



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

ORDER P-1058

Appeal P-9500350

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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

The International Thermonuclear Experimental Reactor Council (ITER Council), with membership comprising representatives from Russia, the United States, Japan and a number of countries from the European Union, has agreed to jointly fund, design and build the experimental reactor. Canada is included in the group of countries representing the European Union. A site for the reactor will be selected between 1996 and 1998, and construction is scheduled to begin in 1998.

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 a study completed by the consulting firm of Ernst & Young about the economic benefits of a proposal to site the reactor in Ontario. Hydro denied access to the study under the following exemptions:

- relations with other governments - section 15(a)
- valuable government information - section 18(1)(a)
- economic and other interests - sections 18(1)(c) and (e)

The requester appealed Hydro's decision to deny access to the record, and indicated that the public interest in its disclosure should override the exemptions claimed (section 23 of the Act). During mediation, Hydro disclosed the first five pages of the record, which include the title page, the executive summary and the "Economic Impact Summary Table". Hydro also provided the appellant with additional general background information and clarification regarding the contents of the record. Further attempts at mediation were not successful. A Notice of Inquiry was sent to Hydro and the appellant. Representations were received from both parties.

The record at issue is the remaining 13 pages of the Ernst & Young study, "ITER Project - Economic Impact Assessment". These pages include the "Background and Methodology" and "Economic Impact" sections of the study, and an appendix of spending flowcharts and notes on spending assumptions.

PRELIMINARY MATTER:

Hydro claims in its representations that the record is not in its custody and control.

In my opinion, there is an intended distinction between the concepts of custody and control. An institution which has control of a record may not have the record in its custody. Alternatively, an institution with custody of a record may have very limited rights of control. In order to fall under the jurisdiction of the Act an institution need only have custody **or** control of a record.

The report was commissioned by the Canadian Fusion Fuels Technology Project (CFFTP) and provided to the ITER Siting Board which in turn used it to support their proposal for locating the reactor in Ontario to the Federal Government. Hydro submits that the record is located at Hydro in the

personal possession of a current employee of Ontario Hydro Technologies only as a result of his previous responsibilities at the CFFTP.

In the circumstances of this appeal, I note:

- (1) Hydro states it is a participating member of the ITER Siting Board, which is the body which submitted the record to support its proposal to the Federal Government;
- (2) the employee's current responsibilities at Ontario Hydro Technologies include membership on the ITER Siting Board;
- (3) two other employees of Ontario Hydro Technologies are also members of the ITER Siting Board, one of whom holds membership as Chair;
- (4) Hydro currently has a copy of the record on the premises of Ontario Hydro Technologies;
- (5) Hydro has not indicated that CFFTP has imposed any limitations on Hydro's use of the copy of the record on their premises;
- (6) Hydro has not indicated that CFFTP has imposed any requirements regarding Hydro's retention and disposal of the copy of the record on their premises;
- (7) Hydro responded to the request and participated in mediation, implying that it had the right to deal with the record;
- (8) Hydro makes representations in this appeal in support of the application of the exemption under section 18(1)(a), which requires that the information **belong** to the Government of Ontario; and
- (9) there do not appear to be any limitations placed on Hydro regarding its custody of the records.

Having reviewed all of the circumstances of this appeal, I am satisfied that, for the purposes of the Act, Hydro has custody of the record.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Hydro submits that sections 18(1)(c) and (e) apply to the record. These sections read:

A head may refuse to disclose a record that contains,

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario.

The appellant submits that an argument against disclosure made with respect to section 18(1)(c) of the Act is not tenable when the information is in the public domain through a bona fide publication by the media. In this vein, the appellant has provided two documents released by CFFTP on January 18, 1995 which he claims disclose key findings from the record at issue in this appeal.

I have reviewed the record and the documents provided by the appellant, and there is no significant correlation between them. In addition, the record at issue in this appeal is dated April 1995, while the information provided by the appellant is dated January 1995. In my view, the appellant has not demonstrated that the information in respect of which Hydro claims the application of section 18(1)(c) is in the public domain.

The appellant also states that “the federal government has categorically stated that it will not fund any aspect of the ITER project”, and has provided a letter from the Minister of Natural Resources Canada in support of this assertion.

I have reviewed this letter and, in my view, the letter is not a categorical refusal of funding. The Minister’s letter is simply a negative response to a request from the Siting Board to share the costs of a siting bid preparation and to be prepared to share in construction and operating costs if the proposed sites were selected, because of the federal government’s concern at this point over whether the assumptions on which the predictions of benefits are based will hold up over time. The Minister of Natural Resources Canada confirms in the letter that the federal Cabinet concluded that the economic benefits suggested by the Siting Board merited consideration, but are highly speculative at this point. However, the Minister points out in the letter that the possibility of Canada hosting the reactor has not been dismissed.

Hydro submits that disclosure of the record would prejudice its economic interests.

The record is an economic assessment relating to the financial impact on Canada (costs and benefits) should the project be situated in Ontario. It provides details of expenditures, Gross Domestic Product (GDP) generated and employment created during the construction phase (1998-2007). It relates the project to fiscal benefits to the Federal and Provincial Governments including an estimate of their respective debt reductions. A similar analysis is provided for the Operation Phase scheduled for the period 2008-2027.

The information in the record describes the **potential** financial benefit to Hydro, the province of Ontario, other Canadian provinces and the Federal Government, from the construction and operation of this project in Ontario. Hydro will be party to these financial benefits in that Hydro will participate in the design, construction and operation of the facility. The facility will require extensive power which will be purchased from Hydro.

The information contained in the record is based on estimates and the experience of staff. The estimated spending was based on probabilities, and costs of goods and services, which if pursued, will require sensitive price negotiations. The exact scope of the host nation's responsibilities in some areas will be subject to international negotiations. The apportioning of expenditures was based on assumptions, which if pursued, will also require negotiations.

Having reviewed the record and the representations, I am satisfied that disclosure of the record could reasonably be expected to prejudice the economic interests of Hydro. Accordingly, I find that section 18(1)(c) applies to exempt the record from disclosure, and it is not necessary for me to consider the application of sections 15(a), 18(1)(a) and 18(1)(e).

PUBLIC INTEREST IN DISCLOSURE

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

The appellant represents a group which is active in the area of nuclear energy. He submits that the decision as to whether or not to invest huge amounts of public funds in fusion research is at the heart of a heated debate on energy policy. He argues that it will be impossible to test the assumptions upon which the proposed investment by the government are based if the record is not disclosed and that, accordingly, there is a compelling public interest in its disclosure.

Hydro submits that the public interest relevant to the project is centred on safety issues, including such things as technical design and waste disposal, which are not discussed in the record.

The Act is silent as to who bears the burden of proof in respect of section 23. Where the application of section 23 to a record 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 requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, I have reviewed those portions of the requested records which I have found to be subject to exemption, with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

In considering the record and the submissions, I am not satisfied that there exists a **compelling** public interest in the disclosure of this particular record which would **clearly** outweigh the purpose of the section 18 exemption.

ORDER:

I uphold Hydro's decision.

Original signed by: _____

Holly Big Canoe
Inquiry Officer

_____ November 23, 1995