



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1586

Appeal P-9800068

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 records relating to any determinations, meetings, letters (and replies), severance pay and benefits to be expected or granted regarding the resignation of a named individual.

Hydro identified two responsive records: a one-page document dated August 6, 1997 titled "Advice of Decision of Board of Directors" (meeting minutes); and an agreement dated March 13, 1995 between Ontario Hydro and the named individual (the agreement). Hydro determined that the interests of this individual could be affected by disclosure of the records, 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 granted partial access to the meeting minutes and denied access in full to the agreement on the basis of the following exemptions in the Act:

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

The appellant appealed Hydro's decision.

During mediation, Hydro issued a supplementary decision claiming that the records fall outside the scope of the Act, pursuant to section 65(6).

A Notice of Inquiry was sent to Hydro, the appellant and the affected person. Representations were received from all three parties.

After receiving the Notice, Hydro disclosed the responsive portions of the agreement to the appellant, with the consent of the affected person. The appellant confirmed that the agreement is thereby removed from the scope of the appeal. Consequently, the only information remaining at issue in this appeal is the undisclosed portions of the meeting minutes.

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 remaining portions of the meeting minutes fall within the scope of section 65(6), they would be excluded from the scope of the Act unless they qualify as the type of record described in section 65(7).

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.

Hydro submits that the remaining portions of the meeting minutes fall within the scope of section 65(6)3.

Section 65(6)3

In order for the record to fall within the scope of paragraph 3 of section 65(6), Hydro must establish that:

1. the record was collected, prepared, maintained or used by the Ministry or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Ministry has an interest.

Requirements 1 and 2

Hydro submits that the undisclosed portions of the meeting minutes document a report by the Chairman of Hydro to the Hydro Board's Human Resources Government Committee (the Committee), on discussions between the Chairman and the affected person, and the outcome that was agreed to by the Committee.

I find that the record was prepared, maintained and used by Hydro in relation to meetings, consultations, discussions and communications, and the first two requirements of section 65(6)3 have been established.

Requirement 3

Hydro submits that the subject matter of the Committee meeting was to communicate details of the meeting between the Chairman and the affected person regarding the latter party's employment status with Hydro, and for the Chairman to obtain instructions from the Committee regarding possible follow-up action. In my view, this activity clearly represents an "employment-related matter" for the purposes of section 65(6)3.

The only remaining issue is whether this is an employment-related matter in which Hydro "has an interest."

In Order P-1242, I stated the following regarding the meaning of the term "has an interest":

... an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

Hydro explains that the Power Corporation Act (the PCA) provides the legal authority for the activities of Hydro, and assigns legal responsibility to the Board of Directors to appoint an individual to the position being vacated by the affected person. This responsibility has been delegated under the PCA to the Committee. Consequently, in Hydro's view, the record clearly relates to the Committee's delegated legal responsibilities regarding the appointment to that position, thereby satisfying Requirement 3 of section 65(6)3.

In my view, the routine discharge of responsibilities imposed by statute is not, in and of itself, sufficient to constitute an ongoing legal intent. The statutory responsibility must be considered in context.

At the time the meeting minutes were prepared, I accept that Hydro had a legal obligation to properly discharge its responsibilities under the PCA, and that this was sufficient to constitute a legal interest for the purpose of section 65(6)3. However, several months have passed since the affected person's employment with Hydro ended, and the matters under consideration at the time the meeting minutes were created have concluded. In other words, the context has changed. There is no evidence before me to suggest that there is an ongoing dispute or other employment-related matter involving Hydro and the affected person that has the capacity to affect Hydro's legal rights or obligations. On the contrary, it would appear that the matter has been resolved to the satisfaction of both parties. Consequently, I find that the mere existence of legal responsibilities under the PCA are insufficient to establish the third requirement of section 65(6)3, and that Hydro has failed to establish a current legal interest in the employment-related matter reflected in the record.

Therefore, the third requirement of section 65(6)3 has not been established, and I find that the remaining portions of the meeting minutes are subject to the Act.

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 reviewed the record and I find the information relates to the affected person only. None of the information relates to the appellant.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies, the only way such a presumption can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies.

If none of the presumptions in section 21(3) apply, Hydro must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances which are relevant in the case.

Hydro submits that the provisions of sections 21(3) and (4) do not apply in the circumstances of this appeal, and I concur. Hydro points to sections 21(2)(e), (f) and (h) as relevant considerations in determining whether disclosure of the remaining portions of the meeting minutes would constitute an unjustified invasion of the affected person's privacy.

The remaining portions of the meeting minutes contain details of a meeting between the Chairman and the affected person regarding the affected person's employment status with

Hydro, and the Committee's instructions regarding possible follow-up action. Hydro submits that the resignation of the affected person was the subject of intense national media attention; that disclosure of events that led up to the resignation would be unfair; and that the information reflected in the undisclosed portion of the record was provided by the affected person in confidence. Hydro points out that the Committee meeting was held in camera, which indicates an intention to treat the personal information discussed at the meeting and reflected in the minutes as confidential.

The affected person also submits that this information was provided to Hydro in confidence.

The appellant submits that section 21 of the Act does not apply, because the affected person's resignation "was not a private affair but a very public responsibility acceptance matter and a pressing matter that overrides personal considerations". The rest of the appellant's representations focus on public interest issues, which I will address in my discussion of section 23.

Having considered all representations and reviewed the record, I make the following findings:

- Hydro and the affected person have not demonstrated how disclosure of the record would expose the affected person **unfairly** to pecuniary or other harm as required by section 21(2)(e).
- The affected person provided the information reflected in the record to Hydro with an expectation that it would be treated confidentially, and section 21(2)(h) is a relevant consideration favouring privacy protection.
- The undisclosed portions of the record concern circumstances surrounding the affected person's resignation, and are accurately characterized as highly sensitive (section 21(2)(f)).

Accordingly, I find that disclosure of the remaining portions of the meeting minutes would constitute an unjustified invasion of the affected person's privacy, and this information is properly exempt under the mandatory requirements of section 21 of the Act.

COMPELLING PUBLIC INTEREST

Although the appellant does not refer specifically to section 23 of the Act, he argues that there is a compelling public interest in disclosure of the personal information contained in the record.

Section 23 reads as follows:

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 to apply, two requirements must be met. First, there must be a compelling

public interest in disclosure; and second, this interest must clearly outweigh the purpose of the personal information exemption.

It is important to note that section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained, except where infringements on this interest are justified. Where the issue of public interest is raised, I must necessarily weigh the costs and benefits of disclosure to the public, in order to determine whether a compelling public interest exists which outweighs the purpose of the personal information exemption.

The appellant's representations focus on the need for the actual amount of the affected person's severance package to be disclosed, in the public interest.

The affected person's 1997 salary and benefit entitlements have been disclosed pursuant to the Public Sector Salary Disclosure Act. During the course of this appeal, Hydro disclosed the portion of the affected person's employment agreement which outlines termination entitlements. Hydro and the affected person also point out that the circumstances surrounding the affected person's resignation have been the subject of intense media and public attention.

Having reviewed the record and the representations, I am not persuaded that disclosure of the undisclosed portions of the meeting minutes, which I have found to constitute an unjustified invasion of privacy under the Act, is necessary in order to advance the public interest in this matter. In my view, the appellant has been provided with sufficient financial details about the affected person's resignation to satisfy any public interest concerns.

I find that the appellant has failed to satisfy me that there is a compelling public interest in the disclosure of the particular personal information which is at issue in this appeal. Moreover, even if the public interest in disclosure was compelling, in my view, the appellant has not established that this interest is sufficient to outweigh the purpose of the mandatory section 21(1) exemption, the protection of individual privacy, which is one of the central purposes of the Act.

Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

Because of these findings, it is not necessary for me to consider the application of section 18(1)(c).

ORDER:

I uphold Hydro's decision not to disclose the remaining portions of the meeting minutes.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

June 19, 1998