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

ORDER PO-2606

Appeal PA-050217-2

Hydro One

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

Hydro One received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "all letters, emails, memos or any other communications relating to [the requester]".

Hydro One initially issued a decision in which it refused to confirm or deny the existence of the requested records under section 14(3) of the *Act*. The requester (now the appellant) appealed that decision, and Appeal PA-050217-1 was opened. That appeal was resolved by Order PO-2450, in which I determined that section 14(3) did not apply and ordered Hydro One to issue a revised decision letter to the appellant.

Hydro One issued a revised decision in which it denied access to certain responsive records in full, citing section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(e) (endanger life or safety), 19 (solicitor-client privilege) and 20 (danger to health or safety); as well as section 49(b) (invasion of privacy) with reference to the factors in sections 21(2)(d), (e) and (f). In its decision letter, Hydro One also stated that the exemptions would cover approximately 90% of all information in the records, leaving "no substantive information" available to the appellant. Therefore, Hydro One denied access to the records in full. Hydro One also identified in its decision letter that it had excluded two categories of records from the request: 1) records in which the appellant was the original recipient, and 2) records that were covered by other requests filed by the requester.

The appellant appealed Hydro One's access decision, and the current appeal (PA-050217-2) was opened.

During the mediation process, Hydro One provided the appellant with a further decision letter which clarified a paragraph from the earlier access decision. Also during mediation, the appellant identified that, in addition to appealing the access decision, he believed that additional responsive records exist. He stated that he believed records (particularly emails) predating the earliest date of the records identified as responsive to his request, existed. In addition, he referred to a transcript which he states references information not included in the responsive records.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to Hydro One, initially, and Hydro One provided representations in response. I then sent the Notice of Inquiry, along with the non-confidential portions of Hydro One's representations, to the appellant. The appellant did not provide me with representations in response.

RECORDS:

The records at issue are the nine records identified in the index of records. They include an incident report and eight records containing emails or email strings.

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

Hydro One states that, while certain information contained in the records is recorded in a business context, "… some of the information is clearly [the appellant's] personal information (as this term is defined in the *Act*) ... as well as personal information about individuals other than [the appellant]." Furthermore, by relying on the exemption in section 49(a) and (b) for each of the records at issue, Hydro One appears to be taking the position that all of the records contain some personal information relating to the appellant.

Analysis and findings

On my review of the records, I find that all of them contain the appellant's personal information, including the appellant's name, the views or opinions of another individual about the appellant (paragraph (g) of the definition), as well as the appellant's name where it appears with other personal information relating to him (paragraph (h) of the definition).

In addition, I find that some of the records contain information about other individuals in their capacity as staff of Hydro One. However, many of the records also contain the personal information of individuals other than the appellant (the affected parties) including, in some cases, their names, their personal opinions or views (paragraph (e) of the definition), the views or opinions of another individual about them (paragraph (g) of the definition), as well as their names where they appear with other personal information relating to them or where the disclosure of their name would reveal other personal information about them (paragraph (h) of the definition). Specifically, I find that Records 1, 3, 4, 5, 7, 8 and 9 contain the personal information of individuals other than the appellant.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Under section 49(a), Hydro One has the discretion to deny the appellant access to his own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this appeal, Hydro One relies on section 49(a) in conjunction with sections 19, 20 and 14(1)(e) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

Hydro One submits that section 19 of the *Act* applies to Record 7. When the request in this matter was filed, section 19 read as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

Hydro One's representations

In its representations, Hydro One refers to litigation that the appellant has been involved in. In support of its position that Record 7 qualifies for exemption under section 19, Hydro One states:

> Some of the responsive records contain legal advice provided by Hydro One's counsel to [Hydro One] staff regarding [matters] in which the appellant is/was

> involved or … communications from Hydro One staff to Hydro One counsel for legal advice. [Record 7 consists] of direct communications of an implicit confidential nature between Hydro One counsel and Hydro One staff.…

Hydro One also states that the solicitor client privilege was not lost through waiver.

Analysis and findings

I have carefully reviewed Record 7, which is a string of emails, and I am satisfied that this record meets the solicitor-client communication privilege test set out above. The record consists of email communications between Hydro One (through its agents or employees) and Hydro One's legal counsel, made for the purpose of seeking, formulating and/or giving legal advice with respect to certain identified issues. Record 7 clearly contains a specific request by Hydro One staff to its counsel for the provision of legal advice. This record also contains counsel's response, which consists of legal advice prepared by counsel and communicated back to Hydro One staff. Hydro One has also provided evidence that these communications were made in confidence. Accordingly, I am satisfied that Record 7 constitutes direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.

In addition, although not all of the exchanges contained in the email string which constitutes Record 7 contain the specific legal advice or request, I find that these communications fall within the ambit of the solicitor-client communication privilege on the basis that they form part of the "continuum of communications" passing between Hydro One staff and legal counsel, as contemplated in *Balabel* [cited above].

Accordingly, I find that Record 7 is subject to solicitor-client communication privilege under Branch 1 of section 19 of the *Act*, and qualifies for exemption under section 49(a).

Danger to Safety or Health

Hydro One also claims section 49(a) in conjunction with section 20 as a basis for denying access to Records 1, 2, 3, 4, 5, 6, 8 and 9.

Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated (*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Ministry of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)). The Court of Appeal has stated that, in reviewing whether section 20 of the *Act*

applies in a given situation, the expectation of harm must be reasonable, but it need not be probable *(Ministry of Labour)*.

In its representations, Hydro One refers to a number of reasons why it believes that section 20 applies in the circumstances of this appeal. In my view, with one exception, the reasons referred to by Hydro One are not persuasive, as they do not provide sufficient evidence to support a finding that section 20 applies. The one exception, however, is Hydro One's reference to the existence of possible threats made by the appellant. In support of its position that section 20 applies, Hydro One refers to excerpts from a transcript, which was initially provided to this office by the appellant. The referenced portions of the transcript refer to alleged threats.

In this appeal, I provided the appellant with the opportunity to provide representations in response to Hydro One's position that the referenced exemptions, including section 20, apply to the records at issue. I shared the relevant portions of Hydro One's representations, including the references to the transcript evidence, with the appellant. As identified above, the appellant chose not to provide representations in this response to the invitation to do so.

In the particular circumstances of this case, and in the absence of representations from the appellant, I find that Hydro One has demonstrated that there is a reasonable basis for believing that endangerment could reasonably be expected to result from disclosure of the records, and its reasons for resisting disclosure are not frivolous or exaggerated. Although I may not be convinced that the expectation of harm is probable, the Ontario Court of Appeal has stated that, in order for section 20 to apply, the expectation of harm must be reasonable, but need not be probable. In this appeal I have been provided with sufficient evidence to satisfy this standard and, accordingly, I find that Records 1-6 and 8 qualify for exemption under section 20, and are exempt on the basis of section 49(a) of the *Act*.

EXERCISE OF DISCRETION

General principles

The sections 19, 20 and 49(a) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so. In addition, this office may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

If any of these circumstances are present, the matter may be sent back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution.

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Hydro One identifies the factors it considered in deciding to exercise its discretion not to disclose the records in this appeal. Their representations on this issue were shared with the appellant.

Having reviewed the reasons and rationale provided by the Hydro One for exercising discretion under section 49(a) in conjunction with sections 19 and 20 of the *Act*, I find nothing improper in the manner in which it exercised its discretion. Accordingly, I uphold Hydro One's decision to withhold the records under section 49(a) of the *Act*.

Having found the records to be exempt from disclosure under section 49(a), it is not necessary for me to review the possible application of sections 14(1)(e) or 49(b).

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether Hydro One has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of Hydro One will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statement.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution 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, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

In its representations on the issue of whether it conducted a reasonable search for responsive records, Hydro One reviews the searches conducted for responsive records, and maintains that it made "diligent efforts" to identify and locate responsive records. Hydro One then states that it:

- conducted searches of offsite storage locations and Hydro One offices where any records responsive records could possibly have been stored;

- conducted searches of electronic document servers and backups for any responsive records; and

- interviewed current Hydro One employees who may be aware of responsive records.

Hydro One then confirms that the requested information relates to an area of operation which was divested and shut down by Hydro One in 2002, and that much of the information which may have at one time existed should have been destroyed, with the remainder transferred to new owners, when the assets of the business were sold. Hydro One confirms that, given the fact that the business was divested in 2002, the number of identified responsive records were in fact "more than [Hydro One] would reasonable have expected to find …."

Analysis

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether Hydro One has conducted a reasonable search for the records as required by section 24 of the *Act*. In this appeal, if I am satisfied that Hydro One's search for responsive records was reasonable in the circumstances, its decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

Although the appellant was invited to provide representations on whether additional responsive records exist, and to provide any documents and/or other relevant evidence which support the position taken, the appellant provided no additional information in support of the position that additional responsive records exist.

Hydro One has provided a clear and detailed description of the efforts it undertook to locate records responsive to the appellant's request, as well as a reasonable explanation as to why additional responsive records were not located. Based on the information provided by Hydro One, I am satisfied that its search for records responsive to the request was reasonable in the circumstances.

ORDER:

I uphold the decision of Hydro One.

Original Signed by: August 27, 2007
Frank DeVries
Adjudicator