



Information and Privacy  
Commissioner/Ontario

Commissaire à l'information  
et à la protection de la vie privée/Ontario

# ORDER P-808

Appeals P-9400082 and P-9400246

Ontario Hydro



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Téléc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEALS:**

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). The appellant in both appeals is the president of a union involved in collective bargaining with Ontario Hydro (Hydro). Throughout the request and appeal stages of these matters, the appellant has been represented by counsel. These appeals arise from two requests submitted to Hydro by the appellant, for records relating to a named Hydro employee (the employee). The types of records sought by the appellant which are relevant in the context of these appeals are as follows:

### **Appeal P-9400082**

- (1) the Record of Employment or any other document created by Hydro and provided to the employee confirming the termination of his employment with Hydro;
- (2) any record concerning or indicating the terms and conditions of any agreement between Hydro and the employee for the provision of personal services during any period between August 1993 and December 1994.

### **Appeal P-9400246**

- (1) any Special Retirement Program (SRP) election form executed by or on behalf of the employee and submitted to Hydro in 1993;
- (2) any document executed by the employee and submitted to Hydro purporting to revoke his SRP election form;
- (3) any document executed or created by Hydro acknowledging or confirming the employee's SRP election;
- (4) any document indicating the terms on which the employee could take the SRP and/or the benefits he would receive for doing so;
- (5) any record concerning or indicating the terms and conditions upon which the employee's employment with Hydro would be terminated.

Hydro responded to both requests by refusing to confirm or deny the existence of records based on section 21(5) of the Act. The requester appealed the decisions to refuse to confirm or deny the existence of records.

A Notice of Inquiry was provided to the appellant, to Hydro and to the employee. Representations were received from the appellant and Hydro only.

## **DISCUSSION:**

### **REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS**

The first issue to be addressed in this appeal is whether Hydro properly exercised its discretion under section 21(5) of the Act in refusing to confirm or deny the existence of responsive records.

This provision states that:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

In Orders P-339 and P-423, former Assistant Commissioner Tom Mitchinson described the circumstances in which section 21(5) might be applied by an institution, in the following manner:

In my view, an institution relying on this section must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy.

Stated another way, these orders have established that two basic requirements must be met before Hydro can exercise its discretion to refuse to confirm or deny the existence of responsive records, namely:

- (1) Hydro must establish that disclosure of the records would constitute an unjustified invasion of personal privacy; **and**
- (2) Hydro must provide detailed and convincing evidence that disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that its disclosure would constitute an unjustified invasion of personal privacy.

Thus, if disclosure of the records (if they exist) would not constitute an unjustified invasion of personal privacy, the first requirement has not been met and Hydro would not be able to refuse to confirm or deny the existence of records under section 21(5).

The analysis of the first requirement is identical to the process I will follow in determining whether the exemption in section 21(1) applies to the records. This is the case because, in the circumstances of this appeal, once it has been established that the records contain personal information, they will be exempt from disclosure under section 21(1) unless the **exception** in section 21(1)(f) applies. Section 21(1)(f) indicates

that personal information is not to be disclosed to individuals other than the person to whom it relates except "if the disclosure does not constitute an unjustified invasion of personal privacy".

To avoid duplication, I will consider this in my discussion of section 21(1), under the heading "Invasion of Privacy", below. Based upon the conclusions reached in that analysis, namely, that disclosure of most of the contents of the records would **not** constitute an unjustified invasion of personal privacy, I find that the first requirement noted above with respect to section 21(5) has **not** been met. Accordingly, I find that Hydro is not entitled to rely on section 21(5).

Having made this finding, and to facilitate the remaining discussion in this order, therefore, I will now indicate that two responsive records exist. The records are as follows:

Record 1: Memorandum of agreement, executed by Hydro and the employee, dated May 21, 1993;

Record 2: Letter from Hydro's General Counsel to the employee, dated August 31, 1993.

### **ISSUES AND EXEMPTIONS TO BE CONSIDERED**

Hydro's decision letters in response to the requests which are the subject of these appeals referred only to section 21(5) and did not claim any specific exemptions.

In its representations, Hydro takes the position that the Commissioner and his delegates only have the authority to determine whether or not Hydro has appropriately exercised its discretion in applying section 21(5) to the requested information. Hydro's representations do not advance any authority to support this assertion.

I infer from this submission that Hydro is of the view that I do not have the authority to consider whether access to the records was properly denied.

I do not agree with this assertion. In my view, when a government organization responds to a request under the Act by citing section 21(5) and refusing to confirm or deny the existence of records, an implicit part of that response is a decision to deny access to the records, either on the basis that no responsive records exist, or that they are exempt from disclosure under section 21(1). Moreover, it is clear in the circumstances of these appeals that Hydro has, in fact, denied access to the records, and it has made submissions to support the application of the exemption provided by section 21(1).

Accordingly, in my view, Hydro's decision to deny access to the records is a "decision" which is subject to appeal under section 50(1) of the Act, and I have both the authority and the obligation to determine whether access was properly denied.

Later in its representations, Hydro states as follows:

In the event that the Commissioner disagrees with Hydro's position, we reserve the right to determine more precisely whether any other exemption will apply to the records that exist and that Ontario Hydro will be given sufficient time to make that determination.

As noted above, Hydro has made representations to support the application of the exemption provided by section 21(1), although it has not explicitly stated that it relies on this exemption. For that reason, and because section 21(1) is a mandatory exemption, I will consider its possible application to the records.

With respect to additional discretionary exemptions, Hydro was advised, in the Confirmations of Appeal for these two appeal files, that it had 35 days after the appeals were opened to claim new discretionary exemptions. The deadlines specified in the Confirmations of Appeal for additional discretionary exemptions were April 13, 1994 and June 2, 1994, respectively.

This requirement in the Confirmations of Appeal is in accordance with the edition of IPC Practices dated January 1993, entitled "Raising Discretionary Exemptions During an Appeal". The objective of this policy is to provide institutions with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

I understand Hydro's reasons for not raising additional exemptions in its initial decision letters, since those documents were sent to the appellant and references to additional exemptions could give rise to the inference that responsive records exist. However, Hydro could have advised the Commissioner's office of any additional exemptions it intended to claim, either during the mediation stage of the appeals, or in its representations, without conveying this information to the appellant. It did not do so, nor has it provided me with any basis for allowing it additional time to raise new exemptions. Under the circumstances, I am not prepared to permit Hydro to claim additional exemptions at this stage in the proceedings.

## **INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

In his representations, the appellant acknowledges that any records responsive to the request would consist of "personal information". Hydro also states that the records consist of personal information. I have reviewed the records, and I agree that they consist of personal information. I find that the personal information relates to the employee only. Thus, the personal information relates to an individual other than the appellant.

Once it has been determined that a record contains personal information of an individual other than the requester, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

In its representations, Hydro claims that section 21(2)(f) (highly sensitive information) is a relevant factor favouring non-disclosure in the circumstances of this appeal.

The appellant's representations raise the possible application of several provisions of the Act to support his contention that the records ought to be disclosed, namely section 21(2)(a) (public scrutiny), the exception to the section 21 exemption in section 21(4)(a), and the provision relating to public interest in disclosure found in section 23.

I have also considered the possible application of the presumptions in section 21(3). In my view, in addition to the sections referred to above, the possible application of the presumption in section 21(3)(f) must be addressed.

### **Section 21(3)(f)**

This section reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

describes an individual's finances, income, assets, liabilities, net worth,  
bank balances, financial history or activities, or creditworthiness;

I have carefully reviewed the two records. In my view, the presumption in section 21(3)(f) applies to the salary dollar amounts in Record 1, but not to any of the other information contained in the records.

### **Section 21(2)(f)**

As noted above, the Ministry contends that the factor in section 21(2)(f) (the information is highly sensitive) is a relevant factor favouring non-disclosure. In Order P-434, former Assistant Commissioner Tom Mitchinson stated that, in order for personal information to be considered "highly sensitive", the party

resisting disclosure must establish that "... release of the information would cause excessive personal distress ..." to the individual to whom it relates.

The Ministry's representations indicate that the information reflects the employee's negotiated salary, conditions of employment and subsequent retirement. However, the Ministry does not provide any information which establishes that disclosure would cause excessive personal distress to the employee, and the employee himself has not provided representations.

Accordingly, I find that the relevance of this factor has not been established.

### **Section 21(2)(a)**

The facts outlined in the appellant's representations indicate that section 21(2)(a) may be relevant. That section provides a factor favouring disclosure in circumstances where "the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario or one of its agencies to public scrutiny".

Based upon the fact that Hydro is listed as a Schedule 2 agency in "Directives", a publication of Management Board of Cabinet, I find that Hydro is an agency of the Government of Ontario for the purposes of this section.

In order for section 21(2)(a) to apply in the circumstances of an appeal, it must be established through evidence provided by the appellant, and following a review of the relevant records, that the disclosure of the personal information found in these records is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

In this case, the appellant's representations indicate that the records are related to a massive downsizing by Hydro in which approximately 4700 jobs were to be eliminated. The downsizing program was the subject of considerable media attention. The appellant's representations raise questions as to whether the arrangements respecting the employee were consistent with the requirements of one of the early retirement programs established in connection with the downsizing, and whether other employees' pension arrangements might be affected.

In Order M-173, Assistant Commissioner Irwin Glasberg considered the possible relevance of section 14(2)(a) of the Municipal Freedom of Information and Protection of Privacy Act (which is equivalent to section 21(2)(a) of the Act) to early retirement agreements. In the present appeals, Record 1 is a memorandum of agreement relating to early retirement, and Record 2 is a letter from Hydro to the employee proposing to change the terms of the agreement. Accordingly, in my view, the disposition of this issue in Order M-173 is highly relevant to the question of whether section 21(2)(a) applies to the records at issue in the present appeals. In Order M-173, Assistant Commissioner Glasberg stated as follows:

... the contents of retirement agreements entered into between institutions and high ranking government employees represent the sort of records for which a high degree of public

scrutiny is warranted. On this basis, I find that section 14(2)(a) [21(2)(a)] of the Act is a relevant consideration which weighs in favour of releasing the personal information found in the retirement agreements.

It is clear from the records that, in the circumstances of these appeals, the employee could fairly be described as "high-ranking".

Having reviewed the records and the representations of the parties, I find that section 21(2)(a) is a relevant factor favouring disclosure of the employee's personal information.

### **Section 21(4)(a)**

The appellant has advanced the argument that section 21(4)(a) requires disclosure of the personal information in the records.

This section states as follows:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

The meaning of the equivalent of this section in the Municipal Freedom of Information and Protection of Privacy Act was considered by Commissioner Tom Wright in Order M-23, where he stated as follows:

Since the "benefits" that are available to officers or employees of an institution are paid from the "public purse", either directly or indirectly, I believe that it is consistent with the intent of section 14(4)(a) [21(4)(a)] and the purposes of the Act that "benefits" be given a fairly expansive interpretation. In my opinion, the word "benefits" as it is used in section 14(4)(a), means entitlements that an officer or employee receives as a result of being employed by the institution. Generally speaking, these entitlements will be in addition to a base salary. They will include insurance-related benefits such as life, health, hospital, dental and vacation, leaves of absence, termination allowance, death and pension benefits. As well, a right to reimbursement from the institution for moving expenses will come within the meaning of "benefits".

I find that some of the personal information in these records relates to pension benefits of the employee. I have already determined that section 21(2)(a) applies as a factor favouring disclosure of this information (as well as other information in the records). In addition, I find that section 21(4)(a) applies to require disclosure of the pension-related information.



To summarize, I have found that disclosure of the salary dollar amounts in Record 1 would be a presumed unjustified invasion of personal privacy under section 21(3)(f). This is not information to which section 21(4) applies, and I find it is exempt under section 21(1).

I have also found that section 21(2)(a) is a relevant factor favouring disclosure of the remaining information in the records. However, in my view, an appropriate level of public scrutiny can be achieved without ordering disclosure of the employee's name and job title where they appear in the records. Accordingly, I find that the employee's name and job title qualify for exemption under section 21(1).

Finally, I have found that section 21(4)(a) applies to require disclosure of the pension-related information in the records.

In the result, only the dollar salary figures in Record 1 and the name of the employee in both records are exempt under section 21(1). The balance of the information in the records is not exempt and should be disclosed. I have highlighted the exempt portions on the copy of the records which is being sent to Hydro's Freedom of Information and Privacy Co-ordinator with a copy of this order.

## **PUBLIC INTEREST IN DISCLOSURE**

The appellant's representations suggest the possible relevance of section 23 of the Act. If it applies, this section means that information which otherwise meets the criteria for exemption under any of the sections mentioned in it (including section 21) would not be exempt. In this case, the exempt information is the employee's name and job title, and the salary dollar amounts, as discussed above.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this compelling interest must clearly outweigh the purpose of the invasion of privacy exemption.

In my view, any public interest in disclosure will be met by the disclosure of the information which I have found **not** to qualify for exemption. I am not satisfied that the public interest in disclosure of the exempt information outweighs the purpose of the exemption in section 21(1). I find, therefore, that section 23 of the Act does not apply in the circumstances of this appeal.

## **ORDER:**

1. I do not uphold Hydro's decision to refuse to confirm or deny the existence of the records.
2. I uphold Hydro's decision to deny access to the parts of the records which are highlighted on the copy of the records which is being sent to Hydro's Freedom of Information and Privacy Co-ordinator with a copy of this order.

3. I order Hydro to disclose the parts of the records which are **not** highlighted on the copy of the records which is being sent to Hydro's Freedom of Information and Privacy Co-ordinator with a copy of this order, within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
4. In this order, I have confirmed the existence of records responsive to the appellant's request. I have released this order to Hydro and the affected person in advance of the appellant in order to provide Hydro and/or the affected person with an opportunity to review this order and determine whether to apply for judicial review with respect to the issue of the existence of the records.
5. If I have not been served with a Notice of Application for Judicial Review with respect to the issue of the existence of the records within fifteen (15) days of the date of this order, I will release this order to the appellant within five (5) days following the expiration of the 15-day period.
6. In accordance with the requirements of section 54(4) of the Act, I will give the appellant notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to Hydro and the affected person.
7. In order to verify compliance with this order, I reserve the right to require Hydro to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: \_\_\_\_\_  
John Higgins  
Inquiry Officer

\_\_\_\_\_ December 1, 1994