



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

ORDER P-1012

Appeal P-9500142

Ontario Hydro



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NATURE OF THE APPEAL:

Ontario Hydro (Hydro) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to any information related to the formation of alliances or facilities-sharing arrangements between a named corporation (the Corporation) and Ontario Hydro Technologies (OHT), a wholly owned subsidiary of Hydro.

Hydro identified six records as being responsive to the request and granted access to three records, one in its entirety and two in part. Hydro denied access to the balance of the records under the following exemptions contained in the Act:

- third party information - section 17(1)
- valuable government information - section 18(1)(a)
- economic and other interests - sections 18(1)(c) and (e)

The requester appealed the denial of access.

During mediation, the appellant clarified that he was not seeking access to information that would identify third parties in Record 2 (a facsimile cover sheet with a two-page Non-Disclosure Agreement). Rather, he was seeking access to the one and a half pages of the Non-Disclosure Agreement that Hydro had severed on the basis that they were not responsive to the request. Hydro reiterated its position that this part of Record 2 was not responsive to the request and provided the appellant with its own form of confidentiality agreement which it said was similar to Record 2.

The appellant confirmed that he still sought access to the record.

The records that remain at issue in this appeal are the severed portions of Record 2 and Records 4, 5, and 6 which were withheld in their entirety. Hydro has claimed that section 17(1) applies to Records 2, 5 and 6 and that section 18(1) applies to Records 4, 5 and 6.

A Notice of Inquiry was provided to the appellant, Hydro and the Corporation. The parties were also asked to comment on the issue of the responsiveness of Record 2. Representations were received from all parties. In its representations, the Corporation submits that it is not subject to the Act. I will, therefore, consider this submission as a preliminary matter.

Hydro submits that in the event I find the severed portion of Record 2 is responsive to the request, then it is Hydro's position that the information is exempt under section 17(1) of the Act. I will also address the responsiveness of Record 2 as a preliminary matter.

The Corporation points out that it has not had the opportunity to view Record 4 to determine if it contains any information which would qualify for exemption under section 17(1). The Corporation states that it is entitled to view the record and to make submissions on its own behalf. Because of my finding on Record 4 below, I do not need to address the issue raised by the Corporation.

PRELIMINARY MATTERS:

RESPONSIVENESS OF RECORD 2

Record 2 consists of a facsimile cover sheet from the Corporation to Hydro, with a two-page non-disclosure agreement attached to it. The cover sheet refers to the addition of OHT to the attached agreement between the Corporation and a named third party. The information pertaining to the identity of the third party has been deleted under section 17(1) of the Act and is not at issue in this appeal. The first page of the attachment and one-half of the second page have been withheld by Hydro on the basis that it is not responsive to the request. The remaining portion of the second page contains a rider adding OHT to the agreement between the Corporation and the third party. The information pertaining to the third party on this page is deleted under section 17(1) and is not at issue.

The issue of responsiveness of records was canvassed in detail by Inquiry Officer Anita Fineberg in Order P-880. That order dealt with a re-determination regarding this issue which resulted from the decision of the Divisional Court in Ontario (Attorney-General) v. Fineberg (1994), 19 O.R. (3d) 197.

In the Fineberg case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In her discussion of this issue in Order P-880, Inquiry Officer Fineberg stated as follows:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by the head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with these conclusions and adopt them for the purposes of this appeal.

Another aspect of the non-disclosure of records on the basis of non-responsiveness is the issue of whether an institution can withhold **parts** of a record for this reason. As noted above, Hydro seeks to withhold portions of Record 2 because of its view that the withheld portions are non-responsive. In Order P-913, Inquiry Officer John Higgins addressed this issue and found that, with respect to passages in a record which are in fact non-responsive, this approach is consistent with the Act and is supported by the wording in section 10(2). I agree with this view which is also consistent with the approach taken by Inquiry Officer Fineberg in Order P-880.

I will now consider the withheld portions of Record 2 to determine whether I will uphold Hydro's assessment that they are not responsive to the request.

The request is for any information concerning the **formation of alliances** or **facilities sharing arrangements** (emphasis added) between the Corporation and OHT from January 1, 1993. As I have indicated above, Record 2 contains a non-disclosure agreement between the Corporation and a third party which sets out certain terms. The Record also clearly indicates that OHT is added as a party to the agreement.

Hydro states that the request is for information relating only to arrangements or agreements between the Corporation and OHT. Hydro states further that the agreement to which OHT was added as a party was not finalized and, on that basis, the record is not responsive to the request.

I have carefully considered the wording of the request and the representations of Hydro. I do not accept Hydro's submissions with respect to this issue. In my view, Hydro's interpretation of the request is too narrow. It is my opinion that a liberal interpretation is more in keeping with the spirit of the Act. I find that the severed portion of Record 2 is "reasonably related" to the wording of the request and is, therefore, responsive to the request. It is also my view that while the agreement may not have been finalized, it does relate to the "formation of alliances" and is responsive.

Hydro and the Corporation have both made representations on the application of section 17(1) to Record 2 and I will consider their submissions in my discussion below.

APPLICATION OF THE ACT TO THE CORPORATION

The Corporation correctly states that it is not designated as an "institution" for the purposes of the Act.

The Corporation refers to the legal principle that "a party cannot do indirectly that which it cannot do directly". Thus the Corporation contends that it would be wrong for the appellant to obtain information about the corporation indirectly from Hydro when the Corporation does not have a direct legislative obligation to disclose this information as an institution under the Act.

In Order P-1001, Inquiry Officer Fineberg addressed the same issue raised by the same Corporation in an appeal by the same appellant. In that order, Inquiry Officer Fineberg analyzed the purpose and extent of access under the Act and concluded that the Act does not preclude a request for access to government held information about the Corporation. I agree with the reasoning and conclusion contained in Order P-1001 and adopt it for the purposes of this appeal.

The parties do not dispute that, in the present case, the records at issue are in Hydro's custody and control. I have carefully reviewed the representations of the Corporation. I accept the submissions of the Corporation as to the sensitive nature of its mandate and the competitive environment of the industry. I note that section 17(1) of the Act allows for representations from third parties to ensure appropriate protection of their business and proprietary interests. In my view, the Corporation has not provided any evidence to show why I should depart from the intent of the Legislature and treat the information of the Corporation differently from that of any other third party agency or business which provides information to an institution. I find therefore, that the requester is entitled to exercise his right of access under the Act to seek information about the Corporation from Hydro.

DISCUSSION:

Hydro claims that Records 4, 5 and 6 are exempt from disclosure pursuant to sections 18(1)(a), (c) and (e) of the Act. Record 4 is an internal OHT memorandum dated January 24, 1995; Record 5 is an internal memorandum dated January 25, 1995; Record 6 is a letter dated January 30, 1995 from OHT to the Corporation. I will first consider the application of section 18(1)(c) to the records.

ECONOMIC AND OTHER INTERESTS

Section 18(1)(c) of the Act reads as follows:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of the records could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

Previous orders of the Commissioner have interpreted the term "could reasonably be expected" to mean that the expectation of harm should be based on reason. It is not necessary to prove actual harm will result from disclosure. I agree with this interpretation and adopt it for the purposes of this appeal.

Hydro points out that it has undergone extensive restructuring and downsizing in the past three years. This has led to the creation of several business units within Hydro. Hydro explains that one such unit is OHT, previously known as Ontario Hydro Research Division. The restructuring has simultaneously created a need for a change in mandate and direction for OHT. OHT now not only provides services to the other business units but it is also required to make a profit. Its expanded mandate permits OHT to commercialize its viable technologies and to market its services on a broader base. OHT is therefore looking to other organizations with a view to creating partnerships and alliances which will enable it to fulfil its mandate.

Hydro states that Records 4, 5 and 6 contain information about OHT's potential commercial ventures and opportunities that could increase its market viability. Hydro submits that disclosure of this information would prejudice OHT's ability to compete in the market place and would result in economic loss to OHT and economic gain to its competitors. I have carefully reviewed the information in the records together with the representations of the parties. I am satisfied that disclosure of the information in the records could reasonably be expected to prejudice the economic interests and the competitive position of OHT and, therefore, the records qualify for exemption under section 18(1)(c) of the Act.

THIRD PARTY INFORMATION

Hydro submits that the severed portion of Record 2 (that portion which Hydro also claimed to be non-responsive to the request) is exempt from disclosure under sections 17(1)(a) and (c) of the Act. The appellant has indicated that he is not interested in the identity of the third party and therefore, that portion of Record 2 is not at issue. I have highlighted the portion of the record which would reveal the identity of the third party on the copy of the record which I will provide to Hydro's Freedom of Information and Privacy Co-ordinator. The highlighted portion must not be disclosed to the appellant.

I will now look at the remaining parts of Record 2 to determine if the exemption under section 17(1) applies.

Sections 17(1)(a) and (c) of the Act state:

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;

The appellant submits that section 17(1)(a) cannot apply to the Corporation as it is designated by Management Board of Cabinet as a Schedule III Operating Agency of the government of Ontario. The appellant points out that "agency" is not included in the wording of section 17(1)(a) as one of the entities which should be protected from the harms listed in this section. While it is true that the section 17(1)(a) exemption does not specifically apply to agencies, it does refer to organizations. In my view, the Corporation can reasonably be described as an organization and, on this basis, I believe that it is entitled to avail itself of the protection afforded under this statutory provision.

For a record to qualify for exemption under section 17(1)(a) or (c), the institution 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 section 17(1) will occur.

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All three parts of the test must be satisfied in order for the exemption to apply.

Part One

The Corporation submits that the information contained in Record 2 constitutes commercial and technical information. I agree that the information is commercial in nature. The information relates to a specific joint project and contains terms upon which information may be shared among the parties. I find that part one of the test is satisfied.

Part Two

In order for this part of the section 17(1) test to be met, the information must have been supplied to Hydro, in confidence, either implicitly or explicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

Record 2 contains a cover facsimile sheet which shows that it was sent by the Corporation to OHT. There is nothing on the face of the record to indicate that it was provided explicitly in confidence. The Corporation explains that the information was provided to OHT during negotiations for joint research and development projects. The Corporation submits, therefore, that it was provided implicitly in confidence. Since the record was part of ongoing business discussions and negotiations between parties intending to enter into joint venture and other sharing arrangements, I am prepared to accept that there was a reasonable expectation of confidentiality on the part of the supplier of the record. I am satisfied therefore, that the record was provided by the Corporation to Hydro implicitly in confidence. Part two of the test has been met.

Part Three

In order to meet this part of the test, the Corporation must show how disclosure of the information in the record could reasonably be expected to result in the harms described in section 17(1)(a) and/or (c) of the Act.

The appellant submits that the Corporation has always maintained that it is not in competition with the appellant nor with other public or private sector organizations. The appellant claims therefore, that disclosure of the record could not prejudice the competitive position of the Corporation.

The Corporation states that it provides, on a fee for service basis, research and development and testing services to other businesses both within Canada and internationally. The Corporation submits that, in this particular industry, confidentiality is paramount to its clients and disclosure of the information in the record would affect its client relations and therefore, its competitive position in the marketplace. In addition, disclosure of the information in the record would also prejudice its negotiations with OHT and the third party. The Corporation submits that the record contains commercial information relating to a product

and/or project which, if disclosed prematurely, could result in financial loss to the Corporation and its clients.

I have carefully reviewed the information in the record. I accept the Corporation's arguments with respect to the part of the record that relates directly to the project which is the subject of the business venture. I am satisfied that there is a reasonable expectation that disclosure of this information could result in undue loss to the Corporation and/or its clients. I am not satisfied that disclosure of the non-disclosure clauses in the balance of the record could reasonably be expected to result in the harms listed in sections 17(1)(a) and/or (c). The third part of the test has been met only with respect to the part of Record 2 which qualifies for exemption under section 17(1)(c) of the Act.

I have highlighted the portions of the record which qualify for exemption, on the copy which I will provide to Hydro's Freedom of Information and Privacy Co-ordinator. As I have indicated previously, I have also highlighted the parts of the record which would reveal the identity of the third party. The highlighted parts must not be disclosed to the appellant. The remaining parts of the record should be disclosed to the appellant.

ORDER:

1. I uphold Hydro's decision to deny access to Records 4, 5 and 6 in their entirety and to those parts of Record 2 which I have highlighted on the copy of the record provided to Hydro's Freedom of Information and Privacy Co-ordinator.
2. I order Hydro to disclose the remaining portions of Record 2 (i.e. the non-highlighted parts) to the appellant, within thirty-five (35) days of the date of this order and 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 that is disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ October 4, 1995