

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3568

Appeals PA15-278 and PA15-304

Hydro One

January 18, 2016

Summary: Hydro One Inc. (Hydro One) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for access to information relating to a named wind project. Hydro One deemed certain information in the records non-responsive to the request. It also decided to disclose most of the responsive information in the records, withholding a portion of one page under the mandatory third party information exemption in section 17(1) of *FIPPA*. The requester appealed Hydro One's decision to withhold information. As well, the third party appealed Hydro One's decision to disclose certain information, claiming that section 17(1) applied.

In this order, the adjudicator partially upholds Hydro One's decision concerning the responsiveness of the information it deemed non-responsive. The adjudicator also finds that the responsive information in the records is not exempt under section 17(1) and orders it disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 24.

OVERVIEW:

[1] Hydro One Inc. (Hydro One) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to information relating to a named wind project for the time period of June 23, 2014 to the date of the request.

[2] Hydro One wrote to the requester and advised him that since the time period of June 23, 2014 to November 13, 2014 had been dealt with in two other requests, it would only search for responsive records for the time frame of November 14, 2014 to March 2, 2015.

[3] Hydro One located records responsive to the request and wrote to a third party to seek its position on the disclosure of the records. The third party then submitted representations to Hydro One, providing consent to the disclosure of the records, in part.

[4] Hydro One issued a decision to the requester advising that partial access was being granted to the records. Some information in the records was being denied pursuant to the mandatory exemptions in section 17(1) (third party information) and 21 (personal privacy) of the *Act*, or because the information was not responsive to the request.

[5] The requester filed an appeal of Hydro One's decision and appeal PA15-304 was opened. The third party also filed an appeal of Hydro One's decision and the third party appeal PA15-278 was opened.¹

[6] In appeal PA15-304, the requester advised the mediator that he was not pursuing access to the information withheld pursuant to section 21(1) of the *Act*. As such, the information denied pursuant to section 21(1) is not at issue in this appeal.

[7] However, the requester advised that he wished to pursue access to the information denied pursuant to 17(1) of the *Act*, specifically, the information located on page 20. The requester also advised that he wished to pursue access to the information severed as not responsive to the request at pages 5, 7, 30, 31 and 32 of the records.

[8] In appeal PA15-278, the third party advised the mediator that it had reconsidered its position and now consented to the disclosure of additional pages, specifically pages 22 to 29. However, the third party continued to object to Hydro One's decision to disclose to the requester pages 20, 21, and 30 to 32 as it believes these pages should be denied in full pursuant to section 17(1) of the *Act*.

[9] The mediator forwarded the third party's consent for disclosure of pages 22 to 29 to Hydro One and these pages were disclosed to the requester.

[10] The requester advised the mediator that he continued to pursue access to the pages that the third party objected to the disclosure, namely, pages 20, 21, and 30 to 32 of the records.

¹ As I am dealing with both appeals in this order, I will refer to the appellants as the requester and the third party.

[11] As mediation did not resolve these appeals, the files were transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC *Code of Procedure and Practice Direction 7*.²

[12] In this order, I uphold Hydro One's decision that the information it deemed non-responsive on pages 5, 7, 30, and 32 of the records is not responsive to the request. I do not uphold its decision regarding the responsiveness of the information in page 31. I also find that the responsive information on pages 20, 21, and 30 to 32 of the records is not exempt under section 17(1) and I order it disclosed.

RECORDS:

[13] The records remaining at issue consist of email chains. At issue are portions of pages 5, 7, 20, 21, and 30 to 32.

ISSUES:

- A. Are pages 5, 7, and 30 to 32 of the records responsive to the request?
- B. Does the mandatory third party information exemption at section 17(1) apply to pages 20, 21, and 30 to 32 of the records?

DISCUSSION:

A. Are pages 5, 7, and 30 to 32 of the records responsive to the request?

[14] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;

² Hydro One only provided representations on the responsiveness of the records. The third party only provided representations on the third party information exemption in section 17(1). The requester provided representations on both issues.

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[15] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.³ To be considered responsive to the request, records must "reasonably relate" to the request.⁴

[16] Hydro One states that it wrote to the requester to advise that because he had previously received decisions from Hydro One for the same records for the time period of June 23, 2014 to November 13, 2014, it would only search for records dated between November 14, 2014 and March 2, 2015. Accordingly, it submits that it responded to the letter and spirit of the request at issue, particularly in light of the eight access requests filed by the requester, which were repetitive and successive in nature.

[17] Hydro One further states that this request was identical to the previous requests made by the requester and provided sufficient detail to identify the records or portions of records that were responsive to this request.

[18] The requester states that pages 5, 7, 30, 31 and 32 are responsive to his request based on the time period, content and context of the records, and submits that Hydro One unilaterally narrowed the scope of his request.

Analysis/Findings

[19] In its representations, Hydro One provided a list of the time periods of all the requests made by the requester for records related to the wind project. I agree with Hydro One that the records for the period June 23, 2014 to November 13, 2014 are covered by a previous request and I find that Hydro One appropriately clarified the scope of the request to cover records for the subsequent period, November 14, 2014 to March 2, 2015.

[20] Hydro One provided representations on each page at issue. I will list its representations (in italics) followed by my decision on each page, as follows:

³ Orders P-134 and P-880.

⁴ Orders P-880 and PO-2661.

Page 5 - this redacted portion relates to email correspondence that falls outside of the November 14, 2014 to March 2, 2015 time period for requested records. Moreover, this record page falls outside of the time period of the request as specifically and originally worded by the requester – this record is an email that is dated June 13, 2014.

[21] This page contains three emails; one email is dated June 12, 2014 and is outside the scope of the requester's request. The other two emails in the email chain are dated February 2015 and come within the time period of the request. The two emails that are within the time period of the request have been disclosed to the requester. I uphold Hydro One's decision that the earlier email is not responsive to the request.

Page 7 - the redacted portion relates to email correspondence that falls outside of the November 14, 2014 to March 2, 2015 time period for requested records. Moreover, this record page falls outside of the time period of the request as specifically and originally worded by the requester - this record is an email chain that is dated between June 5 and June 12, 2014.

[22] As the entire email chain is dated prior to November 14, 2014, I am upholding Hydro One's decision that page 7 is not responsive to the request.

Page 30 - is an email wherein the third party seeks information from Hydro One on a wind project that is not the project that is the subject of this request. On the balance of probabilities, it is not clear that this withheld information expressly or inferentially relates to the information sought by the requester regarding the wind project named in the request. The only possible link is the email subject title and this title is not enough of a nexus or link to provide the requester with information that is outside the scope of his request. Hydro One believes that the author (the third party) simply used the "reply" function from an older Hydro One email, rather than create a new email for this communication. It is the email content, and the fact that it specifically references other projects, that makes this withheld information non-responsive.

[23] Hydro One has agreed to disclose the first part of the first email on this page to the requester. I agree with Hydro One that the remainder of this page relates to a wind project not listed in the requester's request. Therefore, I uphold Hydro One's decision on page 30.

Page 31 – the redacted portion of this page relates to email correspondence that falls outside of the November 14, 2014 to March 2, 2015 time period for requested records. The withheld information is from an email dated February 10, 2014.

Hydro One has decided to only redact the top portion of page 31. This is part of an email continued from page 30 and dated February 10, 2015 (not 2014) and consists of one sentence about multiple wind projects, which includes the wind project named in the request. Therefore, I find that this portion of page 31 is responsive to the request. As the third party has claimed that section 17(1) applies to this portion of page 31, I will consider the application of this exemption below.

Page 32 – the redacted portion of the record relates to email correspondence that falls outside of the November 14, 2014 to March 2, 2015 time period for requested records. The withheld information is from an email chain dated between April 14, 2014 and June 10, 2014.

[24] This page contains three emails; one email is dated November 24, 2014 and Hydro One has agreed to disclose this email to the requester. The other two emails on this page are dated April 14, 2014 and June 10, 2014 and are outside the scope of the requester's request. Therefore, I uphold Hydro One's decision on this page.

Conclusion

[25] I uphold Hydro One's decision on the responsiveness of the information at issue on pages 5, 7, 30, and 32.

[26] I do not uphold Hydro One's decision on the responsiveness of the information at issue on page 31 and I will consider the application of section 17(1) to the withheld information on this page.

B. Does the mandatory third party information exemption at section 17(1) apply to pages 20, 21, and 30 to 32 of the records?

[27] Section 17(1) states:

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.

[28] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁵ 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.⁶

[29] For section 17(1) to apply, the institution and/or the third party must satisfy each part of 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 the institution 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.

[30] Hydro One states that as the burden of proof in this case concerning section 17(1) falls on the third party, it makes no representations on this exemption.

Part 1: type of information

[31] The third party states that the records contain commercial information as they contain the contractual arrangements between it and Hydro One as a result of extended business negotiations. It states that all of this information facilitates its commercial enterprise of developing wind energy projects for profit.⁷

[32] The requester did not make direct representations on part 1 of the test.

Analysis/Findings re: part 1

[33] The type of information referred to in the third party’s representations has been

⁵ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁷ The third party provided both confidential and non-confidential representations on section 17(1). In this order, I will only be referring to the non-confidential representations.

considered in prior orders:

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.⁸ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁹

[34] I agree with the third party that the information at issue in pages 20, 21, and 30 to 32 of the records is commercial information as it is information about the selling of wind project services by the third party. Therefore, part 1 of the test has been met under section 17(1).

Part 2: supplied in confidence

Supplied

[35] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.¹⁰

[36] 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.¹¹

In confidence

[37] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹²

[38] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was:

⁸ Order PO-2010.

⁹ Order P-1621.

¹⁰ Order MO-1706.

¹¹ Orders PO-2020 and PO-2043.

¹² Order PO-2020.

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.¹³

[39] The third party states that the records contain information that was submitted to facilitate the development of the wind project and, in light of anti-wind coalitions attempting to halt proposed wind energy projects in Ontario, the third party has consistently acted with due caution to protect the information in the records from disclosure.

[40] The third party states that pages 20 and 21 of the records consist of an e-mail sent directly from Hydro One, which was not supplied by the third party, but contains information supplied in confidence by it to Hydro One. It states:

While none of the records were expressly marked "private and confidential", the records contain information that was supplied to Hydro One pursuant to a business relationship in which correspondence and shared information were expected to remain confidential.

[41] The requester refers to the Assignment and Novation Agreement template at pages 22 to 29 of the records, which was disclosed to him at the mediation stage of these appeals. He submits that the information required to be provided in this agreement by the third party is non-confidential information in the public domain, e.g. the names of the corporations that are the assignor and assignee to the agreement mentioned in the records.

Analysis/Findings re: part 2

[42] The third party did not provide representations on the specific information at issue in pages 20, 21, and 30 to 32. I find that it has only provided general representations on this information.

Pages 20 and 21

[43] Pages 20 and 21 consist of an email from Hydro One to the third party. Hydro One has only claimed section 17(1) for the first sentence of this email. The third party

¹³ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

wants withheld the entire body of the email, as well as the attachment line and most of the subject line in the header of the email. This email contains Hydro One's general instructions on how to complete the agreement template at pages 22 to 29 of the records, along with instructions about the required supporting documents. I find that other than the name of the assignee on page 20, none of the information in pages 20 to 21, the instructions of Hydro One for completing the agreement template, was supplied by the third party to Hydro One.

[44] The name of the assignee on page 20 of the records was supplied by the third party to Hydro One. This is also information that Hydro One is seeking to withhold. I find that I do not have sufficient evidence to satisfy me that the name of the assignee on page 20 was prepared for a purpose that would not entail disclosure. I find, based on the contents of the agreement at pages 22 to 29 of the records, that the name of the assignee corporation involved in the wind project is information that would be available from publicly accessible sources. Therefore, I find that this information was not supplied in confidence to Hydro One and part 2 of the test has also not been met for this information.

[45] In any event, even if I was to find that the name of the assignee on page 20 of the records was supplied in confidence by the third party to Hydro One, I would not have found that the harms test under part 3 had been met. The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁴

[46] The third party provided similar representations for part 3 as it did for part 2 regarding anti-wind coalitions attempting to halt proposed wind energy projects in Ontario. It did not provide specific representations under part 3 as to how the name of the assignee itself could reasonably be expected to cause the harms set out in section 17(1), nor are these harms apparent to me from my review of the record and the third party's representations.

[47] Taking into consideration the entirety of the third party's representations under part 3, I find that I do not have the requisite evidence to find that disclosure of the name of the assignee on page 20 of the records could reasonably be expected to result in the harms set out in part 3 of the test.

Pages 30 to 32

¹⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[48] Pages 30 to 32 of the records contain an email chain between the third party and Hydro One. The responsive information in pages 30 to 32 of the records consists of one email at page 30, part of an email at the top of page 31, and one email on page 32. All these emails are related to the Assignment and Novation Agreement template at pages 22 to 29 of the records. I find that this information is also general information related to the completion of this agreement and does not reveal information that was supplied by the third party to Hydro One within the meaning of section 17(1). Therefore, I find that this information does not meet part 2 of the test.

Conclusion

[49] As I have found the responsive information in pages 20, 21, and 30 to 32 was not supplied in confidence, part 2 of the test has not been met. As this information is not exempt under section 17(1) and I will order it disclosed.

ORDER:

1. I uphold Hydro One's decision concerning the information it deemed not responsive in pages 5, 7, 30, and 32 of the records.
2. I order Hydro One to disclose to the requester the responsive information in pages 20, 21, and 30 to 32 of the records by **February 23, 2016** but not before **February 17, 2016**. With this order, I am providing Hydro One a copy of these pages highlighting the information to be disclosed.

Original Signed by: _____

Diane Smith
Adjudicator

January 18, 2016