



Information and Privacy
Commissioner/Ontario

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

INTERIM ORDER PO-1820-I

Appeals PA-990433-1 and PA-990434-1

Ministry of Energy, Science and Technology
and Ontario Hydro



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PURPOSE OF THE INTERIM ORDER:

The purpose of this Interim Order is to rule on Ontario Hydro's request to withhold portions of its representations which were submitted in response to a Notice of Inquiry issued by the Commissioner's office.

BACKGROUND AND NATURE OF THE APPEALS:

Appeal PA-990433-1

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Energy, Science and Technology (the Ministry) for access to all records pertaining to the exemption of Ontario Hydro's successor companies from the Act.

Following consultation, the Ministry granted partial access to the records. Access was denied or partially denied on the basis of sections 12(1), 13(1), 19 and 21(1)(f) of the Act.

The appellant appealed the denial of access to the records. During the course of the appeal, the appellant raised the application of section 23, the so-called public interest override.

I sent a Notice of Inquiry to the Ministry, initially.

Appeal PA-990434-1

The same appellant submitted a request under the Act to Ontario Hydro for all records pertaining to Ontario Hydro's exemption from the Act.

On behalf of Ontario Hydro, Ontario Hydro Services Company (OHSC) issued a decision letter in which it denied access to three responsive records on the basis of section 19 of the Act.

The appellant appealed the denial of access, and contends that additional records exist.

For the purposes of this appeal, all references to actions taken by OHSC (now Hydro One Inc., effective May 1, 2000) in this Interim Order shall be to Ontario Hydro. I sent a Notice of Inquiry to Ontario Hydro, initially.

Inter-relationship between the two appeals

One record at issue in Appeal PA-990434-1 (Record 1), is the same as Record 12 in Appeal PA-990433-1. I therefore sent a copy of the Notice of Inquiry for Appeal PA-990433-1 (which was also sent to the Ministry) to Ontario Hydro concurrently with the Notice for Appeal PA-990434-1, and provided it with an opportunity to address the issues arising in that appeal with respect to Record 12. I advised Ontario Hydro that it needed only to respond to the issues relating to this record once and may incorporate its representations into the other appeal by reference.

Submission of Representations

Both the Ministry and Ontario Hydro submitted representations to this office. Ontario Hydro's representations indicated that its representations in Appeal PA-990434-1 also pertained to Record 12 in Appeal PA-990433-1.

The Ministry indicated in its representations that it objects to the sharing of its representations with the appellant in their entirety. The Ministry subsequently agreed to sharing a portion of its representations but believes that the remaining portions should not be shared. I accept the Ministry's request for confidentiality regarding the remaining portions of its representations.

ISSUE:

Ontario Hydro did not initially indicate that any portions of its representations were confidential. Neither did it indicate that they could be shared with the appellant. However, in response to the Adjudication Review Officer's queries in this regard, Ontario Hydro indicated that it objects to the disclosure of two paragraphs in their entirety and portions of three others.

DISCUSSION:

Sharing of representations procedure

In the Notice of Inquiry cover letter to the Ministry and Ontario Hydro, I stated:

The representations you provide to this office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The *Inquiry Procedure* document states:

In its representations, the first party must indicate clearly, and in detail:

- which information in its representations, if any, the party wishes the Adjudicator to withhold from the second party; and
- its reasons for this request (see confidentiality criteria below).

The document later sets out the criteria for withholding representations, as follows:

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

Ontario Hydro's confidentiality request

As I noted above, Ontario Hydro did not initially indicate whether its representations could be shared with the appellant or not. Upon being contacted by the Commissioner's office, Ontario Hydro stated that it wished two paragraphs and parts of three others to be withheld as their disclosure would reveal information exempt under section 12 of the Act and because their disclosure would reveal the content of the records at issue.

Findings

In order to understand the section 12 exemption claim in Appeal PA-990434-1 it is necessary to refer to the submissions tendered by the Ministry and the records in Appeal PA-990433-1. Upon review of both appeals, I agree that the highlighted portions of paragraphs 9 and 11 of Ontario Hydro's representations would reveal information that might be exempt under section 12. This finding is consistent with the portions of the Ministry's representations that were withheld in Appeal PA-990433-1.

Ontario Hydro submits that, for the sake of consistency with the above finding, paragraphs 21, 22 and part of paragraph 25 should also be withheld. In addition, Ontario Hydro contends that disclosure of these three portions of the representations would reveal the content of the records at issue.

I do not agree. The information in these three paragraphs is factual and its substance is already within the knowledge of the appellant. Although aspects of the general issue, as identified by the appellant in his request, may have been considered by Cabinet, the disclosure of the information in these three paragraphs does not go so far as to reveal the contents of any of the records at issue in either appeal. Therefore, paragraph (a) of the confidentiality criteria does not apply. Nor would its disclosure reveal the substance of deliberations of the Executive Council or its committees, or any other information that would be exempt under section 12 if contained in a record subject to the Act (paragraph (b)).

Ontario Hydro has not argued that the information at issue in paragraphs 21, 22 and 25 is otherwise confidential in nature (paragraph (c) of the confidentiality criteria). This information is relevant to the issue to be determined. I find that there is nothing in the representations themselves, or in Ontario Hydro's objections to support withholding this information under paragraph (c).

Procedure

I have attached to Ontario Hydro's copy of this order a copy of its representations in the form in which they will be sent to the appellant. I intend to send the non-highlighted portions of Ontario Hydro's representations to the appellant, together with a Notice of Inquiry, no earlier than **October 17, 2000**.

Original signed by: _____
 Laurel Cropley
 Adjudicator

_____ October 2, 2000