

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3583

Appeals PA14-495 and PA14-518

Hydro One

March 9, 2016

Summary: Hydro One Inc. (Hydro One) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for access to information relating to a specific wind energy project for the time period of February 18, 2014 to June 23, 2014 (the date of the request). Hydro One denied access to a portion of one page of the records, citing the mandatory third party information exemption in section 17(1). It also denied access to certain portions of the records as being non-responsive to the request. The requester appealed Hydro One's decision. The affected party also appealed Hydro One's decision, claiming that portions of two additional pages were exempt by reason of section 17(1).

The order upholds the application of section 17(1) to the two pages in the affected party's appeal, but does not uphold this exemption as applied by Hydro One to the other page of the records at issue. This order also upholds Hydro One's decision concerning the information deemed by it to be non-responsive to the request.

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

OVERVIEW:

[1] Hydro One Inc. (Hydro One) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to information relating to a specific wind energy project (the project) for the time period of February 18, 2014 to June 23, 2014 (the date of the request).

[2] Hydro One located 75 pages of records responsive to the request and wrote to an affected party to seek its position on the disclosure of the records. The affected party submitted representations to Hydro One, providing partial consent to the disclosure of the records.

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

[4] Hydro One subsequently issued a revised decision to both the requester and the affected party explaining that Hydro One's decision on one page of the records had been changed. Hydro One advised that it had now decided to deny a portion of page 4 pursuant to the mandatory third party information exemption in section 17(1) of the *Act*.

[5] The requester filed an appeal of Hydro One's decision and Appeal PA14-495 was opened.

[6] The affected party also filed an appeal of Hydro One's decision and PA14-518 was opened.¹

The requester appeal PA14-495

[7] During the course of mediation, the requester advised the mediator that he was not pursuing access to the information withheld pursuant to section 21(1) of the *Act*. As such, the information denied pursuant to section 21(1) is not at issue in this appeal.

[8] However, the requester advised that he wished to pursue access to the information denied pursuant to section 17(1) of the *Act*. Specifically, he is seeking access to the information located on page 4.

[9] The requester also advised that he wished to pursue access to some of the information severed as not responsive to the request. Specifically, portions of emails chains severed on pages 5, 6, 48 and 49. Therefore, the responsiveness of these pages is an issue in this appeal.

[10] Accordingly, these are the only records remaining at issue in the requester's appeal.

The third party appeal PA14-518

[11] The affected party advised the mediator that it had reconsidered its position and

¹ I will be referring to both appellants as the requester and the affected party in this order.

now consented to the disclosure of additional information, specifically information on pages 13, 16, 25 and 42. However, the third party continued to object to Hydro One's decision to disclose to the requester all of pages 38 and 40, and portions of pages 1, 3, 37 and 47 as it believes this information should be denied pursuant to section 17(1) of the *Act*.

[12] The mediator forwarded the third party's consent for disclosure to Hydro One.

[13] Hydro One then disclosed to the requester pages 3, 37 and 47 in full and page 4 in part.

[14] Accordingly, a portion of page 4 and pages 38 and 40 is the only information remaining at issue in the third party appeal.

[15] As mediation did not resolve these appeals, the files were transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I sought representations from Hydro One, the affected party and the requester as to the information remaining at issue in the records in accordance with section 7 of the *IPC Code of Procedure and Practice Direction 7*.

[16] In this order, I partially uphold the application of section 17(1). I also uphold Hydro One's decision concerning the information deemed by it to be non-responsive to the request.

RECORDS:

[17] The records remaining at issue consist of email chains and an email attachment.

ISSUES:

A. Does the mandatory third party information exemption at section 17(1) apply to pages 4, 38, and 40 of the records?

B. Are pages 5, 6, 48, and 49 of the records responsive to the request?

DISCUSSION:

A. Does the mandatory third party information exemption at section 17(1) apply to pages 4, 38, and 40 of the records?

[18] The affected party relies on sections 17(1)(a) and (c), which read:

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;

[19] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.² Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.³

[20] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[21] Hydro One did not provide representations on section 17(1). It only applied section 17(1) to the information at issue on page 4 and not to the information at issue on pages 38 and 40.

[22] The affected party claims that section 17(1) applies to pages 4, 38, and 40. It states with respect to part 1 of the test, that the records contain commercial information supplied to Hydro One concerning the project. In particular, it states that the records contain non-public correspondence relating to the Connection Cost Agreement (CCA) for the project between it and Hydro One, including costs, deliverables, and scheduling. According to the affected party, all of the redacted information relates to and facilitates the affected party's commercial enterprise of

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

developing wind energy projects for profit.

[23] The requester did not provide representations on part 1 of the test under section 17(1).

Analysis/Findings re: part 1

[24] Based on my review of the information at issue in pages 4, 38, and 40 of the records, I agree with the affected party that they contain commercial information related to the sale of the affected party's services to Hydro One for the project. This type of information listed in section 17(1) has been discussed in prior orders:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

[25] Page 38 also contains financial information as it reveals costing information. This type of information has also been discussed in prior orders as follows:

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁶

[26] Therefore, part 1 of the test under section 17(1) has been met for the information at issue for pages 4, 38, and 40 of the records.

Part 2: supplied in confidence

Supplied

[27] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁷

[28] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate

⁴ Order PO-2010.

⁵ Order P-1621.

⁶ Order PO-2010.

⁷ Order MO-1706.

inferences with respect to information supplied by a third party.⁸

In confidence

[29] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁹

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.¹⁰

[31] The affected party states that the records contain information that was supplied by it, either explicitly or implicitly, to Hydro One pursuant to a business relationship in which correspondence and shared information were expected to remain confidential. It states that the records contain information that was submitted to facilitate the development of the project and, in light of anti-wind coalitions attempting to halt proposed wind energy projects in Ontario, it has consistently acted with due caution to protect the information in the records from disclosure.

[32] The affected party further states that for the portions of the records not directly supplied by it, one could reasonably draw accurate inferences about information that was originally supplied in confidence. As an example it points to page 40 of the records, which it states contains a timeline for various activities and milestones based on information supplied in confidence by it.

[33] The affected party also states that in instances where Hydro One created a specific record, such as page 38 of the records relating to the costs of the CCA, such a record would have only been generated from the information supplied by affected party and, accordingly, disclosure would reveal the information originally supplied by it.

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

¹⁰ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[34] The requester submits that the "updated property descriptions" on page 4 of the records are non-confidential information. He further states that page 38 is an attachment to page 37, described as "cost report up to and including May 31, 2014". He states that page 40 is an attachment to page 39, described as "Cover Activity Schedule".

[35] The requester submits that Hydro One has not identified in any previous decisions that the Cost Report or the Cover Activity Schedule was subject to any exemptions and has disclosed in full such records in response to each of the requester's previous access requests. He also states that the affected party has not previously claimed that the exemptions at section 17(1) apply to this type of information.

[36] In reply, the affected party states that it has consistently maintained in these, as well as other appeal proceedings, that all sensitive financial and commercial information related to its dealings with Hydro One is subject to the third party disclosure exemption, such as that found on pages 38 and 40 of the records.

Analysis/Findings

[37] Page 4 is part of an internal Hydro One email chain. At issue on page 4 is the legal property description for the project to be included in the CCA. This legal description describes where the project is located. Based on my review of the internal email chain in its entirety, I find that the information at issue on page 4 is not information, although supplied, was not supplied in confidence. I find that the information at issue, the legal description of where the project is located, is information that was not prepared for a purpose that does not entail disclosure. I have no evidence that the location of the project is information that is not otherwise disclosed or available from sources to which the public does not have access nor that it was prepared for a purpose that would not entail disclosure. Therefore, I find that part 2 of the test has not been met for this information.

[38] Page 38 is a Cost Report prepared by Hydro One. It is an attachment to page 37, which has been disclosed to the requester. Page 38 includes the actual and forecasted costs for the project. Based on my review of this record, I agree with the affected party that it was supplied in confidence by it to Hydro One. The information contained therein outlines in detail the actual and forecasted costs that the affected party has incurred or may incur to complete the project.

[39] Page 40 of the Records is entitled "Customer Deliverables and Activity Schedule", and contains a detailed timeline for various activities and milestones based on information supplied in confidence by the affected party to Hydro One. Based on my review of this record, I agree with the affected party that it was supplied in confidence by it to Hydro One. The information contained therein outlines in detail the dates and steps of the project that the affected party has or will complete.

[40] In conclusion, I find that page 4 has not been supplied in confidence to Hydro One by the affected party and part 2 of the test has not been met for this information. As no other exemptions have been claimed for this information, I will order page 4 of the records disclosed.

[41] I have found that pages 38 and 40 of the records meet part 2 of the test. I will now consider whether these two pages meet part 3 of the test under section 17(1).

Part 3: harms

[42] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹¹

[43] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹²

[44] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 17(1).¹³

[45] The affected party states that the information on pages 38 and 40 of the records relates to costs, deliverables, and scheduling, which is confidential financial and planning information that should not be publicized to the public as competitors could use this information to its detriment.

[46] The affected party further states that disclosure of the redacted information can reasonably be expected to significantly harm its competitive position, significantly interfere with ongoing contractual negotiations, and cause it undue loss. It states:

The decision to disclose or not disclose information relating to a commercial venture by a third party should be approached with a view to the “commercial realities” of the relevant government approval process or the industry (Order PO-2965).

¹¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹² Order PO-2435.

¹³ Order PO-2435.

[The affected party] is in the business of developing wind energy projects, both in Ontario and other jurisdictions. [It] currently has four wind projects underway and two wind projects in commercial operation in Ontario. There has been vocal resistance from anti-wind coalitions against wind energy projects in Ontario, as well as against [the affected party's] projects in particular. Despite the provincial government's promotion of sustainable energy sources to improve Ontario air quality by streamlining the approvals process for energy developers, anti-wind activists have gone out of their way to slow down or thwart wind energy projects. For example, there have been lawsuits filed against [it], as well as landowners who have entered into commercial agreements with [the affected party] to host turbines and other infrastructure.

[47] The affected party is concerned that disclosure of the information at issue could impact not only future negotiations with Hydro One regarding ongoing and future wind projects, but also credit agreement assumptions with lenders providing financing for such projects. It further states that disclosure will also prejudice it in similar approvals and development processes in other jurisdictions.

[48] The requester points out that Hydro One did not decide to apply section 17(1) to pages 38 and 40 and that, in his experience, the affected party has not previously claimed the section 17(1) exemption for this information. He also refers to the affected party's pending Renewable Energy Approval (REA) application as a reason for this information to be made public.

[49] In reply, the affected party states that it has consistently maintained in these, as well as other appeal proceedings, that all sensitive financial and commercial information related to its dealings with Hydro One is subject to the third party disclosure exemption. It further states that the substantive merit of the REA application is irrelevant to the consideration of whether to disclose information relating to the Connection Cost Agreement, which includes the information found in pages 38 and 40. It further states that Hydro One is not involved in the review and consideration of a REA application and its role is only to facilitate the connection of renewable generating facilities to the electricity distribution system.

Analysis/Findings

[50] Based on my review of the information at issue in pages 38 and 40 of the records, I agree with the affected party that disclosure of pages 38 and 40 of the records could reasonably be expected to significantly prejudice its competitive position or interfere significantly with its contractual negotiations under section 17(1)(a), or result in undue loss to it under section 17(1)(c).

[51] The pages at issue contain detailed financial and commercial information about the affected party's ongoing wind project. As referred to above, these records contain

non-public correspondence relating to the Connection Cost Agreement (CCA) between the affected party and Hydro One, including costs, deliverables, and scheduling. I agree with the affected party that disclosure could reasonably be expected to cause the harms set out in its representations. I find the requester's arguments about Hydro One's position on these two pages and the pending REA application not relevant to whether part 3 of the test under section 17(1) has been met.

[52] In conclusion, as part 3 of the test has been met for pages 38 and 40, I find that this information is exempt under section 17(1).

B. Are pages 5, 6, 48, and 49 of the records responsive to the request?

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

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

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

[54] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹⁴

[55] To be considered responsive to the request, records must "reasonably relate" to the request.¹⁵

[56] The affected party states that it is not in a position to respond to this issue as it does not have access to the information in the portions of these pages at issue redacted by Hydro One.

[57] Hydro One states that the requester has made a total of eight access requests,

¹⁴ Orders P-134 and P-880.

¹⁵ Orders P-880 and PO-2661.

one of which is this request. Accordingly, it submits that there was no need for Hydro One to clarify the request with the requester. It states that this request was identical to the previous requests made by the requester and provided sufficient detail to identify the records or portions of records that were responsive to this request.

[58] The requester states that pages 48 and 49 are contained in pages 5 and 6 of the records at issue, which include one additional email in the chain. Therefore, he states that pages 48 and 49 are redundant to his request. The requester submits that the same pages (date; time) and email chains are contained in many records (containing identical redactions in part) previously released to him by Hydro One.

[59] In reply, Hydro One states that it is clear on the face that these redacted portions of the record relate to email correspondence that falls outside of the February 18, 2014 to June 23, 2014 time period for the requested records. It also points out that if the requester wanted continuing access to information, he could have made a continuing access request as he would have been entitled to do pursuant to *FIPPA*.

Analysis/Findings

[60] I find that the redacted emails are all dated 2013 and are outside the scope of the request, which sought records for the time period of February 18, 2014 to June 23, 2014. The requester has previously sought the same records for 2013 related to the wind project, as set out in Hydro One's representations.

[61] I find that the information at issue in pages 5, 6, 48, and 49 is not responsive to the requester's request. Therefore, I am upholding Hydro One's decision to withhold this information.

ORDER:

1. I order Hydro One to disclose the information at issue on page 4 of the records to the requester by **April 15, 2016** but not before **April 11, 2016**.
2. I uphold Hydro One's decision to withhold the remaining information at issue in the records.

Original Signed by: _____
Diane Smith
Adjudicator

March 9, 2016
