



Order F23-12

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Emily Kraft
Adjudicator

February 24, 2023

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Summary: A journalist made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to BC Hydro for access to records related to Site C project board meetings. BC Hydro withheld the information in dispute in this inquiry under s. 17(1) (harm to financial or economic interests). The adjudicator found that s. 17(1) applied to most of the information in dispute and ordered BC Hydro to disclose the information it was not authorized to withhold under s. 17(1).

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] The applicant, who is a journalist, requested that the British Columbia Hydro and Power Authority (BC Hydro) provide him with access to “all agendas, minutes and PowerPoint or like presentations” for Site C project board meetings that took place between October 2016 and December 2016.

[2] BC Hydro provided the applicant with 42 pages of responsive records, with some information withheld pursuant to ss. 17 (harm to financial or economic interests), 21 (harm to third-party business interests), and 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).¹

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review BC Hydro’s decision. Mediation by the OIPC did not resolve the matter and it proceeded to this inquiry.

¹ May 29, 2017 letter from BC Hydro responding to the applicant’s request.

[4] During the inquiry, BC Hydro reconsidered its severing decision and released additional information to the applicant. Also, in its initial submission, BC Hydro says that it is abandoning reliance on s. 21.² Accordingly, s. 21 is no longer in dispute in this inquiry.

[5] BC Hydro also clarifies in its initial submission that it did not apply s. 22 to any information in the responsive records,³ although I note that it cited s. 22 in its May 29, 2017 letter to the applicant. Regardless, s. 22 is no longer in dispute in this inquiry.

[6] Finally, s. 19 (harm to individual or public safety) was listed as an issue in the investigator's fact report and notice of inquiry, but BC Hydro clarifies that it has not relied on s. 19 to withhold any information in the responsive records.⁴ Accordingly, s. 19 is not an issue in this inquiry.

[7] Both parties provided submissions in this inquiry. BC Hydro requested and was given prior approval from the OIPC to submit parts of its evidence and submission *in camera* (i.e. for the OIPC to see, but not the applicant).

PRELIMINARY MATTER

[8] In his response submission, the applicant raises a new issue that was not listed in the notice of inquiry: he says that BC Hydro has violated the *Canadian Charter of Rights and Freedoms (Charter)*.⁵ He does not specify which provision of the *Charter* he believes BC Hydro has violated. BC Hydro objects to the applicant raising this issue for the first time in his response submission.⁶

[9] Past OIPC orders have said that parties may only introduce new issues at the inquiry stage if they request and receive permission from the OIPC to do so.⁷ The notice of inquiry, which was provided to both parties at the start of this inquiry, also states that parties may not add new issues into the inquiry without the OIPC's prior consent.⁸

[10] In this case, the applicant did not request permission from the OIPC to add the *Charter* issue or explain why he did not raise this issue at an earlier stage. Therefore, I decline to add the *Charter* issue.

² BC Hydro's initial submission at para 4.

³ BC Hydro's initial submission at para 3.

⁴ BC Hydro's initial submission at para 3.

⁵ Applicant's response submission at para 4.

⁶ BC Hydro's reply submission at para 4.

⁷ Order F16-34, 2016 BCIPC 38 at para 9.

⁸ Notice of written inquiry, June 30, 2022.

ISSUE

[11] The issue to be decided in this inquiry is whether BC Hydro is authorized to refuse to disclose the information in dispute under s. 17(1) of FIPPA.

[12] 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

Background

[13] The Site C Clean Energy Project (Site C) involves the construction of a third dam and hydroelectric generating station on the Peace River.⁹ Site C is overseen by a project board that is comprised of members of BC Hydro's board of directors, provincial government officials, and others. The project board holds regular meetings to receive updates from Site C staff and consider resolutions related to the Site C project.¹⁰

Records and information at issue

[14] The responsive records are materials from the project board's November 14, 2016 meeting. The records consist of a one-page meeting agenda and 41 PowerPoint slides¹¹ outlining the progress of the Site C project, including construction schedules, completed and upcoming work, and cost and budget information.

[15] BC Hydro disclosed most of the information in the records to the applicant, but is withholding the following information from three of the PowerPoint slides:

- Contingency amounts allocated to a number of Site C work packages;¹² and
- Information about the progress of a Site C project task referred to as the Left Bank excavation.¹³

⁹ Site C construction started in 2015 and will not be completed for several more years (records at p 6 and BC Hydro's initial submission at para 24).

¹⁰ BC Hydro's initial submission at para 7.

¹¹ BC Hydro describes this material as "minutes," but it appears to me to be PowerPoint slides prepared for the meeting as opposed to notes recorded during the meeting.

¹² Records at pp 8 and 36.

¹³ Records at p 17.

Section 17(1)

[16] Section 17(1) authorizes a public body to refuse to disclose 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.

[17] Subsections 17(1)(a) to (f) are examples of information that, if disclosed, could result in harm under s. 17(1). Subsections 17(1)(a) to (f) are not stand-alone provisions, and even if information fits within those subsections, a public body must also prove that disclosure of that information 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.¹⁴

[18] Information that does not fit under subsections (a) to (f) may still fall under the opening words 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.¹⁵

[19] BC Hydro is withholding the information in dispute under ss. 17(1)(d), 17(1)(e), and 17(1)(f),¹⁶ which state 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.

[20] The standard of proof for s. 17(1) is a reasonable expectation of probable harm, which is “a middle ground between that which is probable and that which is

¹⁴ Order F19-03, 2019 BCIPC 4 (CanLII) at paras 22-23; Order F20-56, 2020 BCIPC 65 (CanLII) at para 35.

¹⁵ Order F14-31, 2014 BCIPC 34 (CanLII) at para 41.

¹⁶ BC Hydro’s initial submission at para 12.

merely possible.”¹⁷ In order to meet that standard, a public body “must provide evidence ‘well beyond’ or ‘considerably above’ a mere possibility of harm.”¹⁸ The evidence must be detailed enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.¹⁹

[21] A public body must also demonstrate that the release of the information itself would give rise to a reasonable expectation of harm.²⁰ There must be a clear and direct connection between the disclosure of information and the harm that is alleged.²¹

Contingency amounts

[22] BC Hydro explains that during major construction projects, contractors sometimes encounter issues that result in delay or increased costs beyond those contemplated in the contract. BC Hydro says it negotiates with contractors to resolve those issues, which sometimes results in additional money being paid to a contractor. In anticipation of potential additional costs, BC Hydro sets aside a contingency fund that can be drawn on to resolve any claims or disputes.²²

[23] The Site C contingency fund is allocated to a number of “work packages.” Each work package represents one component of the overall project. For instance, Main Civil Works, Turbines and Generators, and Worker Accommodation are separate work packages.²³ Work packages are allocated contingency amounts based on the nature of the work and the assessed level of risk associated with each work front in terms of the foreseeability of negative events such as claims, disputes and delays.²⁴ The contingency amounts are reset from time to time and are not necessarily allocated to all contracts.²⁵

[24] BC Hydro is withholding the contingency amounts allocated to numerous Site C work packages as of September 30, 2016.²⁶ It is also withholding the total contingency for the project, the total contingency held by the BC Hydro executive

¹⁷ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54.

¹⁸ *Ibid.*

¹⁹ Order 02-50, 2002 CanLII 42486 (BCIPC) at para 137.

²⁰ *British Columbia (Minister of Citizens' Services) v British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para 43.

²¹ Order F19-10, 2019 BCIPC 12 (CanLII) at para 31; Order F07-15, 2007 CanLII 35476 (BCIPC) at para 17.

²² BC Hydro's initial submission at para 15.

²³ Records at p 36.

²⁴ Affidavit of NK at para 25.

²⁵ Affidavit of NK at para 9.

²⁶ The contingency amounts are presented in table format on pages 8 and 36 of the records.

and board of directors, the total contingency committed in contracts, and the total contingency remaining as of September 30, 2016.²⁷

BC Hydro's initial submission

[25] BC Hydro says that the contingency amounts in dispute are unspent, available contingencies for various work packages, many of which correspond to single contracts that have been awarded to specific contractors.²⁸ It says that many work packages and contracts are still active or have outstanding claims associated with them and that the withheld contingency figures are not known to the contractors.²⁹

[26] BC Hydro submits that disclosing the withheld figures would reveal or allow a contractor to reasonably infer the contingency amount and contingency percentage allocated to their contract.³⁰ BC Hydro says that disclosing this information would harm its position during negotiations over a claim for additional payments because a contractor would know how much reserve BC Hydro has available to resolve the claim. It says that disclosure could also result in undue financial gain to contractors.³¹ It submits that, if contractors knew how much money is available, they could enhance or expand their claims, which could result in BC Hydro paying more from its contingency fund.³² BC Hydro explains that it is currently working with contractors to resolve claims and believes more claims will arise in the future of the project.³³

[27] BC Hydro also cites Order F18-51³⁴ in support of its position that s. 17(1) applies to the contingency amounts in dispute.

Applicant's response submission

[28] The applicant says that the contingencies in question are now "historical" and that no harm exists.³⁵ He also says that BC Hydro's evidence is "speculative and subjective" and cites Order 02-50³⁶ where the adjudicator said that such evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1).³⁷ He also cites Orders F14-37³⁸ and

²⁷ Records at p 36.

²⁸ BC Hydro's initial submission at para 18; Affidavit of NK at paras 23-25.

²⁹ BC Hydro's initial submission at para 18.

³⁰ BC Hydro's initial submission at para 19.

³¹ BC Hydro's initial submission at para 19; Affidavit of NK at para 34.

³² BC Hydro's initial submission at para 21.

³³ BC Hydro's initial submission at para 25; Affidavit of NK at para 34.

³⁴ Order F18-51, 2018 BCIPC 55.

³⁵ Applicant's response submission at para 3.

³⁶ Order 02-50, 2002 CanLII 42486 (BCIPC).

³⁷ Applicant's response submission at paras 6-7.

³⁸ Order F14-37, 2014 BCIPC 40.

F20-36³⁹ where the adjudicators found that s. 17(1) did not apply to the information at issue in those cases.

BC Hydro's reply submission

[29] BC Hydro reiterates that the contingency amounts in dispute have not been spent and relate to active contracts and disputes.⁴⁰ It also says that the orders cited by the applicant are not applicable to this case because they involve different types of information and different circumstances.⁴¹

[30] BC Hydro also adds that if contractors knew the contingency for their particular contract “or the project contingency generally,” they would have a significant advantage to the detriment of BC Hydro in negotiations over additional payments.⁴²

Analysis and findings

Section 17(1)(f) – harm to negotiating position

[31] Since BC Hydro's main argument regarding the contingency amounts is that disclosure would harm its negotiating position under s. 17(1)(f), I will consider that subsection first.

[32] Previous OIPC orders have found that s. 17(1)(f) applies to information that reveals valuable information or a key aspect of a public body's negotiating position that could give another party a negotiating advantage to the detriment of the public body's financial interests or otherwise harm a public body's financial interests.⁴³

[33] For the reasons that follow, with a few exceptions that I will discuss below, I find that disclosing most of the contingency amounts in dispute could reasonably be expected to harm BC Hydro's negotiating position and financial interests under ss. 17(1)(f) and 17(1).

[34] With the exception of the total contingency amounts on page 36 of the records, I accept that the withheld figures on pages 8 and 36 would either directly reveal the contingency allocated to a single contract or allow a contractor to calculate, with reasonable accuracy, the contingency allocated to their contract. I also accept that the contingency amounts in dispute relate to work packages and contracts that are still active or have outstanding claims associated with them.

³⁹ Order F20-36, 2020 BCIPC 42.

⁴⁰ BC Hydro's reply submission at para 11.

⁴¹ BC Hydro's reply submission at paras 6-9.

⁴² BC Hydro's reply submission at para 10.

⁴³ Order F22-35, 2022 BCIPC 39 at para 85.

[35] I am satisfied that BC Hydro would be at a disadvantage in future negotiations with contractors over claims for additional payments if the contractors knew how much contingency BC Hydro allocated to their contract to resolve claims. I am persuaded that contractors could use that information to negotiate higher settlements with BC Hydro, which could reasonably be expected to harm BC Hydro's financial interests by increasing the amount of money it will need to draw from its contingency fund to resolve claims with contractors.

[36] Order F23-01 considered the application of s. 17(1)(f) to the same type of information in dispute in this case.⁴⁴ That case, which involved the same parties, dealt with contingency amounts allocated to various Site C work packages as of March 31, 2017. The adjudicator found that s. 17(1)(f) applied to the contingency amounts because "it is reasonable to conclude that knowledge of the full extent of the contingencies that BC Hydro had allocated...would assist contractors in formulating an effective negotiating strategy with a view to obtaining the maximum amount of compensation from BC Hydro."⁴⁵

[37] Order F18-51, which BC Hydro cited, also involved the application of s. 17(1) to contingency amounts allocated to various Site C work packages. In that case, the adjudicator found that BC Hydro would be at a disadvantage during negotiations if contractors knew how much it had set aside to address unforeseen changes to the scope of the Site C project.⁴⁶

[38] Consistent with previous OIPC decisions, I find that ss. 17(1) and 17(1)(f) apply to most of the withheld figures in the records.

[39] However, for the reasons that follow, I am not satisfied that disclosing the following information on page 36 of the records could reasonably be expected to harm BC Hydro's negotiating position under s. 17(1)(f): the total contingency (updated forecast allocation), the total contingency held by the BC Hydro executive and board of directors, the total contingency committed in contracts, the total contingency held by management (uncommitted), and the total contingency remaining as of September 30, 2016.

[40] BC Hydro has previously disclosed the total contingency fund for Site C, as noted in Order F18-51,⁴⁷ so I do not see how disclosing that figure again could reasonably be expected to harm BC Hydro's negotiating position under s. 17(1)(f). Also, given that the total contingency has already been disclosed, I do not see how disclosing the portions held by the BC Hydro executive and board of directors, the portion committed in contracts, and the portion remaining could reasonably be expected to harm BC Hydro's negotiating position under s. 17(1)(f). BC Hydro does not explain. Even if the total contingency had not

⁴⁴ Order F23-01, 2023 BCIPC 2.

⁴⁵ *Ibid* at para 23.

⁴⁶ Order F18-51, 2018 BCIPC 55 at para 23.

⁴⁷ *Ibid* at para 15.

previously been disclosed, BC Hydro has not adequately explained how disclosing these amounts could reasonably be expected to cause any harm under s. 17(1)(f) given that they would not reveal or allow a reader to accurately infer the contingencies allocated to individual work packages or contracts.

[41] To conclude, with the exception of the total contingency figures on page 36, described above, BC Hydro is authorized under ss. 17(1)(f) and 17(1) to refuse to disclose the withheld figures on pages 8 and 36 of the records.

[42] I have considered the OIPC orders that the applicant has cited in support of his position, but the information at issue here is materially different from the information that was at issue in those orders. Those orders do not persuade me that s. 17(1) does not apply to the information described above.

Section 17(1)(d) – undue financial gain to a third party

[43] Since I have found that ss. 17(1)(f) and 17(1) apply to most of the contingency amounts in dispute, I find it unnecessary to consider whether s. 17(1)(d) also applies to the same information. Therefore, I will only consider the application of s. 17(1)(d) to the remaining information in dispute on page 36 of the records.

[44] BC Hydro says generally that if the contingency amounts in dispute were disclosed, contractors could use that information “to try to maximize the amounts BC Hydro would pay out in response to...claims”, which “would harm BC Hydro’s ability to negotiate a lower settlement and potentially result in unfair financial gain to a contractor.”⁴⁸ BC Hydro does not provide any further explanation about how s. 17(1)(d) applies.

[45] I understand BC Hydro to be saying that disclosing the contingency amounts in dispute could reasonably be expected to harm BC Hydro’s negotiating position, which could then result in unfair financial gain to a contractor. As explained above, I am not persuaded that disclosing the total contingency amounts on page 36 could reasonably be expected to harm BC Hydro’s negotiating position. BC Hydro has not adequately explained how disclosing the total contingency amounts could otherwise reasonably be expected to result in undue financial gain to a contractor.

[46] Accordingly, I am not satisfied that s. 17(1)(d) applies to the remaining information in dispute on page 36 of the records.

⁴⁸ BC Hydro’s initial submission at para 19.

Section 17(1)(e) – information about negotiations

[47] I will now consider whether s. 17(1)(e) applies to the remaining information in dispute on page 36 of the records.

[48] BC Hydro cites s. 17(1)(e) in its submission but does not explain how it applies.⁴⁹

[49] Previous orders have interpreted the phrase “information about negotiations” under s. 17(1)(e) as information that reveals negotiating analysis, strategies, options, positions, criteria, objectives, or other similar information.⁵⁰ Information that is compiled *for the purpose* of negotiations, or information that, if disclosed, may *affect* negotiations is not necessarily information *about* negotiations for the purposes of s. 17(1)(e).⁵¹

[50] BC Hydro says that many of the work packages listed on page 36 of the records are still active and ongoing.⁵² BC Hydro also says it is “currently working with contractors to resolve claims.”⁵³

[51] I accept that BC Hydro is involved in active negotiations related to one or more of the work packages listed on page 36. However, I do not see, and BC Hydro does not explain, how the total contingency amounts in dispute are “about” those negotiations for the purposes of s. 17(1)(e).

[52] Therefore, I am not satisfied that s. 17(1)(e) applies to the remaining information in dispute on page 36 of the records.

Section 17(1) – reasonable expectation of probable harm

[53] As explained above, information that does not fit under subsections (a) to (f) may still fall under the opening words 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. I have considered whether the remaining information in dispute on page 36 of the records falls under the opening words of s. 17(1), and, in my view, it does not.

Conclusion on s. 17(1)

[54] To conclude, I find that BC Hydro is authorized under ss. 17(1)(f) and 17(1) to refuse to disclose most of the withheld contingency amounts on pages 8 and 36 of the records. However, I am not satisfied that ss. 17(1), 17(1)(d),

⁴⁹ BC Hydro's initial submission at para 12.

⁵⁰ See for example Order F21-56, 2021 BCIPC 65 at para 47.

⁵¹ Order 00-39, 2000 CanLII 14404 (BCIPC) at pp 10-11.

⁵² Affidavit of NK at para 24.

⁵³ Affidavit of NK at para 34.

17(1)(e), or 17(1)(f) apply to the total contingency amounts on page 36 of the records.

Progress of Left Bank excavation

[55] BC Hydro withheld progress information about a particular project task known as the Left Bank excavation on page 17 of the records. The information is presented in a bar graph that shows the work that was planned to be done and the work that was actually done by the Main Civil Works contractor between June and November 2016.

[56] BC Hydro says that disclosure of this information would significantly harm its negotiating position in a particular matter that it describes *in camera*.

[57] BC Hydro's argument and evidence on this issue were accepted *in camera*, so I cannot discuss them. However, I am satisfied that disclosing the withheld information on page 17 of the records could reasonably be expected to harm BC Hydro's negotiating position and financial interests for the purposes of ss. 17(1)(f) and 17(1). Therefore, it is authorized to refuse to disclose this information under ss. 17(1)(f) and 17(1).

CONCLUSION

[58] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. Subject to item 2 below, I confirm, in part, BC Hydro's decision to refuse to disclose the information in dispute under ss. 17(1) and 17(1)(f).
2. BC Hydro is not authorized under ss. 17(1), 17(1)(d), 17(1)(e), or 17(1)(f) to refuse to disclose the information I have highlighted in the copy of page 36 of the records provided to BC Hydro with this order.
3. I require BC Hydro to give the applicant access to the highlighted information described in item 2 above.
4. BC Hydro must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of page 36 of the records described at item 3 above.

[59] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **April 11, 2023**.

February 24, 2023

ORIGINAL SIGNED BY

Emily Kraft, Adjudicator

OIPC File No.: F17-70589