



Information and Privacy  
Commissioner/Ontario

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

# ORDER PO-1740

Appeal PA-990092-1

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

## **NATURE OF THE APPEAL:**

The appellant represents an environmental organization whose objectives include raising public awareness about nuclear issues and energy alternatives. She submitted a request to Ontario Hydro (Hydro) under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the “Electricity Supply Adequacy Review” (the ESAR) as well as all documents prepared for the Ontario Hydro Board of Directors relating to the review. The appellant advised that the review was referred to in the cover story of the November 1998 issue of *Nuclear Update*, published by Ontario Hydro Nuclear.

Hydro identified four records responsive to the request, and provided partial access to them. Access to the remaining information was denied on the basis of sections 18(1)(a) (valuable government information) and 18(1)(c) (economic and other interests) of the Act.

In appealing the denial of access, the appellant states that it is in the public interest that an independent review be undertaken of the Hydro electricity demand forecast and its business case for the proposed restart of the Pickering A nuclear generating station prior to the decision being made by Hydro or its successor, Ontario Power Generation Inc. (OPG). The appellant adds that the basic economic information from the ESAR is necessary to determine if Hydro/OPG really need to restart the Pickering A nuclear station. In this regard, the appellant raised the application of section 23 of the Act, the so-called public interest override.

This office provided the appellant and Hydro with a copy of the Notice of Inquiry inviting their representations. Submissions were received from both parties. The appellant also indicated her wish to rely on the submissions which accompanied her original appeal to this office.

## **RECORDS:**

The records identified by Hydro as responsive to the request are listed below. The information at issue consists of those parts of each record which were withheld from disclosure, and is listed below the record description.

Record 1: Ontario Hydro Board of Directors Memorandum, entitled “Electricity Supply Adequacy Review and Strategy for the Restart of Pickering NGS ‘A’”, dated October 7, 1998.

Information at issue is contained in the last three pages of this four page record.

Record 2: Presentation to Ontario Hydro Board of Directors, entitled “Electricity Supply Adequacy Review and Strategy for Restart of Pickering A”, dated October 7, 1998.

Information at issue is contained in pages 4-7 of this record.

Record 3: Presentation to Ontario Hydro Board of Directors, entitled “Pickering A Restart Strategy” dated October 7, 1998.

Information at issue is contained in pages 3, 4, 11 and 12 of this record.  
Record 4: Working Draft entitled "Electricity Supply Adequacy Review" dated October 1998.

Pages 7 to 36 of this record were withheld in full and these pages in their entirety are at issue.

## **DISCUSSION:**

### **VALUABLE GOVERNMENT INFORMATION**

Section 18(1)(a) of the Act states that:

A head may refuse to disclose a record that contains,

trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

In Order 87, former Commissioner Sidney B. Linden held that:

In order to qualify for exemption under subsection 18(1)(a), the head must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**
2. belongs to the Government of Ontario or an institution; **and**
3. has monetary value or potential monetary value.

The submissions of the appellant address primarily the "public interest override" issue in section 23, rather than the application of the exemptions claimed to the records. In response to the questions posed in the Notice of Inquiry pertaining to the application of section 18(1) to the records, the appellant states that:

The economic information about Pickering A and Pickering B would be disclosed in isolation from the totality of Ontario Hydro/Ontario Power Generation cost estimates. This means that the overall confidentiality of their cost estimates and figures would still be protected.

Hydro submits that the records:

comprise Ontario Hydro's assessment of the demand for electricity in Ontario and a financial analysis of meeting that demand through various options. In its initial response to this request, Ontario Hydro released its estimate of electricity demand in Ontario and its forecast growth over the coming years, but has withheld its financial analysis of the various options in meeting the forecast demand. [It] submits that the information which has been withheld is financial and commercial information, it belongs to Ontario Hydro and it has monetary value.

It goes on to add that:

The information has value since a financial analysis of the various options for meeting a demand for a product is a fundamental element of a business decision made by a company to enter a market for any product. With the opening of the electricity market to competition, ... a number of competitors to Ontario Hydro (now OPG) have announced their intentions to potentially build new generation facilities to supply electricity to the Ontario electricity market. These corporations will need to either do their own analysis, or purchase an analysis, of the demand for electricity in Ontario and a financial analysis of the various options for meeting this demand.

Ontario Hydro's analysis has value since there is a market for this type of information among companies considering entering the market for electricity generation in Ontario. This value is above and beyond the value the information has to Ontario Hydro as a generation company. For instance, some energy consulting companies specialize in providing this type of analysis to generation companies for a fee. Presumably, Ontario Hydro could potentially sell this analysis, just as those consulting companies do and realize a monetary gain. Because Ontario Hydro has expertise in this field, its financial analysis could potentially be worth more than that of most consulting firms.

The ESAR referred to in Hydro's submissions describes in detail the supply options available to Hydro to meet its projections for Ontario's electricity needs into the future. The ESAR document evaluates the financial costs, advantages and disadvantages for each of the options and reaches certain conclusions with respect to each. The information contained in Records 1-3 similarly refers to the conclusions reached in the ESAR with respect to the options outlined therein, including the proposal for restarting the Pickering A plant. As noted in the submissions from Hydro, the evaluation contained in the ESAR extensively canvasses the financial ramifications of each of the options under consideration, as well as the operational impact of each.

Accordingly, I find that the undisclosed information contained in all four records qualifies as financial information. The analyses contained therein include the cost as calculated for each of the options outlined and the methods and assumptions upon which these calculations were based. The first part of the test described in Order 87 has, therefore, been met.

There is no question that the undisclosed information contained in the ESAR and the other three records was created by and belongs to Hydro, which was an institution under the Act at the time the request was made. The second part of the Order 87 test has, therefore, also been met.

I further accept the evidence of Hydro that a market for the kind of operational and financial analysis which is contained in the records exists. In the competitive world of hydro generation and distribution which followed the enactment of the Electricity Act, 1998, I find it reasonable to conclude that the competitors of the former Ontario Hydro who may wish to secure a place in the Ontario electricity generation market would find the information contained in the records to be very valuable indeed. The analysis entailed a great deal of time and effort on the part of Hydro. Its competitors would also have to incur these type of expenses in creating a similar document for their own use.

Under the terms of The Electricity Act, 1998, Hydro will be forced to compete in the electricity generation and distribution marketplace and to divest itself of a significant portion of its current generating capacity. In my view, the potential purchasers of those divested assets would also have reason to place a monetary value on the information contained in the record.

Accordingly, I find that the third requirement of the test for section 18(1)(a) has been satisfied and the undisclosed information contained in the records qualifies for exemption under that section. Because of the manner in which I have addressed the application of section 18(1)(a) to the records, it is not necessary for me to determine whether they are also exempt under section 18(1)(c).

## **PUBLIC INTEREST IN DISCLOSURE**

The appellant has made extensive submissions, both in the material filed with her appeal and in response to the Notice of Inquiry, with respect to the application of section 23 of the Act to the undisclosed information contained in the records. Section 23 reads:

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. [my emphasis]

It has been established in a number of 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 exemption [Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1998] O.J. No. 420, 107 O.A.C. 341, 5 Admin. L.R. (3d) 175 (Div Ct.), reversed (January 27, 1999), Docs. C29916, C29917 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe described the criteria for the first requirement mentioned in the preceding paragraph, as follows:

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 18(1)(a). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

I agree with these approaches to the analysis under section 23.

In addition to considering the representations of the parties on this issue, I have also reviewed the records themselves with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the section 18(1)(a) exemption.

Hydro argues that the undisclosed information in the records deals with a financial analysis of various operational options, as opposed to an issue which may be the subject of a public interest, such as health, safety or environmental concerns.

Hydro also suggests that the public interest in a proposed restart to the Pickering A plant is protected through several other regulatory mechanisms. For example, an environmental assessment has been ordered by the Atomic Energy Control Board (the AECB) pursuant to the Canadian Environmental Assessment Act. Hydro indicates that considerable information will be made available to the public for comment at the time the environmental assessment is undertaken.

In addition, Hydro submits that additional information is made public in the course of the AECB licencing process for nuclear facilities. This process includes public hearings and has recently seen the disclosure of considerable information relating to public safety at its nuclear generating facilities. Through this mechanism, Hydro suggests that the public interest in safety, health and the environment are addressed.

Finally, Hydro argues that the public interest in health, safety and environmental concerns is also served through the disclosure of its annual environmental report to the provincial Ministry of the Environment and the federal Environment Canada.

For these reasons, Hydro submits that there is no compelling public interest in the disclosure of the severed information in the records.

The appellant's submissions focus primarily on the necessity for more public input into the decision by Hydro to reactivate the Pickering A facility. The organization represented by the appellant is seeking the disclosure of this information in order to independently review the decision by Hydro and its successors to restart the Pickering A generating plant, rather than making use of other alternative generating facilities. The appellant submits that in light of the enormous expense to be incurred and the possible health and safety concerns associated with this decision, the records address issues which are matters of public interest. In her view, the information contained in the undisclosed portions of the records will assist in this debate by giving the public greater information about the proposed safety upgrades for the facility and their anticipated cost. It will thereby enable the public to evaluate whether the proposed upgrades will ensure the health and safety of those who live in the communities surrounding the plant.

The appellant also points out that the AECB environmental assessment will not consider whether there exists a need for additional electrical generating capacity in Ontario at this time; nor will it address the economic case for the restart of Pickering A as opposed to other alternative sources.

The appellant submits that the full release of all of the requested information will help reveal whether or not Hydro is sacrificing safety to cut costs on its Pickering A restart plan. She further argues that Hydro's assumptions about electricity supply and demand options must be released publicly and the complete justification for restarting "this very dangerous facility" made perfectly transparent so that the public can be made aware of its risks associated with the planned restart of the Pickering A nuclear station.

In Order P-1552, former Adjudicator Marianne Miller reviewed the past decisions of the Commissioner's office with respect to the application of section 23 to records relating to nuclear safety and the operation of nuclear facilities. She held that:

A number of previous orders have discussed the issue of a compelling public interest in the issue of nuclear safety (Orders P-270, P-1190 and P-956).

In Order 270, which involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by Hydro under section 17(1) of the Act, former Commissioner Tom Wright discussed the issue of nuclear safety and section 23 when considering whether there was a compelling public interest in disclosure of nuclear safety related information. He stated:

In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclosure of the information could have the effect of providing assurances to the public

that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.

I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.

In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

Assistant Commissioner Tom Mitchinson quoted from Order 270 and made a similar finding in Order P-1190 which involved a request for all peer evaluation reports conducted on nuclear power plants operated by Ontario Hydro.

Former Assistant Commissioner Irwin Glasberg also dealt with the issue of nuclear safety in Order P-901, which also involved Ontario Hydro. In that case, he found that records prepared by a working group involved in nuclear emergency planning qualified for exemption under section 12 of the Act (Cabinet records), which is not subject to the section 23 public interest override. However, he went on to state that:

Were it not for the fact that the records at issue are subject to the Cabinet records exemption, I would have had no hesitation in finding that there exists a compelling public interest in the disclosure of these documents which clearly outweighs the purposes of the exemptions found in the Act.

I note that each of the cases referred to above addressed the issue of access to records which pertained directly to nuclear safety. The records were concerned primarily with Ontario's preparations in the event of a nuclear accident or on the steps undertaken by Hydro to ensure that accidents of that sort do not occur.

Hydro submits that the undisclosed information at issue in this appeal does not, per se, address questions relating to nuclear safety. Rather, the records represent a financial analysis of various options for generating electricity in the future, whether it be through the restarting of the Pickering A nuclear facility or by some other means. It is clear that the appellant takes the position that information relating to the economic arguments in favour of the startup of the Pickering A plant ultimately must address questions of public health and safety, which may be put at risk if the plant is brought back on stream.

In Order P-1210, Assistant Commissioner Tom Mitchinson addressed the application of section 23 to records about the privatization of Hydro, which he found to be exempt under section 18(1)(c). These records did not directly address the question of health or safety in the operation of its nuclear facilities. In Order P-1210, Assistant Commissioner Mitchinson distinguished his earlier decision in Order P-1190



where he held that there existed a compelling public interest in the disclosure of records relating to peer reviews of operations at Ontario's nuclear generating facilities which clearly outweighed what he described as the "monetary-based" purposes of the exemption in section 18(1)(c). He concluded the order by finding that:

Before ending this order, I want to make it clear why my finding in this appeal differs from Order P-1190. In Order P-1190, I found that when the monetary-based purposes of the section 18(1)(c) exemption claim were balanced against the broad public interest in nuclear safety and public accountability for the operation of nuclear facilities, these compelling public interests clearly outweighed the purpose of the exemption claim. I feel that the circumstances of this appeal are fundamentally different. Most importantly, nuclear safety is not an issue, nor have any issues been raised which question the proper operation of nuclear facilities.

In the present case, I find that the undisclosed information contained in the records does not directly address questions of public safety or health relating to the operation of Hydro's nuclear facilities. The records simply describe the financial and operational impact of each option available for the generation of additional electrical energy by Hydro and its successors. I find that the information does not relate to nuclear safety in the same sense or to the same extent as was the case in Orders 270, P-910, P-956 and P-1190. Rather, the information pertains directly to financial and operational analysis and planning, which is similar to that contained in the records addressed in Order P-1210.

For this reason, I find that the information which was not disclosed in the records is exempt from disclosure under section 18(1)(a) and that the public interest in disclosure is not sufficiently compelling to clearly outweigh the purpose of the exemption claim.

**ORDER:**

I uphold Hydro's decision.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

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January 13, 2000