



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

ORDER P-1210

Appeal P-9600101

Ontario Hydro



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NATURE OF THE APPEAL:

Ontario Hydro (Hydro) received a request under the Freedom of Information and Privacy Act (the Act) for access to:

1. Any and all financial impact studies of ownership scenarios conducted by Ontario Hydro within the last six months.
2. Any and all financial analysis and associated conclusions conducted by Ontario Hydro in reviewing the findings of the June 22, 1995 report of the Financial Restructuring Group (the FRG).
3. Any and all financial analysis and studies leading to observations and conclusions respecting costs or rates such as those on: page 12 of the September 30, 1995 version of the Competition, Convergence and Customer Choice report; and pages 14, 77, 87, and 90 of the January 25, 1996 version of the Competition, Convergence and Customer Choice report.

The requester is an association representing certain employees of Hydro.

Hydro granted access to some records identified as responsive to part three of the request, and denied access to all other responsive records, on the basis of the following exemption claims:

- economic and other interests - sections 18(1)(c) and 18(1)(e)

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

During the course of mediation, Hydro disclosed the only remaining record responsive to part three of the request.

With respect to part one, Hydro states that it has not performed any formal studies relating to the financial impact of ownership scenarios within the last six months. However, it identified a series of 12 "Illustrative Scenarios" as being responsive to this part of the request. Each scenario consists of a computer spread sheet containing financial modelling scenarios based on combinations of various assumptions. Hydro provided a representative sample of these scenarios (Record 1), and, with the agreement of the parties, my findings with respect to this sample record will apply to all of the "Illustrative Scenarios" identified by Hydro.

In response to part two of the request, Hydro identified one responsive record entitled, "DRAFT WORKING PAPER - Financial Analysis of the Model and Assumptions Used by Nesbitt Burns to Support the [Financial Restructuring Group] Report" (Record 2).

A Notice of Inquiry was provided to the appellant and Hydro. Representations were received from both parties.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Sections 18(1)(c) and (e) of the Act states:

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;

To establish a valid exemption claim under section 18(1)(c), Hydro must demonstrate a reasonable expectation of prejudice to its economic interests or competitive position arising from disclosure.

In their representations, both parties provide background and context to the creation and purpose of the two records.

The Government of Ontario is currently reviewing the structure of Hydro, a publicly owned utility. It is considering options, including the privatization of all or parts of Hydro. As part of this review exercise, the Ministry of Environment and Energy established The Advisory Committee on Competition in Ontario's Electricity System (the Advisory Committee), headed by the Honourable Donald Macdonald. To quote from the Advisory Committee's literature, its mandate is, in part, to:

Make recommendations on the structure, legislative, regulatory and, potentially, ownership reforms required to ensure that Hydro and the provincial electricity system are poised to meet the competitive challenges of the 21st century.

The Advisory Committee recently tabled its report, and the Government is in the process of considering it as part of the overall review of the future structure of Hydro.

In its representations, Hydro describes Record 1 as consisting of a balance sheet, income statement, and cash flow projections for Hydro's business units. These projections cover the ten-year period from 1996 to 2005, and deal with various scenarios based on different assumptions for the electricity industry structure and the privatization of all or parts of Hydro. According to Hydro, in order to estimate market values for the purpose of privatization, judgements were applied to the earnings projections under various scenarios.

Hydro states that Record 2 is a financial critique of the various earning assumptions and valuations made by the FRG report. According to Hydro, this critique makes observations and

comments on the impact of the various assumptions and valuations contained in the FRG report, relative to its various ownership scenarios.

In support of the section 18(1)(c) exemption claim, Hydro submits that, because the privatization of Hydro's assets may be conducted through a bidding process, public disclosure of information at this early stage could influence future dealings with potential investors or purchasers. Hydro contends that disclosure of the records would reveal Hydro's preliminary judgements on the value of generating assets, which could influence the bids by various potential investors, thereby negatively impacting the potential sale proceeds to Ontario Hydro and/or the Government of Ontario.

Hydro also submits that the records contain detailed cost projections which could be analysed by potential competitors and used in developing competitive strategies that could impact negatively on the competitive and economic interests of Ontario Hydro.

The appellant focuses its representations on the speculative nature of the information contained in the records, and the similarity to information already released by Hydro in response to part three of the request. The appellant also points out that Hydro is currently a monopoly and that any harm to its competitive position could only exist if the province moves to a non-monopoly utility structure.

The appellant submits that the information contained in the records is based on a number of potential scenarios, which may or may not come to pass, depending on a number of factors, including the recommendations of the Advisory Committee, a decision by the Government regarding privatization, and proceedings in the Legislative Assembly. The appellant states:

... although change itself, given the current climate, is not unlikely, it is also not a certainty. In addition, and perhaps more importantly, the precise nature of the change is far from clear.

In the appellant's view, even if changes to the structure of Hydro are eventually implemented, Hydro's future position could not be impacted because the scenarios contained in the records are based on potentialities which are subject to market fluctuations which will take place between now and the time any privatization takes place.

There appears to be no dispute that major changes in the structure of Hydro are being considered by the Ontario Government, some of which may involve the sale of all or parts of Hydro's assets. I note that the Advisory Committee's recently issued report contains recommendations for the privatization of a significant portion of Hydro's assets, and that these recommendations are under active consideration by the Government.

In Order P-1190, I made the following comments regarding section 18(1)(c):

In my view, the potential economic and competitive interests of Hydro in pursuing partnership arrangements and contractual agreements are valid and consistent with the requirements for exemption under section 18(1)(c). I also accept that this exemption claim recognizes an inherent public interest in

maintaining the ability for Hydro to negotiate the best possible deal in any partnership or contractual negotiation.

I feel that these comments are equally applicable in the context of potential discussions of privatization through the sale of assets.

Having reviewed the records and representations of both parties, I agree with Hydro's position that if its assets are eventually sold to private interests, disclosure of the information contained in Records 1 and 2 at this point in time could have a negative impact on potential sale revenues. In my view, Hydro has provided sufficient evidence to establish that disclosure of these two records could reasonably be expected to prejudice its economic interest with respect to ongoing and potential privatization initiatives, and I find that both records qualify for exemption under section 18(1)(c) of the Act.

Because I have found that Records 1 and 2 are both exempt under section 18(1)(c), it is not necessary for me to address the application of section 18(1)(e) of the Act.

PUBLIC INTEREST IN DISCLOSURE

The "public interest override" as set out in section 23 of the Act states:

An exemption from disclosure of a record under sections 13, 15, 17, **18**, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

In order for section 23 of the Act to apply to a record, two requirements must be met. First, there must be a **compelling** public interest in the disclosure of the record; and second, this interest must **clearly** outweigh the **purpose** of the exemption which otherwise applies to the record.

The appellant submits that as a public corporation, Hydro is accountable to the Ontario public. The appellant states that it is interested in ensuring that all members of the public are fully informed of the possible impacts of privatization. It provides poll results to demonstrate the public's concern with respect to rate increases that may occur as a result of privatization, and argues that the public should know if Hydro has produced information which shows that rates will increase under certain proposed options. The appellant contends that a rate increase would have a negative economic impact on Ontario residents, and submits that the public interest in the potential economic harm resulting from rate increases outweighs any harm Hydro may suffer in negotiations surrounding asset sales or to its future competitive position through loss of its monopoly status.

In my view, there is a compelling public interest in ensuring that any sale of Hydro's assets through privatization is conducted in a manner that is publicly accountable. Part of this accountability relates to the impact of privatization on electricity rates for consumers. However, I find that the appellant has failed to establish that this interest is present with respect to the disclosure of the specific records at issue in this appeal. In addition, even if I were to find that there is a compelling public interest in the circumstances of this appeal, section 23 would only

apply if this compelling public interest was sufficient to **clearly** outweigh the **purpose** of the section 18(1)(c) exemption claim.

In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests or compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

As I stated earlier in this order and also in Order P-1190, there is an inherent public interest in maintaining Hydro's ability to obtain the best possible deal in any privatization arrangements that are ultimately implemented by the Government. In preparing for possible privatization, it is only prudent for Hydro to conduct various analyses and impact assessments for different scenarios. In my view, permitting this exercise to take place on a private and confidential basis is also in the public interest.

In the circumstances of this appeal, I find that the public interests identified by the appellant, even if compelling, are not sufficient to clearly outweigh the purpose of section 18(1)(c), and section 23 of the Act is not applicable.

Before ending this order, I want to make it clear why my finding in this appeal differs from Order P-1190. In Order P-1190, I found that when the monetary-based purposes of the section 18(1)(c) exemption claim were balanced against the broad public interest in nuclear safety and public accountability for the operation of nuclear facilities, these compelling public interests clearly outweighed the purpose of the exemption claim. I feel that the circumstances of this appeal are fundamentally different. Most importantly, nuclear safety is not an issue, nor have any issues been raised which question the proper operation of nuclear facilities.

ORDER:

I uphold Hydro's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ June 19, 1996