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

ORDER PO-1698

Appeal PA-990044-1

Ontario Hydro

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BACKGROUND:

The Electricity Act, 1998 implemented a restructuring of Ontario Hydro, effective April 1, 1999. At the same time, Ontario Hydro ceased to be an institution covered by the Freedom of Information and Protection of Privacy Act (the Act). Some, but not all, of the new corporate bodies created as part of the restructuring exercise were added by regulation to the list of institutions covered by the Act. Ontario Power Generation Company (OPGC) was not one of the new organizations designated as an institution. However, by means of a Transfer Order made by the Lieutenant Governor in Council under the Electricity Act, 1998, OPGC assumed responsibility for all requests made under the Act that were received by Ontario Hydro prior to April 1, 1999 and unresolved as of that date.

NATURE OF THE APPEAL:

On November 9, 1998, Ontario Hydro received a request under the Act for access to all records pertaining to the contract between a named company and Ontario Hydro from "Jan 1 1998 to present".

Ontario Hydro identified two responsive records: an "Engagement Letter" dated March 3, 1998 signed by the officials of the named company and Ontario Hydro; and an "Amending Letter" dated August 25, 1998 signed by the same individuals. The content of these two letters reflects arrangements for the named company to act as exclusive financial advisor to Ontario Hydro "in connection with a potential Transaction involving the nuclear power generating assets of Hydro". Pursuant to section 28 of the Act, Ontario Hydro notified the named company of the request and provided the company with an opportunity to submit representations if it felt the records should not be disclosed. After considering the company's response, Ontario Hydro issued its decision to the requester granting access to both records in their entirety.

The company (now the appellant) appealed Ontario Hydro's decision, but only with respect to "Schedule A", a Transaction Fee Schedule, which was attached to the Engagement Letter. The appellant claimed that this schedule qualifies for exemption pursuant to sections 17(1)(a) and (c) of the Act.

During the course of mediation, the records were provided to this Office by Ontario Hydro. Included among them was a third record, which was not referred to in the appellant's letter of appeal. This record is a five-page purchase order, dated November 25, 1998, naming the appellant as supplier, with an attached two-page unsigned memorandum of purchase approval, dated May 20, 1998. Ontario Hydro identified this record as responsive to the appellant's request, but had not provided section 28 notice to the appellant. Because the Mediator determined that disclosure of this record might affect the interests of the appellant, she asked OPGC, which had by this point assumed responsibility for the appeal under the terms of the Transfer Order, to provide a copy of the record to the appellant, which it did. The appellant objected to disclosure of this record, and advised the Mediator accordingly. The appellant claimed that the record was created after the date of the request and therefore was not responsive; that it was unsigned and therefore not part of the contractual arrangements between the appellant and Ontario Hydro; or, alternatively, that it also qualified for exemption pursuant to sections 17(1)(a) and (c) of the Act. As a consequence, this third record was added to the scope of the appeal.

I sent a Notice of Inquiry to OPGC (on behalf of Ontario Hydro), the appellant and the requester. Representations were received by all three parties.

PRELIMINARY MATTERS:

Responsiveness

The appellant claims that the purchase order and attachment are not responsive to the request, for two reasons: (1) because the date of the purchase order (November 25, 1998) falls after the date of the request (November 9, 1998); and (2) because the record is in draft form and unsigned by Ontario Hydro.

With regard to the first reason, the appellant points to the actual wording of the request, which includes the time frame "Jan 1 1998 to present", and is dated November 9, 1998. The appellant refers to Order P-931 which includes the statement:

> The Act does not impose an obligation on an institution to make a decision with respect to records that do not exist at that point in time.

The appellant acknowledges that the attachment to the purchase order, dated May 20, 1998, falls within the time frame of the request.

OPGC's representations on this issue are as follows:

1. The Purchase Order is an internally generated document created for Ontario Hydro's administrative purposes.

2. Furthermore, although the purchase order is dated November 25, 1998, it is our understanding that it was entered into our computer system on May 21, 1998.

The requester accepts that the purchase order is not dated within the time period specified by the request, but submits that it makes sense to deal with it in the context of other related records, and that it is "reasonably related" to the request, the phrase used in Order P-880 to define responsiveness.

Turning to the second reason, the appellant points out that the record was neither signed by Ontario Hydro nor sent to the appellant, and remains in draft form. The appellant submits:

> Until a Purchase Order is signed by one contracting party and sent to the other contracting party, it cannot be considered to form part of a contract between two parties. Since the Purchase Order should not be considered to form part of the [appellant's] contract with

> Ontario Hydro, it does not fall within the purview of the Requester's request, and cannot be considered to be reasonably related to it.

The requester points out that his request was for all records "pertaining to the [appellant's] contract". Therefore, he submits that even if the record in draft form does not form part of the contract, the record is still clearly responsive to the request as worded.

The issue of responsiveness of records was canvassed in detail by former Adjudicator Anita Fineberg in Order P-880, referred to earlier. That order dealt with a redetermination regarding this issue which resulted from the decision of the Divisional Court in Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3rd) 197.

In the Fineberg case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In her discussion of this issue in Order P-880, Adjudicator Fineberg stated as follows:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with these conclusions and adopt them for the purposes of this appeal.

The purchase order and the attachment both contain information directly related to the other two records at issue in this appeal. The purchase order is a standard administrative document which serves as a formal agreement for the purchase of goods and services; and the attached memorandum of purchase approval is a corresponding form which ensures that proper authorizations for payment are in place, according to established policy. The wording of the request is not restricted to actual contract documents, but rather to records "pertaining" to the contract. In my view, administrative documents used to implement payment under the terms of a contract are "reasonably related" to the contract itself. Therefore, I find that the purchase order and attachment are responsive to the request.

As far as the time frame of the request is concerned, there is no question that the attachment is dated within the time period identified in the request. The purchase order itself has two date fields at the top of page one. One is simply headed "date" and contains the date "98Nov25". The other is called "confirm date" and includes the date "98May21". There is no question that November 25, 1998 post-dates the request. However, in my view, the explanation offered by OPGC that the information contained in the purchase

order was entered into the computer on May 21, 1998 is a reasonable one, given the second date that appears on the purchase order form, and I accept this explanation in the circumstances.

Accordingly, I find the purchase order and attachment are responsive records and fall within the scope of this appeal.

Notification

The appellant states that it was not given proper notification by either Ontario Hydro or OPGC under section 28 of the Act. As a result, the appellant submits:

> This irregularity has denied [the appellant] its procedural rights under the Act, which [the appellant] did not waive and which cannot be cured by including Record "B" [the purchase order and attachment] as a record at issue in the Adjudication. Furthermore, [the appellant] was denied the benefit of mediation (with the Mediator of the OIPC) with respect to disclosure of Record "B". The failure of Ontario Hydro to initially disclose Record "B" thus compromised [the appellant's] rights in the mediation. Accordingly, the issue concerning disclosure of Record "B" should be referred by the Adjudicator to Ontario Hydro, to be determined in accordance with the procedure mandated by the Act.

I do not accept the appellant's position. The Mediator assigned to the appeal identified the possible impact that disclosure of the purchase order and attachment might have on the interests of the appellant, and arranged for OPGC to provide a copy of this record to the appellant. The appellant advised the Mediator of its position, which was reflected in the amended Report of Mediator sent to all parties prior to commencement of this inquiry. In addition, the Notice of Inquiry issued to the parties identified the appellant's position regarding this third record, and gave the appellant and the other parties an opportunity to address issues relating to the purchase order and attachment in their representations. The appellant provided detailed representations in response to the Notice.

In my view, these various steps taken by this Office are sufficient to correct any technical deficiencies in the notification requirements under section 28, and I find that no useful purpose would be served by referring this record back to OPGC at this point.

RECORDS:

Neither OPGC nor the appellant object to the disclosure of the Engagement Letter and the Amending Letter. It would appear that these two records have not yet been disclosed to the requester, and I will include a provision in my order requiring disclosure.

Two records which remain at issue in this appeal are:

> Record A: the transaction fee schedule attached to the Engagement Letter

Record B: the purchase order and attachment

DISCUSSION:

THIRD PARTY INFORMATION

The appellant claims that sections 17(1)(a) and/or (c) apply to both records.

Sections 17(1)(a) and (c) of the Act 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;

For the records to qualify for exemption under sections 17(1)(a) or (c), the appellant 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 Ministry 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]

Requirement One

"Commercial information" has been defined in past orders to mean information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to

both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

"Financial information" has been defined in past orders to mean information relating to money and its use or distribution and must contain or refer to specific data." Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

The appellant's position with respect to both records is essentially the same. It submits that the records relate to Ontario Hydro's purchase of expertise and services from the appellant, and therefore qualify as commercial information; and contain the appellant's pricing practices and also set out the financial terms under which it would be paid in connection with a potential transaction involving nuclear assets, and therefore qualify as financial information.

The requester submits that the records do not contain trade secrets or financial, scientific, labour relations or technical information, but concedes that "[t]he documents may, however, contain commercial information (ie. information relating to the buying of services).

I accept the appellant's position. Both records reflect the financial component of contractual arrangements entered into by Ontario Hydro and the appellant for a specified service. As such, I find that they contain both commercial and financial information.

Therefore, the first requirement of the section 17(1) test has been established.

Requirement Two

In order to satisfy the second requirement, the appellant must show that the information was **supplied** to Ontario Hydro, either implicitly or explicitly **in confidence**.

Supplied

Because the information in a contract is typically the product of a negotiation process between two parties, the content of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 17(1) of the Act. Records of this nature have been the subject of a number of past orders of this Office. In general, the conclusions 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, not information that has resulted from negotiations between the institution and the affected party. If disclosure of a record would reveal information actually supplied by an affected party, or if disclosure would permit the drawing of accurate inferences with respect to this type of information, then past orders have also found that this information satisfies the requirements of the "supplied" portion of the second requirement of the section 17(1) exemption test (see, for example, Orders P-36, P-204, P-251 and P-1105).

The requester submits:

> The parties negotiating a contract have separate interests and no relationship of confidentiality can be assumed between these two opposed parties. Accordingly, information supplied to Hydro in reference to [the appellant's] contracts was not supplied in confidence.

As far as Record A is concerned, Ontario Hydro, in its original decision letter to the appellant stated:

> Since the records [the Engagement Letter which included Record A, and the Amending Letter] do not meet all three parts of the test for section 17 of the Freedom of Information and Protection of Privacy Act and since Ontario Hydro does not object to the disclosure of the Contract between Ontario Hydro and yourselves, full access will be provided to the requester.

As far as Record B is concerned, OPGC's representations explain that Ontario Hydro did not consider this record to affect the interests of the appellant because it is "an internally generated document created for Ontario Hydro's administrative purposes".

The appellant submits that Record A was supplied to Ontario Hydro. The appellant provides the following in support of this position:

> Consistent with its usual practice in connection with mergers and acquisitions mandates, upon being selected as the supplier of financial advice with regard to a potential transaction involving the Nuclear Assets, [the appellant] presented Ontario Hydro with a draft Engagement Letter which, as stated above, was intended to set out the legal and financial terms under which [the appellant] would act as financial advisor to Ontario Hydro. The draft Engagement Letter included [the appellant]'s standard form Transaction Fee Schedule... At this point, the Engagement Letter was in the nature of a standard form contract, which was prepared by one party, and presented to the other for signature, without negotiation.
>
> ...
>
> Ontario Hydro did not request specific amendments to, or attempt to negotiate in regard to [Record A]. However, Ontario Hydro commented, without making any specific request, that the fees which might be payable to [the appellant] based on the Transaction Fee Schedule seemed high for a government institution like Ontario Hydro. Accordingly, [the appellant], of its own accord, submitted a revised version of the Transaction Fee Schedule to Ontario Hydro, which it tailored to Ontario Hydro's specific circumstances.

The appellant then goes on to describe the nature of the changes made to Record A, and continues:

> This restated Transaction Fee Schedule was never thereafter changed and was ultimately incorporated into the final Engagement Letter as executed, although Ontario Hydro did comment on and negotiate some of the legal terms (as opposed to the transaction fees) of the Engagement Letter. Accordingly, the financial terms of the Engagement Letter and the Transaction Fee Schedule were not negotiated but were submitted to Ontario Hydro by [the appellant], although tailored to Ontario Hydro's specific circumstances.

Although the appellant acknowledges that the contents of Record A were changed "in light of one comment (but no specific requests) from Ontario Hydro", it submits that this is insufficient to constitute "negotiation".

The appellant points to Order P-807 in support of its position. This order dealt with an appeal of a decision by the Ministry of Heath to deny access to certain portions of a contract with an affected party for the supply of vaccine and related products. As the appellant points out in its representations, the adjudicator in Order P-807 made the following statements:

> In its representations, the Laboratory [the affected party in that appeal] submits that disclosure of the information in the record would reveal unique proposals, terms and conditions that were developed solely for the Ministry and that are not standard in the industry. The Laboratory claims that the information in the record is not the result of a negotiating process but constitutes terms and conditions actually supplied by the Laboratory to the Ministry.

Although not referred to by the appellant, the adjudicator in Order P-807 goes on to state:

> I have carefully reviewed the information in the record and the representations of the Ministry and the Laboratory. I accept that most of the information in the record is information that was supplied by the Laboratory to the Ministry. However, there is some information which, in my view, does not fall within this ambit. I have highlighted in blue, the part of the record that, in my view, was not supplied for the purposes of the section 17(1) test. I have highlighted in yellow the part of the record that was supplied.

In my view, Order P-807 does not assist the appellant in the present appeal. The adjudicator in Order P-807 accepts the Laboratory's position with respect to certain parts of the agreement, and rejects it for others. She appears to accept that certain parts of the agreement were simply supplied by the Laboratory and other parts were negotiated. There is no indication in her reasons that any information falling within the definition of "supplied" was altered from its original form during the process of discussions between the Ministry of Health and the Laboratory leading up to the agreement, as was the case between Ontario Hydro and the appellant with respect to Record A.

The appellant's representations include one dictionary definition of the term "negotiate", and one of "negotiation":

> "negotiate" - to hold communication or conference (*with* another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some settlement or compromise (Oxford English Dictionary, 2nd ed. (Oxford: Clarendon Press, 1989) p.303);
>
> "negotiation" - deliberation and discuss upon the terms of a proposed agreement, and includes conciliation and arbitration (Dictionary of Canadian Law (Toronto: Carswell, 1991) p.675);

Similar definitions are found in other dictionaries:

> "negotiate" - to bargain in good faith with a view to the conclusion of an agreement (Dictionary of Canadian Law (Toronto: Carswell, 1991) p.675);
>
> "negotiate" - to communicate or confer with another so as to arrive at the settlement of some matter (Black's Law Dictionary 6th ed. (St. Paul: West Publishing Co., 1990) p.1036).

Although the appellant acknowledges that the version of Record A that ultimately formed part of its contractual arrangements with Ontario Hydro differs from the original, and that the appellant reduced certain rates contained in Record A as a result of a suggestion by Ontario Hydro that they "seemed high for a government institution", it takes the position that this activity does not constitute "negotiations". I disagree.

It is clear that Ontario Hydro and the appellant were interested in "arriving at the settlement of some matter" or "arranging some matter by mutual agreement", and that the two parties entered into discussions for this purpose. The appellant made a proposal, which was rejected by Ontario Hydro. The discussions and deliberations that followed were undertaken "in good faith with a view to the conclusion of an agreement" or "with a view to some settlement or compromise", and concerned "the terms of a proposed agreement". In my view, this activity constitutes negotiations. The fact that the deliberations, discussions and communications in this instance were relatively straightforward is not determinative of the issue; there was an active two-way communication process between the parties, and the final version of Record A reflects a compromise between the opening positions of each party. Therefore, I find that Record A was the result of negotiations between the appellant and Ontario Hydro, and that this record was not "supplied" for the purposes of section 17(1) (see also Order P-1545).

As far as Record B is concerned, the appellant acknowledges that the record itself was not supplied by it to Ontario Hydro. However, the appellant submits that the financial information contained in the purchase order and attachment:

> is either taken directly from information supplied by [the appellant] in Record A or would permit the drawing of accurate inferences with respect to information supplied by [the appellant] in Record A.

Having found that the financial information contained in Record A was not "supplied" for the purposes of section 17(1), I similarly find that any related information contained in Record B was not "supplied".

Therefore, I find that neither record satisfies the second requirement of the section 17(1) test. Because all three requirements must be established, I find that Records A and B do not qualify for exemption under either of sections 17(1)(a) or (c) of the Act.

Because of my finding, it is not necessary for me to consider the possible application of section 23 in the circumstances of this appeal.

ORDER:

1. I order OPGC to disclose the Engagement Letter (without the attached Record A) and the Amending Letter to the requester by **August 5, 1999**.

2. I order OPGC to disclose Records A and B in their entirety to the requester by **August 26, 1999,** but not before **August 23, 1999**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require OPGC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 1 and 2.

Original signed by: July 21, 1999
Tom Mitchinson
Assistant Commissioner