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

ORDER PO-2450

Appeal PA-050217-1

Hydro One

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NATURE OF THE APPEAL:

Hydro One Inc. (Hydro One) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "all letters, emails, memos or any other communications relating to [the requester]". In response to the request, Hydro One issued a decision that stated:

> [Hydro One] neither confirm nor deny the existence of letters, e-mails, memos or any other communication relating to [the requester], in accordance with section 14(3) of the *Act*.

The requester, now the appellant, appealed the decision.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to Hydro One, initially, and received representations in response. I decided that it was not necessary for me to seek representations from the appellant.

RECORDS:

Relying on section 14(3) of the *Act*, Hydro One has refused to confirm or deny the existence of responsive records. For the reasons stated below, I find that section 14(3) does not apply and Hydro One may not refuse to confirm or deny the existence of records.

Accordingly, I hereby confirm the existence of responsive records.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, I must decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as including "recorded information about an identifiable individual".

The appellant seeks records relating to him. In its representations, Hydro One acknowledges that all the responsive records "relate to" the appellant, and confirms that some of the information is "clearly" the requester's personal information.

On my review of the wording of the request and the records, I am satisfied that the responsive records contain information which qualifies as the personal information of the appellant. A number of the records also contain the personal information of other identifiable individuals.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, Hydro One relies on section 14(3). I therefore must determine whether Hydro One may rely on section 49(a), in conjunction with section 14(3), to refuse to confirm or deny the existence of responsive records.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD UNDER THE LAW ENFORCEMENT EXEMPTION

Introduction

Section 14(3) of the *Act* reads as follows:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

Section 14(3) acknowledges the fact that in order to carry out their mandates, in certain circumstances, law enforcement agencies and other institutions must have the ability to be less than totally responsive in answering requests for access to records to which sections 14(1) or (2) apply.

In Order P-344, former Assistant Commissioner Mitchinson stated the following with respect to the interpretation and application of section 14(3):

> A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the *Act*. By invoking section 14(3), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.

Section 14(3) is one of two "refuse to confirm or deny" provisions in the *Act*. The other appears at paragraph (5) of the section 21 personal privacy exemption.

In a recent decision, the Court of Appeal for Ontario considered the interpretation of section 21(5) [see *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 95]. The Court of Appeal held that to exercise its discretion to invoke section 21(5), the institution must show that disclosure of the mere existence of the record would itself be an unjustified invasion of personal privacy. The effect of this interpretation is that the institution may *not* invoke section 21(5) where disclosure of the mere existence of the record would not itself engage a privacy interest.

In keeping with that court decision and previous orders of this office, similar considerations apply regarding section 14(3). Therefore, an institution may exercise its discretion to invoke

section 14(3) only where disclosure of the mere existence of the record itself could reasonably be expected to harm one of the interests sought to be protected by section 14(1) and (2).

Accordingly, an institution must provide sufficient evidence to establish both of the following requirements before it may be permitted to exercise its discretion to invoke section 14(3):

1. the record (if it exists) would qualify for exemption under sections 14(1) or (2); and

2. disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and disclosure of that information could reasonably be expected to harm one of the interests sought to be protected by sections 14(1) or (2).

Hydro One's representations

In support of section 14(3), Hydro One relies, in part, on section 14(1)(e) which reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expect to:
>
> > endanger the life or physical safety of a law enforcement officer or any other person

Hydro One's submissions in support of section 14(3) may be summarized as follows:

(i) The records qualify for exemption under section 14(1)(e) and, therefore, Hydro One may refuse to confirm or deny their existence under section 14(3);

(ii) It is "less provocative to refuse to confirm or deny the existence of records, rather than to simply deny access on the basis of section 14(1)(e)" and "revealing the existence or nature of the responsive records to [the appellant] may provoke a negative response";

Findings

The effect of Hydro One's first submission is that if the records qualify for exemption under section 14(1)(e), Hydro One automatically may exercise its discretion to refuse to confirm or deny their existence. This is not consistent with orders of this office under section 14(3), and the Court of Appeal decision referred to above. Rather, under Part 2 of the two-part test, Hydro One must show that disclosure of the fact that records exist would in itself convey information to the requester that could reasonably be expected to harm one of the interests sought to be protected by sections 14(1) or (2).

Regarding Hydro One's second argument, I am not persuaded that merely confirming the existence or non-existence of the records at issue could reasonably be expected to engage any of the interests under section 14(1) or (2), including the life or physical safety interest in section 14(1)(e). In the circumstances, I find the reasons for resisting disclosure of the existence of records to be "frivolous and exaggerated" [see *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

More specifically, I find that the appellant is already aware of the existence of responsive records. At least one of the records is actually addressed to him and appears to have been sent to him. The existence of a number of the other records is referred to, either directly or implicitly, in one of the attachments which Hydro One provided with its representations. Hydro One confirms that it received this attachment, which references a number of the records, from the appellant. In these circumstances, it is not reasonable to expect that the disclosure of the mere existence or non-existence of the records to the appellant would engage one of the interests in section 14(1) or (2).

Accordingly, I conclude that the second part of the two-part test for section 14(3) has not been met, and Hydro One may not exercise its discretion to refuse to confirm or deny the existence of responsive records under section 49(a) in conjunction with section 14(3).

Finally, it appears that Hydro One is also arguing that disclosure of the fact that it relies on section 14(1)(e) would itself convey information to the requester which could reasonably be expected to engage the life or physical safety interest in section 14(1)(e).

Except in the most unusual case, a requester is entitled to know the basis for a refusal under section 14(3) of the *Act*. While it theoretically may be possible that the mere disclosure of the provision of the *Act* on which an institution relies could reasonably be expected to result in physical harm of this nature, I find that there is no valid basis for this claim in these circumstances.

Accordingly, I will order Hydro One to provide the appellant with a new decision respecting access to the responsive records.

ORDER:

1. I do not uphold the application of section 14(3) by Hydro One.

2. I order Hydro One to issue a revised decision letter to the appellant pursuant to section 26 of the *Act*, using the date of this order as the date of the request.

3. In this order, I have confirmed the existence of records responsive to the appellant's request. I have released this order to Hydro One in advance of the appellant in order to

provide Hydro One with an opportunity to review the order and determine whether to apply for judicial review or to request a reconsideration.

4. If I have not been served with a Notice of Application for Judicial Review or a reconsideration request by **March 23, 2006**, I will release this order to the appellant by **March 28, 2006**.

5. In accordance with the requirements of section 54(4) of the *Act*, I will give the appellant notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to Hydro One.

Original signed by: February 21, 2006
Frank DeVries
Adjudicator