



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

ORDER P-1022

Appeal P-9500383

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). The appellant submitted a request to Ontario Hydro (Hydro) for access to documentation exchanged between Hydro and a named corporation (the Corporation) with respect to the power purchase agreement entered into between Hydro and the Corporation on May 29, 1992.

Hydro identified 41 responsive records, and, pursuant to section 28 of the Act, notified the Corporation of the request. The Corporation objected to the disclosure of two of the records. Hydro then issued its decision granting access to 34 documents in their entirety, and denying access to the two records identified by the Corporation under section 17(1) of the Act (third party information). In addition, Hydro granted partial access to five other records, the balance of which were withheld under section 18(1)(c) of the Act, economic interests of an institution.

The appellant appealed the denial of access.

A Notice of Inquiry was sent to Hydro, the appellant and the Corporation. Representations were received from Hydro and the Corporation.

The records at issue in this appeal and the exemptions claimed for each are as follows. The records are numbered according to the system used by Hydro in its Index of Records:

- 35: Letter from Hydro to the Corporation, dated May 7, 1992: portions withheld under section 18(1)(c).
- 36: Power Purchase Agreement between Hydro and the Corporation: portions withheld under section 18(1)(c).
- 37: Letter from the Corporation to Hydro, dated June 8, 1992: portions withheld under section 18(1)(c).
- 38: Letter from Hydro to the Corporation and another party, dated September 3, 1992: portions withheld under section 18(1)(c).
- 39: Letter from the Corporation to Hydro, dated October 21, 1994: portions withheld under section 18(1)(c).
- 40: Letter from the Corporation to Hydro, dated January 26, 1994: withheld in total under section 17(1).
- 41: Static Exciter Agreement between Hydro and the Corporation, dated May 19, 1994: withheld in total under section 17(1).

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 17(1)(a), (b) or (c), Hydro and/or the Corporation 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]

Part One

Hydro submits that Records 40 and 41 contain financial and/or commercial information. The Corporation submits that they contain information that is of a scientific, technical, commercial or financial nature.

Having reviewed these records, I find that they contain commercial and technical information. Record 40 sets out the basic terms of the agreement stating the prices and quoted costs as well as a description of the technical and equipment and services the Corporation will provide to Hydro. Record 41, the agreement itself, represents the "formalization" of the information contained in Record 40. Accordingly, part one of the section 17(1) test has been satisfied.

Part Two

In order to satisfy part two of the test, the information at issue must have been supplied by the Corporation to Hydro, either implicitly or explicitly in confidence. In addition, a number of orders have determined that information contained in a record would reveal information "supplied" by a third party, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

The information contained in Record 40 was clearly supplied by the Corporation to Hydro. It contains the terms under which the Corporation is prepared to enter into the Static Exciter Agreement with Hydro and requests Hydro to advise if the terms are acceptable.

In general, past orders of the Commissioner's office have concluded that information contained in an agreement between an institution and a third party, is not "supplied" for the purposes of section 17(1) of the Act. This is so because such information usually represents a negotiated agreement, as opposed to information passing between one party and another.

With the exception of paragraph 4.0, the terms of the agreement as set out in Record 41, do not reflect

those contained in the Corporation's letter, Record 40. Record 40, in itself, contains two terms - the first dealing with the static excitation retrofit, and the second addressing issues related to power steam stabilizers.

It appears that after the Corporation sent Hydro Record 40, the parties conducted further negotiations with respect to the terms of the agreement related to the static excitation retrofit. Clause 2.0 of Record 41 does not contain the same information as Term 1 of Record 40. In this regard, I note that the Corporation's letter is dated January 26, 1994 and the agreement, May 19, 1994.

Thus, I find that the balance of the information contained in Record 41 was not supplied to Hydro by the Corporation. Nor would its disclosure reveal information that the Corporation supplied. Part two of the test has not been met with respect to this information. As all three parts of the section 17(1) test must be satisfied, I will not consider this information further.

I will now consider whether the information contained in Record 40 and Clause 4.0 of Record 41 was supplied by the Corporation to Hydro in confidence.

Hydro states that the agreement is supplementary to the original power purchase agreement it entered into with the Corporation on May 29, 1992. Hydro indicates that this initial agreement included a confidentiality clause. Hydro further states that both parties had agreed that the confidentiality clause would apply to all subsequent side agreements. The Corporation also indicates that the negotiations were treated as confidential.

On this basis, I find that the Corporation held a reasonable expectation that information it supplied to Hydro during the course of its negotiations would be held in confidence. Accordingly, I find that part two of the section 17(1) test has been satisfied with respect to Record 40 and Clause 4.0 in Record 41.

Part Three

The Corporation maintains that disclosure of the information would prejudice significantly its competitive position and potentially interfere significantly with future contractual negotiations (section 17(1)(a)), as well as result in undue loss to the Corporation (section 17(1)(c)).

The Corporation has explained why it believes these harms will occur should certain information contained in Records 40 and 41 be disclosed. This information appears in Term 1 of Record 40. Based on the submissions of the Corporation, I find that disclosure could reasonably be expected to result in the harms claimed. Thus all three parts of the section 17(1) test have been met with respect to this information.

The Corporation's submissions do not include any evidence to explain how disclosure of the information contained in Clause 4.0 could reasonably be expected to result in the harms outlined in sections 17(1)(a) and/or (c) of the Act. Therefore, I find that the information found in Clause 4.0 of Record 41 does not qualify for exemption under section 17(1) of the Act.

In summary, Record 40 should be disclosed to the appellant, with the exception of Term 1 and Record 41 should be released in its entirety.

ECONOMIC AND OTHER INTERESTS

Hydro has claimed that portions of Records 35-39 are exempt under section 18(1)(c) of the Act which states:

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 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).

Hydro has explained that it enters into contracts and agreements with entities such as the Corporation for Non Utility Generation (NUG). Such entities generate electricity that is sold to Hydro. Records 35-39 all relate to the negotiations Hydro held with the Corporation to enter into such an agreement. The agreement itself is Record 36.

The only information which has been withheld from these documents consists of the specific "percentage" rate component as well as the terms and conditions of the power purchase, including the rates and charges for capacity power.

Hydro states that it is currently negotiating with other NUG projects and will shortly negotiate with Renewable Energy Technology (RET) projects for the purchase of electricity. Hydro submits that disclosure of the information contained in Records 35-39 could place Hydro in an unfavourable bargaining position. It claims that other NUGs and RETs could negotiate with Hydro on the basis of the terms and conditions so disclosed, rather than on the basis of their own site specific costs and profit components. Hydro submits that this could result in its having to pay higher costs for the purchase of power and its economic interests would thus be harmed.

On the basis of Hydro's submissions, I find that disclosure of the information withheld from Records 35-39 could reasonably be expected to result in the harms outlined in section 18(1)(c). Thus, the exemption applies.

ORDER:

1. I uphold the decision of Hydro to deny access to the withheld portions of Records 35-39 and Term 1 in Record 40.
2. I order Hydro to disclose the balance of Record 40, and Record 41 in its entirety, to the appellant

within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.

3. In order to verify compliance with the terms of this order, I reserve the right to require that Hydro provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

Anita Fineberg
Inquiry Officer

_____ October 11, 1995