Information and Privacy
Commissioner/Ontario

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

# ORDER P-1574

## Appeal P-9700261

## Ontario Hydro

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## NATURE OF THE APPEAL:

Ontario Hydro (Hydro) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of records relating to a report entitled "Metal Discharges from the Ontario Hydro Pickering Nuclear Generating Station - Report of an Expert Panel" dated June 18, 1997 (the Report). The Report is attached as "Appendix J" to a document entitled "Evaluation of Emissions from Ontario Hydro Admiralty Brass Condensers to the Great Lakes" which was released by Hydro on July 8, 1997. The request for the records was worded as follows:

> (a) all drafts of the Report and all drafts of the Appendices to the Report;
>
> (b) all records relating to Appendix A of the Report, including all records related to siltation sampling;
>
> (c) all records relating to the fish tissue metal sampling referred to in the Report, including all records associated with the Confidential Memo which constitutes the final eight pages of the Report.

Hydro responded by advising the requester that it had no responsive records.

The requester then clarified his request, and Hydro located two records and disclosed them in their entirety.

The requester (now the appellant) appealed Hydro's decision claiming that the search for responsive records was inadequate and that further responsive records exist. The appellant provided an extensive list of the records he believed should exist. They include records relating to fish and siltation sampling, analysis and methodologies including notes, memoranda and forms, laboratory records, notes of the members of the Expert Panel (the Panel Members), financial records, records relating to two facilities that provided fish to Hydro for the studies (the named fish holding source and an unnamed reference facility (the Facility)), drafts of the Report, and various other related records.

During the course of mediation, several events occurred. Hydro conducted several more searches and located a large number of additional responsive records. Hydro advised the appellant that access would be granted to them upon payment of a specified fee. Hydro also claimed the notes of the Panel Members were not in the custody or control of Hydro, and that records relating to the fish holding source, the Facility, and any financial records were outside the scope of the request. After reviewing the records, the appellant identified those he wished copies of, and paid $27.80 for the disclosure of 142 pages of records. The identity of the Facility, which appears on page 2b (laboratory notes) and 2g (an invoice) was the only information on these pages which was not disclosed. This name was withheld under sections 17(1)(a) and (c) of the Act (third party information).

The appellant remained dissatisfied with Hydro's response.

A Notice of Inquiry was sent to Hydro, the appellant, the Facility and two Panel Members. The Notice requested representations on four issues: (1) whether records relating to the fish holding

source, the Facility, and all financial records are outside the scope of the request; (2) Hydro's denial of access to the name of the Facility pursuant to sections 17(1)(a) and (c); (3) whether the notes of the Panel Members are within Hydro's custody or control; and (4) whether Hydro's search for responsive records was reasonable.

Representations were received from all of the parties.

## DISCUSSION:

### SCOPE OF THE REQUEST

The appellant submits that because the confidential memorandum specifically identified in his request refers to fish from both the fish holding source and the Facility, the scope of his request covers any records created by Hydro and provided to these organizations, or any records created by them and provided to Hydro, **relating to the fish sampling**. [emphasis added]

Hydro submits that records relating to the fish obtained from the two organizations for purposes relating to the report are within the scope of the request and have been provided to the appellant. Hydro takes the position that any other records relating to the two organizations **that have no relationship to the report** are outside the scope of the request. [emphasis added]

Having reviewed the representations of both parties, I have concluded that they are in fact both in agreement with which records relating to the fish holding source and the Facility are within the scope of the request. I agree with Hydro that any other records involving either organization that do not relate to the Report would be outside the scope of the request, but the appellant has not indicated that he wishes access to any such records.

Hydro also appears to have reconsidered its position with respect to the financial records. It states in its representations that "financial records relating to obtaining information to be submitted to the Panel for their consideration in reporting their assessment **is** included in the scope of the request" [emphasis added]. Hydro indicates that these records include the cost of obtaining fish, the cost of the fish, water and feed analyses, the cost of sediment sampling, etc. Hydro issued a further decision letter after receiving the Notice of Inquiry, which disclosed these types of financial records, and others, in their entirety to the appellant.

In my view, all concerns about the scope of the appellant's request have now been resolved.

Because Hydro has indicated that all responsive records have been provided to the appellant, and the appellant disagrees, the issue of the adequacy of Hydro's search for responsive records remains, and I will discuss this later in my order.

### THIRD PARTY INFORMATION

Hydro and the Facility submit that sections 17(1)(a) and (c) of the Act apply to the identity of the Facility which was severed from Records 2b and 2g. These sections state:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Hydro and/or the Facility must provide evidence that each of these elements are present in the records for which the exemption is claimed.

**Part 1**

Hydro and the Facility submit that the Facility's name represents commercial information. The appellant argues that this information cannot possibly constitute commercial information.

In Order 16, former Commissioner Sidney B. Linden addressed the issue of the name of a third party in the following manner:

> The release of the names of third party appellants is something that should be decided on a case by case basis. Ordinarily, releasing these names would not be a problem. However, if by releasing these names, the very information at issue in the appeal is released, then obviously, the names cannot be released.

While the current appeal does not involve a third party appellant, the same principle applies to an affected third party, such as the Facility in this appeal.

In Order P-493, former Inquiry Officer Anita Fineberg described "commercial information" as follows:

> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

Hydro's only submission on Part 1 is that "[d]isclosure of the record would reveal the name and address of a commercial fish farm that has commercial involvement with Ontario Hydro. Accordingly, the first part of the test is met." The Facility's representations do not deal specifically with Part 1 of the test. The appellant simply states that the name of the Facility "cannot possibly constitute a trade secret or scientific, technical, commercial, financial or labour relations information."

Two previous orders of this office have found that the mere knowledge of the identity of an affected party was sufficient to categorize the information as "commercial" (Orders 68 and 76). In my view, both of these cases are distinguishable from the records at issue in this appeal. In Order 68, the request involved the names of drug manufacturers applying to have products added to the Ministry of Health's Drug Benefit Formulary; and in Order 76 the requester sought access to a listing of dairy producers names and addresses to prepare a customer list for the sale of advertising space in its magazine. In both cases, the names themselves related directly to the "buying, selling or exchange of merchandise or services" and thereby constituted "commercial" information. In my view, the identity of the Facility in this case does not fit this category. The records themselves have already been disclosed, and I find that the identity of the Facility, which is the only undisclosed information, is in itself not a piece of "commercial" information for the purposes of section 17(1).

Therefore, Part 1 of the test has not been established.

**Part Two**

In order to satisfy part two of the test, the parties resisting disclosure must show that the information was **supplied** to Hydro, either implicitly or explicitly **in confidence**.

Although the invoice itself (Record 2g) was sent by the Facility to Hydro, only the name of the Facility remains at issue. In my view, the names of entities doing business with the government would not normally be considered to have been "supplied", simply because they appear on a piece of letterhead or an invoice. Although the content of the invoice may have been "supplied", it has been disclosed, and is no longer at issue. I find that the name, on its own, was not "supplied" for the purposes of section 17(1). As far as the lab notes (Record 2b) are concerned, they were created by Hydro staff, not the Facility and, again, I am not persuaded that the name of the Facility severed from this record would reveal information "supplied" by the Facility.

Hydro submits that the Facility has supplied fish to Hydro for a number of years and that during this time there has been an informal agreement between the Facility and Hydro that the Facility's identity and location would remain confidential. The Facility's representations do not specifically address this issue. The appellant simply states that the name of the Facility was not supplied in confidence.

Based on the representations provided by Hydro and the Facility, I am not persuaded that the Facility's identity was provided with a reasonable expectation that it be kept confidential. It may be that in its ongoing dealings with Hydro the Facility provided certain information in confidence, although that has not been established by the evidence provided by the parties in this appeal. Even if this were the case, the information contained in Records 2b and 2g would not fit this category, since both records have been disclosed to the appellant in their entirety, with the exception of the Facility's name. It is also relevant to note that the identity of the fish holding source, which also provided fish samples to Hydro, has been disclosed, with no apparent concern for confidentiality. I am unable to accept that the Facility's identity could attract the protection of section 17(1) while the other organization's identity does not.

Accordingly, I find that Part 2 of the section 17(1) test has also not been met.

**Part Three**

The essence of Hydro's representations on the harms part of section 17(1) is that if the identity of the Facility is disclosed, it may be picketed by animal activist and/or environment groups who disagree with Hydro's use of fish in their study of metal discharge. Hydro submits that this would have an adverse effect on the Facility's business, as customers would switch to competitor suppliers, which in turn would prejudice both the competitive position and the income for the Facility.

The Facility does not identify any specific harm in its representations. Rather, it feels that there is no useful purpose in releasing its identity to the appellant, and does not understand why the name should be disclosed.

The appellant submits that disclosure of the mere name of the Facility cannot give rise to a reasonable expectation that disclosure would result in any of the harms outlined in sections 17(1)(a) and (c). The appellant points out the fish holding source, whose identity has been disclosed, is more likely to suffer harm than the Facility. The appellant states:

> It is conceivable, if unlikely, that information about how the Pickering discharges affects [the fish holding source's] fish could affect its competitiveness. The [Facility], on the other hand, is located somewhere in southwestern Ontario and has nothing to do with Pickering's remissions. Its fish are only being used for the sake of comparison. If Ontario Hydro is comfortable disclosing the identity of [the fish holding source], then it should certainly be required to disclose the identity of the comparison, site, being the [Facility].

In order to meet the requirements of Part 3, the parties resisting disclosure must provide sufficient evidence to establish a reasonable expectation of one or more of the specified harms listed in sections 17(1)(a) or (c) should the information be disclosed. The expectation of harm must not be fanciful, imaginary or contrived, but rather one which is based on reason.

In my view, Hydro and the Facility have not provided me with sufficient evidence to establish a reasonably expectation of any of the articulated harms resulting from disclosure of the identity of the Facility. This is particularly the case given that all other information contained in these two records has been disclosed, and the fact that Hydro's concerns about animal rights or environmental groups would apply equally to the fish holding source, whose identity has also been disclosed.

Therefore, I find that Part 3 of the test has not been established.

Because all three parts of the test for exemption under sections 17(1)(a) and/or (c) have not been satisfied, the name of the Facility severed from Records 2b and 2g does not qualify for exemption and should be disclosed.

**CUSTODY OR CONTROL**

The appellant submits that any notes or other records created by the Panel Members during their investigation of metal emissions would be in the custody or control of Hydro. He argues that, there is a great deal of proximity between Hydro and the Panel, since it was formed by Hydro and reported its findings directly to Hydro. The appellant further submits that the Panel Members were undoubtedly compensated by Hydro and they had access to Hydro employees and records for the purpose of creating the Report.

Hydro explains that the contract with the Panel required the "production of the product of their study" and did not require the production of internal correspondence generated by the Panel Members. Hydro provides the following information regarding the creation and use of Panel Members' records, if in fact they exist:

- they would have been created by the Panel members;
- Hydro does not have possession of such records, nor does it require the production of these records;
- the Panel Members are neither officers nor employees of Hydro;
- Hydro does not have a right to possession of, and authority over, the records of the Panel Members;
- the records belong to the Panel Members;
- the records would not relate to the mandate and functions of Hydro.

In Order 120, former Commissioner Sidney B. Linden made the following comments regarding the issue of custody and control: "I feel it is important that [custody and control] be given broad and liberal interpretation in order to give effect to [the] purposes and principles [of the Act]." I agree. He went on to outline what he felt was the proper approach to determining whether specific records fell within the custody or control of an institution:

> In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.
>
> In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:
>
> 1. Was the record created by an officer or employee of the institution?

2. What use did the creator intend to make of the record?

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

5. Does the institution have a right to possession of the record?

6. Does the content of the record relate to the institution's mandate and functions?

7. Does the institution have the authority to regulate the record's use?

8. To what extent has the record been relied upon by the institution?

9. How closely is the record integrated with other records held by the institution?

10. Does the institution have the authority to dispose of the record?

> These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

A number of orders have dealt with the issue of custody and control (Orders P-239, P-271, P-326, P-396 and M-59), all of which turn on the particular circumstances of the appeal in relation to the principles enunciated by former Commissioner Linden in Order 120. Similarly, this appeal must be decided on the basis of its particular facts.

The "Terms of Reference" of the Report clearly indicate that the Panel's mandate was to prepare "a report on the data reviewed, approach and findings" and provides no reference or condition respecting Panel Members' notes or other records.

The Panel Members explain that their notes were taken to facilitate communication among themselves, and were created solely for their individual use within the context of the Panel.

They submit that their notes are their personal property, and Hydro has not asked that they be produced and has no right of possession. The Panel Members also confirm that they are not employees of Hydro.

In Walmsley and Attorney General et al. (1997), 34 O.R. (3d) 611 (C.A.), the court considered the issue of custody and control in the context of records created by members of the Judicial Appointments Advisory Committee. The Ministry of the Attorney General maintained that these notes were not under Ministry control and therefore not accessible under the Act.

The following is a quote from the court's judgement:

> It is true, as the assistant commissioner said, that the documents in question were held by these individuals because of their role in the committee and that the contents of the documents related to the work of the Ministry. While these factors are of some limited relevance to the question of Ministry control, much more important are the following considerations. Individual committee members were neither employees nor officers of the Ministry. They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry. The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess. The Ministry has no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them. While there may have been elements of agency in the relationship between individual committee members and the Ministry, nothing suggests that that agency carried with it the right of the Ministry to control these documents. Finally, there is nothing in the record that allows the conclusion that these documents were *in fact* controlled by the Ministry. Hence it cannot be said that the documents in the possession of individual committee members were under the control of the Ministry.

In my view, the findings in Walmsley are consistent with a finding that custody and control of any personal notes rests with the Panel Members, not Hydro. The notes were prepared by the Panel Members for their own information or assistance in carrying out their mandate. The Panel Members were not employees of Hydro and, as I stated earlier, the "Terms of Reference" of the Report provide no reference or condition respecting Panel Member's notes or other records. Finally, there is no indication that Hydro had a statutory or contractual right to control the records of the Panel Members.

Having carefully reviewed Hydro's and the Panel Members' representations and the circumstances of this appeal, I am satisfied that the notes are not in the custody or control of Hydro and are, therefore, not accessible under the Act.

**REASONABLENESS OF SEARCH**

Where a requester provides sufficient details about the records which he is seeking and Hydro indicates that such records do not exist, it is my responsibility to ensure that Hydro has made a reasonable search to identify any records which are responsive to the request. The Act does not

require Hydro to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, Hydro must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

By the time the Notice of Inquiry was issued in this appeal, Hydro had provided the appellant with a letter which included headings describing the records provided in response to various components of his request. The appellant responded to each heading, identifying the type of responsive records he felt should exist. Hydro's headings and the appellant's responses were included in the Notice, and the parties were asked to follow this format in making representations on the issue of reasonable search. I will also use this format in my discussion.

Under the various headings, I have indicated the specific records that the appellant believes should exist, along with his reasons for believing they exist, followed by Hydro's submissions. Hydro's representations also include an affidavit sworn by its Director, Corporate and Environmental Affairs (the Director) who oversaw the search for responsive records.

**1. First Fish Analysis**

**1(a) Procedures for handling fish for metal analysis (½-page)**

The appellant argues that Hydro repeatedly distinguishes between sampling and analysis but, that Hydro has only produced records of handling the fish for the analysis and no records relating to sampling.

Hydro explains that the first fish analysis was of fish tissue and fish feed only, and no analysis of water. Hydro explains that the fish had been obtained some considerable time earlier for a purpose unrelated to the study, and because they were available they were used for the analysis. As a result, Hydro submits that there was no fish sampling and no sampling of fish feed; it was simply collected from the reference facility.

I accept Hydro's explanation.

**1(b) & (c) Lab notes for the analysis [results of analysis] (6 pages)**

The appellant submits that Hydro has failed to produce all records relating to the analysis including the Terms of Reference and notes made in the course of the analysis. He states that e-mail copies of the results have been produced, but the original results have not, nor has Hydro produced any notes from the water or diet analysis.

Hydro re-iterates that there was no sampling and submits that it has provided the appellant with all records relating to the results of the fish and feed analysis.

I accept Hydro's explanation.

**1(d) Time sheets of the technicians who took the first fish samples (3 pages)**

The appellant submits that Hydro has only produced time sheets for one named individual, although others, in particular a second named individual, were involved. The appellant questions why these other time sheets have not been produced.

Hydro explains that the time sheets of the first named individual were provided to the appellant because he was the technician involved in the analysis. As far as the second individual is concerned, his time sheets and laboratory notes were identified after the issuance of the Notice of Inquiry and have now been disclosed to the appellant.

I accept Hydro's explanation.

**2. Second Fish Study**

**2(a) Written instructions to [a named laboratory] for the water quality analysis from the two fish farms (6 pages)**

**2(b) Written laboratory notes made by Hydro (5 pages) (severed pursuant to sections 17(1)(a) & (c) of the Act)**

**2(c) Invoices from [the named laboratory] (9 pages)**

**2(d) Written instructions to [the named laboratory] (Fish and Fish Feed analysis) (6 pages)**

**2(e) Laboratory notes from [the named laboratory] related to the fish, water and feed analysis (66 pages)**

**2(f) Time sheets of Hydro employees involved in the analysis (includes second fish analysis and water analysis) (6 pages)**

Because these items are inter-related, I will deal with them together.

The appellant submits that Hydro has not produced written instructions to the named laboratory, and Hydro should be compelled to produce any correspondence with this organization. This would include records for the second fish analysis, such as lab notes made by individuals other than Hydro staff, any records of the diet of the fish, work orders, project approval forms, invoices and proof of payment. The appellant also submits that no time sheets have been provided for the analysis of the diet, and that only two time sheets have been produced for other analyses. The appellant has difficulty believing that there were not more people involved in the second fish analysis.

Hydro submits that although records responsive to items 2a and 2d are not within its custody and control, it obtained these records from the named laboratory and provided them to the appellant

in an effort to settle the appeal. Hydro states that there were no written instructions to the named laboratory and that the six pages of records disclosed under these two headings consist of notes taken by laboratory employees of verbal instructions conveyed by Hydro.

With respect to item 2c, Hydro states that invoices for the named laboratory were provided to the appellant and argues that "proof of payment" records relate to Hydro's internal account payable system are outside the scope of the request. I agree. In addition, the affidavit of the Director indicates that additional laboratory notes from laboratories operated by Hydro (item 2b) which had anything to do with the fish analysis, and responsive portions of Project Approval forms (item 2c) used within Hydro to account for work performed by Hydro laboratories were disclosed to the appellant following the issuance of the Notice of Inquiry, as were records responsive to item 2f.

Finally, with respect to item 2e, Hydro points out that the appellant has been provided with the Certificates of Analyses from the named laboratory, which is the record Hydro requires in response to a request for analysis. Hydro submits that it has no knowledge of any notes that would have been prepared by the named laboratory and that any such notes would be in the custody and control of the laboratory, not Hydro.

I accept Hydro's explanations.

**NOTE:**

**1. For the first fish analysis, there are no records of fish weight. However, I am advised the trout were 300 g each based on a visual calculation. Fish fillets only were used from the small mouth bass and sucker analysis.**

The appellant argues that there must have been records related to the sampling and weighing of these fish because the sampling was done some time ago and individuals would not remember the fish weights.

Hydro explains that they advised the appellant that the weight of the fish was estimated based on a visual calculation. Hydro points out that the estimated weight of the fish is not an issue in the analysis and procedures for handling fish for metal analysis.

I accept Hydro's explanation.

**2. Invoice #32940 dated 27 June 1997 refers to Soil Samples. This was in fact fish diet samples**

The appellant argues that all financial records relating to the fish, water and diet analyses should be disclosed by Hydro.

Hydro points out that all responsive financial records that fall within the scope of the appeal have been provided to the appellant.

I accept Hydro's explanation.

**3. Records relating to the sediment studies**

**3(a) Reports of major studies on CCW Plume- selected pages only (27 pages)**

**3(b) Methodology used for sediment sampling at Pickering NGFS (2 pages)**

**3(c) Service contract for sampling**
**Maps showing locations of the sample points (5 pages)**
**Note: These maps were appended to the report of the Expert Panel**

The appellant submits that Hydro has only produced records relating to sediment sampling but not analysis. He adds that two soil samplings occurred, one in August 1996 and the other in October 1996, but that records have only been produced for the first sampling. Consequently, the appellant argues that additional records relating to who did the sampling and analyses, when they were done, how they were done, and what method of analysis was used should be disclosed by Hydro.

Hydro states that additional records in relation to sediment sampling were located and have now been disclosed to the appellant. These records include handwritten notes, several computer printouts, e-mails, client billing worksheets and the responsive portion of a "Head Office Project Report".

I accept Hydro's explanation.

In addition to the foregoing submissions respecting specific records, the appellant adds that Hydro's initial response to the request was that no responsive records exist but, while Hydro has "retreated" from that position and provided access to records, it has attempted to produce as few documents as possible.

Hydro acknowledges that it initially responded to the request by claiming that no records exist. However, following meetings with the appellant and discussions with the Appeals Officer assigned to mediate the appeal, Hydro conducted several searches and located a number of responsive records which were disclosed to the appellant in their entirety, with the exception of the name of the Facility severed from two records. Hydro also points out that additional responsive records were identified during the course of this inquiry, and disclosed in full to the appellant.

The Director's affidavit also details the steps that were taken to search for all responsive records. These steps included meetings with the appellant, meetings with several senior members of Hydro staff, discussions with the Panel Members and searching for records despite Hydro's belief that the appellant was expanding the scope of his request. The Director points out that in reviewing the Notice of Inquiry, a further search was conducted and the additional records noted above were located and provided to the appellant. Accordingly, as a result of all of these steps, Hydro submits that it has taken all reasonable steps to locate the responsive records and that no other responsive records exist.

Having reviewed the representations of the appellant and Hydro, and thanks to extensive mediation efforts by the Appeals Officer, it is my view that Hydro has now provided me with sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all records responsive to the request.

Therefore, I find that the searches by Hydro were reasonable under the circumstances of this appeal.

## ORDER:

1. I order Hydro to disclose to the appellant Records 2b and 2g in their entirety by sending the appellant a copy no later than **July 3, 1998** but not before **June 29, 1998**.

2. I find that the search by Hydro was reasonable, and this part of the appeal is dismissed.

3. I find that the Panel Members' notes are not in Hydro's custody or control, and this part of the appeal is dismissed.

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

Original signed by: May 29, 1998
Tom Mitchinson
Assistant Commissioner