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

ORDER PO-1705

Appeals PA-990001-1 and PA-990032-1

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

BACKGROUND:

The Electricity Act, 1998 implemented a restructuring of Ontario Hydro (Hydro), effective April 1, 1999. At the same time, 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 Hydro prior to April 1, 1999 and unresolved as of that date.

NATURE OF THESE APPEALS:

Hydro received a request under the Act for access to all records pertaining to a named individual or his corporate entities from July 1, 1995 to the date of the request (October 8, 1998).

Hydro identified 110 pages of responsive records, consisting of an engagement letter, invoices, purchase orders, purchase requisitions, administrative instruction notices, letters, a draft communication strategy, a brochure with covering letter, and other related notes and e-mail messages created by Hydro employees.

Before responding to the requester, Hydro notified the named individual, pursuant to section 28 of the Act, and sought his views on disclosure of the records. This individual did not object to disclosure of the brochure and an attached covering letter, but did object to disclosure of all other records. Following consideration of the individual's response, Hydro issued its decision letter to the requester. Hydro:

- granted access in full to 87 pages;
- granted partial access to 11 pages, claiming sections 17(1)(a) and (c) (third party information) as the basis for exempting those portions relating to professional fees, the identity of specific employees of the appellant's company, and the payment rates and billable time associated with each employee;
- granted partial access to seven pages, claiming section 21(1) (invasion of privacy) as the basis for exempting certain information concerning a senior Hydro official; and
- denied access in full to the five- page draft communication strategy pursuant to section 18(1)(c).

The named individual (now the third party) appealed Hydro's decision to disclose the 87 full pages and 18 partial pages, claiming that they qualified for exemption pursuant to sections 17(1) and 21(1) of the Act (Appeal PA-990001-1).

The requester appealed Hydro's denial of access to the remaining portions of the 18 pages of records, and to the draft communications strategy (Appeal PA-990032-1). The appellant subsequently raised the possible application of the public interest override contained in section 23 of the Act.

During mediation, Hydro identified ten additional pages of invoices. Hydro advised the third party that it intended to grant the requester access in full to six pages and partial access to the other four pages. The basis for denying access to the remaining information on these four pages was the same as for the other pages of invoices described above. These ten pages have been added to the scope of this appeal.

The third party also raised the possible application of the sections 13(1) and 18(1) discretionary exemptions not claimed by Hydro. In the third party's view:

> ... the appropriate "head" has improperly considered, or neglected to consider, these discretionary exemptions and accordingly the application of these sections should be referred back to the "head" for proper consideration.

Neither Hydro nor the third party object to disclosure of the company brochure and covering letter. The third party points out that "[t]his brochure forms part of the material on our web page, which can be readily accessed by any member of the public". However, it would appear that these two records have not yet been disclosed to the requester, so I will include a provision in my order requiring disclosure.

I sent a Notice of Inquiry to OPGC (on behalf of Hydro), the third party, the requester, and nine individuals employed by the third party's company whose names appear in the records and whose interests may be affected by the outcome of these appeals (the affected persons). Representations were received from OPGC, the requester and counsel for the third party.

PRELIMINARY MATTERS:

JURISDICTION

In his representations, counsel for the third party made the following submission:

> Pursuant to sections 2(1), 10 and 69 of the Act, the Information and Privacy Commissioner/Ontario only has jurisdiction over those institutions listed in the schedule to Regulation 460. Accordingly, effective April 1, 1999 the Act ceased to apply to, and the Information and Privacy Commissioner lost jurisdiction over, the disclosure of any records of Ontario Hydro or Ontario Hydro Financial Corporation ...
>
> Based on the foregoing, it is our submission that the Information and Privacy Commissioner/Ontario lacks jurisdiction to order disclosure of the records sought. In our

> submission, this should dispose of the appeals on the basis of a lack of jurisdiction. [emphasis in original]
>
> Under the circumstances, and while the issue of jurisdiction of the Information and Privacy Commissioner/Ontario is outstanding, it is premature to make further submissions.

I acknowledged receipt of the third party's representations, and reminded counsel of the deadline for submitting representations on the substantive issues raised in the Notice. My letter included the following:

> I would like to advise you that I intend to dispose of **all** of the issues in these appeals, including the jurisdictional issue which you have raised, when I issue my order.
>
> Accordingly, should you wish to provide your representations on the substantive issues raised in the Notice of Inquiry, dated April 28, 1999, please submit them to me by **Monday June 21, 1999**. I will be proceeding to deal with these appeals based on the representations received as of that date. [emphasis in original]

I subsequently obtained a copy of a document titled "Electricity Act, 1998 - Transfer Order - Transfer of Certain of the Officers, Employees, Assets, Liabilities, Rights and Obligations of Ontario Hydro to Ontario Power Generation Inc." (the Transfer Order).

I forwarded a copy of the Transfer Order to the third party's counsel, and drew his attention to section 3.3(e) in particular, which states:

> The transfer of the officers, employees, assets, rights, liabilities and obligations to the Transferee by this Transfer Order includes all rights, remedies, obligations and liabilities of Ontario Hydro under the *Freedom of Information and Protection Act*, [sp] R.S.O. 1190 c. F31, as amended, (the "FOI Act"), as if the Transferee were subject to such liabilities and obligations of Ontario Hydro under the FOI Act, solely with respect to any request for access to a record or records or parts thereof made under the FOI Act (the "Request"), including all rights, remedies, obligations and liabilities of Ontario Hydro respecting any notices, appeals, judicial review applications, and other steps or proceedings relating to such a "request (collectively "Proceedings"), provided:
>
> (i) the Request was received by Ontario Hydro prior to the Transfer Date;
>
> (ii) the Request is Related to the Business or is related to the Business of a subsidiary of the Transferee (as defined in the Transfers to such subsidiaries) or to the officers, employees, assets (including any books and records), liabilities, rights or obligations transferred

> to the Transferee pursuant to this Transfer Order or to a subsidiary of the Transferee pursuant to a Transfer; and
>
> (iii) the Request or any of the Proceedings have not been concluded prior to the Transfer Date or any appeal period applicable thereto has not expired prior to the Transfer Date.
>
> With respect to such Requests and Proceedings, the Transferee shall have all the rights (including the rights under the FOI Act relating to granting or refusing requests for access to records or parts thereof), powers and duties of an "institution" (as that term is defined in the FOI Act) and the Chair of the Board of Directors of the transferee shall have the same rights, powers and duties as a "head" (as that term is defined in the FOI Act), as if the FOI Act applied to the Transferee, however, for greater certainty, the Transferee is not an agency, board, commission, corporation or other body designated as an institution in the regulations made under the FOI Act. Terms defined in this section 3.3(e) have the meanings ascribed thereto for the purposes of this section only.

I also gave the third party a one-week extension of the deadline, to June 28, 1999, for submitting additional representations on the jurisdictional issue and representations on the substantive issues identified in the Notice of Inquiry.

Counsel for the third party submitted the following representations on the jurisdictional issue:

> We have reviewed the Transfer Order and we remain of the view that the Privacy Commissioner lacks jurisdiction over these appeals. While the Transfer Order speaks to the obligations and liabilities of Ontario Hydro and Ontario Power Generation Inc., it does not address the issue of the jurisdiction of the Privacy Commissioner. By virtue of the amendments to the Regulation 460 under the Act,. Neither Ontario Hydro nor Ontario Power Generation Inc., fall within the jurisdiction of the Act or the Privacy Commissioner. Had Ontario Hydro remained subject to the Act, subsequent to April 1, 1999, the situation may have been different.

I disagree with the third party.

In my view, the wording of the Transfer Order and the actions of Hydro and OPGC in responding to requests and participating in these and other outstanding appeals leaves no doubt that all matters relating to requests made under the Act that were ongoing prior to April 1, 1999 were to be continued to their conclusion. Section 3.3(e) of the Transfer Order specifically recognizes the role that the Commissioner's Office is intended to play during this transitionary period by stating that the transferee under the terms of the Transfer Order (OPGC in this case) assumes all outstanding obligations of Ontario Hydro respecting "any notice, **appeals**, judicial review applications, and other steps or proceedings", provided that the three

conditions outlined in section 3.3(e) are present. In my view, all three conditions are clearly present in the circumstances of these appeals:

- the request was received by Hydro on October 10, 1998, which is prior to the April 1, 1999 transfer date;
- the request relates to the business of Hydro, specifically the services provided by the third party to Hydro during an identified period of time;
- proceedings, specifically these appeals, were not concluded prior to the April 1, 1999 transfer date.

Accordingly, I find that the records at issue in this appeal remain subject to the Act for the purposes of this inquiry, and that I have jurisdiction to consider the substantive issues raised in these two appeals.

As noted earlier, the third party's counsel declined to provide representations on the substantive issues in these appeals, pending the outcome of the jurisdictional issue. In his letter responding to the jurisdictional issue, counsel states:

> It continues to be our view that until the jurisdictional issue is resolved, it is inappropriate for us to make further substantive submissions on the merits of the appeals. In the event that you do proceed to deal with the substance of the appeals and we submit you ought not to, we believe that the summary of our submissions contained in our letter of June 2, 1999 and our client's Notice of Appeal set out the general nature of our client's position.

I made it clear to the third party, in both the Notice of Inquiry and in subsequent correspondence, that I would be dealing with both jurisdictional and substantive issues in the same order. Despite clear notice to this effect, the third party declined to provide detailed representations on the substantive issues. The original representations provided by counsel for the third party include what he categorizes as "preliminary submissions", and I will consider these representations and the contents of the third party's letter of appeal in deciding the remaining issues in this inquiry.

RAISING OF DISCRETIONARY EXEMPTIONS BY THE APPELLANT

During mediation, the third party raised the application of the sections 13(1) and 18(1) discretionary exemption claims for those records or partial records Hydro decided to disclose to the requester. The third party also claimed that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision.

This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:

> The Act includes a number of discretionary exemptions within sections 13 to 22 [of the provincial Freedom of Information and Protection of Privacy Act, the equivalent of sections 6 to 16 of the Act] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
>
> The Act also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17(1) of the Act respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
>
> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the Act.

I agree with these conclusions and adopt them for the purposes of this appeal. While the above addresses the raising of discretionary exemptions by an affected party, in my view, the same reasoning applies to circumstances where a third party appellant makes a similar claim.

During mediation, counsel for the third party wrote to the Mediator stating "[w]ith respect to sections 13 and 18, we believe that the circumstances are such that [the third party is] entitled to rely on this (sic) provision ..." No additional representations on this issue were included in the materials submitted by the third party during the course of this inquiry.

Based on the information before me, I am not persuaded that this is one of "the most unusual of cases" envisioned by former Adjudicator Fineberg in Order P-1137. Accordingly, I will not consider these exemption claims beyond the section 18(1)(c) claim raised by Hydro with respect to the draft communications strategy.

On a related aspect of this issue, the third party submits:

> It will be our submission that the head as defined in sections 13(1) and 18 of the Act has not fully and properly applied his or her mind to the discretionary exemptions contained in sections 13 and 18 of the Act. Our clients are entitled, as is the Commissioner, to be satisfied that the head has fully exercised his or her discretion.

OPGC did not provide representations on this issue.

The requester submits that Hydro "clearly turned its mind to those [the sections 13(1) and 18(1)] exemptions, as evidenced by the fact that it did rely on the s. 18(1)(c) exemption in denying access to one of the records at issue in these Appeals".

In responding to the requester, Hydro claimed both of the mandatory exemptions (sections 17(1) and 21(1)) for certain parts of individual records, as well as the section 18(1)(c) exemption for the draft communications strategy. Before making its decision, Hydro provided notification to the third party, and took his views into account before providing the requester with a decision. As the requester points out, it is obvious that Hydro did in fact turn its mind to the application of discretionary exemption claims, as evidenced by its decision regarding the draft communications strategy. In my view, there is no evidence of an improper exercise of discretion by Hydro, and no further action on this issue is warranted in the circumstances.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

OPGC submits that section 18(1)(c) of the Act applies to the five-page draft communication strategy prepared by the third party and submitted to Hydro. 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).

OPGC states that the mandate of one of the subsidiaries of Ontario Hydro Services Corporation, Ontario Hydro International Inc. (OHII), includes investment in and partnering with international organizations. According to OPGC, the draft communication strategy pertains to a bid through OHII to acquire the assets

of a specified foreign company, and provides background information describing political and communication risks and opportunities. The record also discusses OHII's commitment to, and long term interests in, the foreign country and in international investments. According to OPGC, OHII is currently in the process of assessing its options regarding a different company operating in the same foreign country, and OPGC submits that disclosure of the record could have a direct impact on OHII's ability to negotiate appropriate commercially attractive arrangements should it wish to formalize dealings with this second company.

Neither the third party nor the requester provided detailed representations on this issue.

Having reviewed the record and OPGC's submissions, I am satisfied that OPGC has provided sufficient evidence to establish a reasonable expectation of prejudice to Hydro's economic interests or competitive position should the draft communications strategy be disclosed. Therefore, I find that this record qualifies for exemption under section 18(1)(c) and should not be disclosed to the requester.

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.

The third party submits:

> The records contain numerous references to the identities of individuals, the hourly rates which they charge for their services and their skills and experiences as reflected by the description of the services which they have performed. In addition, [the third party] is the personification of the Company and to release any of the information of the Company has the effect of releasing personal information concerning [the third party] and the amounts paid to him by virtue of the work performed by the Company.

The requester submits that the records do not contain personal information. The requester does not address personal information considerations related to any of the affected persons, but as far as the third party is concerned, the requester states:

> I am seeking information regarding the contracts entered into by [the third party], or a corporate entity connected to him, with Hydro, a publicly funded corporation ...
>
> If the contracts were entered into by a corporate entity connection (sic) to [the third party], these would not be "personal information" in any event because they would not relate to an individual.

OPGC's representations focus on seven pages of invoices and correspondence, all of which relate to work undertaken by the third party's company in recruiting a senior Hydro executive, and the fees paid to the

third party's company for these services under the terms of their contractual arrangement with Hydro. Because the fee was based on a percentage of salary, Hydro appears to have concluded that figures which could be used to calculate the actual salary should be protected, together with the actual salary figure contained on one page. Since the time of Hydro's decision, salaries for senior executives at Hydro were made published under the Public Sector Salary Disclosure Act. Consequently, OPGC is no longer relying on section 21(1) as the basis for denying access to the undisclosed information on these seven pages. One of these pages contains the name of an individual interviewed by the third party's company for a position at Hydro. Disclosure of this name would identify that the individual was being considered for employment with Hydro, which is information "about an identifiable individual", and falls within the introductory wording of the definition of personal information.

A number of other records contain the names of individual employees of the third party's company, together with the rate of pay earned by these employees for services provided under the terms of the agreement between the third party's company and Hydro, and the number of hours/days being billed for each individual's services. In some instances the records also include the total amount billed for each individual's services. I find that this is "information relating to financial transactions in which the individual has been involved", and thereby satisfies the requirements of paragraph (b) of the definition of personal information.

As far as the third party is concerned, his name, billing rate and billed time are included in certain records, and I find that this information also satisfies the requirements of paragraph (b) of the definition of personal information, for the same reasons.

However, I do not accept the third party's position that all information about his company should similarly be characterized as his personal information. The question of whether information which outwardly pertains to a business but could possibly be categorized as relating to "an identifiable individual" has been canvassed in a number of previous orders issued by this Office. In Order 16, former Commissioner Sidney B. Linden made the following general statement:

> The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear.

Former Commissioner Linden elaborated on the interpretation of "personal information" in the business context in Order 80. In that case, a Ministry relied on the personal information exemption claim as the basis for denying access to the names of officers of the Council on Mind Abuse (COMA) which appeared on funding-related correspondence sent by COMA to the Ministry. In rejecting the exemption claim, the former Commissioner stated:

> All pieces of correspondence concern corporate, as opposed to personal, matters (i.e. funding procedures for COMA), as evidenced by the following: the letters from COMA to

> the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

In my view, the remainder of the records at issue in these appeals are analogous to those that former Commissioner Linden dealt with in Order 80. These records consist of the engagement letter and invoices submitted on the official letterhead of the third party's company; official procurement documents prepared by Hydro as part of administering the contractual arrangements for services provided by the third party's company under the terms of the engagement letter; or internal documents, such as e-mails and notes created by employees of Hydro which relate directly to the third party's consulting contract. None of these records or portions of records contain any of the types of information listed under the various paragraphs of the definition of personal information. In my view, with the exception of the information about the third party's personal billing rates and times discussed above, all other information contained in the records is "about the consulting firm" not "about an individual", and I find that the remainder of the records do contain personal information as defined in the Act (see also Order PO-1646).

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. One of these circumstances is found in 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.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure 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.

OPGC submits that disclosure of the financial information originally withheld under section 21(1) would no longer be an unjustified invasion of the personal privacy of any individual, because the annual salary for senior executives is now a matter of public record. I concur, and I find that the remaining portions of the seven pages of records, with the exception of the name of the individual interviewed by the third party's company, should be disclosed to the requester.

The requester submits that even if the records contain personal information, their disclosure would not be an unjustified invasion of privacy because the information falls within the scope of sections 21(4)(a) or (b) of the Act. The requester provides no detailed reasons in support of his position.

The third party's counsel states that disclosure of the records would amount to an unjustified invasion of privacy, but he too provides no detailed reasons in support of this position, other than the fact that the third party "is the personification of the Company".

Sections 21(4)(a) and (b) of the Act read:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;
>
> (b) discloses financial or other details of a contract for personal services between an individual and an institution;

Neither the third party nor the other individuals named in the records are officers or employees of Hydro. These individuals are also not parties to a personal services contract with Hydro. Therefore, I find that sections 21(4)(a) and (b) are not relevant with respect to the third party or any of the other affected persons named in the records.

Section 21(3)(f) of the Act states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The portions of records that contain personal information of the third party and the other employees of his company consist of the names, billing rates and total billable time. In some instances, the records also include the sum total of billings for each individual covered by a particular invoice.

In Order P-1502, Commissioner Ann Cavoukian considered the application of section 21(3)(f) in the context of billings submitted to the Ministry of Health by physicians for services rendered under the provincial health system. Commissioner Cavoukian found that information which would reveal a physician's billing history is "financial activity", and that disclosure of records which contain this information would

constitute a presumed unjustified invasion of privacy under section 21(3)(f). Although there are similarities between the physician billings and billing details for services provided by individuals under the terms of a consulting contract, in my view, the personal information contained in the records at issue in this appeal is more accurately described as a component of the "income" or "assets" of these individuals, two terms that are also used in section 21(3)(f). Accordingly, I find that disclosure of this information would constitute an presumed unjustified invasion of the personal privacy of these individuals under section 21(3)(f) of the Act

I have rejected the requester's arguments regarding the application of sections 21(4)(a) and (b), and he has made no other representations to support his position that section 21(1) should not apply. In the absence of any such representations, or any other evidence weighing in favour of a finding that disclosure of the personal information would not constitute an unjustified invasion of the personal privacy of the third party and the affected persons, I find that it would.

Therefore, the exception contained in section 21(1)(f) does not apply in the circumstances of this appeal, and the portions of the records which contain the name of the individual interviewed by the third party's company, as well as the names of the third party and the affected persons together with the billing rates, and billed time for these individuals, qualify for exemption under the mandatory section 21(1) exemption claim. Once the names, rates and billed times are severed from the overall billing amounts which appear in some records, these overall figures no longer relate to any identifiable individual, and disclosure of these amounts would not constitute an unjustified invasion of anyone's personal privacy. I will provide a highlighted version of these records to OPGC with its copy of this order, indicating the portions which qualify for exemption under section 21(1) and should not be disclosed.

THIRD PARTY INFORMATION

In is original decision letter to the requester, Hydro exempted the names, billing rates, and actual billing times contained on the 18 partially disclosed records and the other four partially disclosed records identified during mediation. Hydro determined that this information qualified for exemption under section 17(1), but that all other portions of these records, together with the 93 pages of records for which no exemptions were claimed, should be disclosed to the requester. I have found that the information exempted by Hydro under section 17(1) qualifies for exemption under section 21(1), the other mandatory exemption provided in the Act. Consequently, other than the discussion of section 23 which follows later in this order, all issues in Appeal PA-990032-1 involving the requester have been disposed of.

The records that remain at issue in Appeal PA-990001-1 are the engagement letter between Hydro and the third party's company, the various invoices and internal procurement documents produced during the course of performing services under the terms of the engagement letter, and the related notes and e-mail messages.

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), each part of the following three-part test must be established:

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 Hydro 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.

[Orders 36 and P-373]

The Court of Appeal for Ontario recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meanings. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "**detailed and convincing**" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and

> the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again, it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]
> [Ontario (Workers Compensation Ministry) v. Ontario (Assistant Information and Privacy Commissioner), [1998] O.J. No. 3458 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

The third party, as the party resisting disclosure, must provide detailed and convincing evidence that each of these elements is present in the records and surrounding circumstances.

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 of financial information are cost accounting methods, 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 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).

The third party submits that the records contain information of "a sensitive and strategic commercial or financial nature."

The records contain details of the services and remuneration paid by Hydro to the third party's company for the provision of consulting services. I find that it is clear from the face of the records that they contain commercial and financial information, thereby satisfying the first requirement of the section 17(1) exemption claim.

Requirement Two

In order to satisfy the second requirement, the third party must show that the information was **supplied** to 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 a third 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 third party, not information that has resulted from negotiations between the institution and the third party. If disclosure of a record would reveal information actually supplied by a third 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, P-1105 and PO-1698).

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 third party's contract] was not supplied in confidence.

OPGC makes no reference the "supplied" issue in its representations, and Hydro was prepared to disclose these records on the basis that section 17(1) did not apply.

The third party's only submissions on this issue are as follows:

> The information was supplied expressly or implicitly in confidence. This information, in the context of the industry in which the Company operates, is highly competitive and confidential.

As far as the engagement letter is concerned, I find that this record was negotiated, not supplied. The record contains an outline of services to be provided to Hydro by the third party's company, and contains the signature of Hydro's Vice-President of Corporate Affairs as agreeing to the terms as outlined. I have been provided with no information from the third party to explain the context in which the engagement letter was prepared or the extent of discussions which took place before the final terms were agreed to between the parties. However, the engagement letter represents a contract for services, which, in the absence of evidence to the contrary, I will assume involved the normal negotiations that would be associated with an agreement of this nature. Therefore, I find that the engagement letter was prepared as a result of negotiations, however minimal this may have been, and that it was not "supplied" for the purposes of section 17(1) (see also Orders P-1545, PO-1698 and PO-1646).

Several other records are standard procurement documents created by Hydro in order to administer the consulting services agreement outlined in the engagement letter. Having found that the information contained in the engagement letter itself was not "supplied" for the purposes of section 17(1), I similarly find that any related information contained in these internally-generated records was also not "supplied".

As far as the invoices themselves are concerned, I find that they were supplied by the third party's company to Hydro. I also find that the references to information in the invoices which is reflected in internal e-mails and notes created by Hydro staff would reveal information supplied by the third party's company.

In confidence

In Order M-169, Adjudicator Holly Big Canoe made the following comments with respect to the issue of confidentiality in section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act (the equivalent of section 17(1) of the Act):

> In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

The only reference to the confidentiality aspect of the section 17(1) contained in the third party's representations is the following:

> The information was supplied expressly or implicitly in confidence. This information, in the context of the industry in which the Company operates, is highly competitive and confidential.

There is no indication on the face of the invoices that they were submitted in confidence. In addition, in the absence of evidence to the contrary, I am not persuaded that there is any inherent expectation of confidentiality in the submission of invoices by various suppliers to government institutions for the payment of goods and services.

Accordingly, based on the representations provided by the third party, I do not accept that the invoices were supplied "in confidence", and the second requirement of the section 17(1) exemption has not been established for these records.

Requirement Three

To discharge the burden of proof under the third part of the test, the third party, as the party resisting disclosure, must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Order P-373].

Other than stating that the industry the third party works in is "highly competitive", the only other representations provided by the third party's counsel on the harms component of the section 17(1) exemption are the following statements:

> The release of the information would do severe competitive harm to the Company. Our clients support the application thus far of section 17 insofar as it has resulted in the exclusion from disclosure of certain of the information referred to above [the portions of the records found by me to be exempt under section 21(1)]. It will be our submission that the record sought, in their entirety, ought to be exempted from disclosure.

In its original decision letter to the third party, Hydro stated:

> Some of the information that you indicated should be withheld does not meet the requirements for the application of section 17. Accordingly, this information will be released to the requester.

OPGC's representations defer to the third party on issues of potential harm.

The requester disputes that disclosure could reasonably be expected to interfere with other negotiations undertaken by the third party, affect its competitive position, or result in undue loss to the third party, but provides no additional details in support of his position.

I find that the evidence provided by the third party is clearly insufficiently "detailed and convincing" to establish a reasonable expectation of any of the harms described in section 17(1). Therefore, I find that the third party has not discharged its onus in establishing the requirements of the third part of the section 17(1) test.

In summary, I find that none of the records which remain under consideration with respect to this exemption claim satisfy either the second or the third part of the test. Because all three parts of the test must be established, I find that these records fail to qualify for exemption under section 17(1).

COMPELLING PUBLIC INTEREST

The requester claims that the "public interest override" in section 23 of the Act applies in this case. This section states:

> 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 mandatory section 21(1) exemption and/or the discretionary section 18(1)(c) 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. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption.

In Order P-1210, I made the following statements regarding the purpose of the section 18(1)(c) exemption claim:

> In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests or compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

The following quotations are drawn from the requesters's representations on the section 23 issue:

> A compelling public interest justifies the disclosure of the records at issue in these appeals, because they will allow the public to assess whether the current government is respecting Hydro's traditional ability to manage its own operations in the public interest. There is a public interest in ensuring that patronage in all governments is kept to a minimum, so that the most qualified candidates can run public institutions. At present, there is the appearance of unfair interference with Hydro's operations of the business, because several other

> individuals with strong connections with the provincial Conservatives, ..., have been appointed to, or retained, by, Hydro. ...
>
> The public interest is heightened in the run-up to the anticipated sale of Hydro because the public will have a particular interest in obtaining a good price for its corporation and this privacy will be enhanced by good management of the utility. ...
> The public also has an interest in knowing how its funds are spent, and specifically, the terms on which independent contractors are retained. The passage of the *Public Sector Salary Disclosure Act* shows that there is a legitimate public interest in the pay given to high-ranking public officials. The same legitimate interest applies to external contractors receiving lucrative government contracts. The public interest in Hydro's spending on outside contracts is heightened by recent reports of expensive retainers of American nuclear experts.
> ...
>
> The *Power Corporation Act* [which was in effect at the time of the requester's request] specifically gave Hydro responsibility for employment and operational matters, while reserving to the government issues relating to the policy and general direction of Hydro. The public has a legitimate and compelling interest in ensuring that the separation of powers envisaged by that statute have been retained and that employment with Hydro has not been available as a sinecure to those favoured by the government of the day. Members of the public, as both energy consumers and taxpayers, have an interest in ensuring that Hydro has been efficiently run by the most qualified individuals available at reasonable salaries. This is particularly true if, as is anticipated, Hydro is shortly to be sold. The public will only obtain the best possible price for its asset if Hydro has been soundly managed.

The requester has raised what I consider to be valid and important public interest arguments. However, as a result of my decisions in these appeals, the requester will receive all requested information, including the engagement letter, all procurement-related documents, and all invoices submitted by the third party's company, with only the names, rates of pay and billed times charged by individual employees severed. The only other record I am not ordering disclosed is a draft communications strategy which is related to the actual work undertaken by the third party's company, not the contractual relations between the company and Hydro which, in my view, are at the core of the requester's public interest arguments.

I find that the degree of disclosure provided to the requester as a result of this order addresses the public interest considerations which he raises, and I am not persuaded that there is a compelling public interest in disclosure of the names and specific income and asset figures, or the draft communications strategy, nor that any such public interest is sufficient to outweigh the purpose of the sections 21(1) and 18(1)(c) exemption claims in the circumstances of these appeals.

Therefore, I find that section 23 of the Act does not apply to the records which qualify for exemption.

ORDER:

1. I order OPGC (on behalf of Hydro) to disclose the third party's company brochure and attached covering letter, dated April 2, 1997, to the requester by **September 3, 1999**.

2. I uphold Hydro's decision not to disclose the names of the third party and the affected persons along with their individual billing rates and billed time, which appear on 14 invoices and one e-mail message. I further uphold Hydro's decision not to disclose the name of the individual interviewed by the third party's company contained on the November 12, 1997 letter from the third party's company to Hydro. I have attached a highlighted copy of these 16 pages of records with the copy of this order sent to OPGC's Freedom of Information and Privacy Co-ordinator which identifies those portions which should **not** be disclosed.

3. I uphold Hydro's decision not to disclose the draft communications strategy.

4. I order OPGC (on behalf of Hydro) to disclose all remaining records or parts of records to the requester by **September 27, 1999** but, not before **September 20, 1999**.

5. 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 requester pursuant to Provisions 1 and 4.

Original signed by: August 20, 1999
Tom Mitchinson
Assistant Commissioner