Order F24-50

COLUMBIA BASIN TRUST

Jay Fedorak
Adjudicator

June 12, 2024

CanLII Cite: 2024 BCIPC 58
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 58

Summary: An applicant requested from the Columbia Basin Trust (CBT) information about the terms and conditions for the provision of energy between the CBT, the British Columbia Hydro and Power Authority and Powerex Corporation. The CBT withheld information under ss. 15(1)(l) (harm to a system or property) and 17(1) (harm to the financial interests of a public body) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that s. 17(1) applied to most of the information but that s. 15(1)(l) did not apply. The adjudicator ordered the CBT to disclose the information to which it had applied s. 15(1)(l) and some information to which it had applied s. 17(1). The adjudicator also considered the application of s. 61(2)(c) of the *Administrative Tribunals Act*, which excludes certain records from the scope of *Freedom of Information and Protection of Privacy Act* and determined that it did not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 15(1)(l), 17(1)(f); *Administrative Tribunals Act*, SBC 2004, c 45, ss. 61(2)(c); *Utilities Commission Act*, RSBC 1996, c. 473.

INTRODUCTION

[1] A small company that produces hydro electricity (applicant) requested information under the *Freedom of Information and Protection of Privacy Act* (FIPPA) from Columbia Basin Trust (CBT). This information related to the terms and conditions for the provision of electricity and details relating to environmental protection in dealings between CBT, British Columbia Hydro and Power Authority (BC Hydro) and Powerex Corporation. CBT responded to the request by disclosing records but withholding some information under s. 21 of FIPPA on the grounds that disclosure would harm the business interests of a third party. The applicant was dissatisfied with the response and requested a review by the OIPC.

[2] During mediation CBT reconsidered its decision and released further information. It also applied s. 15(1)(l) to some information on the grounds that disclosure would harm the security of a property or system and s. 17(1) on the grounds that disclosure would harm the security of a public body.

[3] Mediation failed to resolve the matter and it proceeded to an inquiry.

[4] As part of its initial submission to this inquiry, CBT ceased to rely on s. 21(1), so that is no longer an issue.

[5] The OIPC invited the BC Hydro and Powerex to participate in the inquiry as appropriate persons. BC Hydro subsequently requested and received permission to raise a new issue: the application of s. 61(2)(c) of the *Administrative Tribunals Act*[1] (ATA), which excludes certain information from the scope of FIPPA. Despite receiving an invitation, Powerex did not participate in the inquiry.

ISSUE

[6] The issues to be decided in this inquiry are:

1. Whether the records are outside the scope of FIPPA in accordance with s. 61(2)(c) of the ATA;
2. Whether FIPPA authorizes CBT to withhold information under s. 15(1)(l) of FIPPA; and
3. Whether FIPPA authorizes CBT to withhold information under s. 17(1) of FIPPA.

[7] Under s. 57(1), CBT has the burden of proving that the applicant has no right of access to the information it withheld under ss. 15(1)(l) and 17(1). Section 57 is silent regarding the burden of proof in cases involving scope issues, such as the application of s. 61(2) of the ATA, and previous orders have stated that it is in the interests of all parties to present argument and evidence to support their positions.[2]

DISCUSSION

[8] **Background –** BC Hydro is a public utility subject to regulation by the British Columbia Utilities Commission (BCUC). BC Hydro is a Crown corporation

[1] SBC 2004 c. 45.
[2] Order F22-41, 2022 BCIPC 46 (CanLII); Order F10-41, 2010 BCIPC 61 (CanLII); Order F18-02, 2018 BCIPC 2.

with a mandate to generate, supply, and acquire electrical and other types of power. BC Hydro generates electricity for the province and supplements its own generation capacity by entering into electricity purchase agreements with third party suppliers, including the agreements that are at issue.[3] The applicant is one of these suppliers.

[9] The applicant made its request to CBT and was dissatisfied with the response. For some reason, which is not explained in the submissions before me, the applicant did not request a review from the Office of the Information and Privacy Commissioner (OIPC) for almost two years.

[10] As FIPPA requires that applicants normally submit a request for review within 30 days of receiving a response, the OIPC recommended that the applicant resubmit its request to CBT. The applicant resubmitted its request, and CBT provided a response identical to the one it furnished in response to the applicant's first request.

[11] During the interval between these two requests, BC Hydro submitted its own copies of the records at issue in this inquiry to the BCUC. That is because BCUC had directed BC Hydro to file copies of all of its existing electricity purchase agreements it had signed after 2001. In October 2020, BC Hydro provided BCUC with copies of 202 agreements that it had not previously filed with BCUC, including the three agreements at issue in this inquiry. For each agreement, BC Hydro provided BCUC with one complete copy *in camera* and one version with certain information severed that could be made public.[4]

[12] **Record at issue –** The responsive records comprise three electricity purchasing agreements between BC Hydro and third party suppliers of electricity. There are a total of 339 pages. CBT has withheld information on 218 pages in whole or in part.

Preliminary Issue

[13] As mentioned above, BC Hydro asked and received permission from the OIPC to raise the issue of the application of s. 61(2)(c) of the ATA. In its initial submission, BC Hydro characterized the OIPC as lacking the jurisdiction to conduct this inquiry. BC Hydro states "Accordingly, by operation of s. 61(2)(c) of the *ATA*, the [records] are outside the scope of *FIPPA.* The Commissioner therefore has no jurisdiction to proceed with this inquiry and there is no need to proceed further."[5]

[3] BC Hydro's initial submission, para. 8.
[4] BC Hydro's initial submission, paras. 12-13.
[5] BC Hydro's initial submission, para. 5.

[14] Nevertheless, I have reason to doubt the wording of BC Hydro's submission matched its intended meaning. This is because, in support of its position, BC Hydro also cites orders from previous inquiries on the same issue where adjudicators indeed exercised the jurisdiction to determine whether s. 61(2)(c) of the ATA applied.[6]

[15] Therefore, I find that the only reasonable conclusion is that BC Hydro employed wording that did not accurately reflect its position regarding the nature of my jurisdiction to conduct this inquiry. Instead, I infer that BC Hydro is submitting that I have the same jurisdiction as the adjudicators in the cited cases to determine whether the ATA applies to the records in this case. Its intent was to indicate that, if I determine that the ATA does apply, I do not need to proceed further in considering the other issues.

[16] As was the case in the previous orders cited by BC Hydro, I am satisfied that I have the authority to decide if s. 61(2)(c) of the ATA applies to the records at issue in this case.

Are the records outside the scope of FIPPA in accordance with s. 61(2) of the ATA?

[17] CBT, the public body in this case, makes no submissions regarding the ATA. BC Hydro submits that ss. 61(2)(c) of the ATA apply. The applicant makes no submission about the ATA.

[18] The ATA governs certain administrative tribunals in British Columbia. Section 2.1 of the *Utilities Commission Act*[7] stipulates that section 61 of the ATA applies to BCUC.

[19] Section 61 of the ATA reads as follows:

> 61 (2) The *Freedom of Information and Protection of Privacy Act*, other than section 44(1)(b), (2), (2.1) and (3), does not apply to any of the following:
>
> …
>
> (c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;

[6] BC Hydro's initial submission, para. 30; Order F15-06, 2015 BCIPC (CanLII); Order F22-41, 2022 BCIPC (CanLII).
[7] RSBC 1996, c. 473.

[20] Previous orders have established a three-part test for the application of s. 61(2)(c) of the ATA. The first part is that the body receiving the information must be a tribunal. The second part is that the tribunal must have received the information as part of a hearing. The third part is that the public, a party or an intervenor were excluded from the hearing when the information was received.[8]

Was the information at issue received by a "tribunal"?

[21] BC Hydro submits that it made an application to BCUC to renew a number of electricity purchasing agreements. During the hearing into that application, BC Hydro had to file copies of 202 agreements, including BC Hydro's copies of the three records that are at issue here.

[22] BC Hydro submits that BCUC is tribunal for purpose of the ATA. It cites Order F22-41 in support, where the adjudicator found that BCUC was a tribunal for the purposes of the ATA.[9]

[23] Regarding whether a tribunal "received" the information, BC Hydro also submits that FIPPA and the ATA must be read together. BC Hydro says:

> It cannot be the case that a document filed in a BCUC proceeding in confidence and *in camera* could be obtained in unredacted form, or at all, by a roundabout route simply by making a *FIPPA* request of the public body that filed the evidence in BCUC proceeding.[10]

[24] The applicant does not make any submissions regarding the application of the ATA.

Analysis

[25] I find that BCUC is a tribunal for the purposes of the ATA. It is clear from the submissions of BC Hydro, s. 2.1 of the *Utilities Commission Act*, and the decisions of previous orders that the ATA applies to BCUC.[11]

[26] Nevertheless, while I accept that BC Hydro provided copies of agreements in its possession to BCUC, the applicant did not make its access request to BCUC or BC Hydro. Nor did it make a request for information relating to the hearing. It made his request to the CBT for information in the custody or under the control of CBT. The public body at issue in this inquiry is not BCUC, so the previous orders that found that s. 61(2)(c) applied to records in the custody and under its control of BCUC are not determinative here.

---

[8] See for example, Order F22-41, 2022 BCIPC 46 (CanLII) and F24-14, 2024 BCIPC 20 (CanLII).
[9] BC Hydro's initial submission, paras. 20-21; Order F22-41, ibid.
[10] BC Hydro's initial submission, para. 28.
[11] Order F22-41, ibid; Order F24-14, ibid.

[27] In this case, it is necessary to treat the requested records in context. The information that the applicant requested existed in records that had been created and stored in the filing system of CBT for more than ten years prior to BC Hydro providing its versions of the records to BCUC. While the ATA may apply to records in the custody of BCUC, it does not necessarily apply to all copies of those records in existence, regardless of where they are stored or for what purpose.

[28] Therefore, the records that CBT identified as responsive to the applicant's request had an existence separate from the BCUC hearing. That hearing did not concern the renewal of the specific agreements at issue in this request. From the perspective of the applicant's request to the CBT, it was merely a coincidence that BC Hydro provided its own copies of the records to BCUC.

[29] As BC Hydro submits, it is important to consider the purpose of s. 61(2)(c) in the ATA. BC Hydro cites the adjudicator in Order F15-06 as follows:

> Having regard to the context of the UCA as a whole, and the purpose of that statute, I conclude that the purpose of s. 61(2)(c) is to protect information submitted to a tribunal hearing in private. … By providing, in s. 61(2)(c), that an access request cannot be made under FIPPA for information received *in camera*, the Legislature has left it to BCUC to regulate its own procedures respecting hearings, and access to information provided in such hearings, in a manner it considers necessary.

[30] The applicant's original access request predated the BCUC proceeding. There is no evidence to suggest that applicant is trying to find a "roundabout route" to access records submitted to a proceeding. Nor can I see how this request could interfere in any way with BCUC's ability to regulate its own procedures.

[31] In conclusion, it appears unreasonable to deprive the applicant of his right of access to a record in the custody of CBT simply because another organization independently just happened to submit its copy of that record to a tribunal hearing.

[32] Therefore, I find that the particular agreements at issue in the custody of CBT were not received by a tribunal of the purposes of s. 61(2)(c) of the ATA.

[33] As I have determined that the requested information was not received by a tribunal, I do not have to determine whether it was received in a hearing or whether that hearing was in the absence of the public, and I decline to do so.

[34] As I have found that that ATA does not apply to the records at issue FIPPA applies to them and I will proceed to the remaining issues.

Section 15(1) – harm to law enforcement

[35] The relevant provision of s. 15(1) is as follows:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
> **…**
>
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[36] To rely on s. 15(1)(l), CBT must establish that disclosure of the information could reasonably be expected to harm the security of a property or system. The "reasonable expectation of harm" standard is "a middle ground between that which is probable and that which is merely possible."[12] There is no need to show on a balance of probabilities that the harm will occur if the information is disclosed, but the public body must show that the risk of harm is well beyond the merely possible or speculative.[13]

[37] CBT describes the information at issue under s. 15(1)(l) as four diagrams of the plans for the electricity system, a back up system, and two sites. CBT submits that disclosure of the site layout and plans would reveal the layout of a dam and its structural vulnerabilities. These items appear on pages 110, 111, 214, and 331 of the records at issue. According to CBT, unauthorized individuals could use this information to cause significant damage and result in the facilities ceasing to function. In the event of certain structural damage, there would be a risk of significant uncontrolled water flow downstream that could destroy homes and buildings and lead to loss of life. CBT cites the example of the war in Ukraine where there was a deliberate breach of a dam.[14]

[38] The applicant makes no comment with respect to the application of s. 15(1)(l) other than to state that he never requested the diagrams at issue.[15]

Analysis

[39] It is not sufficient for CBT merely to claim that s. 15(1)(l) applies. It must demonstrate how the exception applies to the specific information at issue. It

---

[12] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, para. 201.
[13] *Ibid*, para. 206. See also *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, paras. 52-54.
[14] CBT's initial submission, paras. 15-21.
[15] Applicant's response submission, Part D.

must establish a direct connection between the disclosure of that information and the harm it envisages. CBT must provide sufficient explanation and evidence to demonstrate that the risk of harm does indeed meet the required standard.

[40] In this case, CBT has merely claimed that there is a risk of harm, without substantiating that claim. It provides no affidavit evidence or explanation as to how third parties could harm the security of a property or a system using the information at issue. It merely makes brief and vague assertions about revealing unspecific vulnerabilities. I have reviewed the records at issue, and it is not evident what information would be of assistance to individuals intending to attack the facility or how they could use it. The adjudicator in Order F19-10 found that s. 15(1)(l) applied where the public body provided descriptions of the risks of harm to a property or system supported by affidavit evidence.[16] The evidence of CBT in this case does not meet this standard.

[41] Therefore, I find that CBT has failed to meet its burden of proof with respect to the application of s. 15(1)(l) and it is not authorized to withhold the information.

Harm to the financial interests of the public body s. 17(1)

[42] The CBT is refusing to disclose some information under s. 17(1) on the grounds that disclosure would be harmful to BC Hydro's financial interests. BC Hydro agrees, and its arguments raise the following parts of s. 17:

> 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:
>
> …
>
> (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.

[43] Subsections 17(1)(a) to (f) are examples of the types of information that, if disclosed, could reasonably be expected to cause harm under s. 17(1). Past orders have said that 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.[17]

---

[16] Order F19-10, 2019 BCIPC 12 (CanLII).
[17] Order F19-03, 2019 BCIPC 4 (CanLII), para. 22 and Order F22-35, 2022 BCIPC 39 (CanLII), para. 33.

[44] To rely on s. 17(1), CBT must establish that disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body, in this case BC Hydro. The "reasonable expectation of harm" standard for s. 17(1) is the same as the standard for s. 15(1) discussed above.[18]

[45] CBT's position is that disclosure of the information at issue would harm the negotiating position of BC Hydro. CBT submits that as BC Hydro has made a submission regarding the application of s. 17(1), CBT would not repeat the arguments of BC Hydro. CBT made no further submission about s. 17(1). The burden of proof remains with CBT, but I will treat the submissions of BC Hydro as supporting the burden of proof required of CBT.

[46] BC Hydro submits, in addition to producing its own electricity for sale, it also purchases electricity from other suppliers for resale. In so doing, it is one of a small number of energy companies that compete to obtain a limited resource in electricity. The severed portions of the agreements contain information regarding rates, terms and conditions that would reveal the position that BC Hydro is prepared to take in a highly competitive electricity marketplace. BC Hydro argues that this information would be valuable to its competitors. It submits:

> Release of the Severed Portions would thus be of significant competitive interest to BC Hydro's competitors, namely FortisBC and TransAlta (and other similar purchasers), who are also motivated to purchase power at the lowest possible cost and would want to reveal BC Hydro's negotiation position in order to seek a more advantageous deal for themselves with power suppliers, thereby attempting to negotiate favourable terms for themselves at BC Hydro's (and its ratepayers') expense. Should BC Hydro lose the energy, in turn, BC Hydro (and rate payers) would likely need to pay more or purchase energy from elsewhere to meet the power needs.

[47] In addition, power suppliers who contract with BC Hydro to supply it with electricity would also be interested in the rates, terms and conditions. This would assist these providers in obtaining more favourable terms from BC Hydro, at BC Hydro's expense, when renewing their own contacts or providing new sources of electricity.[19]

[48] BC Hydro supports its arguments with affidavit evidence from employees with experience in the electricity marketplace that I identify and cite below. These witnesses testify that the supply of electricity is limited and is in demand from numerous purchasers. This information could help BC Hydro's competitors to outbid it. It would damage BC Hydro's competitive position for competitors to know how much it pays for electricity and for how long and any other terms and conditions relating to outages and scheduling.

---

[18] para. 36.
[19] BC Hydro's initial submission, para. 51.

[49] The Manager for Independent Power Producer Portfolio Management testifies:

> As an example of a specific risk, the failure to renew the Brilliant Expansion EPAs at renewal rates similar to those offered under the EPA Renewal Program would require BC Hydro to increase the amount of energy that it acquires through an upcoming call for power. The Brilliant Expansion EPAs are due to expire in 2027 and 2029, just prior to the period when BC Hydro expects to need new power resources. Since BC Hydro's 2021 IRP assumes that all expiring contracts will be renewed, power resources not acquired through EPA Renewals would need to be acquired through EPAs with new (greenfield) energy projects, which we expect would likely be at higher rates, and such cost increases would result in subsequent increases to ratepayers.[20]

[50] The Manager of Resource Planning and Coordination testifies:

> Based on current planning assumptions, if BC Hydro is unable to renew the Brilliant Expansion EPA, BC Hydro estimates that it would need to pay at least $7 million more per year, before considering escalation, to secure equivalent amounts of energy to be delivered to BC Hydro.[21]

[51] BC Hydro submits that Fortis BC, one of its competitors, has indicated that it wishes to obtain electricity from one of the suppliers in the agreements at issue and this would be at the expense of BC Hydro.[22]

[52] For the purposes of this inquiry, CBT consulted BC Hydro on whether there was any information withheld from the applicant that could be disclosed. BC Hydro indicated that further information could be disclosed, and CBT has disclosed it. The information that remains at issue, according to BC Hydro, "relates to unique negotiated commercial terms."[23]

[53] The applicant submits that it is seeking transparency about the terms and conditions in agreements that BC Hydro has with other suppliers. It believes that BC Hydro has treated it unfairly by paying it lower rates than it pays to other suppliers. It states that it needs to know how it compares to its competitors and wants to obtain better terms from BC Hydro. It accuses BC Hydro of being a monopoly that manipulates the market and oppresses some suppliers. It

---

[20] BC Hydro's initial submission, para. 56; Affidavit of the Manager for Independent Power Producer Portfolio Management, para. 18.
[21] BC Hydro's initial submission, para. 57; Affidavit of Manager of Resource Planning and Coordination, para. 39.
[22] BC Hydro initial submission, paras. 58-59.
[23] BC Hydro initial submission, paras. 73-75.

asserts that the public must be able to hold BC Hydro accountable to operate in an ethical manner and promote the public interest. It submits that fair competition is in the public interest and that it requires access to the terms and conditions in the agreements at issue to ensure that there is fair competition.[24]

Analysis

[54] Previous OIPC orders have found that s. 17(1)(f) applies to valuable information or key aspects of a public body's negotiating position that could give another party a negotiating advantage to the detriment of the public body or otherwise harm its financial interests.[25]

[55] In this case, the information at issue constitutes the rates, terms and conditions that BC Hydro has agreed to for the purchase of electricity from suppliers. I accept the argument of BC Hydro that it is reasonable to conclude that this information would be valuable to other suppliers of electricity and to other purchasers of electricity who would compete with it for supplies of electricity. In this case, it appears that the applicant is seeking the information to leverage a better price from BC Hydro in future negotiations. This would mean that it is reasonable to expect that BC Hydro would have to pay a higher price for the electricity the applicant supplies or make other types of concessions to obtain an agreement with the applicant. It is reasonable to conclude that this would cause BC Hydro financial harm.

[56] BC Hydro's competitors could also use this information to improve their chances of outbidding BC Hydro on future projects. BC Hydro has provided affidavit evidence that at least one of its competitors, FortisBC, is targeting one of BC Hydro's suppliers for a future project once the current agreement with BC Hydro expires. BC Hydro's affidavit evidence is also that the failure to renew one of its current agreements would result in an estimated cost increase of $7 million for the provision of electricity from another source.

[57] BC Hydro has provided sufficient arguments and affidavit evidence to establish that the disclosure of the information at issue can reasonably be expected to cause it financial harm by damaging its negotiating position. It has established a direct connection between the disclosure of the information at issue and the harm it asserts may occur. BC Hydro is a public body within the meaning of s. 17(1). As CBT is relying on the submissions of BC Hydro to support its decision to withhold the information under s. 17(1)(f), I find that CBT has, with a few exceptions, met its burden of proof.

[24] Applicant's response submission, paras. 6-18.
[25] Order F24-40, 2024 BCIPC 48 (CanLII), para. 52; Order F20-38, 2020 BCIPC 44 (CanLII), paras. 62-63 and Order F17-10, 2017 BCIPC 11 (CanLII), para. 19.

[58] The exceptions are where CBT has severed information in a page footer on some pages even though it has disclosed the same footer in its entirety on most of the other pages. It would be obvious to any reader what this information is. CBT has not provided an explanation for this discrepancy in its severing. This occurs on pages 240, 276-7, 280, 283-6, 301-3, 305, 323, 326, 329-30 of the disputed records, and I find that s. 17(1) does not apply to this information. In addition, CBT has also severed page numbers from some of these same pages. It has not explained why, and no rationale is apparent, so I find that s. 17(1) does not apply to those page numbers.

[59] CBT has also withheld a passage on page 190 of the records in the "Brillant Power Corporation Agreement" with BC Hydro section 20.8 Confidentiality paragraph (d). This passage merely recognizes the right of BC Hydro to do something with a copy of the agreement. BC Hydro has not explained how disclosure of this passage would damage its negotiating position and it is not evident from the record how it would do so. It appears obvious to me that BC Hydro would have a right to do this with a copy of the agreement and unlikely that it would have been a point of contention during the course of the negotiations of the agreement. I do not see how disclosing that passage on page 190 could reasonably be expected to harm the negotiating position of BC Hydro, so I find that s. 17(1) does not apply.

[60] Therefore, I find that s. 17(1)(f) authorizes CBT to withhold the information at issue, with the exceptions of the information noted above.

CONCLUSION

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

1. I find that s. 61(2)(c) of the ATA does not apply to the records at issue and, therefore, FIPPA applies to them.

2. CBT is not authorized to refuse to disclose information under s. 15(1)(l) of FIPPA. CBT is required to give the applicant access to the information it withheld under this section. This information appears on pages 110, 111, 214, and 331 of the records.

3. Subject to item 4 below, I confirm that CBT is authorized to refuse to disclose the information in dispute under s. 17(1) of FIPPA.

4. CBT is not authorized to refuse to disclose the information it severed on page 190 under paragraph (d) of Section 20.8, or any of the footers or page numbers on pages 240, 276-7, 280, 283-6, 301-3, 305, 323, 326,

and 329-30 of the records. It is required to give the applicant access to that information.

5. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at items 2 and 4 above.

[62] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **July 25, 2024**.

June 12, 2024

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F22-89688