



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

# **ORDER P-689**

**Appeal P-9200442**

**Ontario Hydro**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

# ORDER

## BACKGROUND:

Under the Power Corporation Act, Ontario Hydro (Hydro) has regulatory responsibilities associated with municipal electrical utilities and private distributing companies that buy power from Hydro and resell it to their own customers. These municipal utilities and the distributing companies make submissions to Hydro to support their requests for approval of changes to rate structures or rate levels. The role of Hydro is to establish a rate of return on investment such that the ratepayers are treated fairly and the company being regulated is not financially disadvantaged.

Hydro received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to "required rate of return in common equity submitted by [a named company] for the years 1991 and 1992".

Hydro identified the responsive record as the submissions made by the named company to Hydro for 1991 and 1992 as well as the covering letters for each submission. The record also includes letters from a number of customers of the named company and a securities company, commenting on the content of the rate submissions.

Hydro notified the named company of the request pursuant to section 28(1) of the Act and it objected to the disclosure of the record. After considering the named company's representations, Hydro granted partial access to the record but denied access to the remainder under sections 17(1)(b) and (c) of the Act. The named company informed Hydro that it agreed with the decision to grant partial access. The requester appealed Hydro's decision to deny access to parts of the record.

Mediation was not possible and notice that an inquiry was being conducted to review Hydro's decision was sent to the appellant, Hydro, the named company and five companies who had provided comments on the submissions. Representations were received from the appellant, Hydro and the named company.

The majority of the record which remains at issue contains information about the named company such as the requested rate of return, sales forecasts, operating margins, power purchases, business risk, capital structure, financial and operating data, assets and liabilities.

Also at issue is information about one of the named company's customers contained in the submissions themselves, in the letters from the customer and in one of the letters from the securities company commenting on the submissions. The customer whose information is at issue was one of the companies who commented on the submissions of the named company.

Although Hydro did not claim section 17(1)(a) to exempt the information about the customer, its representations relating to this information appear to focus on the harm set out in that section. Since section 17(1)(a) is a mandatory exemption, I will also consider its application to the customer's information.

## **PRELIMINARY ISSUE:**

In its representations, the named company states that it believes that the request may be related to a hearing in which it is involved before the Assessment Review Board. If such is the case, the named company submits that the request represents "an abuse of the Act, as well as an abuse of the process in which it is presently involved pursuant to the provisions of the Assessment Act."

In my view, the fact that information which is the subject of a request under the Act may also be at issue in another proceeding does not prevent a request from being made under the Act. Former Commissioner Sidney B. Linden reached a similar conclusion in Orders 48 and 53. In Order 48, he stated:

[I]n my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the Freedom of Information and Protection of Privacy Act, 1987 is unfair.

In my opinion, had the legislators intended that the Act not apply to records held by government institutions whenever circumstances such as those described by the named company existed, they could have done so through use of specific wording to that effect. I find no such wording in the Act and the named company has not drawn my attention to any section of the Act which might be interpreted in such a manner. In my view, the Act can and should operate as an independent piece of legislation.

## **ISSUE:**

The issue for me to determine in this appeal is whether the mandatory exemption provided by sections 17(1)(b) or (c) of the Act applies to the record. I will also consider whether section 17(1)(a) applies to the information about one of the named company's customers. Sections 17(1)(a), (b) and (c) read as follows:

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;

For the record to qualify for exemption under section 17(1), Hydro and/or the named company 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 record 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 section 17(1) (a), (b) or (c) will occur.

Failure to satisfy the requirements of any part of this test will render the section 17(1) claim invalid (Order 36).

### **Part One**

I agree with the parties that the record contains commercial and financial information. Therefore, part one of the test has been met.

### **Part Two**

In light of my conclusion with respect to part three of the test, I have not made a specific finding with respect to this part.

### **Part Three**

In order to satisfy the third part of the test, Hydro and/or the named company must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harms described in sections 17(1)(b) and (c) would occur if the information was disclosed. Generalized assertions of fact in support of what amounts, at most, to speculation of possible harm do not satisfy the requirements of the third part of the test (Orders 36, P-373, P-394, P-400, P-583).

Hydro, the named company and the appellant have all commented on the application of sections 17(1)(b) and (c) as they relate to the information of the named company. I will first address the application of sections 17(1)(b) and (c) to this information. I will then consider the information which relates to the customer.

### **Section 17(1)(b)**

In order to meet the requirements of section 17(1)(b) of the Act, the Ministry and/or the named company must demonstrate that:

1. the disclosure of the information in the records could reasonably be expected to result in similar information no longer being supplied to the institution; and
2. it is in the public interest that similar information continue to be supplied to the institution in this fashion.

(Order P-604)

In its representations, Hydro states:

Since the information supplied to Ontario Hydro exceeds the minimum requirements, [the named company] (or any of the 300+ municipal customers of Ontario Hydro) may cut back detail provided to Ontario Hydro if the information was subject to general release. This would not be in Hydro's best interest nor the interest of the public as it would significantly impair the ability of Ontario Hydro to regulate rates under the Power Corporation Act.

In its representations, the named company supports Hydro's position, stating that:

... it [the named company] will have to give consideration to discontinuing the provision of such information in its present form and seek, with the assistance of Ontario Hydro, other means by which a determination of an appropriate rate can be made.

However, in their representations neither Hydro or the named company specifically identifies the kinds of information which the named company included in its 1991 and 1992 submissions that would no longer be included in future submissions, if the information might be subject to disclosure under the Act.

The named company submits that there are no specific requirements that define the particular information that it must provide to Hydro and takes the position that:

all information that is contained in the record was provided to Ontario Hydro on a voluntary and consensual basis and not subject to any specific contractual requirement.

However, the representations of Hydro indicate that a practice concerning the content of rate of return applications has developed over the years. Hydro states that, as a result, some types of information are expected to be provided as minimum and there is an understanding as to the common components of a rate of return application. According to Hydro,

a "typical" study has several distinct phases that are built up to draw a conclusion as to the range of an acceptable rate of return. These can be roughly portrayed as:

- Risk assessment;
- Capital structure;
- Selection and comparison to a reference group of companies;
- A description of the methods available to evaluate a rate of return;
- The general and specific economic conditions that are faced by the company and industry;
- Estimate of a fair rate of return and the relative effects it would have on the capital structure.

Hydro then elaborates on some of these phases. For example, Hydro explains that risk assessment would involve assessment of business risk, financial risk and investment risk. Hydro concludes by stating:

... [T]he rate of return on common equity is a judgemental process and, as a result, the supporting information is provided to convincingly persuade the regulator that the application is valid. To this extent the amount of information submitted to support the application is open to judgement and discretion. Generally speaking, the more detailed and specific the information is to the rate of return components being advanced, the regulator is better able to assess the merits of the application

...

The appellant maintains:

In the future, regardless of disclosure in this case, [the named company] will continue, out of business necessity, to provide the information which is the subject of this appeal. It must in order to obtain its regulated return on investment.

I have carefully considered the representations of all parties. The representations of Hydro and the named company suggest to me that while there is an element of public interest in the

continued supply of the information, it is also very much in the interests of the named company that it provides sufficiently detailed information to Hydro in support of its rate application.

As I have noted, neither Hydro or the named company has identified the kinds of information that would no longer be supplied. As well, in my view, it is reasonable to expect that a party making a rate application submission will continue to provide information which will be of assistance in obtaining a favourable response from Hydro to its application.

In addition, in my opinion the fact that not all the information contained in the record may be "required" by the practice that has built up around the content of rate submissions does not mean that similar information will no longer be supplied to Hydro.

Therefore, in my view, the third part of the test has not been met and the record does not qualify for exemption under section 17(1)(b).

### **Section 17(1)(c)**

In its representations, the named company claims that disclosure of the information in the record could result in potential prejudice to the company and its business and financial position. The named company also maintains that:

... revealing of such information is unnecessary, unwarranted and could result in possible loss to [the named company] or gain to other persons. Such information might conceivably be used in a manner to embarrass [the named company] in such a way as to injuriously affect the value of the Company and impact adversely upon its undertakings.

However, in my view, the named company does not provide any additional details or facts which would support these representations.

Hydro states:

Disclosure of the ... information would provide exact details of the operation of [the named company] and the release of detailed information about the operations of the third parties, would reveal to competitors, valuable information about management strategies.

The appellant points out that the named company's customers have no alternative but to purchase electricity from it as a result of the regulatory scheme governing the provision of electric power in Ontario and that entry into the market served exclusively by the named company is controlled by Hydro. More specifically, the appellant states:

As the information is disclosed annually to a public body, by a monopolist, the appellant cannot conceive of a possible scenario wherein release of the information could cause any loss or gain to any person, group, committee, financial institution or agency.

I have carefully reviewed the representations and the record itself. The representations of both Hydro and the named company with respect to section 17(1)(c) set out general assertions without providing any detailed and convincing evidence or describing a set of facts and circumstances which would support the general assertions.

I have also reviewed copies of the publicly available Annual Report of the named company for 1990 and 1991 which it provided to me. It would appear that some of the same types of information that are found in the record are also contained in the Annual Reports.

In my view, both Hydro and the named company have failed to provide sufficient evidence to establish that disclosure of the record could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. Therefore, the record does not qualify for exemption under section 17(1)(c).

### **Customer's Information**

No representations were made by the named company about how the harms enumerated in sections 17(1)(b) or (c) might arise in relation to any of the information about its customer. All who commented on the named company's rate submissions, including the customer whose information is at issue, were notified of the appeal and none made representations.

Hydro states in its representations that information commenting on the viability of major customers of the named company:

... is commercially sensitive in nature and can be directly linked to the customers' competitive positions within their respective industries ... and the release of detailed information about the operations of the third parties would reveal to competitors, valuable information about management strategies ... Competitive positions of third party retail customers would be adversely impacted if the information were released. The result would be to disadvantage the retail customer(s) ... through an impact on future sales revenues and profits ... Other retail customers including residential, commercial and industrial would likewise be adversely impacted by any requirement of the distributing company ... to redistribute the legitimate costs, if a major retail customer were to lose contracts and reduce power demand.

Hydro's representations appear to focus on the harms set out in sections 17(1)(a) and (c). In my view, taking into account the nature of the information which is at issue, the representations do not provide sufficient evidence to meet the requirements of the third part of the section 17 test.



Therefore, the information relating to the customer does not qualify for exemption under section 17(1)(a), (b) or (c).

**ORDER:**

1. I order Hydro to disclose the record within 35 days of the date of this order, but not earlier than the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with the order, I order Hydro to provide me with a copy of the record which is disclosed to the appellant, **only** upon request.

Original signed by: \_\_\_\_\_  
Tom Wright  
Commissioner

\_\_\_\_\_ May 25, 1994