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

ORDER P-1190

Appeal P-9500760

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

Ontario Hydro (Hydro) operates five nuclear power plants which are licensed and regulated by the Atomic Energy Control Board (AECB). A Peer Evaluation Program has been established by Hydro, and evaluations are conducted on each plant every second year. The reports which are prepared following these evaluations are used by Hydro to supplement periodic AECB reviews which address regulatory compliance. The peer evaluation teams are made up of employees from each of the nuclear generating plants which Hydro operates, as well as outside industry experts.

The peer evaluations follow a process similar to the one developed in the United States by the Institute of Nuclear Power Operations (INPO). The INPO is a non-profit collective organization established in 1979 after the Three Mile Island nuclear incident. The INPO developed standards of excellence against which member utilities are evaluated. Ontario Hydro adopted standards substantially similar to those developed by the INPO to evaluate its own nuclear operations. The standards are described in an internal Hydro publication which was recently updated and republished.

NATURE OF THE APPEAL:

Hydro received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of all peer evaluation reports conducted by or for Hydro. The request was later clarified to be the most recent peer evaluation report for each of the five nuclear plants operated by Hydro. The requester is a newspaper reporter.

Hydro responded by denying access to all responsive records on the basis of the discretionary exemptions provided by section 13(1) (advice to government) and sections 18(1)(c), (e), (f) and (g) (economic interests of an institution) of the Act.

The requester (now the appellant) appealed Hydro's decision. In his letter of appeal, the appellant raised the possible application of section 23 of the Act, the so-called "public interest override".

The records at issue are draft or final evaluation reports on the following nuclear generating plants: Bruce A (1995 first draft report); Bruce B (1994 final report); Pickering A/B (1992 final report); Pickering B (1995 first draft report); and Darlington (1994 final report). According to Hydro, reports remain in draft form until a response has been made by Hydro management.

Mediation was not possible and a Notice of Inquiry was sent to the appellant and Hydro. Representations were received from Hydro only.

In its representations, Hydro withdrew its exemption claims under sections 18(1)(e) and (f). Therefore, section 13(1) and sections 18(1)(c) and (g) of the Act are the only exemptions which remain at issue in this appeal.

DISCUSSION:

ADVICE TO GOVERNMENT
Section 13(1) of the Act states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It was established in Order 118, and followed in many subsequent orders, that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations given also qualifies for exemption under section 13(1) of the Act.

In its representations, Hydro states that the peer evaluation reports reflect the findings of the evaluation team relative to published performance objectives. According to Hydro, the format of the reports follows the industry protocol, namely that findings are taken as being recommendations for improvements. After receiving these findings, management develops and implements corrective actions to address the issues. Hydro argues that the peer evaluation reports are always to be viewed as recommendations regarding suggested courses of action to improve the safety of nuclear facilities.

In my view, some parts of the evaluation reports contain what can accurately be characterized as "background information" in the context of section 13(1): a description of the purpose and scope of the review; how the review was conducted; and areas of accomplishment. Other parts include "factual" information which is distinct from any identified recommendations or action plans. Accordingly, I do not accept the Ministry's position that each report in its entirety relates to a suggested course of action and qualifies for exemption under section 13(1).

The five evaluation reports are not all written in the same style. Other than the background and factual information I have identified above, three of the reports identify areas for improvement, recommendations and action plans for implementing the recommendations. I find that this information does meet the requirements of section 13(1).

The other two reports outline findings in response to particular performance objectives. Although it is not clear from the face of these reports that any course of action outlined under these finding has been recommended, I am prepared to accept Hydro's submission that recommendations can be inferred from the nature of the peer evaluation process, and I find that the portions of the reports containing this information satisfy the requirements of section 13(1).

Although I have found that the requirements of section 13(1) have been established with respect of portions of the records, I must now consider the potential application of section 13(2), specifically section 13(2)(f), which states:

> Despite subsection (1), a head **shall not refuse** under subsection (1) to disclose a record that contains,

> a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

Section 13(2)(f) is unusual in the context of the Act in that it constitutes a mandatory exception to the application of an exemption for discrete types of documents, namely reports on institutional performance or efficiency. Even if a report contains advice or recommendations for the purposes of section 13(1), an institution must disclose the **entire** document if the report falls under section 13(2)(f) (Orders P-726 and P-763).

Previous orders of this office have interpreted section 13(2)(f) to apply to reports and studies which focus on one or more discrete program areas within an institution, rather than the institution as a whole (Orders P-348, P-603 and P-658). This interpretation is consistent with the general principle of providing requesters with a general right of access to government information, and accords with the plain meaning of the exception. I therefore adopt this interpretation for the purposes of this appeal.

Although section 13(2) was identified in the Notice of Inquiry, Hydro did not make specific representations on this section.

Hydro does state that it adopted standards to evaluate its nuclear operations, which are described in an internal Hydro report entitled "Ontario Hydro's Nuclear Performance Objectives and Criteria for Operating Nuclear Power Plants". This report was recently updated and re-published in February 1996. Hydro points out in its representations that the peer evaluation reports which are at issue in this appeal are evaluations conducted relative to these performance objectives.

Having reviewed the five records at issue in this appeal, I find that they are clearly reports. They are identified as such, and they consist of formal statements or accounts of the results of the collation and consideration of information. Furthermore, each record involves the study of a number of issues and concerns relating to management and maintenance of one of Hydro's nuclear power plants.

Further, I find that the peer evaluation reports relate specifically to the performance of nuclear facilities operated by Hydro, and as such fall squarely within the scope of section 13(2)(f). Because section 13(2)(f) is a mandatory exception to the section 13(1) exemption claim, Hydro must not refuse to disclose these reports irrespective of whether all or any parts of them meet the requirements for exemption under section 13(1).

Therefore, I find that the records are not subject to exemption under section 13(1) of the Act.

ECONOMIC AND OTHER INTERESTS OF THE INSTITUTION

Section 18(1)(c) states:

> A head may refuse to disclose a record that contains,

> information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

To establish a valid exemption claim under section 18(1)(c), Hydro must demonstrate a reasonable expectation of prejudice to its economic interests or competitive position arising from disclosure.

With respect to prejudice to both its economic interests and its competitive position, Hydro states that at this time it is under considerable pressure to reduce the cost of producing power and to open itself up to competition in power generation. It argues that unduly critical public releases may harm two initiatives in which it is currently engaged.

Hydro describes current negotiations with potential private sector partners regarding one of its nuclear plants, and submits that unduly critical public releases could reasonably be expected to raise concerns with these potential partners.

Hydro also points out that it is involved in ongoing international negotiations which could lead to a multimillion dollar contract. In Hydro's view, because the peer evaluation reports do not provide a balanced picture of safety at its nuclear power plants, these reports could be used by others in the industry in an attempt to gain a competitive advantage. According to Hydro, its United States competitors are not required to disclose comparable peer evaluation reports prepared by the INPO.

I have intentionally been somewhat vague regarding the details of these ongoing negotiations, so as not to disclose facts which could have an impact on these discussions. Hydro has provided me with more detailed evidence than I have included in this order.

In my view, based on the evidence provided to me in this appeal, I find that Hydro has established that disclosure of the evaluation reports could reasonably be expected to prejudice its economic interest and/or competitive position with respect to its current and potential negotiations, and I find that the five records qualify for exemption under section 18(1)(c) of the Act.

Section 18(1)(g) states:

> A head may refuse to disclose a record that contains,
>
> > information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

In order to qualify for exemption under this section, Hydro must establish that the records contain information including proposed plans, policies or projects, **and** that disclosure could reasonably be expected to result in:

(i) premature disclosure of a pending policy decision, or
(ii) undue financial benefit or loss to a person.

In its representations on section 18(1)(g), Hydro refers back to statements regarding ongoing negotiations made in support of its section 18(1)(c) exemption claim. In addition, Hydro states that because the peer evaluation reports do not provide a balanced picture to the public, there is a reasonable expectation that they will be used to generate negative public opinion, and result in possible unnecessary and costly plant improvements or temporary shut downs.

In my view, Hydro has not provided evidence sufficient to establish the requirements for exemption under section 18(1)(g). I am not convinced that the records are properly characterized as "proposed plans, policies or projects", and even if they are, I find that Hydro has not provided sufficient evidence to establish a reasonable expectation that their release could result in premature disclosure of a pending policy decision or in undue financial loss to Hydro or benefit to any other person.

Therefore, I find that the records do not qualify for exemption under section 18(1)(g) of the Act.

PUBLIC INTEREST IN DISCLOSURE

I have found that the records qualify for exemption under section 18(1)(c), and I will now consider the possible relevance of section 23 of the Act. This section reads as follows:

> An exemption from disclosure of a record under sections 13, 15,17, **18**, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

As I have stated above, although the appellant raised the application of section 23, he did not make any representations on this issue. This is unfortunate.

The Act is silent as to who bears the burden of proof in respect of section 23. The burden of proof in law generally is that a person who asserts a position must establish it. However, where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, I have reviewed the records with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the section 18(1)(c) exemption.

Hydro submits that for the Peer Evaluation Program to be useful, its employees must be prepared to provide full and open input to the review team, and the team in turn must be frank and direct

in its report. Hydro expresses concern that disclosure of the peer evaluation reports would result in future input that is not bluntly critical, thereby diminishing the significance and undermining the usefulness of the evaluations in ensuring the highest standards of safety and reliability at the nuclear plants.

Hydro also makes reference to the case of Rubin v. Canada (Minister of Transport) (December 21, 1995), Doc. T-891-93, T-2187-93 (Fed. T.D.), where the court upheld the government's decision to deny access to records relating to a post-accident review of the operation of an airline. It is important to note that, unlike the Rubin case, in the appeal before me, Hydro has not submitted any evidence to indicate that the Peer Evaluation Program would be cancelled if the confidentiality of the records is not maintained.

Hydro submits that the safe operation of nuclear stations is assured through the regulatory and licencing process overseen by AECB. In Hydro's view:

> The peer evaluation program is a management tool that evaluates plant operations against the best standards in the industry and works to assure a standard of excellence for safety and reliability that is in the best interests of Ontario Hydro, its employees and the public at large.

In explaining the rationale behind the adoption of the INPO program (which led to the creation of Hydro's Peer Evaluation Program), Hydro makes the following statement:

> Nuclear disasters, regardless of whether or not there is harm to the environment and/or to the public were seen to have a negative effect on the public. It was determined that nuclear incidents, even minor incidents, must not be allowed to occur; INPO therefore developed the standards of excellence against which the member utilities would be evaluated.

It is clear that public concerns regarding the safety of nuclear facilities was the impetus behind the creation of Hydro's Peer Evaluation Program. In my view, it is not possible to allay these concerns by merely advising the public that reviews of nuclear operations are conducted against the highest possible standards. This simply does not provide enough information for the public to assess the adequacy of the program in meeting its objectives. I am unable to accept Hydro's position that the results of the Peer Evaluation Program should not be disclosed to the very public whose concerns about nuclear safety the Program was designed to allay.

As far as Hydro's submissions about confidentiality and the openness of its employees are concerned, in my view, it is in the interests of both Hydro and the public to ensure that Hydro continues to receive frank and open input and to report on nuclear safety issues in the most fulsome manner possible. This enables Hydro to represent itself in its commercial ventures as operating nuclear plants as closely as possible to the highest standards of excellence.

Commissioner Tom Wright discussed the issue of nuclear safety and section 23 in Order P-270. This appeal involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by

Hydro under section 17(1) of the Act. In considering whether there was a compelling public interest in disclosure of nuclear safety related information, he stated:

> In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.
>
> I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.
>
> In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

I agree with Commissioner Wright's comments, and find that there is a compelling public interest in disclosure of records concerning nuclear safety. The question which remains is whether this compelling public interest is sufficient to clearly outweigh the purpose of the section 18(1)(c) exemption.

In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. 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.

Although, it was not necessary for Commissioner Wright to make a finding under section 23 in Order 270, because he did not uphold the exemption claim under section 17(1), he stated his view that the public interest in disclosure of the information contained in the records at issue in that appeal would be sufficiently compelling as to clearly outweigh the purposes of section 17(1) of the Act.

Former Assistant Commissioner Irwin Glasberg dealt with the issue of nuclear safety in Order P-901, which also involved Hydro. In that case, he found that records prepared by a working group involved in nuclear emergency planning qualified for exemption under section 12 of the Act (Cabinet records), which is not subject to the section 23 public interest override. However, he went on to state that:

> Were it not for the fact that the records at issue are subject to the Cabinet records exemption, I would have had no hesitation in finding that there exists a compelling public interest in the disclosure of these documents which clearly outweighs the purposes of the exemptions found in the Act.

(See also Order P-956).
In my view, the potential economic and competitive interests of Hydro in pursuing partnership arrangements and contractual agreements are valid and consistent with the requirements for exemption under section 18(1)(c). I also accept that this exemption claim recognizes an inherent public interest in maintaining the ability for Hydro to negotiate the best possible deal in any partnership or contractual negotiations. However, in my view, when the monetary-based purposes of this exemption claim are balanced against the broad public interest in nuclear safety and public accountability for the operation of nuclear facilities, I find that these compelling public interests clearly outweigh the purpose of the section 18(1)(c) exemption, in the circumstances of this appeal.

Having taken into account all of the submissions contained in Hydro's representations, I find that section 23 of the Act applies, and the peer evaluation reports should be disclosed.

ORDER:

1. I order Hydro to disclose all five records to the appellant by **June 17, 1996**.

2. In order to verify compliance with this order, I reserve the right to require Hydro to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.

Original signed by: May 27, 1996
Tom Mitchinson
Assistant Commissioner