



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

ORDER P-1597

Appeal P_9800042

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 member of the media for access to (a) reference material listed in the final page of a named document; and (b) records relating to deuterium ingress in Hydro CANDU nuclear reactors due to corrosion of pressure tubes. The request was later expanded to include access to a document entitled "Retube Breakthrough Initiative - July 1996". This record was later clarified to be a report entitled "Retube Breakthrough Initiative Overall Report - Phase 1" (the Report).

Hydro granted full access to all records responsive to part (a) of the request.

Hydro issued an interim access decision together with a fee estimate and time extension for responding to part (b) of the request. This decision was appealed, but during the course of mediation the appellant agreed to remove all issues relating to part (b) of the request from the scope of this appeal, leaving the Report as the only record under consideration.

Hydro determined that the interests of a third party, Atomic Energy of Canada Limited (AECL), could be affected by the disclosure of the Report, and sought representations from AECL regarding access, pursuant to section 28 of the Act. After receiving these representations, Hydro provided the appellant with partial access to the Report and claimed sections 17(1)(a), (b) and (c) (third party information) and sections 18(1)(a) and (c) (economic and other interests) as the basis for denying access to the remaining portions.

The appellant appealed Hydro's decision, and also raised the possible application of section 23 of the Act, the public interest override.

Our office sent a Notice of Inquiry to the appellant, Hydro and AECL. Representations were received from all three parties. At the same time it submitted representation, Hydro issued a supplementary decision to the appellant, withdrawing its reliance of sections 18(1)(a) and (c), and disclosing all portions of records which were subject only to these exemption claims.

In its representations, AECL takes the position that the Act is not constitutionally applicable to records containing atomic energy information, but provides representations on a "without prejudice" basis.

RECORDS:

The portions of the Report which remain at issue in this appeal have been divided by Hydro into nine records, described as follows:

Record 1: Introduction - sections 6 and 6.1, pages 14 and 15, and the first paragraph of page 16. This is part of the main body of the Report and was prepared by Hydro based on information provided by AECL on fuel channel/calandria tube/steam generator lifetimes.

- Record 2: Appendix "F" (of Appendix 4) - rows 2009, 2011 and 2013. This is a table relating to tentative QSFCR Schedules, provided by an AECL employee.
- Record 3: Appendix 5 - all 46 pages. This is a report on the evaluation of small scale fuel channel replacement strategy prepared by AECL's Reactor Engineering Services Department.
- Record 4: Appendix 6A - all 27 pages. This is a report on "peripheral issues" such as safety and licensing, fuel management etc., prepared by a Hydro employee on secondment with AECL.
- Record 5: Appendix 6B - all 67 pages. This is a record of contacts and resulting outputs on the same peripheral issues prepared by the same individual who prepared Record 4.
- Record 6: Appendix 9 - section 3.1, third paragraph on page 5, and page 2 of "executive summary". This is a report establishing various restoration/retube sequence plans for restoration/retubing of all Hydro reactors, prepared by AECL.
- Record 7: Appendix 10A - all 77 pages. This is a report on the assessment of expected unit fuel channel lifetimes, prepared by AECL's Reactor Engineering Services Department.
- Record 8: Appendix 10B - all 13 pages. This is a draft report on the assessment of the lifetimes of calandria tubes prepared by AECL.
- Record 9: Appendix 23 - all 49 pages. This is a compilation of expert opinions on the extension of pressure tube life limits, provided either by AECL staff or Hydro employees on secondment to AECL.

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.

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), Hydro and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

Hydro states that the Report:

... discusses a methodology that if implemented would substantially reduce the previously estimated Bruce A Retube costs and outage times. It includes comprehensive assessments of the remaining lifetimes of pressure tubes and steam generators, and proposes a long range plan. The report discusses a methodology including the technical approach and peripheral issues such as safety, licensing outage planning etc.

It includes a number of technical reports and documentation prepared by AECL or by staff on secondment to AECL.

Type of information

“Technical information” has been identified in previous orders as “belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics ... it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.” [Orders P-454 and P-479].

Hydro submits that the records include both costing data and technical data relating to the replacement of pressure tubes at the generating stations. Hydro indicates that as part of the

Report, information was obtained from AECL, a respected authority on technical issues related to nuclear reactors. AECL's representations support this position.

The appellant's representations make no specific reference to this or any of the other specific requirements of section 17.

In my view, the records are highly technical in nature, and have been prepared by professionals expert in the field of nuclear energy production and operations. Therefore, I find that the information qualifies as technical information, and the first part of the section 17(1) exemption claim has been established.

Supplied in confidence

In order to satisfy the requirements of the second part of the test, Hydro and/or AECL must establish that the information was supplied to Hydro, in confidence, either implicitly or explicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to Hydro (Orders P-203, P-388 and P-393).

Hydro states:

Each AECL formal report or memoranda is clearly identified as having been prepared by AECL. Other reports have been identified as authored by staff on secondment and paid by AECL.

Each document from AECL is identified as a "Controlled" document and includes a statement relating to its confidentiality viz "No exploitation or transfer of any information contained herein is permitted in the absence of an agreement with AECL and Ontario Hydro, and neither the document nor any such information may be released without the written consent of AECL and Ontario Hydro." Clearly there is an expectation of confidentiality by both parties. This expectation is extended to all correspondence from AECL.

Hydro submits that "the records at issue are all either supplied to Ontario Hydro or the record is extracted from information supplied to Ontario Hydro. Additionally, there is both an explicit and implicit expectation of confidentiality by both parties."

In its representations, AECL does not address Record 1, however the portions of this record which remain at issue consist of information essentially the same as that in other exempt records. AECL supports Hydro's position with respect to Records 2 to 9, and confirms that these records contain confidential AECL technical information. AECL advises that Records 3, 5, 7 and parts of Record 4 were produced by its Reactor Engineering Services Department. AECL points out that Records 3 and 7 are marked "Controlled" to indicate the document's confidential nature and its limited distribution within AECL. AECL states that its technical information was supplied to Hydro on a confidential basis and that it had a reasonably held-expectation that this information would be treated in this manner by Hydro.

The appellant's representations do not specifically address this requirement of section 17(1).

I am convinced on the basis of the evidence provided by Hydro and/or AECL that, subject to certain exceptions which I will address, the records were supplied by AECL to Hydro with a reasonable expectation that they would be treated confidentially. The documents provided by AECL were marked "controlled" and/or included a confidentiality statement. Having taken these precautions to ensure the limited distribution of the records and to provide the requirement of written consent by both parties for their release, it is clear that both parties held a reasonable expectation of confidentiality with respect to the information supplied by AECL.

Record 5 includes a number of e-mails which appear to have been generated by an employee of Hydro. However, because the information in these e-mails would permit the drawing of accurate inferences with respect to the confidential technical information actually provided by AECL, I find that this information was also "supplied" in confidence by AECL.

Reference 6 of Record 4 was prepared by Hydro, not AECL. AECL's representations on Record 4 specifically exclude this portion of the record. I find that it does not contain information supplied by AECL, nor information which would permit the drawing of accurate references from other information so supplied. Accordingly, Reference 6 does not satisfy the requirements of part 2 of the section 17(1) exemption claim.

Reference 5 of Record 4 was authored by a different organization which has not been added as a party to this appeal. If the appellant remains interested in pursuing access to this information after receiving this order, this office will ensure that this party is notified and provided with an opportunity to provide representations prior to any decision on access.

Section 17(1)(b)

In order to meet the requirements of section 17(1)(b) of the Act, Hydro and/or AECL must demonstrate that:

1. the disclosure of the information in the records could reasonably be expected to result in similar information no longer being supplied to the institution; and
2. it is in the public interest that similar information continue to be supplied to the institution in this fashion.

(Order P-604)

Hydro submits that:

... the release of this information by Ontario Hydro without permission from AECL would have a negative effect on the relationship between Ontario Hydro and AECL that could lead to a loss of expert knowledge required by Ontario Hydro in support of its nuclear operations.

AECL submits that the release of the information could result in similar information no longer being supplied to Hydro. AECL states:

AECL carries on business on a commercial basis in the competitive fields of nuclear research and development and international reactor sales, and must carry on this business in a confidential basis to remain competitive. If our corporation cannot be assured that its customers can maintain the confidentiality of AECL proprietary information, then AECL would seriously have to consider whether continuing to provide such information was worth the risk of having its valuable proprietary information publicly disseminated so that its customers and competitors could freely access to the economic detriment of AECL.

In Order P-270, former Commissioner Tom Wright dealt with an appeal involving minutes of meetings between Hydro, AECL and a third party that contained technical, commercial and scientific information provided in confidence to Hydro by AECL and the third party. At page 23, he stated:

... the institution submitted that "Disclosure of this information, which has been provided in confidence, could reasonably be expected to result in such information no longer being supplied to Ontario Hydro."

Simply stated, I do not accept this assertion. Given that the institution is AECL's premier customer for CANDU reactors and given the business relationship between the institution, AECL and the other affected party, I do not accept that it could reasonably be expected that the kind of information at issue would no longer be supplied.

I agree with the view taken by former Commissioner Wright, and find that it applies equally in this appeal. Given the status of Hydro as a premier client of AECL, I find that it could not be reasonably expected that AECL would no longer provide the type of technical information contained in the records at issue to Hydro if the information was disclosed. Even if I were to accept that this would be the case, neither Hydro nor AECL have established why it is in the public interest for this kind of information to continue to be provided. Accordingly, I find that section 17(1)(b) does not apply to the records.

Sections 17(1)(a) and 1(c)

With respect to sections 17(1)(a) and (c), Hydro states that:

AECL is an expert in the field of CANDU nuclear reactors. It carries out research and engineering both for itself and for third parties, for an appropriate fee ... If the records were obtained by a competitor or customer or potential customer of AECL, the disclosure would significantly prejudice AECL's competitive position. It would interfere significantly with AECL's contractual obligations and negotiations with its customers or potential customers and could result in a loss of future revenue for AECL.

AECL submits [in respect of Records 3-5 and 7-9] that:

... the release of this information could reasonably be expected to prejudice significantly the competitive position of AECL, and its ongoing commercial relationships and contractual negotiations with its CANDU reactor customers, by providing access to confidential AECL information and expertise in reactor engineering to both its current and potential CANDU customers and its competitors in the intensely competitive area of nuclear reactor sales worldwide. Accordingly, the information is exempt from release pursuant to section 17(1)(a) of the Act. In addition, the prejudice to [its] competitive position could reasonably be expected to result in undue loss to AECL, and accordingly, the information is also exempt from release pursuant to s.17(1)(c) of the Act.

AECL's comments relating to Records 2 and 6 are that:

[T]his information is confidential AECL technical information relating to the scheduled maintenance of CANDU reactors owned by AECL customers in [named places]. The distribution of this information is limited and its disclosure to parties outside of AECL is subject to appropriate arrangements to ensure confidentiality ...

Its release could reasonably be expected to significantly interfere with AECL's ongoing commercial relationships and contractual negotiations with its customers, as these customers reasonably expect that their commercial relationships and discussions with AECL are on a confidential basis, and these expectations will be violated if this information is released. Accordingly, the information is exempted from release pursuant to section 17(1)(a) of the Act.

Again, it should be noted that the appellant has provided no specific representations on this part of the section 17(1) exemption claim.

The undisclosed portions of Record 2 and section 3.1, paragraph 3 of Record 6 consist of information concerning the anticipated lifetime of pressure tubes installed in specific reactors. This information is the same or highly similar to information already disclosed by Hydro to the appellant in its supplementary decision letter issued at the time of withdrawing its section 18 exemption claim. In my view, it is not reasonable to expect that the release of this previously disclosed information would result in either of the harms outlined in sections 17(1)(a) or (c), and I find that these parts of Records 2 and 6 do not satisfy the third requirement of this exemption claim.

Certain portions of Records 4 and 5 contain information which is the same or highly similar to portions of the main body of the Report already disclosed to the appellant. More specifically:

Record 4: Paragraph 1.0 is the same as 3.4 on page 9; part of paragraph 4.2 is highly similar to 3.4.7 on page 10; paragraph 7.0 is highly similar to 3.4.3.2 on page 10; 8.0 is highly similar to 3.4.3.1 on page 9; paragraphs 8.1 and 8.1.1 are highly similar to 3.4.3.1.1 on pages 9 and 10; paragraph 8.2 is highly similar to 3.4.3.1.2 on page

10; a portion of paragraph 9.0 is the same as 3.4.5 on page 10 and paragraph 10.0 is highly similar to 3.4.4 on page 10.

Record 5: Memorandum dated July 26, 1996 from A.R. Oliva to G.J. Field is the same memorandum as the one included as Appendix 7 in the body of the Report; and parts of paragraphs 3 and 4 of Reference 7 contain the same or highly similar information as paragraphs 3.4.6 and 3.4.7 on page 10.

In my view, it is not reasonable to expect that the release of this previously disclosed information would result in either of the harms outlined in sections 17(1)(a) or (c), and I find that these parts of Records 4 and 5 do not satisfy the third requirement of this exemption claim.

As far as the remaining Records and portions of Records 4, 5 and 6 are concerned, I find that they contain highly technical information that is reflective of AECL's expertise in the field of nuclear reactors. I accept that this is a highly competitive field of business with a small market, and that the information contained in these records reflects the expertise that AECL would sell to its worldwide clients. As such, I find that it is reasonable to expect that disclosure of this information could significantly prejudice AECL's competitive position with respect to customers both current and potential, and/or could result in an undue loss to AECL. Therefore, I find that Hydro and AECL have provided sufficient evidence to establish that disclosure of all of Records 3, 7, 8, and 9, the undisclosed portions of Record 1, the remaining portions of Records 4 and 5, and the "executive summary" of Record 6 could reasonably be expected to result in the harms outlined in sections 17(1)(a) and/or (c), thereby satisfying the third requirement of the section 17(1) exemption claim.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the Act provides that an exemption under sections 13, 15, **17**, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of a record clearly outweighs the purpose of the exemption.

It has been established in a number of previous orders that in order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the third party exemption.

The appellant states:

... Ontario Hydro has a duty to be accountable to the citizens of Ontario, particularly in the domain of nuclear energy. Ontarians have an enormous stake in decisions being made by Hydro vis a vis its nuclear division ... Nuclear energy is one of the most important issues currently on the public agenda, not only from a safety point of view but also from a cost/benefit analysis. Any monies used to pay for the repairs being proposed for Ontario Hydro's nuclear reactors are being underwritten by the public purse.

When Ontario Hydro was proposing to build its nuclear reactors, there was assurance that these reactors had a 40 year life span, and on that basis were a financially sound investment. The initial cost of the reactors was amortized over that 40 year period in order to justify the business decision to go nuclear as opposed to going to other types of electrical generation that were available. Any new information that allows a re-examination of the principles upon which this financial assumption was based should be a part of the public debate.

[The Report] is part of a body of research conducted by Ontario Hydro to determine the present and future condition of the "pressure tubes" in each of the Ontario Nuclear reactors. These pressure tubes form the "heart" of the reactor and necessitate some of the most costly repairs that must be done in order to keep the reactors in safe working order. The document in question examines the steps that Ontario Hydro believes would be necessary in order to achieve this.

AECL states that:

If it is assumed that, as was the case in Order P-1190, the "public interest" of concern here is the "broad public interest in nuclear safety and public accountability for the operation of nuclear facilities", then AECL submits that such public interest would not be furthered by the release of the documents of interest in this appeal, as it is sufficiently protected by the AECB's [Atomic Energy Board] ongoing oversight of AECL's and Ontario Hydro's activities.

Hydro states that the Report "was prepared in 1996 to support an initiative to retube all existing Ontario Hydro nuclear reactors. Long term plans for the Nuclear generating stations have changed significantly following a complete review by a team of experts. Current plans call for the shut down of several units and the refurbishing of others."

Hydro further states:

Most of the information in the report has already been provided to the requester and the records withheld are technical papers that provide support to the data contained in the report itself.

Supporting data to a report that discusses an initiative that will not be implemented is not of compelling public interest such that disclosure would outweigh the purpose of the mandatory exemption provided by section 17(1).

I agree with Hydro's position. The appellant has been provided with the vast majority of the main body of the Report, together with some portions of the technical appendices produced in support of the Report's findings. While I accept that a public interest exists in knowing the basis for Hydro's decisions relating to its nuclear reactors, particularly in matters concerning safety, I find that the records already released by Hydro to the appellant are sufficient to satisfy this interest.

I also find that the appellant's cost accountability concerns have been satisfactorily addressed by the substantial amount of disclosure of costing data contained in the records she has already received or will receive as a result of this order.

In my view, disclosure of the records which I have found qualify under sections 17(1)(a) and/or (c), all of which relate to an initiative that will not be implemented, would not further advance public awareness or knowledge.

Accordingly, I find that there is not a compelling public interest in the disclosure of the remaining records which I have found to be exempt under section 17(1), and even if such a compelling public interest did exist, it would not be sufficient to clearly outweigh the purpose of this exemption claim, in the circumstances of this appeal.

Therefore, section 23 of the Act does not apply.

ORDER:

- I. I order Hydro to disclose the following portions of records: Rows 2009, 2011, 2013 of Record 2; Reference 6 and paragraphs 1.0, part of 4.2, 7.0, 8.0, 8.1, 8.1.1, 8.2, part of 9.0, and 10.0 of Record 4; memo dated July 26, 1996 from A.R. Oliva to G.J. Field and parts of paragraphs 3 and 4 of Reference 7 of Record 5; and section 3.1, paragraph 3 of Record 6. The portions of these records to be disclosed are highlighted on the copy of records which have been provided to Hydro's Freedom of Information and Privacy Co-ordinator. Disclosure is to be made by **August 20, 1998** but not earlier than **August 17, 1998**.
2. I uphold Hydro's decision to withhold the remaining Records and/or partial Records.
3. I reserve the right to require Hydro's to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.
4. I remain seized of this appeal in order to decide the issue of access to Reference 5 of Record 4 should the appellant wish to continue to pursue access to this information.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

July 16, 1998