



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-2609-I

Appeals PA07-14 & PA07-94

Hydro One



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

Hydro One received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for “any documentation relating to the Asset Purchase Agreement between [a named company] and Hydro One ... for the sale of gas/electric contracts.”

Upon receipt of this request, Hydro One notified two corporate third parties of the request, as required by section 28 of the *Act*, and invited the third parties to advise it regarding their views on the disclosure of the responsive record.

One of the third parties responded to the notification by stating that it did not consent to the disclosure of any of the requested record. The other third party did not respond to the notification.

Hydro One then issued a decision letter to the requester stating that partial access to the responsive record was being granted. It identified that the responsive record was 142 pages long (including table of contents, signature pages, and all Schedules and Exhibits), and that complete access would be granted to 103 pages. Hydro One’s decision identified that it was granting access to the agreement itself and to certain schedules and exhibits, but that it was denying access to seven identified schedules and three named exhibits to the agreement. The decision letter stated:

Partial access will be granted to the responsive record. Subject to the right of any third party(ies) whose interests may be affected appealing this decision in accordance with Subsection 28(9) of [the *Act*], Hydro One will grant access to the Agreement with the exception of Schedules 2.1(I), 2.1(L), 2.3(H), 4.1(H), 4.1(O), 4.1(U), 5.12 and Exhibits A, B and H

Access is not being granted to Schedules 2.1(I), 2.1(L), 2.3(H), 4.1(H), 4.1(O), 4.1(U), 5.12 and Exhibits A, B and H by reason of Subsection 17(1) of the *Act*.

On the same date, Hydro One notified the third parties of its decision to disclose portions of the record to the requester, and to deny access to the portions of the record set out above.

When it was notified of Hydro One’s decision to disclose portions of the record, one of the third parties (the third party appellant) filed an appeal of that decision with this office, and appeal PA07-14 was opened.

The requester (now the requester/appellant) subsequently also appealed Hydro One’s decision denying access to the seven identified schedules and the three named exhibits on the basis that they were exempt from disclosure under section 17(1). As a result, Appeal PA07-94 was also opened.

During the mediation stage of these appeal files, the third party appellant consented to the disclosure of certain information contained in the agreement. On receipt of this consent, Hydro One issued a new decision letter to the appellant, indicating that it was prepared to disclose this additional information.

The third party appellant continued to appeal Hydro One's decision to disclose the other information contained in the agreement. The requester/appellant confirmed that he continued to appeal Hydro One's decision to deny access to the listed schedules and exhibits. Mediation did not resolve the remaining issues in these two files, and they were transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the third party appellant and Hydro One, initially, and both of those parties provided representations in response. Upon my review of those representations, I decided it was not necessary for me to hear from the requester/appellant prior to issuing this interim order.

RECORDS:

The records remaining at issue in these appeals are the portions of the Asset Purchase Agreement and the attachments thereto which have not been disclosed to the requester/appellant. They are described more particularly as follows:

Appeal PA07-14: The Records at issue are the following portions of the Asset Purchase Agreement: Sections 1.1(g), 1.1(k), 1.1(l), 1.1(m), 1.1(kk), 1.1(ww), 1.1(lll), 3.1, 3.5, 3.7, 3.8, 5.6(f) and 9.8, and the attachments to the agreement which Hydro One has indicated it is prepared to disclose.

Appeal PA07-94: The Records at issue are the following attachments to the Asset Purchase Agreement: Schedules 2.1(I), 2.1(L), 2.3(H), 4.1(H), 4.1(O), 4.1(U), 5.12 and Exhibits A, B, and H.

PRELIMINARY MATTER:

As a preliminary matter, in its representations, Hydro One identified for the first time that some specific detailed monetary information contained in three of the schedules to the Asset Purchase Agreement may contain information which affects the interests of third parties other than the two third parties notified in the course of these appeals. Hydro One's representations in this regard state:

Should you decide that the third party appellant does not have a third party interest in the data set out in the [schedules], Hydro One requests that any monetary amounts set out in the any of the following ... schedules or parts thereof be severed and Hydro One be given the opportunity to give third party notice to the affected third parties whose names appear in the [schedules] before any disclosure is made The only [schedules] or portions of [schedules] impacted by this would be:

- 5 of the 27 descriptions of agreements in Schedule 2.1(I);
- All of the agreements described in Schedule 4.1(O); and
- All descriptions of agreements in Exhibit B to Schedule 5.12.

I have reviewed the portions of the three schedules referred to by Hydro One, and agree that they may contain information which affects the interests of third parties who have not been notified in the course of these appeals. I also find that some of this same information is contained in the body of the agreement (specifically, the monetary amounts mentioned in sections 1.1(k) and 1.1(l)).

In the circumstances, I have decided to address in this order the issues raised in these two appeal files, but to defer a finding on the issue of access to the portions of the three schedules identified by Hydro One, and the two monetary amounts in section 1.1(k) and 1.1(l), until Hydro One provides the affected third parties whose names appear therein with the required notifications under section 28.

DISCUSSION:

THIRD PARTY INFORMATION:

Section 17(1) reads:

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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

In order for a record to qualify for exemption under section 17(1), the parties resisting disclosure (in this case Hydro One and the third party appellant) must satisfy the following three-part test:

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 One 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

Hydro One and the third party appellant take the position that the record contains technical, commercial and financial information.

Hydro One states that the information contained in the schedules to which it has denied access contains commercial and financial information, and that this information:

...consists of dates and descriptions of agreements signed by [Hydro One] and numerous named third parties which descriptions include the nature of the services being provided and, in many cases, financial information pertaining thereto such as the value of the work being performed under the agreement and/or contract prices for natural gas supply.

The third party appellant states:

The Agreement itself constitutes technical, commercial and financial information. Without limiting the generality of the foregoing, the Agreement contains confidential information as to the price paid, price adjustment clauses, non-compete agreements, trade-mark license agreements, utility contracts, supply contracts, and other technical, commercial and financial information.

The terms “technical”, “commercial” and “financial” information have been defined in previous orders as follows:

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field

and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

On my review of the portions of the agreement remaining at issue, I am satisfied that they are portions of a contractual agreement negotiated by Hydro One and the third party appellant, which brings them squarely within the definition of “commercial information”. In addition, the schedules and exhibits to which Hydro One denied access also refer to contractual agreements between Hydro One and other parties. The information contained in these records also fits within the definition of “commercial information”. Furthermore, the portions of these records that refer to or include monetary amounts and/or adjustments relating to the agreement, as well as the agreements referenced in the schedules and exhibits, also contain “financial information” for the purpose of section 17(1).

Accordingly, I find that part 1 of the section 17(1) test has been established for the records.

Part 2: Supplied in Confidence

To satisfy the second part of the test requires that the information be “supplied” to Hydro One, and further that it was supplied “in confidence.”

Supplied

The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

PA07-14 - The portions of the Asset Purchase Agreement

In this appeal, the third party appellant provides the following representations in support of its position that the agreement was supplied in confidence:

The information contained in the agreement was supplied by the purchasers [including the third party appellant] to Hydro One in confidence as part of a commercial transaction. This is explicitly recognized in [an identified section] of the agreement, wherein the vendor agrees to hold all confidential information in confidence, and not to disclose it to any third party, except to the purchasers employees.

Previous orders have found that the contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706]. In general, for such information to have been “supplied”, it must be the same as that originally provided by an affected party, not information that has resulted from negotiations between an institution and an affected party (Orders P-36, P-204, P-251).

In my view, this reasoning applies to the Asset Purchase Agreement entered between Hydro One and the third party appellant. On my review of this agreement, I find that it was negotiated by the parties to it for the purposes of the analysis under section 17(1). Accordingly, the clauses of the agreement remaining at issue reflect negotiated terms, which were not “supplied” to Hydro One by the third party appellant for the purposes of part 2 of the section 17(1) test.

Because all three parts of the test must be established in order for a record to qualify for exemption under section 17(1), this record does not qualify for exemption and appeal PA07-14 is dismissed. I will, therefore, order disclosure of the agreement, except for the two monetary amounts identified in the “Preliminary Matter” discussed above.

PA07-94 – The schedules and exhibits attached to the agreement

Hydro One has provided representations regarding the schedules and exhibits attached to the agreement, which read:

... Hydro One contends that all of the information that is the subject of this appeal [PA07-94] is explicitly viewed as confidential by both Hydro One and the third party. The information included in the PA07-94 Schedules was supplied by [an identified subsidiary of Hydro One] to the third party appellant.

Based on Hydro One’s representations, as well as on my review of the records, I conclude that the Schedules and Exhibits at issue in Appeal PA07-94 were not “supplied” to Hydro One by the

third party appellant. Hydro One's representations, and my review of the schedules, make it clear that this information was in fact supplied to the third party appellant by Hydro One or its subsidiary. Accordingly, I find that the Schedules and Exhibits remaining at issue were not "supplied" to Hydro One by the third party appellant for the purposes of part 2 of the section 17(1) test.

Because all three parts of the test must be established in order for a record to qualify for exemption under section 17(1), these schedules and exhibits do not qualify for exemption, and I will order that they be disclosed to the appellant, except for the portions of the three schedules identified in the "Preliminary Matter" discussion above.

ORDER:

1. I order that the records at issue in these two appeals (except for the portions of the three schedules identified by Hydro One, and the two monetary amounts in section 1.1(k) and 1.1(l)) be disclosed to the appellant by **October 4, 2007** but not before **September 28, 2007**.
2. I dismiss appeal PA07-14 (the third party appeal).
3. I remain seized of appeal PA07-94 in order to address the portions of the records, referred to in Provision 1, that remain at issue.
4. Hydro One is to conduct the section 28 notification for the portions of the three schedules identified by it, and the two monetary amounts in section 1.1(k) and 1.1(l), only if the appellant indicates, within 20 days of the date that he receives the records ordered disclosed, that he remains interested in obtaining access to this information.

Original signed by: _____
Frank DeVries
Adjudicator

_____ August 30, 2007