



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

ORDER P-1231

Appeal P-9500399

Ontario Hydro



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BACKGROUND:

Atomic Energy of Canada Limited (AECL) appointed a Technical Advisory Committee (TAC) to assist it in developing an environmental impact statement (the impact statement) on the "Concept for Disposal of Canada's Nuclear Fuel Waste". The impact statement was finalized and presented to the Canadian Environmental Assessment Agency (CEAA) in 1994, at which time it was also made available to the public. CEAA is currently holding public hearings on the issues surrounding the disposal of nuclear fuel waste.

The TAC was comprised largely of national experts from the university community who were asked to provide advice on the underground disposal of spent nuclear fuel. It held a number of meetings to discuss the content of the impact statement while it was under development. Communications took place between employees of Ontario Hydro (Hydro) and employees of AECL in the context of these TAC meetings.

NATURE OF THE APPEAL:

The appellant, an organization with an interest in nuclear issues, requested access to information from Hydro under the Freedom of Information and Protection of Privacy Act (the Act). Specifically, the appellant requested copies of all correspondence from a named employee in Hydro's Radioactive Materials Management section of the Nuclear Engineering Department to a named employee of AECL during a specific time period. The appellant has intervenor status at the public hearings currently being conducted by CEAA.

Hydro identified 14 responsive records which dealt with communications between Hydro and AECL in the context of the TAC meetings referred to above. After receiving input from AECL pursuant to section 28 of the Act, Hydro decided to provide the appellant with access to ten records in their entirety and partial access to one other record. Hydro denied access to Records 1, 6 and 8, and to the remaining portions of Record 4, based on one or more of the following exemptions:

- advice to government - section 13(1)
- relations with other governments - section 15(c)
- third party information - sections 17(1)(a) and (c)
- economic and other interests of Ontario - sections 18(1)(e) and (g)

AECL did not appeal Hydro's decision regarding access, and the ten records and one partial record were disclosed.

The appellant appealed Hydro's decision, and also raised the possible application of the so-called "public interest override" (section 23).

This office sent a Notice of Inquiry to the appellant, AECL and Hydro. Representations were received from the appellant and Hydro.

AECL advised this office that it chose not to make representations in this appeal. However, AECL expressed its view that the Act is not constitutionally applicable to records containing information relating to atomic energy and nuclear power facilities, and that its decision not to

participate in this appeal should not be considered as a waiver of its rights to object to disclosure under the Act on this constitutional basis in future appeals.

In its representations, Hydro states that Records 1, 6 and 8 have now been disclosed to the appellant. Therefore, these records and the exemption claims associated with them (sections 13(1) and 15(c)) are no longer at issue.

The only information which remains at issue is a three-page appendix (the Appendix), dated March 10, 1992, which is attached to Record 4. The two-page covering letter has already been disclosed. The Appendix was prepared by a Hydro employee, and contains comments relating to the drafting of the impact statement.

Hydro claims sections 17(1)(a) and (c), and 18(1)(e) and (g) to exempt the Appendix.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 17(1)(a), (b) and (c) of the Act read as follows:

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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied.
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

Hydro must provide sufficient evidence to establish that the Appendix contains the requisite type of information, was supplied to it in confidence, and that one or more of the harms in sections 17(1)(a), (b) or (c) could reasonably be expected to occur upon disclosure of the Appendix. All three of these elements must be satisfied before the exemption can apply.

Type of Information

Hydro states that the entire Appendix contains scientific and labour relations information. Hydro's representations include nothing to support its position regarding "labour relations".

Having reviewed the record, I find that it does not contain information concerning the collective relationship between an employer and its employees, and therefore does not constitute “labour relations information” (Order P-653).

Hydro does not draw any distinctions among the various parts of the Appendix. In my view, paragraphs numbered 1, 2 and 3 on page 1 and the last two sentences of the first full paragraph on page 2 contain scientific and technical information. The rest of the Appendix does not contain any of the types of information listed in section 17(1). Therefore, only the specific parts of the Appendix identified in this paragraph of my order satisfy the first element of this exemption claim.

Supplied in Confidence

Hydro must show that the information was **supplied** to Hydro by AECL, either implicitly or explicitly **in confidence**.

Supplied

Hydro submits that, although the Appendix was created by Hydro, disclosure would reveal information supplied to Hydro by AECL. A number of previous orders have established that information contained in a record would reveal information “supplied” by a third party, within the meaning of section 17(1), if its disclosure would permit someone to draw accurate inferences with respect to information which had actually been supplied by this third party (e.g. Orders P-218, P-839 and P-1000). I find that the scientific and technical information outlined above fits in this category, and was “supplied” to Hydro by AECL

In Confidence

Hydro submits that the draft impact statement was provided by AECL with the express expectation of confidentiality. Hydro’s representations include a copy of the cover page of an April 1, 1993 document prepared by AECL which substantiates this position. Although the draft impact statement itself is not at issue in this appeal, in my view, it is reasonable to imply that information concerning discussions of the content of the draft, which is reflected in the Appendix, was also supplied to Hydro in confidence.

Therefore, I find that the second element of the section 17(1) exemption has been established for the parts of the record I have found to contain scientific and technical information.

Harms

Hydro’s representations on the harms component of sections 17(1)(a) and (c), consist of a quotation from the submissions made by AECL to Hydro in response to the section 28 notification sent by Hydro before responding to the appellant’s request. After receiving these submissions, Hydro decided to provide the appellant with access to a substantial portion of the requested information, and AECL did not appeal Hydro’s decision. As stated earlier, AECL specifically declined to make representations on the section 17(1) exemption claim in response to the Notice of Inquiry.

AECL submitted to Hydro that disclosure of the information may not accurately reflect the true policy positions of the parties. It also stated that disclosure of the records could damage its position at the CEEA hearings, and thereby undermine its ability to maintain its position as the world's pre-eminent company in the development of nuclear technology.

AECL's submissions to Hydro also raised the potential harm outlined in section 17(1)(b), although this section is not addressed in Hydro's representations. Because section 17(1) is a mandatory exemption, I will consider this provision as well.

With respect to section 17(1)(b), AECL focused on the importance of a "free and uninhibited flow of information" from AECL to Hydro. AECL stated that "research and development information supplied by AECL to Hydro is essential to the continued safe operation of the nuclear programme", and that full and frank discussions between AECL and Hydro are in the public interest.

I should note that 13 of the 14 responsive records have been disclosed to the appellant since AECL provided its submissions to Hydro.

I accept that the relationship between Hydro and AECL is an important one and that in some circumstances the disclosure of scientific or technical information supplied in confidence to Hydro by AECL might reasonably be expected to result in one of the harms listed in sections 17(1)(a), (b) or (c). However, I find that Hydro has not established that disclosure of the particular scientific or technical information contained in the Appendix could reasonably be expected to result in any of the harms listed in these sections. Therefore, I find that the harms element of this exemption has not been established.

Because all three elements must be established in order for a record to qualify for exemption under sections 17(1)(a), (b) or (c), I find that the Appendix does not qualify under any of these section 17(1) exemption claims.

ECONOMIC AND OTHER INTERESTS OF ONTARIO

Hydro also claims that the Appendix qualifies for exemption under sections 18(1)(e) and (g).

These sections state:

A head may refuse to disclose a record that contains,

- (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;
- (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Section 18(1)(e)

In order to qualify for exemption under section 18(1)(e), Hydro must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**
3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

[Order P-219]

Hydro submits that the comments contained in the Appendix “comprise expert observations and recommendations, on natural science issues relating to the environmental impact of underground disposal of nuclear waste.” According to Hydro, the comments represent Hydro’s position on the drafting of the impact statement, and qualify for exemption under section 18(1)(e).

Hydro’s representations do not address all of the requirements of section 18(1)(e), in particular the third one. Even if I were to find that the record contains the “positions” of Hydro employees, and that the discussions regarding the impact statement were “negotiations”, the impact statement has been finalized and is publicly available. In my view, any possible “negotiations” have already taken place, thereby removing the Appendix from the scope of section 18(1)(e).

Section 18(1)(g)

In order to qualify for exemption under section 18(1)(g) of the Act, Hydro must establish that the Appendix:

1. contains information including proposed plans, policies or projects; and
2. that disclosure of the information could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.

[Order P-229]

Hydro submits that the Appendix contains Hydro’s position on a work-in-progress for a concept of underground disposal of spent nuclear fuel, and that “disclosure of the preliminary position

taken by Hydro and/or AECL is not in the best interests of the public with respect to nuclear safety or the continued co-operative efforts of Hydro and AECL". Hydro points out that "the safe disposal of nuclear waste is vital and integral to public safety", and that "it is critical to the interest of public safety for Ontario Hydro and AECL to share their resources and expertise in all aspects of nuclear safety." In Hydro's view, "public disclosure of the information would in future, inhibit the open exchange of information to the potential detriment of public safety and the ensuing economic impact."

In my view, Hydro has not addressed the requirements of section 18(1)(g) that I have outlined above. Its representations focus on the issue of public safety, but fail to tie these arguments to the elements of section 18(1)(g). Based on the representations provided by Hydro, I am not convinced that the information contained in the Appendix is properly characterized as "proposed plans, policies or projects", and even if it is, I find that Hydro has not provided sufficient evidence to establish a reasonable expectation that the release of this information could result in premature disclosure of a pending policy decision or in undue financial loss to Hydro or benefit to any other person.

Therefore, I find that section 18(1)(g) does not apply to the Appendix.

Because I have found that the Appendix does not qualify for exemption under sections 17(1)(a), (b) or (c), or sections 18(1)(e) or (g), I do not need to consider the application of section 23 in the circumstances of this appeal.

ORDER:

1. I order Hydro to disclose the Appendix to the appellant by **August 20, 1996** but not before **August 15, 1996**.
2. In order to verify compliance with this order, I reserve the right to require Hydro to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

July 17, 1996