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

# ORDER MO-2240

## Appeal MA-050359-1

## Espanola Regional Hydro Distribution Corporation

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## NATURE OF THE APPEAL:

The Espanola Regional Hydro Distribution Corporation (the Corporation) received a request under the *Municipal Freedom of Information and Protection of Privacy Act*, (the *Act*) for:

> (a) all applicable documents that are required pursuant to the Affiliates Relationship Code ("ARC") in respect of Espanola Regional Hydro Distribution Corporation ("Espanola Distribution"). Specifically, please provide us with copies of:
>
> (i) all services agreements between Espanola Distribution, Espanola Services and Espanola Regional Hydro Holdings Corporation;
>
> (ii) all documents evidencing the periodic compliance reviews required by s. 2.7.1 of the ARC for the past five years;
>
> (iii) documentation illustrating all financial transactions between Espanola Distribution, Espanola Services and Espanola Regional Hydro Holdings Corporation, including details of all services, resources, products or assets transferred or provided between the three corporations for the past five years;
>
> (iv) any documentation that relates to the treatment of confidential information between the three corporations; and
>
> (v) documentation or any other information that provides evidence that Espanola Distribution is in compliance with s. 2.1 of the ARC.

The Corporation responded to the request by informing the requester that much of the information sought is available to the public through filings with the Ontario Energy Board. The Corporation applied the exemption found in section 15 of the *Act* to deny access to this information. Under section 15 of the *Act*, disclosure is not required where the record or information contained in the record has been published or is currently available to the public.

The Corporation also applied the exemption found in section 11(c) (economic and other interests) of the *Act* to deny access to information responsive to item (a)(iii) of the request.

Regarding item (a)(iv) of the request, the Corporation informed the requester that no specific documentation exists in response to that item.

The requester (now the appellant) appealed the Corporation's decision to this office.

During mediation, the appellant removed from the scope of the appeal any issues relating to item (a)(iv) of the request.

Also during mediation, the Corporation issued a revised decision in which it:

- disclosed a service agreement in response to item (a)(i) of the request;
- identified a draft report prepared by the Ontario Energy Board (the Draft OEB Report), to which it denied access under sections 11(c), (d) and (f) of the *Act*, in response to item (a)(ii) of the request;
- informed the appellant that no additional records exist with respect to item (a)(iii) of the request, other than those already identified;
- advised the appellant that it will prepare and file its 2006 EDR Rate Filing within 90 days; provided the appellant with an excerpt of the material to be filed and informed him that the 2006 EDR Rate Filing will be available to the public once filed with the Ontario Energy Board; and
- informed the appellant that no additional records exist with respect to item (a)(v) of the request, other than the Draft OEB Report referred to above.

The appellant maintained his belief that records should exist in relation to management fees referred to in part 4.1 of the Services/Management, Operations and Maintenance Agreement that was provided to it in response to item (a)(i).

Further mediation was not possible, and this file was moved to the adjudication stage of the process. The issues remaining to be adjudicated are whether the Draft OEB Report is exempt under sections 11(c), (d) and/or (f); and whether the Corporation conducted a reasonable search for all records that respond to the request under section 17 of the *Act*.

The Commissioner's office sought representations from the Corporation, initially and sent it a Notice of Inquiry setting out the facts and issues on appeal. Subsequently, this office sought representations from the appellant and provided the appellant with a copy of the representations received in response, along with a copy of the Notice of Inquiry. Along with its representations filed with this office, the Corporation attached a copy of the final version of the OEB Report, which had been received by it after the file proceeded to the adjudication stage of the process. The Corporation indicated in its representations that it considered this to be a record at issue and included submissions on the application of sections 11(c), (d) and (f) to it.

The appellant submitted representations in response. In its representations, the appellant indicated that after reviewing the Corporation's explanation of the steps taken to search for responsive records, it is satisfied that the Corporation conducted a reasonable search, and withdrew its appeal with respect to this issue. The reasonableness of the Corporations search for responsive records is, accordingly, no longer an issue in this appeal.

The file was subsequently transferred to me to complete the adjudication process.

## RECORDS:

The records at issue in this appeal are the Draft and Final OEB Reports.

## DISCUSSION:

### ECONOMIC AND OTHER INTERESTS

#### General principles

Sections 11(c), (d) and (f) state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public…

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Sections 11(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

**The Corporation's representations**

The Corporation stated as follows:

> The OEB Reports are a result of the Corporation's regulator conducting an audit and review of the Corporation, asking questions and providing preliminary comments. The OEB supplied the OEB Reports to the Corporation for discussion purposes only.
>
> The OEB Reports contain information which if released could reasonably be expected to prejudice the economic interests and competitive interests of the institution, and by extension, its financial interests.
>
> The appellant is a competitor of Espanola Services. While the Corporation is a regulated entity, as noted above Espanola Services is a competitive business. To the extent that a competitor is able to review what was anticipated to be a confidential review of the Corporation and more importantly by extension Espanola Services, the appellant would receive information that may give it a competitive and economic advantage.
>
> Information in the OEB Reports addresses areas in which Espanola Services has been successful, and has or has not met utilization expectations. Disclosure of this information to a competitor would be prejudicial.
>
> The audit was conducted by the OEB for the purposes of investigating compliance and providing assistance to the Corporation. The Corporation approached the audit as an opportunity to have the OEB come to their utility, investigate practices and offer findings on possible improvements and to assist in adopting better practices. Accordingly, the Corporation was open and forthright with the OEB regarding the past practices of the utility…
>
> To then make the report of that process available to the appellant would have the effect of disincenting (*sic*) the Corporation from providing full and frank disclosure and voicing questions and concerns to the OEB, knowing that anything that was said would be reported to the public. This lack of ability to have the OEB conduct an open and meaningful review would cause the Corporation economic disadvantage in that they would not benefit from the assistance that their regulator could provide as part of a co-operative and forthright assessment.
>
> In previous years, local distribution corporations have engaged in sales to one another as well as amalgamations. It is anticipated that a transfer tax exemption may be announced in the next provincial budget, which would result in further consolidation by way of sales and mergers. To make internal audit information available, could indeed prejudice the commercial value of the Corporation and in turn prejudice its shareholder. This is but one example of the possible outcome of making commercial information public.

> It is customary that any party engaging in negotiations related to the disposition of a utility enter into a confidentiality agreement so that any commercially sensitive information remains confidential. The Act should not be used as a way in which a potential buyer can get a "free look", uninhibited by such protections.
>
> The Corporation also takes the view that the OEB Reports outline certain findings which implicitly suggest required changes. The findings and implementation of solutions have not yet been put into operation or made public and therefore fall within the exception under section 11(f) of the Act.

***Section 11(c): prejudice to economic interests***

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].

I find that the evidence and submissions tendered by the Corporation in support of its argument that the Draft and Final OEB Reports are exempt under section 11(c) are speculative at best, and do not describe in sufficient detail how the disclosure of the information contained in the records at issue could reasonably be expected to result in the harm envisioned by section 11(c). Although the Corporation states that the appellant is a competitor, it has provided no details of the nature of the competition it faces *vis-à-vis* this or any other competitor, or any indication as to how disclosure could reasonably be expected to prejudice its economic interests or competitive position.

Moreover, I find the Corporation's position that if the records are disclosed it will be reluctant to cooperate with the OEB in its reviews to lack credibility. Pursuant to Part VII of the *Ontario Energy Board Act* (*OEBA*), the Corporation is bound to cooperate and be fully frank with the OEB auditor in conducting their review. Specifically, the Corporation is statutorily required to permit OEB staff to examine, require the production of and remove any document, examine anything being done or make reasonable inquiries of any person during a review. Further, I find that any economic disadvantage that might result from the Corporation's decision not to cooperate would not be a result of disclosure of the records at issue, but from the Corporation's own decision to act in a manner adverse to its own interests – a position I find to be completely lacking in credibility.

Although I accept that the *OEBA* requires the OEB to maintain all documents and information obtained during a review confidential, that legislation does not operate to override the provisions of the *Act* and pertains only to the obligations of the OEB in its regulatory capacity. The records are currently in the hands of the Corporation and fall within the purview of the *Act*. The onus in establishing the application of one or more of the exemptions in the *Act* rests with the Corporation.

I conclude that the generalized statements made by the Corporation in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario* (*Workers' Compensation Board*), cited above. Accordingly, I find that the Corporation has failed to establish the application of the discretionary exemption in section 11(c) of the *Act*.

***Section 11(d): injury to financial interests***

As noted above, for 11(d) to apply, the Corporation must demonstrate that disclosure of the records "could reasonably be expected to be injurious" to its financial interests. As with section 11(c) above, to meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm".

Although it is arguable that section 11(d) is broader in scope than section 11(c), the Corporation has essentially made joint submissions on its application under both headings. Even taking a more expansive view of the interests at stake, I find, for the same reasons enumerated above, that the Corporation has failed to provide the kind of "detailed and convincing" evidence to establish a "reasonable expectation of harm" as contemplated under section 11(d). Accordingly, I find that the Corporation has failed to establish the application of the discretionary exemption in section 11(d) of the *Act*.

***Section 11(f): plans relating to the management of personnel***

In order for section 11(f) to apply, the institution must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:

   (i) the management of personnel, or

   (ii) the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Order P-348].

In my view, the information contained in both records cannot properly be considered a "plan" within the meaning of section 11(f). The records contain information obtained through investigation, analysis, recommendations and responses by the Corporation which, if adopted and implemented by the institution, might involve the formulation of a detailed plan. However, the records themselves do not contain a plan or a proposed plan as that term is defined above. Accordingly, I find that the discretionary exemption in section 11(f) does not apply to the records at issue.

## ORDER:

1. I order the Corporation to disclose to the appellant the Draft and Final OEB Reports by sending it a copy of these records by **November 16, 2007**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Corporation to provide me with a copy of the information disclosed to the appellant.

Original signed by: October 26, 2007
Laurel Cropley
Adjudicator