



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

ORDER P-607

Appeal P-9300368

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 the amount and cost of electricity that it sold to a named company, including the total amount of kilowatt hours and total cost for 1990, 1991, 1992 and 1993.

The Ministry identified a four-page record as responsive to the request, and notified the named company (the affected party) to give it an opportunity to make representations concerning the disclosure of the record. The affected party objected to the disclosure of the record. Hydro then denied the requester access to the record pursuant to sections 17(1)(a), (b) and (c), and 18(1)(c) of the Act. The requester appealed Hydro's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review Hydro's decision was sent to the appellant, Hydro and the affected party. Written representations were received from the appellant, Hydro and the affected party.

The record at issue in this appeal consists of those portions of the four page record entitled "Total Energy-Offpeak to Date", "Total Energy-Peak to Date" and "Total Revenue to Date".

ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemptions provided by sections 17(1)(a), (b) and (c) of the Act apply.
- B. Whether the discretionary exemption provided by section 18(1)(c) of the Act applies.
- C. Whether section 23 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemptions provided by sections 17(1)(a), (b) and (c) of the Act apply.

Sections 17(1)(a), (b) and (c) of the Act read:

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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (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 section 17(1)(a), (b) 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), (b) or (c) of subsection 17(1) will occur.

[Order 36]

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).

Part One

In its representations, Hydro submits that the information in the record represents the majority of the affected party's operating costs. It states that the record includes a financial statement consisting of cost and consumption data. Hydro also submits that the information relates to the financial and economic performance of the affected party and therefore constitutes financial and commercial information.

[IPC Order P-607/January 12, 1994]

The affected party submits that the information requested is technical, commercial and financial as it relates to a commercial relationship with Hydro, its consumption of electricity and its cost of purchasing power for distribution.

In my view, financial information is information pertaining to finance or money matters. Commercial information is information which relates to the buying, selling, or exchange of merchandise or services. I have reviewed the record and am satisfied that it contains financial and commercial information.

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.

Hydro submits that the amount of power provided to the affected party is measured by meters located at the boundary of the town being served, with remote electronic access, as was described in Order P-531. It states that the information in the record was compiled by Hydro from information submitted by the affected party.

The affected party submits that as a result of the regulatory authority granted to Hydro, it is required to make written submissions to Hydro regarding its rates and charges, which has included the information contained within the record. It states that the information in the record was also supplied to Hydro outside of the rate regulation process. Hydro supplies power to the named company through transmission lines that terminate on the premises of the named company. Electronic mechanisms have been installed on the premises in order for the named company to supply to Hydro electronic data that forms the basis of the information contained within the record.

In Order P-531, Inquiry Officer Anita Fineberg discussed the technical process of metering and its relationship to the "supply" of information:

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 ...

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.

I agree and adopt Inquiry Officer Fineberg's approach for the purposes of this appeal. 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 submits that it has historically blocked outgoing information regarding direct customer sales on the basis that this would supply certain trade information considered to be the property of the third party, i.e. the direct customer. It states that the obligation of confidentiality may be implied by the conduct of the parties. Hydro does not provide the specifics of individual direct customer power purchases and sales in its Statistical Yearbook or to the Ontario Energy Board except "in camera". Hydro only provides gross statistics about its direct customers. Any requests for detailed information would be done "in camera" and would not go to the public forum.

Hydro advises that the affected party is a private corporation which does not produce an annual report and expects Hydro to treat the information in confidence. It submits that the purchase information was supplied to Hydro with an implied expectation of confidentiality.

The affected party states that in all their submissions to Hydro, it has marked in plain wording at the top of each page "Confidential and for rate purposes only". It advises that it has, on many occasions, confirmed orally and in writing, and has received oral and written confirmation from Hydro, that all information supplied will be kept in strict confidence and used for rate purposes only. The affected party has provided me with examples of such correspondence.

The affected party advises that it has a long standing corporate policy that all of its information regarding its business relationship with Hydro will remain confidential and not be divulged to any other party.

In my view, the description of the manner in which Hydro does business with such companies 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 submits that since the affected party is a monopoly which has entered into long-term contracts with a named town, and has no competitors according to the terms of those contracts, it is not logical to argue that its business interests will be damaged as a result of disclosure of the record.

The appellant advises that the affected party has a 20 year agreement to be the sole supplier of electricity to the named town. The contract between the town and the affected party expires in

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1995 and will have to be renegotiated. Once the contract has been renegotiated the affected party will again be the sole supplier of electricity and will have no competitor.

The appellant states that it is theoretically possible that in the time between contracts being renegotiated another company could try to replace the affected party. However, he believes it is unlikely for the following reasons:

- the affected party has been in existence for over 100 years and owns the infrastructure for the supply of electricity, i.e. hydro poles, dams, generating plants, which would have to be purchased by any competitor;
- the history and small number of private utilities companies in Ontario shows that the prospect of these companies competing with each other in a small municipal market of just 3,300 customers is extremely remote;
- the only plausible competitor would be the people of the named town who may want to set up a public utility company because it would save them money.

The appellant also advises that the information requested is such an unrepresentative piece of the total economic picture of the affected party, which would include the capital assets of the company and other means of running a profitable operation, that disclosure of the record would not lead to the affected party being replaced by a competitor. The appellant states that this type of information is already made public without apparent harm, during the regulation of private natural gas companies in the province.

The affected party submits that it is in the process of renegotiating their contract with the named town for an additional 20 years. It is their view that release of the information at issue could be used to their disadvantage and severely undermine their bargaining position in connection with the negotiations with the named town.

The affected party states that if the contract is not renewed, their ability to obtain financing and their continued viability is in serious doubt. In addition, it is possible that the requested information could be disclosed to a potential competitor for the purpose of submitting an alternative source of supply. As the affected party and the named town are on the eve of negotiations, the requested information could cause serious harm to the affected party if it fell into the hands of competitors seeking to compete for the renewal of the contract.

Hydro states that the basis for any supply decisions that the town might make, i.e. purchases from a party other than the affected party, will be the relative price of electrical energy delivered to them by the affected party. Power purchased represents the majority of the affected party's operating costs. Therefore, disclosure of the requested information could have a significant

impact on any cost evaluation study a proponent of any new source of power to the town may perform.

Hydro submits that disclosure of this information would provide details of the operations of the affected party, and would reveal to competitors valuable information about negotiating strategies. It states that it is reasonable to expect that the release of the information would give an unfair advantage to competitors for future contracts. The result would be to disadvantage the affected party, resulting in undue loss, and to advantage competitors, resulting in undue gain.

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 party, and/or interfere significantly with contractual negotiations, and/or result in undue loss to this party. 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 exemptions provided by sections 17(1)(a) and/or (c) apply to the record at issue in this appeal.

Because of the manner in which I have disposed of Issue A, it is not necessary for me to consider the application of section 18(1)(c) under Issue B.

ISSUE C: Whether Section 23 of the Act applies.

Under Issue A, I found the record at issue exempt under section 17(1). Section 23 of the Act states:

An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

The Act is silent as to who bears the burden of proof in respect of section 23. Where the application of section 23 has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record before making submissions in support of their contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant (Orders P-241 and P-512).

The appellant submits that it is in the best interests of the people of the named town to be confident that their town council is able to negotiate a fair electricity rate for them. He states that this has long been an issue with the town council, which, at least since the mid-1980's, has expressed publicly its concern about having to discuss electricity rates with the affected party without adequate information. The appellant advises that the town council has said that it is being deprived of the information from the affected party and Hydro, which would allow it to

decide if the deal is fair. The appellant has provided me with newspaper clippings in support of his position.

The appellant submits that since the affected party won't reveal information, it may be causing the town council to unwittingly allow an unfair rate to the townspeople. The appellant advises that the affected party is regulated behind closed doors by Hydro, while private gas utilities, regulated in public hearings, have to disclose financial information to the public.

The appellant states that the Act does not define what sort of criteria it sees as public interest, and that without this criteria section 23 should not be interpreted too narrowly.

The affected party advises that the rates charged by Hydro are subject to public scrutiny as a result of the review by the Ontario Energy Board, and are published and readily available. It states that the amount of power supplied by Hydro to them is in no way relevant to the public confidence in Ontario government institutions, and is only being sought for the purposes of examining the relationship between the named town and the affected party.

It has been stated in a number of previous orders that, in order to satisfy the requirements of section 23, there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption (Orders 24, 163, 183 and P-512). In my view, the purpose of the section 17 exemption is the protection of third party information supplied to an institution in confidence, so that the third party's interests will not be harmed by disclosure.

The appellant, who is employed as a reporter by a newspaper, has submitted that he intends to publicize the information for public benefit. I believe that the interest of this appellant in disclosure is a public, and not a private interest.

I would also agree with the appellant that there is a public interest in having access to the requested information for the local government and people of the named town. However, in the circumstances of this appeal, I am not convinced that there is a **compelling** public interest sufficient to outweigh the **purpose** of the exemption under section 17 of the Act.

ORDER:

I uphold Hydro's decision.

Original signd by: _____
Holly Big Canoe
Inquiry Officer

_____ January 12, 1994