



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1545

Appeal P-9700323

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

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 the “terms of reference, contract and monies provided to [a named individual] and his review”. [The request also encompassed other related records, which are not at issue in this appeal.]

Hydro identified two responsive records and disclosed one of them in full to the requester. The second record is a contract between Hydro and the individual named in the request. Hydro determined that the interests of this individual could be affected by disclosure of the record, and notified him of the request, pursuant to section 28 of the Act. The named individual (the affected person) objected to disclosure and, after considering his representations, Hydro denied access to the record on the basis of the following exemptions in the Act:

- economic and other interests - section 18(1)(c)
- invasion of privacy - section 21

The requester (now the appellant) appealed Hydro’s decision. During mediation, he also raised the possible application of section 23 of the Act, the so-called “public interest override”.

A Notice of Inquiry was sent to Hydro, the appellant and the affected person. Because there was a possibility that the record might fall within the scope of section 65(6) of the Act, this issue was included in the Notice. If section 65(6) applies, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the Act and is not subject to the Commissioner’s jurisdiction.

Representations were received from all three parties.

In its representations, Hydro, for the first time, raised the application of sections 14(1)(e) (endanger life or safety) and 17(1)(a) and (c) (third party information) as new exemption claims. The parties were sent a Supplementary Notice of Inquiry, providing them the opportunity to make further representations. The issues raised in the Supplementary Notice were:

- whether an institution can claim sections 17 and 21 of the Act with respect to the same third party interest;
- if yes, whether sections 17(1)(a) and/or (c) apply to the record;
- whether Hydro should be permitted to claim a new discretionary exemption at this stage of the appeal; and
- if yes, whether section 14(1)(e) applies to the record.

Supplementary representations were received from all three parties.

PRELIMINARY ISSUES:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

When the appeal was first received, this office provided Hydro with a Confirmation of Appeal, indicating that it had 35 days from the date of the Notice (i.e. until December 9, 1997), to raise additional discretionary exemptions not claimed in its original decision letter. No additional exemptions were raised during this period.

Subsequently, in its representations dated February 8, 1998, Hydro raised section 14(1)(e) as a new discretionary exemption claim.

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in its original decision letter.

Hydro was asked in the Supplementary Notice of Inquiry to provide its reasons for raising this exemption after the 35-day period had expired. Hydro states that there are escalating security concerns for some of Hydro's executive staff, and that these concerns were not known by those individuals responsible for responding to the appellant's request. In the context of preparing representations in response to the original Notice of Inquiry these security concerns were identified, and it is for this reason that section 14(1)(e) was raised for the first time at that stage.

In Orders P-658 and P-883, former Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption is claimed late in the appeals process, a decision maker has the authority to decline to consider it. This authority was confirmed by the Ontario Divisional Court in dismissing an application for judicial review of Order P-883 [See Ontario (Minister of Consumer and Commercial Relations) v. Fineberg, Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)]. I agree, and find that I have the authority to decline Hydro's request.

Hydro has provided sufficient evidence to persuade me that this is an appropriate case to depart from the normal practice of this office. Based on Hydro's representations, it is reasonable to assume that had the security-related concerns been known by the individuals responding to the appellant's request, section 14(1)(e) would have been claimed by Hydro at that point. Therefore, I agree to consider the application of section 14(1)(e), in the particular circumstances of this appeal.

Hydro also claimed sections 17(1)(a) and (c) for the first time in its first set of representations. Because these are mandatory exemptions, I am obliged to consider them as well.

DISCUSSION:

JURISDICTION

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegates to continue an inquiry. If the requested record falls within the scope of section 65(6) of the Act, it would be excluded from the scope of the Act unless it is

a record described in section 65(7). Section 65(7) lists exceptions to the exclusions established in section 65(6).

Sections 65(6) and (7) of the Act read as follows:

- (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

- (7) This Act applies to the following records:
 1. An agreement between an institution and a trade union.
 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Sections 65(6) and (7) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 65(6) falls within one of the exceptions enumerated in section 65(7), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in the Act apply.

In order to qualify under any of the paragraphs of section 65(6), a record must either relate to "labour-relations or to the employment of a person", or be "about labour relations or employment related matters."

Hydro and the affected person state quite specifically that the affected person is not an employee. The record itself includes provisions which make it clear that the contract does not create an employment relationship between Hydro and the affected person. However, Hydro submits that in carrying out his responsibilities under the contract "it could be argued that this is similar to 'employment', and the record could thus be described as related to employment matters."

I do not accept Hydro's position. Section 65(6) has no application outside the employment context, and, as discussed more fully later in this order, I find that no employment relationship exists between Hydro and the affected person. Accordingly, the record does not fall within the parameters of section 65(6) and is, therefore, subject to the Act. Even if the requirements of section 65(6) were present, paragraph 3 of section 65(7) would appear to apply, thereby bringing the record back within the jurisdiction of the Act.

ECONOMIC AND OTHER INTERESTS

Hydro submits that section 18(1)(c) of the Act applies. This section reads as follows:

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 the record 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's representations on this issue are restricted to a three-paragraph discussion of why the record should qualify for exemption under section 18(1)(c). The first paragraph summaries the new business direction set by the Ontario Government for Ontario Hydro, as described in the publicly available White Paper "Direction for Change, Charting a Course for Competitive Electricity and Jobs in Ontario". The other two paragraphs read as follows:

This is an entirely new direction for Ontario Hydro. In common with any business whose goal is to be competitive, it is essential to attract and retain highly qualified, successful, senior personnel.

Public disclosure of the personal details of the contract between Ontario Hydro and a senior individual, who by the very nature of what he has been contracted to do is very much in the public forefront, could have a chilling effect for future candidates to senior positions. In a private company, public disclosure such as the record under appeal would not be considered. A potential candidate may choose not to consider an offer from Ontario Hydro or may choose to negotiate more advantageous terms to compensate for any potential embarrassment, harassment

or danger to his physical safety or the security of his family and possessions. This could seriously affect Ontario Hydro's ability to attract and retain suitable senior executives.

The affected person submits that disclosure of the contract could have an impact on his desire to fulfill the conditions of his contract and any requirement to continue the assignment beyond the initial contract. He states that "[T]here is no doubt in my mind that this would severely impact Ontario Hydro's nuclear recovery and its ability to survive in a competitive environment."

The appellant points out that the salaries of senior employees in the public sector are made publicly available through legislation, and questions why similar information about the affected person should not also be publicly accessible.

The concerns expressed by Hydro describe some of the difficulties it might face during future recruitment of senior executives, should the terms of any contractual arrangements be made public. While these difficulties could occur, in my view, Hydro's representations do not establish a reasonable expectation that they will. It is also my view that the representations provided by Hydro do not establish that these difficulties, even if they were to transpire, could reasonably be expected to prejudice its economic interests or its competitive position, or otherwise adversely affect its ability to protect its legitimate economic interests. I am also unable to accept that the unsupported assertion made by the affected person that disclosure could, at most, "have an impact" on his future decisions, could reasonably be expected to severely impact Hydro's nuclear recovery or competitive position.

Accordingly, I find that Hydro has not established the requirements of section 18(1)(c), and the record does not qualify under this exemption claim.

I would add that, whether or not a contract such as this would be disclosed by a private company is, in and of itself, of little relevance to the issue of consequential harm flowing from disclosure. Hydro is a public body, bound by the Public Sector Salary Disclosure Act to disclose the salaries of its senior employees, and by the Act to disclose "benefits or employment responsibilities of an individual who is or was an officer or employee" (section 21(4)(a)). Had the affected person been employed by Hydro rather than retained under contract, his salary and other employment benefits would be publicly available, as would the terms of any contract of employment setting out job responsibilities. I am not persuaded that it is reasonable to expect that the harms associated with section 18(1)(c) are likely to occur simply because the affected person has been retained under a contract for personal services to perform his senior executive responsibilities.

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have examined the record and find that it contains the personal information of the affected person only.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. The only circumstance with possible application in this appeal is section 21(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(4)(b) of the Act identifies a particular type of information, the disclosure of which does not constitute an unjustified invasion of personal privacy. It reads:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses financial or other details of a contract for personal services between an individual and an institution;

The words “[d]espite subsection (3)” do not limit the application of section 21(4) to those types of information identified in section 21(3). Rather, section 21(4) identifies types of information that the legislature clearly intended to fall within the exception contained in section 21(1)(f). If a record contains information of the type described in section 21(4)(b), the exception to the section 21 exemption contained in section 21(1)(f) will apply (Order M-23).

The record is the written contract between Hydro and the affected person. Both Hydro and the affected person state in their representations that the affected person is not an employee of Hydro. The contract itself includes a number of provisions which support this position, and specifically describes the affected person as an “independent contractor”. I accept that no employment relationship exists between Hydro and the affected person, and that the nature of his relationship with Hydro is accurately described as that of an independent contractor.

In its representations, Hydro states that “[w]hile the contract at face value, appears to be captured under [section 21(4)(b)], the Act does describe situations that suggest the circumstances of this agreement warrants non disclosure.” Hydro then points to section 21(3)(f), which requires the head of an institution not to disclose records which describe an individual’s finances, income, assets, and financial activities. In Hydro’s view, its contract with the affected person is a unique arrangement which, if disclosed, would provide the appellant with “complete details of the [affected person’s] engagement with Ontario Hydro including his income and other remuneration in this capacity.” Hydro also argues that the absence of the requirements of section 21(4)(c) can be interpreted to mean that where financial details are unique, disclosure would constitute an unjustified invasion of privacy.

I do not agree with Hydro’s position. Section 21(4) identifies situations where disclosure of a record does not constitute an unjustified invasion of personal privacy, irrespective of whether any of the presumptions included in section 21(3) are present. The fact that the arrangements are “unique” is not relevant, and the provisions of section 21(4)(c) have no bearing on the possible application of section 21(4)(b). In my view, the record at issue in this appeal is a contract for personal services between the affected person and Hydro, which falls squarely within the parameters of section 21(4)(b). Therefore, its disclosure would not constitute an unjustified

invasion of the affected person's privacy, and I find that the record does not qualify for exemption under section 21 of the Act.

ENDANGER LIFE OR SAFETY

Section 14(1)(e) provides:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

endanger the life or physical safety of a law enforcement officer or any other person;

Hydro submits that threats to the physical safety of the affected person and other executives are real. Hydro describes the general workplace and community atmosphere, and states that if the record is disclosed, it will increase the expectation of physical danger to the affected person and other Hydro employees. Hydro includes an affidavit from its Director of Corporate Security which outlines specific details, and states her belief that disclosure of details of the affected person's remuneration will increase existing tensions and concerns for his safety and that of his family.

Section 14(1)(e) is part of the law enforcement exemption, and most commonly applies in the context of law enforcement activity. There is no evidence in this appeal to suggest that law enforcement activity is present or anticipated.

I accept Hydro's evidence that the affected person and other executives at Hydro have, in the past, been the subject of threats to their physical safety, and that these threats may continue. However, in order to satisfy the requirements of section 14(1)(e), I must be persuaded that disclosure of **this particular record** would alter the current situation in a way which is sufficient to raise the reasonable expectation of one or more of the harms outlined in the section. In my view, Hydro has failed to do so.

As the affected person acknowledges in his representations, his professional background and assumption of duties at Hydro has been the subject of considerable media attention and legislative committee review. The fact that he has been retained under contract, and the nature of his responsibilities, is also generally known. The affidavit evidence of Hydro's Director of Corporate Security makes the assertion that disclosure of details of the affected person's remuneration will **increase** existing tensions and concerns for safety, and the affected person's representations support this position. (emphasis added) However, I have been supplied with neither evidence nor sufficient information and reasoning to persuade me that such concerns and/or beliefs are reasonable. All of the other evidence and information before me of possible safety concerns relate to the actual or perceived role played by the affected person in policies affecting Hydro's facilities, and not to the contract at issue or the affected person's remuneration. Disclosure of the record at issue in this appeal would provide specific details of this contract but, in my view, this disclosure could not reasonably be expected to exacerbate the existing situation sufficiently to endanger his life or physical safety or that of others who have no direct connection to the contract.

Therefore, I find that the record does not qualify for exemption under section 14(1)(e) of the Act.

THIRD PARTY INFORMATION

Hydro and the affected person submit that sections 17(1)(a) and (c) of the Act apply to the record. These sections state:

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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

There would appear to be no dispute among the parties that the record at issue in this appeal contains financial information, and I find that it does.

In order to satisfy the requirements of sections 17(1)(a) and/or (c), Hydro and/or the affected person must establish that the information contained in the record was supplied by the affected person to Hydro in confidence, either explicitly or implicitly.

A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been “supplied” it must be the same as that originally provided by the affected party. Because the information in a contract is typically the product of a negotiation process between the institution and the affected party, the content of contracts will not qualify as originally having been “supplied” for the purposes of section 17(1) of the Act. [See, for example, Orders P-36, P-204 and P-251].

Hydro submits that “[the affected person] in discussing his engagement with Ontario Hydro, was asked to set out his terms and conditions for taking on the assignment. Fundamentally, the terms and conditions supplied by the individual were written into the contract. These terms and conditions were not as a result of negotiations.” The affected person also maintains that the terms of the contract were not negotiated.

Having reviewed the record, I simply cannot accept this position. The record is a contract for professional services which provides for fees, duties, benefits, performance expectations, termination and other terms commonly found in similar contracts. Although some of the terms of the contract, and perhaps the contract as a whole, may have been agreed to with little discussion or the more extensive negotiation process normally associated with this type of agreement. I find that the record nonetheless represents a negotiated arrangement between

Hydro and the affected person. In its representations on section 18(1)(c), quoted earlier in this order, Hydro appears to acknowledge that there is an element of negotiation to this type of contract when it argues that disclosure of the record could result in a potential future candidate choosing to “negotiate more advantageous terms”. I find that the contract was the result of negotiations, however minimal, and that the record was not “supplied” for the purposes of section 17(1).

Because the information contained in the record was not “supplied” by the affected person, I find that it does not qualify for exemption under either of sections 17(1)(a) or (c) of the Act.

Because I have found that the record does not qualify under any of the exemption claims raised by Hydro, it should be disclosed to the appellant in its entirety.

It is not necessary for me to consider the possible application of section 23 of the Act.

ORDER:

1. I order the Hydro to disclose to the appellant the record in its entirety by sending the appellant a copy no later than **April 22, 1998** but not before **April 17, 1998**.
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 which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

March 18, 1998