydro) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of "the technical review completed recently on the subject of capital expenditures proposed for the Bruce "A" Nuclear Generating Station" (Bruce A). Appended to the request was an excerpt from a publication entitled Hydroscope, the internal newspaper of Hydro, which referred to a technical review of Bruce A.

In its decision, Hydro advised the requester that the technical review referred to in Hydroscope was ongoing, and that no such document existed at that time. The record Hydro identified as responsive to the request is a document entitled "Bruce NGS `A' Economic Assessment September 1992 Draft".

Hydro denied access to the record in accordance with sections 18(1)(f) and (g) of the Act. The requester, on behalf of a public interest group, appealed the decision, and raised the applicability of section 23 of the Act, the "public interest override", to the record. The appeal proceeded on the basis that the record identified by Hydro as being responsive to the request was the document to which the appellant sought access.

Mediation of the appeal was not possible and notice that an inquiry was being conducted to review Hydro's decision was sent to the appellant and to Hydro. Representations were received from both parties.

THE RECORD:

The record at issue in this appeal is 54 pages in length, including four appendices. It presents the results of an economic assessment relating to Bruce A, as well as the assumptions used in the analysis. It is dated September 1992.

In its representations, Hydro has provided some useful background information relating to the creation of the record and its current status. The following is a summary of that information.

In July 1992, a team was formed to carry out "an analysis to facilitate sound business decision making for future possible major expenditures at Bruce A Nuclear Generating Station." The team included Hydro staff from the Engineering and Construction Branch, Power System Planning, Power System Operations, Corporate Programming, Thermal Operations Branch, and Nuclear Operations Branch. The assessment concluded in September 1992, and the report of the team is the record which is the subject of this appeal.

Senior Management at Hydro subsequently requested a further review of future possible major expenditures at Bruce A. This review was referred to in the Hydroscope article and was ongoing at the time of the appellant's request. At that time "... no decisions had been made about the future administration of the Bruce `A' plant, or the proposed projects to be undertaken to retube the station."

Hydro states that on March 8, 1993, the Board of Directors decided to defer any decisions regarding capital expenditures at Bruce A, and the review was discontinued. Hydro advises that, to date, the review has not resumed.

On March 9, 1993, the Chairman of Hydro held a press conference in which he publicly announced this decision. Consequently, Bruce A continues to operate as it has in the past.

ISSUES:

- A. Whether the discretionary exemption provided by section 18(1)(f) of the Act applies.
- B. Whether the discretionary exemption provided by section 18(1)(g) of the Act applies.
- C. If the answer to A or B is yes, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the exemption.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 18(1)(f) of the Act applies.

Section 18(1)(f) states:

A head may refuse to disclose a record that contains,
...

- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

In order to qualify for exemption under section 18(1)(f) of the Act, the institution must establish that a record satisfies each element of the following three-part test:

- 1. the record must contain a plan or plans, **and**
- 2. the plan or plans must relate to:
 - i) the management of personnel or
 - ii) the administration of an institution, **and**
- 3. the plan or plans must not yet have been put into operation **or** made public.

[Order P-229]

Hydro submits that the record:

... contains four (4) scenarios regarding the operation and retubing of Bruce 'A' NGS. These scenarios comprise a scheme which Ontario Hydro would implement, depending upon the scenario selected.

The plans (scenarios), at their most basic level, relate to the management of personnel, i.e. the number of positions and staff required, the number of positions lost, again depending upon the plan selected.

The plans also relate to the administration of Ontario Hydro as the selection of one scenario over another directly influences the business of meeting load requirements.

Hydro states that the four scenarios have not been reviewed or put into operation.

The appellant submits that the record is not a "plan" for the future of Bruce A, but an economic analysis. He maintains that while the economic analysis might have some indirect effect on the management of personnel or the administration of Bruce A, the record did not have this as its primary focus.

The Eighth Edition of the Concise Oxford Dictionary defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme." It is my opinion that in order for a record to contain a "plan", there must be a specific course of action identified.

In my view, the record at issue does not come to any formal conclusions about adopting or rejecting any of the scenarios presented, nor does it reveal any decisions about Bruce A's future. In fact, Hydro's representations indicate that at the time the record was created, none of the scenarios had been selected and that a further review was commenced. In my opinion, the record does not contain a particular "plan" or "plans".

Furthermore, the substance of the information contained in the record does not relate to the management of personnel or the administration of an institution. The purpose of the analysis was to determine the most cost-effective option for the future of Bruce A. It is only very incidentally, in two sentences of the record, that the impact of the various scenarios on Hydro personnel is discussed. There is no specific reference to the administration of Hydro at all.

Accordingly, the record does not qualify for exemption under section 18(1)(f) of the Act.

ISSUE B: Whether the discretionary exemption provided by section 18(1)(g) of the Act applies.

Section 18(1)(g) states:

A head may refuse to disclose a record that contains,

information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to

result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

In order to qualify for exemption under section 18(1)(g) of the Act, Hydro must establish that the record:

1. contains information including proposed plans, policies or projects; **and**
2. that disclosure of the information could reasonably be expected to result in:
 - i) premature disclosure of a pending policy decision, **or**
 - ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied.

[Orders P-229 and P-426]

Part 1

As far as the first part of the test is concerned, Hydro states that "... the information in the record pertains to a proposed project of Ontario Hydro, i.e. the future major expenditure of retubing the Bruce 'A' NGS". While I am not entirely convinced that such general information can constitute a "project" for the purpose of this section of the Act, I am prepared to accept that the first part of the test has been satisfied.

Part 2

Section 18(1)(g) takes into account the consequences which would result to an institution or person upon disclosure of a record. These consequences are listed in the second part of the test, and are germane to this exemption.

"Detailed and convincing" evidence from Hydro that the harm contemplated by section 18(1)(g) could reasonably be expected to occur should the information in the record be disclosed is required (Orders 162, 163, P-248).

The phrase "could reasonably be expected to" is also found in section 14(1) of the Act. The exceptions to access set out in section 14(1) require that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the information and the harm alleged (Order M-202).

I believe this interpretation should also apply to the phrase as it is used in section 18(1)(g).

With respect to part two of the test, Hydro submits that:

Disclosure of this information would certainly be premature as the options within the document still require review prior to a policy decision being made.

Premature disclosure of the information would not only have an undue financial loss to Ontario Hydro employees but to the communities as well. As **no policy decision has been made**, the release of this record would create further speculation. Property values and the service and supply industries would be affected by a potential lack of demand for services.

[emphasis added]

In Order M-182, Inquiry Officer Holly Big Canoe discussed the interpretation of the words "pending policy decision" as found in section 11(1)(g) of the Municipal Freedom of Information and Protection of Privacy Act, the equivalent of section 18(1)(g) of the Act. She interpreted this phrase as follows:

... the term "pending policy decision" contemplates a situation where a decision has been reached, but has not as yet been announced, rather than a scenario in which a policy matter is simply before an institution for consideration.

I agree with Inquiry Officer Big Canoe, and adopt this interpretation for the purpose of this appeal.

Having reviewed the record, it is my opinion that it describes the impact of certain variables on various scenarios. Although certain scenarios may yield more positive economic results, the report does not contain any formal recommendations or evidence of a policy decision that Hydro intends to implement. As is apparent from Hydro's representations, no policy decision with respect to the future of Bruce A has yet been made. In my opinion, the record is descriptive rather than prescriptive, and, accordingly Hydro has not established that a pending policy decision exists.

Therefore, disclosure of the information in the record cannot reasonably be expected to result in premature disclosure of a pending policy decision. Hydro has thus failed to satisfy the first part of Part 2 of the section 18(1)(g) test.

I will now consider whether disclosure of the record could "reasonably be expected to result in undue financial benefit or loss to a person". As noted above, Hydro states that release of the record would create "further speculation", and cause a detrimental effect on the local economy. With respect to this "harm", Hydro further indicates that "To make the record available now would lead to the assumption that one of the plans would be put into effect but, as yet no decision has been made".

In my opinion, that is not apparent from the face of the record itself, nor has Hydro indicated why such a conclusion would be the reasonable result of disclosure of the record. In my view, Hydro has not established the linkage between the information contained in the record and the anticipated harm of undue financial benefit or loss. Accordingly, Hydro has also failed to satisfy the second part of Part 2 of the section 18(1)(g) test and the exemption does not apply.

Because I have concluded that the record does not qualify for exemption under sections 18(1)(f) or 18(1)(g) of the Act, it is not necessary for me to consider Issue C.

ORDER:

1. I order Hydro to disclose the record to the appellant within 15 days from the date of this order.
2. In order to verify compliance with this order, I order Hydro to provide me with a copy of the records which is disclosed to the appellant pursuant to provision 1, **only** upon request.

Original signed by: _____

Anita Fineberg
Inquiry Officer

_____ October 19, 1993