



Information and Privacy
Commissioner/Ontario

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

ORDER P-877

Appeal P-9400526

Ontario Hydro



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). Ontario Hydro (Hydro) received a request for a copy of an agreement between Hydro and a named company (the Company). Hydro notified the Company of the request. The Company objected to the disclosure of the agreement. Upon review of the Company's representations, Hydro decided to deny access to the agreement in its entirety. The requester appealed the decision to deny access.

The record consists of an agreement for the sale of synthetic gypsum by Hydro to the Company.

Hydro relies on the following exemption to deny access to the record:

- third party information - section 17(1)

Notice of Inquiry was sent to the appellant, Hydro and the Company. Representations were received from all parties.

In its representations, Hydro has raised the application of the discretionary exemptions provided by sections 18(1)(c) and 14(1)(i) of the Act to the record. I will address the late raising of discretionary exemptions as a preliminary matter below.

PRELIMINARY MATTER:

RAISING ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

On August 31, 1994, the Commissioner's office provided Hydro with a Confirmation of Appeal which indicated that an appeal from Hydro's decision had been received. The Confirmation of Appeal also indicated that based on a policy adopted by the Commissioner's office, Hydro would have 35 days from the date of the confirmation (that is, until October 5, 1994) to raise any additional discretionary exemptions not claimed in the decision letter. No additional exemptions were raised during this period.

It was only in Hydro's representations received on November 21, 1994 that it indicated that it wished to also rely on the economic and other interest exemption (section 18(1)(c)) and the danger to security exemption (section 14(1)(i)) of the Act to deny access to the record in its entirety.

Previous orders of the Commissioner's office have determined that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken (Orders P-345 and P-537). This includes the authority to set the time limits for the receipt of representations and a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter.

In Order M-464, I concurred with the determinations made in earlier orders that the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process and I listed the reasons for this position. One reason was the additional delay engendered by further notification to the parties and the possible diminishing in value of the information to the appellant. I find that my conclusions in the earlier order are equally applicable in the circumstances of this appeal.

In its representations, Hydro has provided no evidence of any "extenuating circumstances" which could have led to the delay in claiming the discretionary exemptions beyond the time limit set out in the Confirmation of Appeal. I am therefore unable to find any reasonable basis for allowing the discretionary exemptions provided by sections 14(1)(i) and 18(1)(c) to be raised by Hydro 46 days after the deadline set out in the Confirmation of Appeal. I will, therefore, not consider the application of sections 14(1)(i) and 18(1)(c) of the Act to the record.

DISCUSSION:

THIRD PARTY INFORMATION

Hydro and the Company claim that sections 17(1)(a) and/or (c) of the Act apply to the record.

For a document to qualify for exemption under this provision, Hydro and/or the Company 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.

Failure to satisfy any part of the test will render the section 17(1) claim invalid.

Part One of the Test

Hydro submits that the information in the record relates to the sale of a process by-product known as desulphogypsum (DSG). Hydro states that the record details the financial and commercial obligations of both Hydro and the Company. I have reviewed the information in the record and I accept that it qualifies as commercial and/or financial information for the purposes of section 17(1) of the Act. Part one of the test has been met.

Part Two of the Test

To satisfy this component of the test, Hydro and/or the Company must establish that the information in the record was supplied to Hydro by the Company, and secondly that such information was supplied in confidence, either implicitly or explicitly.

A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, it must be the same as or reveal information that was originally provided by the third party. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been "supplied" for the purposes of section 17(1) of the Act.

Hydro explains that it issued a Request for Proposal (RFP) to all major wallboard manufacturing companies in North America. The RFP provided technical and other information for companies wishing to submit proposals for the utilization of DSG. Hydro states that the information to be supplied by the potential buyer of DSG included costing and business arrangements. The proposal received from the Company included the proposed purchase cost per tonne of DSG with other information which is the same as that set out in paragraph 5(1) of the record and the information set out in Schedules A and B of the record. Hydro submits that the commercial terms of the agreement were "derived from submitted business arrangements" but includes no evidence as to what those were.

The Company has not provided any evidence to show which part of the information in the agreement was "supplied" to Hydro.

I have carefully reviewed the evidence before me together with the information in the record. Based on Hydro's submissions, I am prepared to accept that the information in paragraph 5(1) and Schedules A and B of the record was "supplied" by the Company to Hydro for the purposes of section 17(1) of the Act. However, I have not been provided with sufficient evidence to reach the same conclusion with respect to the remaining information in the record. I have highlighted those portions of the record that qualify as having been supplied to Hydro. I will now consider whether this information was supplied in confidence, either implicitly or explicitly.

Both Hydro and the Company submit that the record contains a confidentiality clause which prohibits disclosure of the information in the record by one party without the written consent of the other. The Company further states that, because the information is closely related to the pricing of its end products, there was a reasonable expectation that the information would be held in confidence. I am satisfied that the information in the highlighted portions of the record was supplied to Hydro explicitly in confidence. Part two of the test has been met with respect to the highlighted portions of the record.

Part Three of the Test

To satisfy this part of the test, Hydro and/or the Company must describe a set of facts or circumstances which would lead to a reasonable expectation that one of the harms described in section 17(1) will occur if the information contained in the record is disclosed. The evidence which is presented to establish this connection must be clear and convincing.

The Company submits that the information at issue relates to the pricing of raw materials, which if disclosed, could enable a competitor to arrange its own pricing in a competitive manner and ultimately affect the profitability of the Company. Hydro states that it supports the Company's position and agrees that disclosure of the information could prejudice the Company's competitive position or interfere significantly with its contractual or other negotiations with potential buyers and vendors. I have carefully reviewed the information in the record and the representations of the parties. In my view, disclosure of the information in the record could reasonably lead to the harms set out in sections 17(1)(a) and/or (c). Part three of the test has been met with respect to the highlighted portions of the record.

Since all three parts of the test have been satisfied, the highlighted portions of the record qualify for exemption under section 17(1) of the Act. The remaining portions of the record should be disclosed to the appellant.

ORDER:

1. I uphold Hydro's decision to deny access to the highlighted portions of the record provided to the Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order Hydro to disclose to the appellant the remaining (unhighlighted) portions of the record, within thirty-five (35) days of the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
3. In order to verify compliance with the terms of this order, I reserve the right to require Hydro to provide me with a copy of the record provided to the appellant in accordance with Provision 2.

Original signed by: _____ February 23, 1995
Mumtaz Jiwan
Inquiry Officer