



Information and Privacy  
Commissioner/Ontario

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

# ORDER PO-1746

Appeal PA-990155-1

Ontario Hydro



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## **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 Inc. (OPG) 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, OPG 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 THE APPEAL:**

Hydro received a request under the Act for access to all records produced by a named consulting company (the consultant) under its contract to review options for Ontario Hydro's Nuclear Division (excluding the contract documents). The request was dated February 1, 1999.

Hydro identified 13 records responsive to the request, consisting of a Summary Information Document (Record 1), a Confidential Information Memorandum (Record 2), Organization Meeting records (Records 3A, 3B and 4), a Transaction Process Update (Record 5), a Management Presentation (Record 6), Data Room records (Record 7), four Partner Profiles (Records 8, 9, 10 and 11) and lists of potential partners (Record 12).

Before responding to the requester, Hydro notified the consultant, pursuant to section 28 of the Act, and sought its views on disclosure of the records. After considering the consultant's response, Hydro issued its decision to the requester, granting access to Record 1 and denying access to all other records pursuant to sections 13, 17(1)(a) and (c), and 18(1)(c), (d) and (e) of the Act.

The requester (now the appellant) appealed Hydro's decision.

During mediation, the appellant claimed that there is a compelling public interest in disclosure of the records pursuant to section 23 of the Act. He also clarified that he was not seeking access to the home addresses, home telephone numbers and home fax numbers of any individuals identified in the records.

I sent a Notice of Inquiry to OPG (on behalf of Hydro), the consultant and the requester. All three parties submitted representations.

OPG included an index of records with its representations, which I have attached as Appendix A to this order. In its representations, OPG withdrew the section 18(1)(e) exemption claim. OPG also agreed to disclose Records 3B and 7 in their entirety and parts of Records 2, 3A, 4 and 6. The consultant was made aware of this decision and advised me that it has no objection to the disclosure of these records. It is evident from the information before me that the records for which OPG is no longer claiming exemptions have not been disclosed to the appellant, so I will include a provision in this order requiring disclosure.

## **RECORDS:**

The records which remain at issue and the corresponding exemption claims are listed in Appendix A.

## **DISCUSSION:**

## **ISSUES:**

## **ECONOMIC AND OTHER INTERESTS**

OPG claims that sections 18(1)(c) and (d) apply to all of the information that remains at issue except for specified portions withheld from Records 3A and 4.

Sections 18(1)(c) and (d) states:

A head may refuse to disclose a record that contains,

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Pursuant to the Electricity Act, 1998, the Government of Ontario is currently the sole shareholder of OPG. OPG submits that its ability or inability to compete in the Ontario electricity market and markets outside Ontario as well as to negotiate competitively with third parties will have a direct impact on the financial interests of its sole shareholder. It states that the return on investment as a shareholder will depend on the success of OPG in pursuit of these endeavours.

The Ontario electricity market is currently moving to an open competitive market. The Energy Competition Act, 1998 embodied the framework for the creation of successor corporations to Hydro and the framework for the competitive electricity market. OPG submits that it is expected not only to compete in the new electricity market, but is required to divest itself of control of a significant percentage of its current generation assets in order to facilitate competition in the electricity generation market. It states that on May 1, 1999, a Transitional Generating License was issued to OPG which states, among other things, that within ten years following the date upon which the competitive energy market opens, OPG is required to have reduced its effective control over the Ontario market place to 35% of capacity available to service Ontario.

OPG submits that disclosure of the withheld information from Record 2 and parts of Record 6, consisting of financial information (statements, actual and budgeted operations, maintenance and administrative costs and financial performance) and an historical financial summary, will prejudice its competitive position in the open market. According to OPG:

The financial information provides estimates of the accounts of Ontario Hydro's nuclear operations as if those operations were a separate business from the rest of [Hydro]. Companies do not routinely estimate, or publish, separate accounts for parts of their businesses. [Hydro], now OPG, has not published such detailed estimates of the accounts of its nuclear operations elsewhere. ...

The data shown in these sections would reveal to potential competitors the cost structure of OPG's nuclear stations. OPG will be expected to operate in a competitive market which will open in November 2000. Competitors in the electricity generation business are currently examining business opportunities in the Ontario market and a number have announced preliminary, but not final, plans to build new electricity stations in Ontario. Knowing [Hydro's], now OPG's, cost structure would assist competitors in preparing their business cases, allowing them a competitive edge at the expense of OPG.

Pages 17-20 (slides 34-40) and page 22 (slide 43) in Record 6 contain the "life cycle plans" and "going forward costs" or future costs and estimates of electricity for specific nuclear facilities. OPG argues:

This information is commercially sensitive because it provides information on the going forward, or future costs of specific nuclear facilities ... It also provides estimates of the costs of specific improvements at the sites and the life extensions that will result from the improvements. As argued above, this information would reveal to potential competitors highly specific information about the cost structure of OPG's nuclear stations.

The consultant adds that because of the inherent harm in disclosure of information such as the life cycle plan for Hydro's five nuclear generating stations, it was required to sign a very restrictive confidentiality agreement before obtaining copies of any records other than the profiles and lists.

Also at issue in this appeal are records which contain the identities of investors that could become partners or purchasers of Ontario Hydro's nuclear assets. Record 4 is an Organizational Meeting document which contains a target list of potential partners and the consultant's presentation to Hydro. This also includes a summary of the marketing process and a second target list of potential partners. Record 5 updates information contained in the presentation documents in Record 4, Records 8-11 are partner profiles, and Record 12 is an extensive list of potential partners. The lists in Record 12 contain two types of information. One type identifies the potential partners and contains the contact persons, the potential partner's response to initial contacts by the consultant, relevant dates, and a status report on discussions with the potential partners. The second type identifies the utilities or companies that Hydro should perhaps not consider as potential partners and includes the country in which the utility or company is based, its specific location, capacity, reactor type, dates of operation, and the consultant's assessment as to why the specified screening

criteria were not met. The partner profiles include information relating to the partners' nuclear expertise, financial information, historical operating performance and research capabilities.

According to OPG, the records relating to potential partnerships were prepared under a contract between Hydro and the consultant commencing in March 1998 and suspended in August 1998. However, in October 1999, the Ontario Government announced that it was looking for expressions of interest of ownership. OPG states:

... OPG has reinitiated its search for partners, and is currently in the process of signing new confidentiality agreements with potential partners. If these names of companies previously interested in OPG assets were divulged, it is reasonable to believe that this would make other companies less willing to do business with OPG in the future, resulting in financial harm to OPG. Moreover, information concerning the interested parties from the last round could result in reduced interest on the part of current potential partners.

Moreover, divulging the names of these companies could result in direct financial harm to OPG. For example, a small company interested in partnership, knowing that several large companies are also interested, may decide that they do not have a chance of completing a deal and therefore, withdraw their interest and change their strategic focus. This would lessen the commercial options for OPG which in the end may have reached the best deal with that small company.

OPG further submits that information that divulges the interest of third parties in OPG's current generation assets, the time lines for divestiture of control and the views of the consultant on these issues would directly affect the investment decisions of OPG's competitors and, therefore, would prejudice its economic interests and its competitive position. It submits that this, in turn, would prejudice the financial interests of the Government of Ontario, since it is the sole shareholder of OPG.

The appellant submits that sections 18(1)(c) and (d) do not apply, and points out that OPG "must provide detailed and convincing evidence of any prejudice to it in order to satisfy their onus with respect to this exemption".

In my view, OPG has provided the level of detailed and convincing evidence necessary to establish the requirements of sections 18(1)(c) and (d) of the Act. I am satisfied, based on this evidence, that disclosure of those records for which these two exemptions have been claimed could reasonably be expected to prejudice the economic interests or competitive position of OPG, and could also reasonably be expected to be injurious to the financial interests of the Government of Ontario, the sole shareholder of OPG.

OPG is about to enter the competitive electricity market, while at the same time divesting itself of a significant portion of its generating assets. To do so, it must perform a delicate balancing act. On the one hand, it must provide potential partners with sufficient information to attract investment; while, on the other hand, it must ensure that future competitors are not given information which could unfairly impair OPG's ability to compete.

The financial information withheld from Record 2 consists of detailed estimates of the accounts of its nuclear operations and the specific withheld portions of Record 6 contain unit cost information and other specific information relating to cost structure. I am satisfied that disclosure of this information could reasonably be expected to prejudice OPG's competitive position in the open market and that this, in turn, would directly impact on the investment made by its sole shareholder, the Government of Ontario.

The long-term future of the nuclear industry depends on OPG's ability to attract private interest and I accept OPG's submission that disclosure of the identities of potential investors and partners contained in Records 8-12 and parts of Records 4 and 5 would lessen its commercial options. In my view, OPG's ability or inability to compete in the Ontario market and markets outside of Ontario and OPG's ability or inability to negotiate competitively with third parties will also have a direct impact on the financial interests of its sole shareholder, the Government of Ontario. As OPG points out, the return on investment as a shareholder will depend on the success of OPG in pursuit of these endeavours.

Therefore, I find that Records 5, 8, 9, 10, 11 and 12 in their entirety, the withheld portions of Records 2 and 6 and pages 5, 6 and 7 of Record 4 qualify for exemption pursuant to section 18(1)(d) of the Act.

#### **ADVICE TO GOVERNMENT**

OPG claims section 13(1) as the basis for exempting page 5, Tab 2 of Record 3A, which is a chart entitled "Proposed Divestiture Time line", dated February 20, 1998; and page 4 of Record 4, which is a later version of the same chart, dated March 23, 1998. Both of these charts were prepared by the consultant.

The appellant claims that sections 13(2)(a), (f) and (h) apply to except the information from exemption under section 13(1) of the Act.

Sections 13(1) and (2) of the Act state, in part:

- (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.
- (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
  - (a) factual material;
  - (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
  - (h) a report containing the results of field research undertaken before the formulation of a policy proposal;

It has been established in a number of previous orders that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must reveal a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363 and P-883].

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it “... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making”.

OPG submits that the charts provide the consultant’s proposal for the possible divestiture of certain assets. It argues that:

[t]he document states that the time line is proposed. Since the proposal is based on the [consultant’s] expertise in the disposition of power generating facilities, this information constitutes advice or a proposed course of action to [Hydro] which, at the time, [Hydro] was free to accept or reject.

The consultant supports OPG’s position, and adds that it is OPG’s exclusive financial adviser with respect to the potential transaction relating to the sale or other disposition of all or a portion of Hydro’s nuclear power generating assets.

I accept OPG’s position. Identifying an appropriate timetable for the divestiture of assets was within the scope of the consultant’s responsibilities. The two charts reflect the consultant’s recommendations in this regard, which Hydro was free to accept or reject. Therefore, I find that these two pages of records qualify for exemption under section 13(1) of the Act.

Section 13(2)(a) of the Act requires that, despite section 13(1), factual information must be disclosed. In Order 24, former Commissioner Sidney B. Linden stated that

.... 'factual material' does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in the record.

I find that there are no separate and distinct facts in the records at issue here. The recommended divestiture time lines is the only category of information contained in the charts, and I find that the exception provided by section 13(2)(a) clearly does not apply. Similarly, these charts do not contain any information relating to “a report or study on Hydro’s performance or its efficiency” or the results of field research, and I find that sections 13(2)(f) and (h) of the Act also do not apply.

Because of the manner in which I have disposed of the issues in this appeal, it is not necessary for me to consider the possible application of sections 17(1)(a) and (c) of the Act.

## **PUBLIC INTEREST IN DISCLOSURE**

As noted earlier, the appellant 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, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the discretionary exemptions under sections 13(1) and 18(1)(c) and (d) of the Act.

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) (1999), 118 O.A.C. 108 (C.A.), leave to appear refused (January 20, 2000), Doc. 27191 (S.C.C.)].

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 (Order P-984).

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, sections 13(1) and 18(1)(c) and (d). 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).

The appellant submits that there is a compelling public interest in the disclosure of the records in two respects: (1) the identities of those who may ultimately run Hydro’s nuclear operations; and (2) the work product of the consultant retained by Hydro.

As far as the identities of the potential partners is concerned, the appellant submits:

The public has a right to know who the potential investors in Hydro’s nuclear facilities are so that informed public debate can take place on the issue of whether the potential investors have the proper qualifications to run nuclear facilities. The public will want to see investors with strong technical credentials, experience and proven track records in running nuclear facilities, as well as financially secure investors who will be able to spend as required to properly maintain the nuclear facilities. The better a potential investor’s qualifications, the more likely it will be that its nuclear operations will be safely run; conversely, the poorer the qualifications, the less likely it is that the nuclear facilities will be safely run by that investor.



History has taught us that when nuclear operations are not run safely, the result can be catastrophic. The nuclear disaster in Japan which took place on September 30, 1999 serves as a recent reminder of this fact. The public has an enormous stake in decisions being made by Hydro concerning its nuclear operations and Hydro has a duty to be accountable to the citizens of Ontario in the domain of nuclear energy. Furthermore, the considerable amounts of money in issue make the identities of investors of significant interest to the public.

The appellant refers to Orders P-270 and P-1190 in which former Commissioner Tom Wright and I found that there was a compelling public interest in disclosure of safety-related information. The appellant submits that the reasoning in these orders is applicable in this appeal.

The appellant further submits that the public interest in nuclear safety and public accountability for the operation of nuclear facilities clearly outweighs the purpose of the section 18 exemption which is to protect the monetary interests of institutions. He adds that there is a heightened public interest in Ontario Hydro at the present time, because of restructuring of the company and the plans to allow private investment in its nuclear facilities. He states the public has the right to know that Ontario Hydro has been well managed through this process.

As far as the work product of the consultant is concerned, the appellant states:

A compelling public interest justifies the disclosure of the records at issue in this appeal because the public, as both energy consumers and taxpayers, have an interest in knowing how its funds are spent, and specifically, that the work product generated by a consultant which has been paid about \$300,000 by a public utility justifies the cost.

OPG argues that the records contain commercially sensitive information prepared to assist OPG in finding a partner for its nuclear assets, and that a compelling public interest in disclosure does not exist. OPG states:

[The Commissioner's office] has sometimes described the public interest as relating to public health and safety or the environment. The information at issue does not specifically relate to effects on the environment, human health or to public safety. Rather, this information is strictly nuts and bolts commercial and financial information. The main public policy issues relating to divestiture have been discussed in public through a number of venues to date: 1) the Macdonald Advisory Committee on Competition in Ontario's Electricity System of 1996, 2) the government's White Paper of November 1997, 3) the Market Design Committee process and reports of 1998 and 1999, 4) the legislative debates on Bill 35, 5) OPG's generation licence granted by the [Ontario Energy Board] and finally through the public announcement that OPG is open to expressions of interest in its Bruce nuclear facility. The information at issue in this appeal does not relate to the bigger public policy issues discussed in the venues described above, rather it is information that is vital to the negotiation of a financial and commercial arrangement.

Moreover, OPG submits that there are other public forums and mechanisms in place for the protection of the public interest relating to finding a partner for Ontario Hydro's, now OPG's nuclear assets. For example, the company makes public considerable financial information in its annual report ... and its prospectus ...

In addition, the Atomic Energy Control Board would need to assess any new partner who might become an operator of a nuclear facility. Considerable information is made public by nuclear operators, AECB staff and the AECB through the AECB's public hearing process.

The consultant also provided representations on the application of section 23 of the Act which support OPG's position. The consultant submits that the records relate to a purely commercial matter, and that they raise no issue with respect to public health or safety, nor is there an issue with respect to "fostering democratic political participation".

I agree with the appellant that there is a compelling public interest in ensuring that Hydro's nuclear facilities are divested to investors qualified to run nuclear facilities. I also agree, as I stated in Order P-1190, that there is an inherent compelling interest in the disclosure of records which have a direct bearing on the safe operation of Hydro's nuclear facilities. That being said, I am not persuaded that disclosure of the records that remain at issue in this appeal will substantially address these public interest considerations.

These records were prepared or obtained by OPG's consultant for the purpose of assisting OPG in its search for investors or a partner for its nuclear assets, and the information will be used to negotiate a business transaction. Ontario taxpayers have made a sizeable investment in Hydro's nuclear facilities, and there is a compelling public interest in ensuring that taxpayers receive the highest possible return on their investment. I expressed this view in Order P-1190, where I stated that:

In my view, the potential economic and competitive interests of Hydro in pursuing partnership arrangements and contractual agreements are valid and consistent with the requirements for exemption under section 18(1)(c). I also accept that this exemption claim recognizes an inherent public interest in maintaining the ability for Hydro to negotiate the best possible deal in any partnership or contractual negotiations.

The records at issue in Order P-1190 are quite different than the ones at issue in this appeal. Order P-1190 dealt with peer review reports concerning the actual operation of nuclear facilities and the connection to public safety considerations was clear and direct. In the present appeal, as OPG points out, the records deal with a possible commercial transaction that happens to involve a nuclear facility. In my view, the factors I relied on in Order P-1190 to conclude that section 23 applied do not exist in the present appeal. The business transaction being contemplated by Hydro requires careful and detailed negotiations which, for the reasons outlined by OPG, demand confidentiality, in the public interest. Similar to the decisions in Order P-1210 and PO-1740, the information withheld from disclosure in the present appeal does not relate to issues of public safety or health in the context of the operation of nuclear facilities. As I stated in Order P-1210:

... 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 [in order P-1190], 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.

I also accept that the regulatory framework for the sale of nuclear facilities, including the public role played by the Atomic Energy Control Board, provides a significant degree of public accountability.

Finally, as I stated above, Hydro has reconsidered its position and agreed to release a substantial amount of the information contained in the various records at issue in this appeal. In my view, this level of disclosure, when considered in combination with the significant public interest in non-disclosure of records of this nature, is adequate to address the public interest arguments put forward by the appellant in the circumstances.

As far as the appellant's second position is concerned, I find that the degree of disclosure he will receive as a result of this order and a previous order dealing with disclosure of contract documents involving the consultation (Order PO-1698) are sufficient to enable him and the public to assess whether the funds payable to the consultant "justifies the cost".

Therefore, I find that there a compelling public interest in disclosing the records which continue to be withheld by Hydro does not exist, and section 23 of the Act does not apply.

## **ORDER:**

1. I uphold Hydro's decision not to disclose Records 5, 8, 9, 10, 11 and 12, and the portions of Records 2, 3A, 4 and 6 identified in Appendix A.
2. I order OPG, on behalf of Hydro, to disclose Records 3B and 7, and the remaining portions of Records 2, 3A, 4 and 6 to the appellant by **February 3, 2000**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require OPG to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

January 26, 2000

## APPENDIX A

### RECORDS AT ISSUE - APPEAL PA-990155-1

RECORD NUMBER AND DESCRIPTION	EXEMPTION(S) CLAIMED ON SECTION(S)
<b>2. Confidential Information Memorandum</b>	Section E pages 51 - 66 inclusive 18(1)(c) and (d)
<b>3A. Organization Meeting Feb/98</b>	Page 5, Tab 2, Divestiture Time lines Chart 13(1)
<b>4. Organization Meeting Mar/98</b>	Page 4, Revised Divestiture Time lines Chart 13(1)  Pages 5, 6 and 7, List of Potential Partners Summary of Marketing Process to Date (1 page) Target List of Potential Nuclear Partners (3 pages) 13(1) 17(1)(a) and (c) 18(1)(c) and (d)

<b>5. Transaction Process Update Jun/98</b>	Record in its entirety (5 pages) 13(1) 17(1)(a) and (c) 18(1)(c) and (d)
<b>6. Management Presentation</b>	Portions of the following pages: Pages 17-20, inclusive (slides 34-40) Pages 22 (slide 43) Pages 55-56, inclusive (slides 110 and 112) 18(1)(c) and (d)
<b>8. Partner Profile</b> <b>9. Partner Profile</b> <b>10. Partner Profile</b> <b>11. Partner Profile</b>	Records in their entirety 17(1)(a) and (c) 18(1)(c) and (d)
<b>12. List of Potential Partners</b>	Record in its entirety 13(1) 17(1)(a) and/or (c) 18(1)(c) and (d)