Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1562

Appeal P-9700342

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) from a representative of a ratepayers association concerned with environmental and public health issues relating to the Bruce Nuclear Power Development (BNPD). In responding, Hydro divided the request into two parts. All issues involving records responsive to the first part of the request have been resolved and are not at issue in this appeal.

Hydro identified one record responsive to the second part of the request. It is a three-page chart outlining foundation sump raw test results regarding levels of tritium at the BNPD Used Fuel Dry Storage Project site. Hydro informed the requester that a report on an overall ground water well drilling sampling program including this site would be available by the end of 1997, and would be made available to him.

The requester (now the appellant) appealed Hydro's decision. Within the 35-day period allowed for the raising of new discretionary exemptions, Hydro issued a supplementary decision, denying access to the record under sections 18(1)(c) and (g) of the Act (economic and other interests). The appellant also raised the possible application of section 23 of the Act, the "public interest override".

This office issued a Notice of Inquiry to the appellant and Hydro. Representations were received from both parties.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Hydro claimed sections 18(1)(c) and (g) as the basis for denying access. These sections read as follows:

> 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;
>
> (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(2) of the Act contains a mandatory exception to section 18(1), and must be considered when dealing with any section 18(1) exemption claim. Section 18(2) provides:

> A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

(a) the testing was done as a service to a person, a group of persons or an organization other an institution and for a fee; or

(b) the testing was conducted as a preliminary or experimental tests for the purpose of developing methods of testing.

Section 18(2) is unusual in the context of the Act, in that it constitutes a mandatory exception to the application of an exemption for discrete types of records, namely results of product or environmental testing. Even if Hydro is able to establish that disclosure of the record could reasonably be expected to result in the harms contemplated by sections 18(1)(c) and/or (g), it would be required to disclose the entire record if it falls under section 18(2) and the circumstances outlined under paragraphs (a) or (b) of that section are not present.

In order for section 18(2) to apply, a record must contain the results of product or environmental testing carried out by or for an institution.

The appellant submits that the record "which consists of the raw tritium contamination data relating to sump tests is obviously an example of 'environmental testing' within the meaning of section 18(2) of the Act." He also submits that paragraph (a) is not applicable because the testing was done by or for Hydro for its own use. As far as paragraph (b) is concerned, the appellant relies on the contents of Hydro's supplementary decision, in which Hydro states that the testing was conducted "as the preliminary step in establishing a ground water sampling program". In the appellant's view this "has nothing to do with methods of testing".

Hydro's representations on section 18(2) state that the record contains "data relating to the initial step in the environmental testing". In Hydro's view, the data contained in the record was collected as "the initial step in a process that will determine any environmental impact through the groundwater pathway". Hydro submits that the test data need to be reviewed, analysed, interpreted and reported in order to assure itself that there has been no inadvertent contamination that would impact the test results.

I accept the appellant's submission that tests undertaken by Hydro in order to produce the record at issue in this appeal are properly characterized as "environmental tests". The only remaining issue is whether the raw data collected from this process constitute test results.

The term "results" is defined in a similar manner in various dictionary sources as follows:

> "the effect, issue or outcome of some action, process, design etc." (Shorter Oxford English Dictionary, p. 1813)
>
> "something that results as a consequence, effect, issue or conclusion" (Webster's Third New International Dictionary, p. 1937)
>
> "the consequence of a particular action, operation or course; an outcome" (The American Heritage Dictionary of the English Language.

I do not dispute that the raw data gathered by Hydro may need to be further reviewed, analyzed, interpreted and reported, as Hydro claims, or that the report Hydro proposes to release may also contain "results" of the environmental testing process. However, this does not alter the fact that the raw data constitutes "results" as that word is ordinarily defined. The raw data are the "outcome" or "consequence" of a particular course of action or process, that is, the testing carried out for the purpose of identifying the levels of tritium at the BNDP site. As such, I find that this raw data constitutes "results" for the purposes of section 18(2).

As far as the exceptions contained in paragraphs (a) and (b) are concerned, I accept the appellant's submissions that the testing was done by Hydro for its own use, and that the purpose of the testing was not for the development of testing methods. Therefore, I find that neither of these paragraphs are applicable in the circumstances of this appeal.

In summary, I find that the mandatory provisions of section 18(2) have been established, and that Hydro is precluded from relying on the provisions of sections 18(1)(c) and/or (g) as the basis for denying access to the record.

My finding is consistent with the approach taken by the Federal Court of Canada, Trial Division, in the case of Pride Beverages Ltd. v. Canada (Minster of Agriculture), [1996] F.C.J. No. 720 in interpreting section 20(2) of the federal Access to Information Act, which contains wordings very similar to section 18(2) of the Act.

Because of my finding under section 18(2), it is not necessary for me to consider section 23.

ORDER:

1. I order Hydro to disclose a copy of the entire record to the appellant by **June 2, 1998**.

2. In order to verify compliance with the provisions of this order, I reserve the right to require Hydro to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: May 11, 1998
Tom Mitchinson
Assistant Commissioner