



Order F23-01

BC HYDRO AND POWER AUTHORITY

Jay Fedorak
Adjudicator

January 10, 2023

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Summary: An applicant submitted a request to the BC Hydro and Power Authority (BC Hydro) for copies of appendices to a Site C Quarterly Progress Report. BC Hydro responded to the request withholding some information under s. 17(1) (disclosure harmful to a public body's financial interests) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that s. 17(1) applied to the information and confirmed the decision of BC Hydro to withhold it.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 17(1), 17(1)(d), 17(1)(e), 17(1)(f).

INTRODUCTION

[1] A journalist (applicant) submitted a request, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to the BC Hydro and Power Authority (BC Hydro) for copies of three appendices to a BC Hydro Site C Quarterly Progress Report (Report). BC Hydro submitted the Report to the BC Utilities Commission (BCUC). The appendices include the following information: summaries of contracts exceeding \$10 million; project progression; and detailed project expenditure. BC Hydro responded by providing copies of the appendices, while withholding some information under s. 17(1) of FIPPA, on the grounds that disclosure could harm its financial interests.

[2] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review BC Hydro's response. Mediation was unable to resolve the matter and the applicant requested that it proceed to an inquiry.

ISSUE

[3] The issue I must decide in this inquiry is whether s. 17(1) authorizes BC Hydro to withhold the information at issue under s. 17(1).

[4] Under s. 57(1), BC Hydro has the burden of proving that the applicant has no right of access to the information it withheld under s. 17(1).

DISCUSSION

[5] **Background** – The Site C project involves the construction of a third dam and hydroelectric generating station on the Peace River in northeastern British Columbia. BC Hydro files quarterly progress reports with BCUC four times every year during the life of the project. Both BC Hydro and BCUC make these reports available to the public on their websites. The three appendices at issue in this inquiry are not included with the published version of the quarterly report of which they form part. BCUC rules of practice and procedure permit BC Hydro to file certain information with the understanding that the BCUC will not disclose it publicly. BC Hydro filed these appendices on the understanding that BCUC would not disclose them.

[6] **Information at issue** – At the inquiry, BC Hydro disclosed to the applicant some of the information that it originally withheld. The information remaining at issue is in the following two appendices attached to the Report:

- Appendix B: Summary of Contracts Exceeding \$10 million; and
- Appendix D: Detailed Project Expenditure.

[7] The responsive records consist of 13 pages in total. BC Hydro now has disclosed 11 of the 13 pages in their entirety.

[8] Appendix B is a table listing 11 contracts in excess of \$10 million. BC Hydro withheld the dollar values in the “Contract Contingency at Award” and “Internal Contract Value at Award” columns.

[9] The information BC Hydro withheld from Appendix D is in a table titled “Allocation of Contingency to Work Packages as of March 31, 2017”. BC Hydro withheld some of the dollar values in the “Contingency Budget”, “Forecast Allocation” and “Balance Remaining” columns.

Financial or economic harm - s. 17(1)

[10] BC Hydro is relying on s. 17(1) of FIPPA to withhold the information at issue. Section 17(1) authorizes a public body to refuse to disclose information that could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that

government to manage the economy. Subsections (a) to (f) of s. 17(1) are examples of the types of information that, if disclosed, could reasonably be expected to cause harm under s. 17(1). However, information that does not fit under subsections (a) to (f) may still fall under the general provision of s. 17(1) as information that, if disclosed, could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy.¹

[11] The parts of s. 17(1) that are relevant to this inquiry reads as follows:

17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the government of British Columbia;

(f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[12] Subsections 17(1)(a) to (f) are merely examples of information that might fall within s. 17(1). It is not enough for a public body to demonstrate that one or more of the provisions of ss. 17(1)(a) to (f) apply. It must also demonstrate that disclosure of the information at issue could also reasonably be expected to result in financial or economic harm to a public body or the government of British Columbia or the ability of that government to manage the economy.²

[13] Section 17(1) uses the language “could reasonably be expected to harm.” Previous orders and court decisions have established that public bodies must prove that disclosure will result in a risk of harm that goes “well beyond the merely possible or speculative”.³ The Supreme Court of Canada describes this standard as “a middle ground between that which is probable and that which is merely possible”.⁴ A public body must provide evidence to demonstrate that

¹ Order F14-31, 2014 BCIPC 34 (CanLII), para. 41.

² Order F19-03, 2019 BCIPC 4 (CanLII), para. 22.

³ *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, para. 206.

⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC, para 54.

disclosure will result in a risk of harm that is “well beyond” or “considerably above” a mere possibility of harm in order to meet the standard.⁵ The evidence it provides must demonstrate “a clear and direct connection between the disclosure of specific information and the harm” that it alleges.⁶

[14] BC Hydro submits that disclosing the information at issue would reveal the amount of money it has set aside for contract contingencies and would, therefore, harm its financial interests in accordance with s. 17(1). It explains that, during major construction projects, unforeseen issues may arise that cause cost increases. It states the parties will negotiate the resolution of these issues, which sometimes requires additional payments to the contractor. In anticipation of these potential cost increases, BC Hydro submits it sets aside a contingency amount at the time it enters into the contract. It explains that this contingency is a reserve of a reasonable amount to cover possible issues or disputes that may arise between the parties during the fulfillment of the contract.⁷

[15] BC Hydro submits that, if the contractor knew the amount in the contingency reserve, this knowledge would harm the position of BC Hydro during negotiations over additional payments to the contractor. It argues the contractor would know the complete extent of the funds available and would reasonably attempt to obtain the full amount.⁸ BC Hydro cites the decision in Order F18-51 in support of its position. That case involved Site C project contingencies and the same applicant. In that decision, the adjudicator found that the contingency figures were equivalent to an insurance company’s claims reserves, which previous orders had found were subject to s. 17(1).⁹

[16] BC Hydro recognizes that s. 17(1) does not apply to contingency funds already spent. It submits that some of the information that remains at issue constitutes contingency funds that it has not spent. It also asserts that the disclosure of the other information at issue would permit a reader to infer unspent contingency amounts. For example, BC Hydro indicates that the severed figures in Appendix B represent contingency amounts that it allocated to each contract at the time of the award and “the internal contract value” of each. The “internal contract value” consists of the combined amounts of the “contract value at award” plus the amount of contingency that BC Hydro has assigned to the contract. It argues that it is necessary to withhold the “internal contract value” because the total “contract value at award” is publicly available and subtracting the “internal contract value” from the “contract value at award” would reveal the contingency amount.¹⁰

⁵ Order F17-01, 2017 BCIPC 1 (CanLII), para. 21.

⁶ Order 02-50, 2002 BCIPC 42486 (CanLII), para. 137.

⁷ BC Hydro’s initial submission, para. 14.

⁸ BC Hydro’s initial submission, para. 14.

⁹ BC Hydro’s initial submission, para. 15; Order F18-51, 2018 BCIPC 55 (CanLII).

¹⁰ BC Hydro’s initial submission, para. 17.

[17] BC Hydro submits that the information withheld in Appendix D indicates the amount of the project contingency budget, “the forecast allocation” and “the balance of contingency for work packages”.¹¹ BC Hydro states the forecast allocation includes adjustments based on new information and the balance remaining indicates the current unspent contingency. It further states that some of the work packages relate to specific contracts with specific contractors that are still active and that the contingency amounts are unknown to the current contractors. BC Hydro argues that disclosure of these amounts to a contractor would reveal, or enable the contractor to infer, the contingency amount and the contingency percentage relating to their contract. It argues this knowledge would assist contractors in maximizing the amount that BC Hydro would pay out as part of the resolution of a dispute over a change to the contract. BC Hydro adds that knowledge of the contingency percentage that BC Hydro has allocated to these contracts would also enable other contractors to apply that percentage to other contracts.¹² This would enable contractors with other contracts to calculate the contingencies that BC Hydro has assigned for those other contracts as well.

[18] In support of its position, BC Hydro has submitted an affidavit from a BC Hydro director with experience delivering capital projects for BC Hydro. It states he is knowledgeable about contract and cost management and contractor behaviour.¹³ The director attests that project and contract contingencies are the most sensitive types of information for negotiating purposes, particularly for ongoing projects like Site C. The director states the information at issue reveals the financial negotiating range that BC Hydro has for the resolution of cost disputes with contractors. Disclosure would harm BC Hydro’s negotiating position, in the director’s opinion, as it would reveal how much BC Hydro was prepared to pay. He asserts that this information would lead to contractors increasing their financial demands in any negotiation to resolve disputes over cost changes to the contract.¹⁴

[19] The applicant rejects the submissions of BC Hydro. He submits that the passage of time has reduced the prospect of harm and that the arguments of BC Hydro are speculative.¹⁵ This is the extent of the applicant’s submission with respect to the application of s. 17(1).

¹¹ BC Hydro defines the “forecast allocation” as an updated allocation of contingency to work packages based on updated information and the “balance remaining column” as the available remaining contingency.

¹² BC Hydro’s initial submission, paras. 19-20.

¹³ BC Hydro’s initial submission, para. 22; Affidavit 1.

¹⁴ Affidavit 1, para. 25.

¹⁵ Applicant’s response submission, paras. 3 and 7.

Analysis and findings on s. 17(1)

[20] I have reviewed the information that BC Hydro withheld and can confirm that it relates to amounts of contingencies. This includes the amounts for “Contract Contingency at Award”, “Internal Contract Value at Award”, “Contingency Budget”, “Forecast Allocation”, and “Balance Remaining”. Disclosure of any of this information would directly reveal the value of contingencies that BC Hydro has assigned or would enable the reader to infer the financial value of contingencies that BC Hydro has assigned.

[21] The matter at issue is whether BC Hydro has met its burden of proof that disclosure could be reasonably expected to harm its negotiating position or result in undue financial gain to a third party, in accordance with s. 17(1)(d), (e) and (f).

[22] I find BC Hydro has made a compelling case that it is reasonable to expect that contractors would use the information at issue in any negotiations with BC Hydro relating to cost overruns or other financial disputes. While the applicant in this case is a journalist, rather than a contractor, I must assume that disclosure of the information at issue to the journalist could result in subsequent disclosure to the world.¹⁶

[23] With respect to the application of s. 17(1)(f), it is reasonable to conclude that knowledge of the full extent of the contingencies that BC Hydro had allocated, as indicated in the records at issue, would assist contractors in formulating an effective negotiating strategy with a view to obtaining the maximum amount of compensation from BC Hydro. This would render it more difficult for BC Hydro to negotiate a settlement for a lesser amount. Given that the total projected budget for the project is \$16 billion, the value of funds at issue in any disputes in this project could be considerable. The potential for financial loss as the result of disclosure is substantial.

[24] I agree that this situation is analogous to that of insurance claim contingencies, as was the case with Order F18-51 that BC Hydro has cited. Insurance companies set aside financial amounts for settling each claim file. This is the maximum amount the insurance company expects to pay on the claim, but the insurance company makes every reasonable effort to settle for a lesser amount. Disclosing the insurance claim contingency would compromise the negotiating position of the insurance company in the same way that disclosure of BC Hydro’s contract contingencies would compromise the negotiating position of BC Hydro: by giving valuable information to their adversaries. It is reasonable to expect that this would result in increased payouts by both insurance companies and BC Hydro. The application of s. 17(1)(f) is the same in both types of cases. As the adjudicator found in Order F18-51 on a similar set of facts and circumstances, I find that s. 17(1)(f) applies in this case.

¹⁶ Order 03-25, 2003 CanLII 49204 (BC IPC), para. 24.

[25] In addition, I find that the financial loss to BC Hydro during the course of any negotiations would result in undue financial gain to the contractors, in accordance with s. 17(1)(d). Therefore, I find that BC Hydro has established that s. 17(1)(d) also applies.

[26] However, I find that s. 17(1)(e) does not apply in this case because the information at issue is not information about negotiations carried on by BC Hydro or the government of British Columbia. BC Hydro has provided no evidence to suggest that any negotiations are currently under way.

[27] With respect to the application of s. 17(1) generally, I find BC Hydro has established a direct connection between the disclosure of the information at issue and the anticipated financial harm to BC Hydro. It has demonstrated that the likelihood of this harm occurring exceeds the merely possible and meets the standard statutory test. Given that the total projected budget for the project is \$16 billion, the amounts subject to negotiation between BC Hydro and its contractors could be substantial. Therefore, the extent of harm envisaged and the prospect of that harm occurring meet the statutory threshold for the application of s. 17(1).

[28] Therefore, I find that s. 17(1) applies to the information at issue and BC Hydro is authorized to withhold it.

CONCLUSION

[29] For the reasons given above, under s. 58 of FIPPA, I confirm BC Hydro's decision to refuse to disclose the information in accordance with s. 17(1).

January 10, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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